Justice V.C.Misra
Chairman

U.P.State Law Commission
Lucknow

Ra.Vi.Aa./Shodh-430/2009

Dated: July 28, 2009

Dear Chief Minister/Law Minister,

I have great pleasure in forwarding herewith Third Report, 2009 of the State Law Commission on Reinsertion of Section 438 of the Code of Criminal Procedure, 1973 by repealing Section 9 of the U.P. Act No. 16 of 1976.

It is to mention here that earlier also a report no. 1 of 2005 was submitted by the Commission on 2nd August, 2005 on the subject. Due to drastic amendment of section 438 of the Code of Criminal Procedure, 1973 by the Parliament, by Act No. 25 of 2005 and latest decisions of the Hon'ble Supreme Court recommending for restoration of provision for anticipatory bail in Uttar Pradesh by the Legislature of the State, the Commission took suo motu cognizance on the subject to submit a fresh report on the reinsertion of section 438 of the Code.

The Report contains the text of section 438 so modified in its final chapter.

With kind regards,

Yours Sincerely

(Justice V.C.Misra)

Sushri Mayawati,
Chief Minister/Law Minister
Uttar Pradesh
Encl: A report with Draft of Proposed Legislation

U.P. STATE LAW COMMISSION

THIRD REPORT OF HON'BLE MR. JUSTICE V.C.MISRA

THIRD REPORT, 2009

ON

REINSERTION OF

SECTION 438 OF THE CODE OF CRIMINAL PROCEDURE, 1973

(ANTICIPATORY BAIL)

IN

ITS

APPLICATION

TO

UTTAR PRADESH

U.P. STATE LAW COMMISSION

THIRD REPORT, 2009

ON
REINSERTION OF

SECTION 438 OF THE CODE OF CRIMINAL PROCEDURE, 1973

(ANTICIPATORY BAIL) IN ITS APPLICATIOIN TO UTTAR PRADESH

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UTTAR PRADESH STATE LAW COMMISSION

THIRD REPORT, 2009

ON

Reinsertion of Section 438 of the Code of Criminal Procedure, 1973

CHAPTER 1

INTRODUCTION

1.1 This report deals with the reinsertion of Section 438 of the Code of Criminal Procedure, 1973 which was omitted by section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) **Act, 1976 (U.P. Act No. 16 of 1976)** in its application to Uttar Pradesh. In this respect a Report no. 1 of 2006 was submitted by the State Law Commission on 02 August, 2005 to the State Government for reinsertion of section 438 in amended form in its application to Uttar Pradesh. So far nothing is heard from the State Government for its implementation. This report was mainly based on the decision of the Division Bench of the Allahabad High Court in **Vijay Kumar Verma vs. State of Uttar Pradesh, 2002 Cri. L.J. 4561** and letter dated 6th July 2005 by the Kanpur Bar Association to His Excellency the Governor. Since then certain new developments have taken place in this regard. Hence it is experienced by the State Law Commission to submit a fresh Report on the subject.

1.2 These developments are, first drastic amendment of section 438 of the Code by the Parliament by the Code of Criminal Procedure (Amendment) **Act, 2005 (Act No. 25 of 2005).** The amended section has not yet been brought into force and kept in abeyance. Secondly in the meantime certain pronouncement has been made by the Hon'ble Supreme Court.

1.3 The earlier Code i.e. the Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present Section 438. In the absence of specific provision under the Old Code, there was a difference of opinion among the High Courts of different states on the question as to whether Courts had the inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power. (See **Gurbakhas Singh Sibbia and others vs. State of Punjab (1980) 2 SCC 565**).

1.4 On the recommendation of Law Commission of India in its 41st Report, Section 438 was inserted in the Code of Criminal Procedure, 1973. Section 438 provides for Courts direction for grant of bail to person apprehending arrest. Such a bail is popularly referred to as anticipatory bail as it is granted in anticipation of arrest. This is a new provision in the present Code which was omitted in its application to Uttar Pradesh as stated above.

1.5 The Parliament further amended the various provisions of the Code of Criminal Procedure, 1973 by **Act No. 25 of 2005.** By section 38 of the amended Act, sub-section (1) of section 438 was also amended. The Code of Criminal Procedure (Amendment) Act, 2005 came into force on 23rd June, 2006 except certain section including section 38 which relates to amendment of section 438 of the Code. Accordingly for existing sub section (1) new sub section (1), (1A) and (1B) are substituted. As stated above, the amended section has not yet come into force.

1.6 As far as judicial pronouncement is concerned, the propriety and practicability of this provision and consequences of the omission of Section 438 in State of U.P. by **U.P. Act No. 16 of 1976** were considered by the Division Bench of the Allahabad High Court in Vijay Kumar Verma case (supra). On a consideration of all the facts and circumstances, the High Court strongly felt that the provision should be restored. The Division Bench in para 17 of the judgment it has observed:

"17. We, therefore, make a strong recommendation to the U.P. Government to immediate issue an ordinance to restore the provision for anticipatory bail by repealing **Section 9 of U.P. Act No. 16 of 1976** and empowering the High Court as well as the Sessions Courts to grant anticipatory bail."

1.7 Looking into the gravity and sensitivity of the matter and in view of **Vijay Kumar Verma's case (supra)** previous report was submitted by the State Law Commission.

1.8 In Balchand Jain vs. State of Madhya Pradesh, AIR 1977 SC 366 in Para 2 of the judgment Hon'ble Supreme Court observed;

2. There was at one time conflict of decisions amongst different High Court in India about the power of a court to grant 'anticipatory bail'. The majority view was that there was no such power in the court under the old Criminal Procedure Code. The Law Commission, in its Forty First Report pointed out:

"The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false case, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody remain in prison for some days and then apply for bail."

1.9 In Smt. Amravati & others vs. State of U.P. 2005 (1) Crimes 44 Seven Judges Full Bench of Allahabad High Court has held;

"The Sessions Judge while considering a bail application under section 439 Cr. P. C. can grant interim bail till the final disposal of the bail application subsequently. This will enable innocent persons to avoid going to jail pending consideration of their bail application."

In para 37 of the judgment Hon'ble Court further observed:

"……particularly since the provision for granting anticipatory bail has been deleted in U.P."

1.10 In **Som Mittal vs. Government of Karnataka, AIR 2008 SC 1126,** Hon'ble Supreme Court in Para 59 of the judgment observed;

"I, therefore, make a strong recommendation to the U.P. Government to immediately issue an Ordinance to restore the provision for anticipatory bail by repealing **Section 9 of U.P. Act No. 16 of 1976** and empowering the Allahabad High Court as well as the Sessions Courts in U.P. to grant anticipatory bail." In this case **Hon'ble Supreme Court** affirmed the above views taken by the Allahabad High Court in the **Vijay Kumar case (Supra) and Amrawati case (Supra).**

1.11 In Lal Kamlendra Pratap Singh vs. State of U.P. and others, 2009 (4) SCALE, 77, Hon'ble Supreme Court again affirmed the decision of the Allahabad High Court in the Amrawati Case (Supra). This shows that the Allahabad High

Court and the Supreme Court in the above judgments have clearly observed that Section 438 which has been deleted by **U.P. Act No. 16 of 1976** should be restored by the State Legislature.

1.12 In Sukhwant Singh and others vs. State of Punjab (S.L.P. (Crl.) 3529 of 2009) Hon'ble Supreme Court affirmed the view taken by the Apex Court in Lal Kamlendra Pratap Singh case (supra). In this case Hon'ble Supreme Court further observed, "When a person applies for regular bail then the court concerned ordinarily lists that application after a few days so that it can look into the case diary which has to be obtained from the police authorities and in the meantime the applicant has to go to jail. Even if the applicant released on bail thereafter, his reputation may be tarnished irreparably in society. The reputation of a person is his valuable asset, and is facet of his right under Article 21 of the Constitution vide **Deepak Bajaj vs. State of Maharashtra and others, J.T. 2008 (II) SC 609".**

1.13 In view of the above developments particularly the latest pronouncements of the Hon'ble Supreme Court the State Law Commission took suo motu cognizance on the subject to submit a fresh report on the reinsertion of section 438 of the Code of Criminal Procedure, 1973 to the State Government by deleting the section 9 of the U.P. Act XVI of 1976. This provision may be the same as amended by the

Parliament by Act No. 25 of 2005 or in modified form which will be recommended by the concluding chapter.

1.14 On 23rd May, 2009 a seminar was organized on the subject which was presided over by the Hon'ble Mr. Justice Markandey Katju, Judge, Supreme Court of India. It was also participated by the Hon'ble Mr. Justice Pradeep Kant, Senior Judge of Allahabad High Court, Lucknow Bench and other legal fraternity. They were of the view that the section 438 of the Code be restored.

1.15 The Commission generally held its meetings at Commission's Head Quarter and its Camp Office Allahabad on various dates. A draft report prepared by Shri Ishwar Deay, Full Time Member of the Commission in the light of the discussion was finally circulated to all the members of the Commission and their views invited therein. The views on the draft report was discussed at a meeting of the Commission held on 10.06.2009. The Report of the Commission proposing reinsertion of section 438 of the Code by repealing section 9 of the U.P. Act No. 16 of 1976 by the Legislature of the State titled, "The Code of Criminal Procedure (Uttar Pradesh Amendment) Bill, 2009," to be submitted to the State Government has been finally settled, approved and signed by the Chairman and the Members of the Commission in its meeting held on July 28, 2009.

1.16 Accordingly, the State Law Commission is submitting its fresh report on reinsertion of section 438 of the Code of Criminal Procedure, 1973 in its modified form, in its application to Uttar Pradesh, whose draft has been prepared and annexed with the report.

1.17 Under Article 254 (2) of the Constitution if a law made by the Legislature of a State with respect to any of the matters in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. Therefore proposed Legislation shall prevail, only if it has received the Presidential assent. Hence after passing the proposed legislation by the Legislature of the State Presidential assent shall also be needed.

1.18 The Commission wishes to acknowledge the valuable services and assistance rendered by Shri Santosh Kumar Pandey, Secretary of the Commission, officers and officials of the Commissions in the preparation of the report.

CHAPTER-2

PRE-AMENDED LAW

2.1 Chapter XXXIII of the Code of Criminal Procedure, 1973 contains provisions as to Bail and Bonds. Section 438 provides for Court's direction for grant of bail to person apprehending arrest. Such a bail is popularly referred to as anticipatory bail as it is granted in anticipation of arrest. This is a new provision in the present Code. The earlier Code i.e. the Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present Section 438. In the absence of specific provision under the Old Code, there was a difference of opinion among the High Courts of different States on the question as to whether Courts had the inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power. (See **Gurbakhas Singh Sibbia and others vs. State of Punjab (1980) 2 SCC 565)**.

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

"39.9 **Anticipatory Bail**:- The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant

anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential person try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

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

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those condition; and moreover, the laying down of such condition may be construed as pre-judging (particularly at any rate) the whole case. Hence we would leave it to the discretion of the court and prefer not to fetter such discretion in the statutory provision itself. Superior Courts will, undoubtedly, exercise their discretion properly, and not make any observations

in the order granting anticipatory bail, which will have a tendency to prejudice the fair trial of the accused." (pp. 320-321).

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

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

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

Above Criminal Procedure Code Bill, 1970 ultimately enacted as the Code of Criminal Procedure, 1973 (Act No. 2 of 1974) in which first time Section 438, direction for grant of bail to person apprehending arrest, popularly known as Anticipatory Bail, was incorporated, which reads as follows:-

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

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this Section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

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

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

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

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

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

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

CHAPTER-3

Legislative Changes

3.1 With a view to remove certain difficulties experienced in its working, the Code of Criminal Procedure, 1973 underwent several amendments in different past years for specific purposes.

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

3.3 Earlier, the IGP's Conference 1981, inter alia, suggested that Section 438 be amended so as to take away the powers to grant anticipatory bail from the Court of Session and vest the same only in the High Courts. In May 1983, the Home Ministry constituted a Group of Officers, which considered the question of deletion of the provision of anticipatory bail and felt that since after deletion of the provision, the High Court will be competent to grant bail under the inherent powers, the provision need not be deleted. As sometimes, the Courts take a very liberal view in granting anticipatory bail to criminals, it was considered that such powers should be taken away from the Court of Session and vest only in the High Court even though it will make difficult for the poor persons to avail of the provisions of anticipatory bail. At times an accused person secures anticipatory bail even without making an appearance

before the Court. It was, therefore, proposed to amend Section 438 Cr. P. C. to the effect that:-

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

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

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

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

3.5 While the Code of Criminal Procedure (Amendment) Bill, 1994 was before the Parliamentary Committee on Home Affairs, the Government of India made a reference to the Law Commission of India to undertake comprehensive revision of

the Code of Criminal Procedure and suggest reforms in the law. Accordingly, the Law Commission of India submitted its 154th Report on the subject. It may be expedient to reproduce the relevant extracts of this Report herein below insofar as the same relate to anticipatory bail.

"Since the introduction of the provision of anticipatory bail under Section 438, its scope has been under judicial scrutiny. The leading case on the subject is **Gurubaksh Singh Sibbia vs. State of Punjab (1980) 2 SCC 565**. The Supreme Court, reversing the Full Bench decision of the Punjab and Haryana High Court in, **Gurubaksh Singh Sibbia and others vs. State of Punjab AIR 1978 P&H 1,** which had given a restricted interpretation of the scope of Section 438, held that in the context of Article 21 of the Constitution, any statutory provision (Section 438) concerned with personal liberty could not be whittled down by reading restrictions and limitations into it. The Court observed:-

"Since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that Section" (p. 586).

The Court also held that the conditions subject to which the bail can be granted under 437 (1) should not be read into Section 438. While allowing unfettered jurisdiction to the High Court and the Court of Session, the Supreme Court fondly hoped that a convention may develop whereby the High Court

and the Court of Session would exercise their discretionary powers in their wisdom. The Court laid down the following clarifications on certain points which had given rise to misgivings:-

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

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

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

(iv) Anticipatory bail can be granted even after the filing of F.I.R.

(v) Section 438 cannot be applied after arrest.

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

3.6 The working of Section 438 has been criticized in that it hampers effective investigation of serious crimes, the accused misuse their freedom to criminally intimidate and even assault the witnesses and tamper with valuable evidence and that whereas the rich, influential and powerful accused resort to it and the poor do not, owing to their indigent circumstances thus giving rise to the feeling that some are "more equal than others" in the legal process.

3.7 In view of the above circumstances, some State Governments have made local amendments to the Code of Criminal Procedure n the following manner.

Uttar Pradesh Legislature has omitted Section 438 by the Amending Act of 1976 (U.P. Act 16 of 1976). **West Bengal** Legislature enacted following amendments in 1990 by West Bengal Act No. 25 of 1990:-

Section 438- For sub-section (1) of Section 438 of the principal Act, the following sub-sections shall be substituted:

(1) (a) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail:

Provided that the mere fact that a person has applied to the High Court or the Court of Session for a direction under this section shall not, in the absence of any order by that Court, be a bar to the apprehension of such person, or the detention of such person in custody, by an officer-in-charge of a police station.

(b) The High Court or the Court of Session, as the case may be, shall dispose of an application for a direction under this sub-section within thirty days of the date of such application:

Provided that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the

State notice not less than seven days notice to present its case.

(c) If any person is arrested and detained in the custody by an officer-in-charge of a police station before the disposal of the application of such person for a direction under this sub-section, the release of such person on bail by a Court having jurisdiction, pending such disposal, shall be subject to the provisions of Section 437.

(1A) The provisions of sub-section (1) shall have effect notwithstanding anything to the contrary contained elsewhere in this Act or in any judgment, decree or order of any Court, Tribunal or other authority.

Orissa legislature enacted following amendment by Orissa Act 11 of 1988:-

S. 438- To sub-section (1) the following proviso shall be added, namely:-

"Provided that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less seven years, no final order shall be made on such application without giving the State notice to present its case".

Maharashtra Legislature substituted section 438 by Maharashtra Act No. 24 of 1993, in the following manner:-

S. 438- For section 438 of the Code of Criminal Procedure, 1973, in its application to the State of Maharashtra, the following section shall be substituted, namely:-

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

(1) When any person has reasons to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to 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:-

(i) the nature and gravity of seriousness of the accusation as apprehended by the applicant;
(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognizable offence;
(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and
(iv) the possibility of the applicant, if granted anticipatory bail, fleeing from justice, 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.

(2) where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1) the Court shall indicate passing an order thereon, as the court may deem fit; and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:-

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

(ii) that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of section 437 as if the bail was granted under that section.

(3) where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice, being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Commissioner of Police, or as the case may be, the concerned Superintendent of Police, with a view to give the

Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(5) On the date indicated in the Court considers such presence necessary in the interest of justice, Public Prosecutor and the applicant and after due consideration of their contentions, if may either confirm, modify or cancel the interim order made under sub-section (1)."

3.8 The Code of Criminal Procedure Amendment Bill, 1994 in clause 43 seeks to amend Section 438, echoing the recommendations of the Law Commission of India in its 48th Report and also on some other grounds referred to above, in the following manner:-

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

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

(i) the nature and gravity of the accusation;

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

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

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

Either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant the applicant, if there are reasonable grounds for such arrest.

(1A) Where the Court grants an interim order under sub-Section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) the presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court

considers such presence necessary in the interest of justice.”

3.9 In the various workshops diverse views were expressed regarding the retention or deletion of the provision of anticipatory bail. One view is that it is being misused by affluent and influential sections of accused in society and hence be deleted from the Code. The other view is that it is a salutary provision to safeguard the personal liberty and therefore be retained. Misuse of the same in some instances by itself cannot be a ground for its deletion. However, some restraints may be imposed in order to minimize such misuse. We are, however, of the opinion that the provision contained under Section 438 regarding anticipatory bail should remain in the Code but subject to the amendments suggested in clause 43 of the Code of Criminal Procedure (Amendment) Bill, 1994 which lays down adequate safeguards”. (Pages 27-29)

CHAPTER-4

AMENDED LAW

4.1. The Parliament enacted the Code of Criminal Procedure (Amendment) Act, 2005 (Act No. 25 of 2005) which came into force on 23rd June, 2006 except certain sections thereof, including Section 38. Section 38 relates to amendment of Section 438 of the Code. Accordingly for existing sub-section (1), new sub-sections (1), (1A) and (1B) are substituted. Section 38 of amending Act, 2005 runs as follows:-

S. 38 Amendment of Section 438- In Section 438 of the principal Act, for sub-section (1), the following sub-sections shall be substituted, namely:-

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

(i) the nature and gravity of the accusation;

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

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

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

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

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) the presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

4.2 After amending Act. No. 25 of 2005 the amended section 438 of the Code of Criminal Procedure, 1973 runs as follows:

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

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

(i) the nature and gravity of the accusation:

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

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

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

either reject the applicant 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 office-in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

1A Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy 9of such order to be served on the Public Prosecutor and the Superintendent of Police with a view to give Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

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

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

(ii) a condition that a person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer;

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

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

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

CHAPTER-5

LAWYERS' OBJECTION TO AMENDED SECTIONS

5.1 Different Bar Associations (as per 203rd Report of Law Commission of India) made the following objections against the various amendment to the Code of Criminal Procedure made by the Code of Criminal Procedure (Amendment) Act, 2005 (Act No. 25 of 2005):-

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

"The proviso to sub-section (1) of Section 438 has to be deleted. The apprehension of the accused is manifold and in some cases there may not even be a real possibility of arrest though the accused may apprehend an arrest. To permit the

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

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

"The proposed amendment being brought in Section 438 of Code of Criminal Procedure will take away the rights of an alleged accused who may not have involved in any offence

without there being any chance to get anticipatory bail without subject himself before the Court where the anticipatory application is pending. In the event of not granting any anticipatory bail by the Court, such person can straightaway be arrested. This amendment provides an unexpected opportunity and embarrassment to the Advocates to bring the alleged accused before the Court hearing anticipatory bail applications on an application made to the Court by the public prosecutor and such advocates indirectly help the police to arrest such accused without there being any investigation made in the alleged offence. This amendment will take away the rights and liberty of an individual to put forth his plea before the Court without being arrested."

5.4 In view of the lawyers' objections against section 438 of the Code of Criminal Procedure, 1973 as amended by the Code of Criminal Procedure (Amendment) Act, 2005, dealing with anticipatory bail, the enforcement of the amended section has been kept in abeyance by the Government of India. Before taking the final decision in the matter, the Government of India decided to seek the expert opinion of Law Commission of India on the amended version of section 438, hence made the reference in this regard.

5.5 The principle objection against the new provisions has been the personal presence of the applicant at the time of final hearing of the application. The main apprehension has been that the applicant could be arrested in the event of rejection of his application and the applicant would thus be

deprived of his right to move the higher Court for necessary relief.

5.6 The Law Commission of India in its 203rd Report made the following recommendation:-

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

Accordingly, the Commission has concluded that it is not necessary to have the Proviso inserted in Section 438 (1) and recommended its omission.

As regards sub-section (1B) relating to the presence of the applicant at the time of final hearing, the Law Commission has gone in depth in the nitty-gritty of restraint and custody to which the applicant may be subjected to in terms of the Court's order under sub-section (1B). The Law Commission has come to the conclusion that when the applicant appears in the Court in compliance of the Court's order and is subjected to the Court's direction, he may be viewed as in Court's custody and this may render the relief of anticipatory bail infructuous. Accordingly, the Law Commission has recommended omission of sub-section (1B) of Section 438 Cr.P.C.

During the course of its examination of the subject, the Law Commission noted plethora of case law as to in what order the Court of Session and the High Court should be approached under Section 438 as well as the grant, or as the case may be, denial of anticipatory bail after an application for the same relief has been considered and disposed of by one of the two alternative judicial forums. It is noted that concurrent powers under the section are vested in the two courts in their original jurisdiction. This might be for the reason that orders for grant of refusal of bail are interlocutory orders against which no revision lie. But this position was obtained when the law does not

provide for interim and final orders on anticipatory bail applications and such applications are ordinarily filed in pending cases. Now, when even registration of FIR is not considered necessary for serving an anticipatory bail application and final orders are required to be passed after hearing the applicants and the State authorities, the scenario has materially altered. Accordingly, the Law Commission has recommended insertion of a provision in the Section 438 on the lines of sub-section (3) of Section 397 providing for an option to choose either the Court of Session or the High Court in which concurrent powers of revision are vested and once that option is exercised, the recourse to the other alternative forum is barred for the same relief. However, all other existing remedy against such a final order will continue to be available except to the extent as aforesaid. In addition, the benefit of revision under Section 397 are recommended and for this purposes, also with a view to place the matter beyond pale of any controversy, an Explanation is recommended to be inserted to clarify that a final order on an anticipatory bail application will not be construed as an interlocutory order for the purposes of the Code."

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

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

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

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

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

CHAPTER-6

REPEAL- ITS CAUSES AND IMPLICATIONS

6.1 Section 438 of the Code of Criminal Procedure, 1973 was omitted in its application to Uttar Pradesh by Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (UP Act No. 16 of 1976). The only reason given in the Statement of Objects and Reasons for its (S. 438) omission, "has been creating practical difficulties." It is difficult to understand which practical difficulties were being faced in the State. Uttar Pradesh is the only State in India where this provision has been omitted. As earlier noted, there are three other states, namely, State of West Bengal, Orissa and Maharashtra where the provisions of the section 438 have been modified. Going through these modifications, it appears that these states have made certain safeguards to avoid the misuse of the section and affording an opportunity to be heard, to the prosecution, before passing any final order by the court, on the application for anticipatory bail.

6.2 Validity of the said U.P. Amendment was challenged before the Hon'ble Supreme Court. The matter was dealt with by the Apex Court in **Kartar Singh vs. State of Punjab (1994) 3 SCC 569** with other Writ Petitions. In Para 368 (15) Hon'ble Supreme Court held "that the deletion of the application of Section 438 in the State of Uttar Pradesh by Section 9 of the Code of Criminal

Procedure (U.P.) amendment, 1976 does not offend ether Article 14 or Article 19 of the Constitution and the State Legislature is competent to delete that section, which is one of the matters enumerated in the Concurrent List (List III of the Seventh Schedule) and such deletion is valid under Article 254 (2) of the Constitution.

6.3 The case involved a challenge to the validity of certain sections of the Terrorist and Disruptive Activities Act, 1987 (TADA) on the grounds of violation of fundamental rights. TADA effectively overrode Section 438 and provided no alternative benefit to those charged under the Act. The validity of this section was challenged on the grounds of deprivation of life and personal liberty under Article 21. The questions that arose in that case were as follows:

-Whether the state legislature has legislative competence to delete Section 438 of the Criminal Procedure Code?

-Whether the UP Act 16 of 1976 is violative of Articles 14, 19 and 21 of the Constitution?

6.4 The response of the Court to the first question was that the state government has the authority to amend any law as it pleases by virtue of Article 254 (2) of the Constitution and pointed out that the Uttar Pradesh

Amendment Act had received the assent of the President.

6.5 The merits of the law and the violation of the fundamental rights aspect were considered next. It was held that "in view of the discussion made in relation to Section 20(7) of the TADA Act and of the legislative competence of the State, the contention that it is violative of Articles 14, 19 and 21 of the Constitution has no merit and as such has to be rejected." The reasons given for the retention of Section 20(7) were:

The provision of anticipatory bail is a relatively new provision and was not provided earlier. Taking that away would not amount to violation of personal liberty, as it has not been provided at all. Thus if it has not been available it would not amount to deprivation.

Providing that benefit of anticipatory bail to "terrorist and disruptionists" would defeat the purpose for which the provision on anticipatory bail was recommended by the Law Commission and then enacted. The Court quoted the High Court of Punjab and Haryana in the **Bimal Kaur Khalsa vs. Union of India (AIR 1988 P & H 1995)** and stated that the crime of terrorism cannot be treated in the same way as other crime.

TADA was a draconian law, and its use, misuse and human rights implications have been exhaustively documented. The restrictions on grant of anticipatory bail were thus in line with the general nature of that law. However, it follows that the reasoning applicable to TADA would not apply to legislation that does not have the same aims, objects and scope as that of TADA. Clearly charging somebody under TADA which was enacted to prevent terrorism, is different from charges under other criminal laws. The rationale behind enactments for a grave crime and terrorist activities would be much different from those for a petty offence. This distinction was not maintained in the judgment and thus did not provide an adequate reason for upholding the repeal of the provision on anticipatory bail.

6.6 In Joginder Kumar vs. State of Uttar Pradesh and others (AIR 1994 SC 1349) Hon'ble Supreme Court observed:-

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

9. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual

duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first and that the criminal should not go free because the constable blundered. In People v. Defore1 Justice Cardozo observed:

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

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

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

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

12. This Court in **Nandini Satpathy vs. P.L. Dani (AIR 1978 SC 1025 at Page 1032) quoting Lewis Mayers stated:**

The paradox has been put sharply by Lewis Mayers:

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

Again in Para 21, at page 1033) it was observed:

"We have earlier spoken of the conflicting claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between social interest in effecting

crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since **Miranda (1966) 334 US 436** there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting law-breakers. Currently, the trend in the American jurisdiction according to legal journals, is that respect for (constitutional) principles is eroded when they leap their proper bonds to interfere with the legitimate interests of society in enforcement of its law…." (Couch v. United State S6) (1972) 409 US 322, 336 our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice."

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

"It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in 'all of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.21 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all."

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

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

21. The Royal Commission suggested restrictions on the power of arrest on the basis of the "necessity of (sic) principle". The two main objectives of this principle are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the commission of offences,

to investigate crime. The Royal Commission was of the view that such restrictions would diminish the use of arrest and produce more uniform use of powers. The Royal Commission Report on Criminal Procedure Sir Cyril Philips at p. 45 said:

"….we recommend that detention upon arrest for an offence should continue only on one or more of the following criteria: (a) the person's unwillingness to identify himself so that a summons may be served upon him;

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

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

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

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

22. **The Royal Commission** in the above said report at p. 46 also suggested:

"To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest

exists, for examples to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case……..”

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

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

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

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

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

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case

diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines…"

6.7 In Joginder Kumar case (supra) in paras 24, 25, 26,27 and 28 Hon'ble Apex Court further observed:

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. If would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendation of the Police Commission merely reflects the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable

justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do. Then, there is the right to have someone informed. That right of the arrested person, upon request, to have someone informed and to consult privately with a lawyer was recognized by Section 56(1) of the Police and Criminal Evidence Act, 1984. These rights are inherent in Article 21 and 22(1) of the Constitution and require to be recognized and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements:

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

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

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

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these

requirements have been complied with. The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various police manuals."

6.8 In **Vijay Kumar Verma case (supra) the Division Bench of the Allahabad High Court** observed that, "despite categorical judgment of Supreme Court in Jogindar Kumar case (Supra) it appears that the police is not at all implementing it. What invariably happens is that whenever an FIR of a cognizable offence is lodged the police immediately goes to arrest the accused person. This is clear violation of the aforesaid judgment of the Supreme Court." Hon'ble Court further observed:-

"8. Thousand of writ petitions and section 482 Cr.P.C. applications are being filed in this Court praying for stay of the petitioner's arrest. This is unnecessary increasing the work load of this Court and adding to the arrears.

9. In our opinion, the problem will be obviated by restoring the provision for anticipatory bail which was contained in Section 438 Cr.P.C. but was deleted in U.P. by Section 9 of U.P. Act 16 of 1976.

10. It is surprising that the provision for anticipatory bail should be deleted in this State although it exists in all other States in India, even in terrorist affected States. We do not understand why this provision should not exist in U.P. also.

12. The provision for anticipatory bail was introduced in the Cr.P.C. because it was realized by Parliament in its wisdom that false and frivolous cases are often filed against some persons and such persons have to go to jail because even if the first information report is false and frivolous a person has to obtain bail, and for that he has to first surrender before the learned Magistrate, and his bail application is heard only after several days (usually a week or two) after giving notice to the State. During this period, the applicant has to go to jail. Hence even if such person subsequently obtains bail his reputation may be irreparably tarnished, as held by the Supreme Court in **Jogindaer Kumar's case (AIR 1994 SC 1349)** (supra). The reputation of a person is a valuable asset for him; just as in law the good will of a firm is an intangible asset. In the Gita Lord Krishna said to Arjun."

6.9 The deletion of the provision has strained the capacity and resources of the already overburdened High Courts in Uttar Pradesh. In the case of **Smt. Sudama & others vs. State of U.P. & others, Criminal Misc Writ Petition No. 5774 of 2006,** the Allahabad High Court suggested that if the provision on anticipatory bail were available in the State of Uttar Pradesh, the burden on the High Court and other courts would substantially reduce and would allow judges to deal with more pressing matters. In the absence of a provision for Anticipatory Bail, the Courts have to deal with a large number of Writ Petition for stay of arrest or quashing of complaints under the extraordinary

jurisdiction of High Court under section 482 of the Cr.P.C. The court also stated that there has been no evidence to suggest that the existence of the anticipatory bail provision in other states has led to its gross misuse. It further stated that reinstating the provision would also be beneficial for the poor, who, in case of abuse by the police, would have to apply to the High Court, which is an expensive and cumbersome process. The court observed that it would be even more useful to the poor if the power to approach a Sessions court were also provided under Section 438.

6.10 In the same judgment the court made the explicit recommendation to the Uttar Pradesh to repeal the Act that scrapped the provision on anticipatory bail. Earlier, in the case of Kailash Chand Garg v. State of U.P. Crl. Misc. W.P. No. 5011 of 2006, connected with Crl. Misc. W.P. No. 3906 of 2006 Babu Ram and another vs. State of U.P. the Allahabad High Court had recommended that the government of Uttar Pradesh issue an ordinance deleting Section 9 of the Act and empower the High Courts as well Sessions Courts to grant anticipatory bail.

6.11 As noted earlier in **Vijay Kumar Verma case (supra)** Division Bench of Allahabad High Court had already made the same recommendation to the State Government.

6.12 In **Som Mitta vs. Government of Karnataka, AIR 2008 SC 1126** Hon'ble Supreme Court observed:-

“47. Because of absence of the provision for anticipatory bail in U.P., thousands of writ petitions and Section 482 Cr.P.C. applications are being filed in the Allahabad High Court praying for stay of the petitioners arrest and/or quashing the FIR. This is unnecessary increasing the work load of the High Court and adding to the arrears, apart from the hardship to the public, and overcrowding in jails.

57. Moreover, the Allahabad High Court is already overburdened with heavy arrears and overloaded with work. This load is increasing daily due to the absence of the provision for anticipatory bail. In the absence of such provision whenever an FIR is filed the accused person files a writ petition or application under Section 482 Cr.P.C. and this is resulted in an unmanageable burden on this Court. Also jails in U.P. are overcrowded.

59. I, therefore, make a strong recommendation to the U.P. Government to immediately issue an ordinance to restore the provision for anticipatory bail by repealing Section 9 of U.P. Act No. 16 of 1976 and empowering the Allahabad High Court as well as the Sessions Courts in U.P. to grant anticipatory bail.”

CHAPTER-7

ANALYSIS OF CASE LAWS

7.1 Now we are discussing various case laws laid down by the High Courts and the Supreme Court on different aspect of Section 438 of the Code to enable us to reach any conclusion for the final shape of the proposed section 438 (to be reinserted) of the Code, in its application to Uttar Pradesh.

7.2 Distinction between ordinary order of bail and order of anticipatory bail: In Gurbakhas Singh Sibbia case (supra) Hon'ble Supreme Court observed that:

"The distinction between ordinary orders of bail and order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest."

In **Adri Dharan Das vs. State of West Bengal (2005) 4 SCC 303** Hon'ble Supreme Court observed:

"The facility which Section 438 of the Code gives is generally referred to as "anticipatory bail". This expression which was used by the Law Commission in its 41st Report is neither used in the section nor in its marginal note. But the expression "anticipatory bail" is a convenient mode of indication that it is possible to apply for bail in anticipation of arrest. Any order of bail can be effective only from the time of arrest of the accused. **Wharton's Law Lexicon** explains "bail" as to set at liberty a person arrested or imprisoned, on security being taken

for his appearance". Thus bail is basically released from restraint, more particularly the custody of police."

In **Balchand Jain vs. State of Madhya Pradesh, AIR 1977 S.C. 1966** Hon'ble Supreme Court observed:

"We might, however, mention here that the term 'anticipatory bail' is really a misnomer, because what the section contemplates is not anticipatory bail, but merely an order releasing an accused on bail in the event of his arrest. It is manifest that there can be no question of bail, unless a person is under detention or custody. In these circumstances, therefore, there can be no question of a person being released on bail if he has not been arrested or placed in police custody. Section 438 of the Code expressly prescribes that any order passed under that section would be effective only after the accused has been arrested. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Sessions Judge or the High Court, he would be released immediately without having to undergo the rigorous of jail even for a few days which would necessarily be taken up if he has to apply for bail after arrest."

7.3 Conditions to be satisfied: In Gurbakhas Singh Sibbia case (supra) Hon'ble Supreme Court further observed:

"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 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, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 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.”

In Adri Dharan Das case (supra) Hon’ble Supreme Court observed:

“The applicant must show that he has “reason to believe” that he may be arrested in a non-bailable offence. Use of the expression “reason to believe” shows that the belief that the applicant may be arrested must be founded on reasonable grounds. Mere “fear” is not “belief” for which reason it is not enough for the applicant to show that he has some sort of

vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for grating of the relief sought."

7.4 When provision cannot be invoked: In Gurbakhas Singh case (supra) Hon'ble Supreme Court observed:

"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."

7.5 Reasons to be recorded:- In State of Maharashtra and another vs. Mohd. Sajid Husain Mohd. S. Husain etc. Hon'ble Supreme Court observed: "it is now well settled principal of law that while granting anticipatory bail, the court must record the reasons therefor".

7.6 Blanket Order of anticipator bail should not be passed: In Adri Dharan Das case (supra) Hon'ble Supreme Court observed:

"A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such "blanket order" should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely."

In **Gurbakhs Singh case (supra)** Hon'ble Supreme Court observed:

"Blanket order" of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under S. 438 (1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence

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

In Naresh Kumar Yadav vs. Ravindra Kumar and others, AIR 2008 SC 218 Hon'ble Supreme Court observed:

"Normally a direction should not be issued to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such 'blanket order' should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely".

7.7 Extraordinary Power: The power exercisable under Section 438 is somewhat **extraordinary in character and it is only in exceptional cases** where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty, then power is to be exercised under Section 438. The power being of important nature, it is entrusted only to the higher echelons of judicial forums i.e. the Court of Session or the High Court. In this respect in Balchand Jain case (supra) Hon'ble Supreme Court observed: "……in view of the fact that an order for anticipatory bail is an extraordinary remedy available in special cases, this power has been conferred on the higher echelons of judicial service, namely the Court of Session or the High Court……".

7.8 Limited Duration: The protection of terms of Section 438 is for a limited duration during which the regular court has to be moved for bail obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Anticipatory Bail is sometimes termed as a provision relief till a Magistrate takes cognizance of the offence. The Hon'ble Supreme Court in Salauddin Abdul Samad Shaikh vs. State of Maharashtra 1996 (1) SCC 667 observed:

"Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realized that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted." In **Sunita Devi vs. State of Bihar, AIR 2005 SC 498** also affirmed the above view. However, in **Gurbaksh Singh Sibbia case (supra)** Hon'ble Supreme Court observed:

"Operation of an order passed under Section 438 (1) should not necessarily be limited in point of time. The Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an 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 reasonably short period after

the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time." In **K.L. Verma vs. State (1988) 9 SCC 348** Hon'ble Supreme Court observed:

"The court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed. It was, therefore, pointed out that it was necessary that such anticipatory ball orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted.

7.9 Notice to Public Prosecutor: Law Commission of India in its 41st Report had recommended to insert the provision for anticipatory bail in the Code. Consequently for the first time Section 438, which is popularly referred to as anticipatory bail was incorporated in the Code of Criminal Procedure, 1973 which is still in operation as the Code of Criminal Procedure (Amendment) Act, 2005 (Act No. 25 of 2005) has not yet been brought into force in respect of Section 438. In this Section there is no provision to issue notice to the public prosecutor. We are of the opinion that before hearing of the application for anticipatory bail a notice be caused to public prosecutor and

the Superintendent of Police, with a view to give the public prosecutor a reasonable opportunity of being heard before passing any order on the application by the court. In this respect in Balchand Jain case (supra) Hon'ble Supreme Court observed:

"That Section 438 of the Code is an extraordinary remedy and should be resorted to only in special cases. It would be desirable if the Court before passing an order under Section 438 of the Code issue notice to the prosecution to get a clear picture of the entire situation."

In its 48th Report the Law Commission of India while commenting on the bail provision observed in paragraph 31 as follows:

"……...It also recommended that this power should not be exercised without giving notice to the other side……..."

The Mallimath Committee appointed to suggest amendments in criminal law, has suggested the following in regard to Section 438:

"S. 438 of the Code regarding anticipatory bail be amended to the effect that such power should be exercised by the Court of competent jurisdiction only after giving the public prosecutor an opportunity of being heard."

Regarding notice in the amended section 438 (which is yet to be enforced) following sub-section (1A) has been added:

(1A) Where the Court grants an interim order under sub-section (1) it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on

the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

In **Gurbaksh Singh case (supra) Hon'ble Supreme Court** observed**:**

"An order of bail can be passed under S. 438 without notice to the public prosecutor. But notice should issue to the public prosecutor or the government advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad-interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage."

7.10 Anticipatory bail is not as a matter of right: Anticipatory Bail cannot be granted as matter of Right. Applicant can approach High Court for grant of anticipatory bail even if his application is rejected by the Court of Sessions, but not vice versa. Where a matter of dowry death is under investigation it is not prudent for High Court or Sessions Court to grant anticipatory bail. In State of **M.P. and another vs. Ram Kishana Balothia and another, AIR 1995 SC 1198** Hon'ble Supreme Court observed:

"Anticipatory bail cannot be granted as 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 it's

non-application to a certain special category of offences cannot be considered as violative of Article 21."

7.11 To restrain arrest: Whether a court can pass an order not to arrest the accused where an application under Section 438 of the Code is pending for disposal. In this regard Hon'ble Supreme Court in **Adri Dharan Das case (supra)** observed:

"In the very nature of the direction which the court can issue under Section 438 of the Code, it is clear that the direction is to be issued only at the pre-arrest stage. The direction becomes operative only after arrest. The condition precedent for the operation of the direction issued is arrest of the accused this being so, the irresistible interference is that while dealing with an application under Section 438 of the Code the court cannot restraint arrest." In **D.K.Ganesh Babu. Vs. P.T. Manokaran and others** Hon'ble Supreme Court observed:

"The Court ordinarily will not interfere with the investigation of a crime or with the arrest of 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."

7.12 Cancellation of bail: An accused is free on bail as long as the same is not cancelled. The High Court or the Court of Session may direct that any person who has been released on bail be arrested and commit him to custody on an application moved by the complainant or the prosecution if he misuses the bail or it has been obtained fraudulently by putting wrong facts

before the court. In **State of Punjab vs. Raninder Singh and another, (2008) 1 SCC 564** Hon'ble Supreme Court observed:

"In case the respondents do not cooperate with the investigation, then it is always open for the State to move an application before the High Court for cancellation of the bail. While granting anticipatory bail the court can lay down a condition that the accused shall make himself available for interrogation by a police officer as and when required. The purpose of such a provision is that anticipatory bail cannot be permitted to be abused. It is, therefore, implicit that whenever the court imposes such a condition in its order, and the accused called for interrogation or for certain investigation does not appear before the investigating officer then it will be open for the State to move the High Court for cancellation of bail.

Mallimath Committee also recommended the cancellation of bail on the following ground:

"Bail may be cancelled depending on the behaviour of the person after the grant of bail. If there is sufficient reason to believe that the accused may abscond, repeat the offence, tamper with evidence, threaten witnesses, then the Court may cancel bail on obtaining sufficient proof regarding the involvement of the accused in crime."

7.13 Concurrent jurisdiction:

The Code has not prescribed any specific order in which the two alternative forums are to be approached. It is left to the option of the applicant to move either the Court of Session or the High Court for anticipatory bail one after another or in

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

view has been taken whereby no such fetter is admitted on the power of the High Court.

7.14 Investigating Officer not to act in a mechanical manner:- In this respect in **M.C. Abraham and another vs. State of Maharashtra and other, (2003) 2 SCC 649**, Hon'ble Supreme Court observed:

"In the first place, arrest of an accused is a part of the investigation and is within the discretion of the investigating officer. Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The Section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that Section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the court has no role to play. Since the power is discretionary, a police officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the

nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection.

CHAPTER-8

Conclusion

8.1 In view of the foregoing discussions and decision of the Allahabad High Court in **Vijay Kumar Verma case (supra), Smt. Sudama and others case (supra) and Kailash Chandra Garg** case (supra) High Court made recommendation to the U.P. Government to immediately issue an ordinance to restore the provision for anticipatory bail by repealing section 9 of U.P. Act No. 16 of 1976, and empowering the High Court as well as the Session Court to grant anticipatory bail. In **Smt. Amrawati and another case (supra)** Seven Judges Full Bench of Allahabad High Court observed:-

"36. We again make it clear that the learned Sessions Judge in his discretion can hear and decide the bail application under Section 439 on the same day of its filing provided notice is given to the Public Prosecutor, or he may not choose to do so. This is entirely a matter in the discretion of the learned Sessions Judge. There may also be cases where the learned Sessions Judge on the material available before him may decide to grant interim bail as he may feel that while he has sufficient material for giving interim bail he requires further material for grant of final bail. In such cases also he can in his discretion, grant interim bail and he can hear the bail application finally after a few days. All these are matters which should ordinarily be left to his discretion."

In para 37 Hon'ble High Court further observed:

"**37…..**the view we are taking would make the provisions for grant of bail in the Cr.P.C. in conformity with Article 21 of the

Constitution, particularly since the provision for granting anticipatory bail has been deleted in U.P."

8.2 In Som Mittal Case (supra) Hon'ble Supreme Court affirmed the view taken by the Allahabad High Court in Vijay Kumar Verma case (supra) and in Smt. Amrawati case (supra) and strongly recommended, to issue an ordinance to restore the provision for anticipatory bail by repealing section 9 of the U.P. Act No. 16 of 1976.

8.3 In Lal Kamlendra Pratap Singh case (supra) Hon'ble Supreme Court observed, "We fully agree with the view of the High Court in Amrawati's case (supra) and we direct that the said decision be followed by all Courts in U.P. in letter and spirit, particularly since the provision for anticipatory bail does not exist in U.P. In appropriate cases interim bail should be granted pending disposal of the final bail application." Since observation has been made by the Hon'ble Supreme Court in Sukhwant Singh case (supra) also.

8.4 Thus Hon'ble Supreme Court has also made recommendation to restore the provision for anticipatory bail in U.P. by repealing section 9 of U.P. Act No. 16 of 1976. Not only this Hon'ble Supreme Court observed to the extent that decision in **Amrawati's case (supra)** be followed by all courts in U.P. in letter and spirit since the provision for anticipatory bail does not exist in U.P. It means if court thinks fit in appropriate cases interim bail should be granted pending disposal of the final bail application under section 439 of the Code.

8.5 Under these circumstances, the commission is of the opinion that provision for anticipatory bail be restored in the State of U.P. because even if it is not restored subordinate courts particularly in the State of Uttar Pradesh have power to grant interim bail pending disposal of the final bail application under section 439 Cr.P.C. in view of the above discussions of the Allahabad High Court and the Supreme Court, which are binding on the subordinate Courts.

8.6 It seems that there is an impression in some quarters that if the provision for anticipatory bail is restored crimes will increase. In our opinion, this is specious argument since it has not made much difference to the crime position in the States where the provision of anticipatory bail exists. As stated earlier except State of Uttar Pradesh it exist in all other States in India, even in terrorist affected States though State of Maharashtra, Orissa and West Bengal have slightly modified the provision of this section retaining the substance thereof.

8.7 There is no evidence to suggest that the omission of the provision regarding anticipatory bail has in any way improved law and order situation in State. The criminal graph and data of this State and other States does not at all support premises that omission of this provision has improved the law and order situation in this State and has worsened it in the other States where such provision continue to exist.

8.8 Another important reason for reinsertion of section 438 is that, in its absence the number of cases in the High Court under Section 482 Cr.P.C. and Article 226 of the Constitution is increasing manifold

besides causing immense hardship to the persons who have to travel long distances to have their cases filed under section 482 or Article 226 before the Allahabad High Court Judicature at Allahabad and at Lucknow Bench. A large number of Benches have to be constituted for the disposal of case under section 482 Cr.P.C. and Article 226 of the Constitution.

8.9 One misconception may also be removed that mere insertion of this provision does not mean that anybody and everybody will be entitled for anticipatory bail or such bail will be granted lightly by the Courts. As stated earlier it is an extraordinary remedy available in special cases, this power has been conferred on the higher echelons of judicial service, namely the Court of Session or the High Court as observed in Balchand Jain case (supra).

8.10 The Mallimath Committee, appointed to suggest amendment in Criminal Law has suggested that, "A person who has reason to believe that he may be arrested in future for a non bailable offence, may apply to the competent Court for grant of anticipatory bail. The Court considering the circumstances of the case may grant anticipatory bail so that in the event of arrest, he shall be released on bail."

8.11 It is also remarkable that when section 438 was omitted by the State Government in its application to Uttar Pradesh, emergency was in operation in India. In the Statement of Object and Reasons it has been stated that the provision is being omitted as it was "creating practical difficulties". It is well known reasons behind the proclamation of the emergency. Now such conditions do not exist. The law and order situation in the State is

much better than earlier. The machinery responsible to maintain the law and order situation in the State is also functioning well. As stated above the High Court and particularly the Hon'ble Supreme Court have recommended to restore the provision for anticipatory bail in Uttar Pradesh. **In Som Mittal case (supra) Hon'ble Supreme Court in para 58** observed:-

"**58**……No doubt the recommendation of a Court is not binding on the State government/State Legislature but still it should be seriously considered, and not simply ignored. The Court usually makes a recommendation when it feels that the public is facing some hardship. Such recommendation should, therefore, be given respect and serious consideration."

8.12 The State Law Commission has considered the various aspects of the matter in depth and is of the considered opinion that the above recommendation of the High Court and Hon'ble Supreme Court not only be respected but it should be honoured by the State Government by restoring the provision for anticipatory bail either as amended by the Parliament or in modified form (which will be discussed latter) by repealing section 9 of the U.P. Act No. 16 of 1976 as it exists in all other States in India, even in terrorist affected States.

8.13 The Parliament has made drastic amendment in section 438 of the Code by Act No. 25 of 2005 but different Bar Associations have made certain objections against some amended provisions particularly the Proviso to sub-section (1) and new sub-section (1B) of Section 438 which runs as follows respectively:-

"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."

"(1B) the presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considered such presence necessary in the interest of justice."

8.14 In view of lawyers objections Government of India referred the matter, to seek the expert opinion, to the Law Commission of India, who submitted its 203rd Report to the Central Government by which Law Commission of India recommended the omission of the above Proviso to sub-section (1) of section 438 and sub-section (1B).

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

necessarily arrest the person in the situation envisaged therein. Undoubtedly, the proviso does not enjoin upon the Police Officer to mandatorily arrest the person whose application for anticipatory bail has been rejected. It only provides that in the exigencies mentioned therein, there will not be a bar to the arrest of the person if the Police otherwise considers his arrest necessary and there are sufficient grounds to do so. The well settled legal position is that in the absence of any protective judicial order, there will not be any fetter on the exercise of power of arrest by the police in accordance with the provisions of the Code. Since the law on this aspect of the matter is already very clear, it is not necessary to insert this proviso in the Section. We are of the considered view that the general power of arrest of the police need not in fact be asserted in the context of anticipatory bail as is done in the said Proviso inasmuch as it may unwittingly give an impression, howsoever wrong it might be, that police could arrest if the applicant is not granted anticipatory bail.

8.16 As far as amended sub-section (1B) of section 438 is concerned, as state earlier, anticipatory bail is in anticipation of arrest. Once arrested, the benefit of anticipatory bail is not amenable to be availed of. There are various sections in chapter V of Code titled “Arrest of Persons” of which Sections 41, 42, 43 and 44 empower different authorities and even private persons to arrest a person in given situation. After going through the distinctive feature of section 438, the Commission is of the opinion the above sub-section (1B) of Section 438 is apparently not in consonance with the nature and scheme of anticipatory bail.

The obligatory nature of the presence as envisaged in above sub-section renders the application for anticipatory bail infructuous as the applicant has already been placed under restraint and is in the custody of the Court. We are of the view that obligatory presence of the applicant seeking anticipatory bail in compliance with court's order to that effect will be antithesis to his right to anticipatory bail.

8.17 Therefore, the Commission if of the opinion that the section 438, which is to be inserted by the Legislature of State, in its application to Uttar Pradesh, should not have the provision like above proviso and sub-section (1B) of section 438.

8.18 Commission is also of the opinion that no ex-parte order should be passed by the court. Where an application is moved, the Court should cause a notice, not less than forty eight hours notice, together with a copy of such application to be served on the Public Prosecutor with a view to give the Public Prosecutor is reasonable opportunity of being heard when the application shall be heard by the court. In State of Assam and another vs. R.K.Krishan Kumar and others AIR 1998 SC 144 the Bombay High Court issued direction under section 438 to release the respondents, if arrested, on bail without even affording an opportunity to the appellants. Hon'ble Supreme Court set aside the impugned orders on that ground alone. In Savitri Goenka vs. Kusum Lata Damant and others, 2007 (12) SCALE 799 Hon'ble Supreme Court held that, "we find that the impugned order of the High Court cannot be maintained on one ground. Though it had

issued notice to the appellant, the matter was disposed of without hearing the appellant."

8.19 Therefore, we are of the opinion that notice to Public Prosecutor should be given first, before hearing the application for anticipatory bail.

8.20 As far as jurisdiction is concerned, as stated earlier, the Commission is of the opinion that:

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

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

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

(iv) Where the person chooses to straightaway move the High Court in the first instance, in such a case the person if aggrieved of the High Court's order on his application for direction under Section 438 may have to invoke the extraordinary constitutional powers of the Supreme Court by seeking special leave to appeal in the Supreme Court.

8.21 The Commission feels that to safeguard the misuse of the provision for anticipatory bail by applicants, the courts while

considering the application for anticipatory bail, may consider the following factors namely:-

(i) The nature and gravity of the accusation;

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

(iii) the possibility of the applicant to flee from justice, repeat the offence and tamper the witnesses; and

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

8.22 The Commission is also of the view that when the Court of Session or the High Court makes a direction under section 438 of the Code, for release of a person on anticipatory bail, it may impose certain conditions, as thinks fit, including:-

(i) a condition that the person shall make himself available for interrogation by a Police Officer as and when required:

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer;

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

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

8.23 In the light of above discussion, we are of the considered view that section 438, which is to be inserted by the Legislature of the State, should have the provisions, as recommended in the succeeding chapter.

8.24 Accordingly, the Commission makes a strong recommendation to the State Government to restore the provision for anticipatory bail by repealing section 9 of U.P. Act No. 16 of 1976 and empowering the Sessions Court

CHAPTER-9

RECOMMENDATIONS

9.1 We recommend that:

9.1.1 The Legislature of the State should reinsert the provision for anticipatory bail (section 438 of the Code of Criminal Procedure, 1973) by repealing section 9 of the U.P. Act No. 16 of 1976.

9.1.2 Section 9 of the U.P. Act No. 16 of 1976 shall be omitted.

9.1.3 The proposed text of section 438 (to be inserted) will be as follows

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

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply either to the Court of Session or the High Court 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,-

(2)

(i) The nature and gravity of the accusation;

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

(iii) the possibility of the applicant to flee from justice, repeat the offence and tamper the witnesses; 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 order for the grant of anticipatory bail:

Provided that where an application is moved, the Court shall forthwith cause a notice being not less than forty eight hours notice, together with a copy of such application to be served on the Public Prosecutor with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be heard by the Court.

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

(i) a condition that the person shall make himself available for interrogation by a Police Officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer;

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

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

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

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

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

We recommend accordingly

(Justice V.C.Misra)
Chairman

(V.K.Mathur)	**(Prof. Balraj Chauhan)**	**(Ishwar Dayal)**
Member	**Member**	**Member**
(Ex-Officio)	**(Part Time)**	**(Full Time)**

ANNEXURE-1

THE CODE OF CRIMINAL PROCEDURE (UTTAR PRADESH AMENDMENT) BILL, 2009

A

BILL

(Model)

to amend the Code of Criminal Procedure, 1973, in its application to Uttar Pradesh

It is hereby enacted in the Sixtieth Year of the Republic of India as follows:-

CHAPTER-1

PRELIMINARY

Short title and extent

1. (1) This Act may be called the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 2009.

(2) It shall extend to the whole of Uttar Pradesh.

CHAPTER-2

OMISSION OF SECTION 9 OF U.P.ACT XVI OF 1976

Omission of section 9 of U.P. Act XVI of 1976

2. Section 9 of the U.P. Act No. XVI of 1976 shall be omitted.

CHAPTER-3

AMENDMENT OF THE CODE OF CRIMINAL PROCEDURE, 1973

Amendment of Section 438 Act 2 of 1974 in its application to Uttar Pradesh

3. For Section 438 of the Code of Criminal Procedure, 1973 reinserted by Section 2 of this Act, in its application to Uttar Pradesh, the following Section shall be substituted, namely:-

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 either to the Court of

Session or the High Court for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

(i) The nature and gravity of the accusation;

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

(iii) The possibility of the applicant to flee from justice, repeat the offence and tamper the witnesses; 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 order for the grant of anticipatory bail:

Provided that where an application is moved, the Court shall forthwith cause a notice being not less than forty eight hours notice, together with a copy of such application to be served on the Public Prosecutor with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be heard by the Court.

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

(i) a condition that the person shall make himself available for interrogation by a Police Officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer;

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

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

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