

(2008) 04 BOM CK 0154

In the Bombay High Court

Case No : Criminal Application No. 2429 of 2007

Prashant Kishor Mehta

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-04-2008

Acts Referred:

Constitution of India, 1950 — Article 141

Criminal Procedure Code, 1973 (CrPC) — Section 173, 204, 208, 209, 437

Penal Code, 1860 (IPC) — Section 409, 464, 471

Citation : (2008) 5 MhLj 824

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : Mahesh Jethmalani and M.S. Mohite, Pranav Badheka, P.G. Sabnis, Nooruddin Dhillal and Shane J. Dias Sapco, instructed by Hariani and Co, for the Appellant; Amit Desai and Sanjeev Kadam, Nankani and Associates, instructed by S.R. Borulkar, Public Prosecutor and K.V. Saste, Assistant Public Prosecutor, for the Respondent

Judgement

V.C. Daga, J.—The issue raised in the present case is of potential significance in relation to grant of bail in anticipation of arrest, popularly known as "Anticipatory Bail" and in particular with respect to the power of the Court in fixing duration of the anticipatory bail.

Factual Matrix:

2. It is not necessary to trace factual matrix. Suffice it to say that by the impugned order impugned in the present application, the Sessions Court of Greater Bombay has granted anticipatory bail only for nine days with direction to the accused to surrender before the remand court on or before 30th July, 2007 with liberty to apply for regular bail.

3. Numerous such orders are passed by the various Sessions Courts falling within the jurisdiction of this Court giving rise to the aforesaid legal issue. The parties are different but the legal issue raised is identical, as such all these cases were

heard together and the issue raised is being answered by this order, reserving the liberty to consider individual cases on their own merits. Submissions:

4. Mr. Shirish Gupte, Mr. A.P. Mundargi and Mr. Mahesh Jethmalani, learned senior Counsel, Mr. Subhash Jha, Mr. S.V. Kotwal, Mr. M.S. Mohite and Mr. Amit Desai, learned advocates canvassed their respective submissions. Mr. S.R. Borulkar, learned Public Prosecutor argued for the State.

5. Mr Gupte, learned senior Counsel urged that Section 438 of the Code per se does not include any statutory discretion to limit the duration of anticipatory bail. He submits that careful perusal of the judgment in Gurbaksh Singh (supra) shows that anticipatory bail can be granted even after FIR is filed, so long as the applicant has not been arrested.

6. He further submits that the judgment of the Supreme Court in the case of Salauddin (supra) holding that the order of anticipatory bail should necessarily be limited in point of time is per incuriam as the observations of the Constitution Bench were neither noticed nor referred to. That the observations made therein limiting the duration of anticipatory bail are therefore only obiter.

7. Mr. Gupte, further submits that if the observations of Salauddin's case are held to be per incuriam and restricted to the facts of that case, then merely because the principles allegedly stated therein were reiterated and reproduced in the subsequent judgments of K.L. Verma Vs. State and Another, ; Sunita Devi v. State of Bihar 2005 SCC (Cri) 435; Adri Dharan Das Vs. State of West Bengal, ; D.K. Ganesh Babu Vs. P.T. Manokaran and Others, ; and Sohan Lal Juneja v. State of Punjab 2007 (1) Cri 20 would not make it good law and this Court would still be required to follow the view of the Constitution Bench.

8. Mr. Gupte further submits that in view of the principle of binding nature of precedents engrafted in Article 141 of the Constitution of India, it is well settled that the law laid down by the Constitution Bench of the Supreme Court would be binding and can only be differed from or set aside by a larger Bench. According to him, this practice is followed by the Supreme Court while dealing with various issues arising under Article 141 and the observations of the Supreme Court in this regard are themselves binding as law under Article 141. He further submits that if the law prohibits a smaller bench from digressing from the view taken by a larger Bench then this Court would be perpetuating an illegality by holding itself to be bound by the observations of a smaller Bench. Mr. Gupte was supported by M/s. Mundargi; Jha; Kotwal; and Mohite, who also reiterated the very same submissions.

9. Mr. Jethmalani, learned senior Counsel, initially, tried to build up an argument on the assumption that there is a conflict between the view taken in the case of Gurbaksh Singh (supra) and other subsequent decisions of the Supreme Court referred to in para-7 (supra). However, on second thought leaving the said line of submission, he switched over to his alternate submission considering gravity of the issue involved and urged that various subsequent judgments of the Supreme

Court referred to in para-7 (supra) can be reconciled with the view taken in the case of Gurbaksh Singh (supra). Mr. Jethmalani also urged that if this Court finds that reconciliation between two views of the Apex Court is not possible, then alone, in accordance with law of precedents, the judgment of the Constitution Bench must be followed over others and the view must be taken that anticipatory bail should not be for a limited duration.

10. Mr. Jethmalani in his endeavour to reconcile two views of the Supreme Court turned to the decision of Gurbaksh Singh (supra) and urged that para-42 thereof lays down that the order of anticipatory bail need not "necessarily" be limited in time. According to him, as per the said judgment normal rule should be not to limit the operation of the anticipatory bail, however, for the reasons to be recorded the same can be limited. According to him, discussion in the said para-42 was the situation wherein FIR was not registered and an arrest was apprehended in anticipation of registration of FIR. In such a case, an order may be limited in time making it operative till some time after registration of FIR. Thus, according to him law laid down in the said para-42 does not lay down an absolute proposition of law that anticipatory bail must be or must not be limited in point of time at all. In his submission, normally, it should not be limited. However, in special circumstances, it can be limited. He, thus, submits that it is desirable to construe that the order must normally enure till the time charge-sheet is filed and, thereafter, it may be left to the discretion of the trial court to grant regular bail.

11. Mr. Jethmalani submits that Section 204 of Cr.P.C. provides for issue of summons or a warrant as the case may be after a charge-sheet is filed. Thus, on production or appearance of an accused before the trial court pursuant to the warrant or summons issued u/s 204 after charge-sheet, it is upto the trial court to grant him bail. Thus the order of anticipatory bail granted at premature stage can operate till filing of charge-sheet. He, thus, submits that this possible interpretation is not only in tune with para-42 of Gurbaksh's case, but it is also in consonance with Section 204 of Cr.P.C. He, thus, submits that if para-42 of the judgment in Gurbaksh Singh's case is not read in the light of Section 204, the said Section itself would be rendered otiose.

12. Mr. Jethmalani, tried to dissect each subsequent judgments of the Supreme Court to demonstrate that there is no conflict between the view taken by the Apex Court in the case of Gurbaksh Singh (supra) and the subsequent decisions starting from Salauddin (supra) onwards.

13. Mr. Desai, learned Counsel appearing for the some of the applicants urged that depending upon the facts and circumstances of each case the duration of anticipatory bail can be curtailed. He also tried to make his submission good by x-raying various cases subsequent to the case of Gurbaksh Singh (supra).

14. Mr. Borulkar, learned Public Prosecutor, appearing for the State canvassed that while considering grant of application for anticipatory bail, larger interest of

the society; public and the State is required to be kept in mind so as to strike balance between the liberty of the individual and the interest of the investigating agency. He, thus, submits that life span of anticipatory bail should be till submission of the report u/s 173 of the Code by the investigating agency.

15. Having heard various submissions sketched hereinabove, majority of the advocates have canvassed that anticipatory bail should be granted for entire period of trial and operation thereof should not be restricted placing reliance on the judgement of the Constitution Bench of the Supreme Court in the case of Gurbaksh Singh (supra), whereas Mr. Jethmalani, Mr. Desai and Mr. Borulkar tried to canvass that while exercising powers u/s 438 of Code the Court is duty bound to strike balance between the individual rights of a person and rights of the State/ Police to investigate offence.

The Issue:

16. The various submission advanced have given rise to the following issue:

Whether the anticipatory bail should be limited in point of time or it should not be so limited?

17. Before proceeding to consider the contentions raised, it would be profitable to review relevant provisions of law in this regard.

Relevant Statutory Provision:

18. The law relating to anticipatory bail is to be found in Section 438 of Code of Criminal Procedure of 1973 ("Code" for short). Said Section 438 empowers the High Court and the Sessions Courts to grant bail to the person apprehending arrest on an accusation of having committed non-bailable offence. It is to be noted that the provision regarding bail in anticipation of arrest was not present in the original code. It is included in the Code in the year 1973 only after Law Commission of India in its 41st report recommended need for such provision. Before such provision was incorporated i.e. in absence of any express provision to grant anticipatory bail, when an application of such a nature was made, in most of such cases the High Court granted anticipatory bail using its inherent powers.

19. In its 48th report, Law Commission again endorsed the view expressed in the 41st report and Clause 447 of the Code of Criminal Procedure Bill 1970 for the first time provided the provisions of anticipatory bail thus:

As recommended by the Commission, 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 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.

It was observed by the Law Commission in its 48th report thus:

31. The Bill introduces a provision of the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission (41st report). We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such power be exercised." WE are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one. Further the relevant Section should make it clear that the direction can be issued only for reasons to be recorded, and if the Court is satisfied that such a direction is necessary in the interest of justice....

20. The Bill was referred to the Joint Committee of the Parliament, which made following observations:

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

21. The Clause so amended (Clause 436) was enacted as Section 438 of the Code of Criminal Procedure 1973. Section 438 reads as under:

438. Direction of 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 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 direction in the light of the facts of the particular case, as may think fit, including:

(i) a condition that the person shall make himself available for interrogation by a police 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 of the Court or to any police officer;

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

(iv) Such other conditions 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 u/s (1).

22. The State of Maharashtra has amended Section 438 of Cr.P.C. by Act No. 24 of 1973, which reads as under:

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

(1) When 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) whether the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail;

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

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

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

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

23. Section 438 provides that when the conditions mentioned in provision are fulfilled, the appropriate Court shall make an order that in the event of arrest the person shall be released on bail. The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest or detention. The gravity of the offence is important factor to be taken into consideration while granting such anticipatory bail so also need for custodial interrogation and the fact of taking cognizance or filing of the charge-sheet cannot be construed as prohibition against grant of anticipatory bail.

24. The distinction between ordinary bail and anticipatory bail has been clearly explained by the Supreme Court in the case of *Balchand v. State of M.P.* AIR 1977 SC 366. The Supreme Court pointed out that there is no question of bail unless there is arrest and so it is only after the arrest such order comes into play. The Supreme Court in the case of *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, ; has also observed that ordinary bail is granted after arrest while anticipatory bail is granted in anticipation of arrest and, is, therefore, effective at the very moment of arrest. The power to grant such bail is of extraordinary character and it is only in the exceptional case where it appears that the person may be falsely implicated or frivolous case must have been launched against him and that there is reasonable ground for holding that the person is accused of the offence is not likely to abscond or misuse his liberty while on bail, such a bail can be granted.

25. In *Naresh Kumar Yadav Vs. Ravindra Kumar and Others*, , Dr. Arijit Pasayat, J. very aptly amplified the distinction between anticipatory bail u/s 438 and regular bail u/s 439 of the Code as under:

The facility which Section 438 of the Code gives is generally referred to as "anticipatory bail". This expression which was used by the Law Commission in its

41st Report is neither used in the Section nor in its marginal note. But the expression "anticipatory bail" is a convenient mode of indication that it is possible to apply for bail in anticipation of arrest. Any order of bail can be effective only from the time of arrest of the accused. Wharton's Law Lexicon explains "bail" as "to set at liberty a person arrested or imprisoned, on security being taken for his appearance." Thus bail is basically release from restraint, more particularly the custody of Police. The distinction between an ordinary order of bail and an order u/s 438 of the Code is that whereas the former is granted after arrest, and therefore means release from custody of the Police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. See: Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, . Section 46(1) of the Code, which deals with how arrests are to be made, provides that in making an arrest the Police Officer or other person making the same "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". The order u/s 438 of the Code is intended to confer conditional immunity from the touch as envisaged by Section 46(1) of the Code or any confinement. This Court in Balachand Jain v. State of Madhya Pradesh AIR 1977 SC 366 has described the expression "anticipatory bail" as misnomer. It is well-known that bail is ordinary manifestation of arrest, that the Court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. The power exercisable u/s 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 u/s 438. The power being of important nature it is entrusted only to the higher echelons of judicial forums, i.e. the Court of Session or the High Court. It is the power exercisable in case of an anticipatory accusation of non-bailable offence. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Session or High Court, he shall be released immediately on bail without being sent to jail. Sections 438 and 439 operate in different fields. It is clear from a bare reading of the provisions that for making an application in terms of Section 439 of the Code a person has to be in custody. Section 438 of the Code deals with "Direction for grant of bail to person apprehending arrest".

26. Section 438 of Code clearly says that when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or Court of Session for a direction under this Section, and that in the event of such arrest, he shall be released on bail. Section 438 of Code provides a protective order in favour of the accused who is apprehending his arrest; while Section 439 of Code applies to the accused who is in custody.

27. The Apex Court as well as various High Courts have laid down principles of law relating to grant of anticipatory bail and ruled that the Court has power to impose conditions while granting anticipatory bail. see Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, ; Pokar Ram Vs. State of Rajasthan and Others, ; and Kiran v. Raja 1988 SCC (Cri.) 106.

28. Clause 2 of Section 438 lays down various conditions which the Court can impose before granting anticipatory bail. These include such conditions as attendance before the investigating Officer as and when it is required, preventing from doing any act that can affect the case, and prohibition of leaving the country. The Supreme Court in the case of Gurbaksh Singh (supra) has laid down that the court has been given wide discretion to look into the various facts that can hamper investigation process and, if the court after looking into the various factors including the past history of the accused comes to the conclusion that there is probability of accused interfering with the investigation process, Court can refuse to pass the order on this sole ground. The Court has wide discretion u/s 438 of the Code.

29. Anticipatory bail some times termed as provisional relief till the Magistrate takes cognizance of the offence and consider application for regular bail. The Hon"ble Supreme Court in Salauddin Abdulsamad Shaikh Vs. State of Maharashtra, held that the order u/s 438 should be of limited duration only and, ordinarily, on expiry of that 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 completion of investigation or charge-sheet is submitted. The essence of the judgment is that anticipatory bail should be granted only for a limited period.

30. More recently in K.L. Verma; Sunita Devi; Adri Dharan Das; D.K. Ganesh Babu; P.T. Manoharan; and Sohan Lal Juneja, the Supreme Court held that anticipatory bail cannot operate till the end of trial, the regular court cannot be by-passed. The Apex Court observed that limited duration of operation of the order of anticipatory bail must be determined having regard to the facts of the case and to give the accused sufficient time to move the regular court and also to give sufficient time to the regular court to decide the bail application.

31. Most of the advocates appearing for the accused submit that view taken by the Supreme Court in the above cases is running counter to the law laid down by the Constitution Bench in the case of Gurbaksh Singh (supra) and against the legislative frame work. Analysis of Various Judgments:

32. Before touching the issue and the various submission made, let me consider various judgment on the issue and examine whether the judgment of the Apex Court in the case of Gurbaksh (supra) unequivocally holds that the anticipatory bail should enure for the entire period of trial.

33. The judgment of the Supreme Court in the case of Gurbaksh Singh (supra) is an earlier judgment than other judgments right from Sallauddin till D.K. Ganesh

Babu (supra), which are later in point of time. Moreover, the judgment in the case of Gurbaksh Singh (supra) is the judgment of Constitution Bench as against the subsequent judgments, which are of lesser strength.

34. First, let me also examine as to whether there is any conflict between the judgment in the case of Gurbaksh Singh (supra) and other subsequent decisions rendered by smaller Benches and that it is not possible to reconcile two views running counter to each other as canvassed by the majority of the advocates. It is necessary to note some of the important principles pronounced by the Constitution Bench in Gurbaksh Singh (supra) may be summarised thus (para 35-42):

(i) The use of the expression "reason to believe" in Section 438(1) shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere "fear" is not belief. 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 applicants apprehension that he may be arrested is genuine. Such belief 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 arrested. Specific events and facts must be disclosed by the applicant in order to enable the Court to judge of the reasonableness of his belief. (Paras 35, 40, 41). A blanket order i.e. an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had, should not generally be passed. Such a blanket order is bound to cause serious interference with the functions of the police. (Paras 40 and 41)

(ii) If an application for anticipatory bail made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out granting such relief. It cannot leave the question for the decision of the Magistrate concerned u/s 437 of the Code, as and when an occasion arises. (Para 36)

(iii) The filing of an FIR is not a condition precedent to the exercise of the power u/s 438. (Para 37)

(iv) Anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested. (Para 38)

(v) The provisions of Section 438 cannot be invoked after the arrest of the accused. (Para 39)

(vi) An order of bail can be passed u/s 438(1) without notice to the Public Prosecutor. But notice should be issued 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. (Para 42)

(vii) Regarding time limit, if any, for anticipatory bail the limit the operation of the order to 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 o bail u/s 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. (Para 42)

35. Reading of the observations made in the aforesaid paragraphs makes it that normal rule is not to limit the operation of the order in relation to the period of time. In the very judgment the Apex Court has said that in the absence of special reasons the order of anticipatory bail should not be limited in relation to the duration.

36. Reading of the aforesaid paragraph 42, in the light of para 36 referred to hereinabove, two issues are clear (i) first, that the order of anticipatory bail normally should not be limited in time and (ii) second, the court hearing anticipatory bail application should not leave it to the Magistrate to decide the issue u/s 437 as the same would defeat the object of Section 438. It is, thus, clear that law laid down in Gurbaksh Singh's case is that in normal case the order of anticipatory bail should not be limited in time but in an exceptional case as illustrated and for the reasons to be recorded the same may be limited in relation to the duration.

37. It is true, Salauddin's case (supra) (Coram of three Judges) was considering the order granted by this Court reading as under:

Heard Mr R.S. Bhonsale for the applicant and Mr. Mr. D.U. Mirajkar for the State, in this application for anticipatory bail in a case under Sections 409/464/471 I.P.C. The accusation of the prosecution is that the applicant is one amongst those who have embezzled a large sum to the tune of Rs.12 lakhs. It is also alleged by the prosecution that forgery was committed by the applicant. In my view this is not a fit case for granting anticipatory bail to the applicant. Consequently this application is rejected. In case a regular bail application is moved before the courts below it will be decided by them wholly unfluenced by the observations in this order as expeditiously as possible.

38. In Salauddin's case (supra), it was observed as follows:

2. u/s 438 of the Code of Criminal Procedure when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Sessions may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions having regard to the facts of the particular case, as it may deem appropriate. 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 by-passed 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. The Apex Court further stated that that is the correct procedure to follow because it must be realised that when the Court of Sessions 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.

39. The Hon'ble Judges laid down the law, which reads as under:

It should be realised that an order of anticipatory bail could even be obtained in cases of a serious nature as for example murder and therefore, it is essential that the duration of that order should be limited and ordinarily the court granting anticipatory bail should not substitute itself for the original court which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail.

40. Two years later, the decision in Salauddin's case (supra) was once again considered by the Supreme Court in the matter of K.L. Verma's case (supra). After considering the Salauddin's case, it was observed that Salauddin's case desired to convey that order of anticipatory bail does not enure till the end of trial but it must be for limited duration and that the regular court cannot be by-passed and that the anticipatory bail was ordered to enure till the regular court decide the application for grant of bail and for a week thereafter so that if that regular court refuses bail, the accused person can move the higher Court. That the accused persons can seek regular bail u/s 437 and/or 439 of the Code even without surrendering himself before the Court. In the aforesaid two judgments, there is no reference to the case of Gurbaksh Singh (supra).

41. Both the aforesaid judgments came up for consideration before the Supreme Court in the case of Sunita Devi (supra) wherein the Apex Court held that in order to maintain application for regular bail u/s 437 or 439 of the Code the accused must be in custody and since K.L. Verma's case granted little concession to the accused without physically surrendering, the Supreme Court held that decision K.L. Verma's case to that extent is per incuriam. In the judgment of Sunita Devi's case reference to the judgment of Gurbaksh Singh find a place, to high light distinction between the order u/s 438 and 439 of Code.

42. Next in the line is the judgment of the Supreme Court in the case of Adri Dharan Das v. State of West Bengal (supra) wherein the Apex Court once again

considered the cases in Sallauddin, K.L. Verma and Sunita Devi and laid down the following principles:

(i) Interim order not to arrest the applicant cannot be passed by the court. It cannot restrain arrest;

a. Arrest is part of process of investigation.

b. Order u/s 438 should enure for a limited period i.e. till filing of the charge-sheet and that regular court should not be allowed to be by-passed.

43. Latest decision of the Apex Court in the matter of D.K. Ganesh Babu (supra). The Apex Court again considered all its earlier judgments right from K.L. Verma (supra) onwards and also made reference to the Gurbaksh Singh's case. Reading of D.K. Ganesh Babu's case also shows that the view of the Supreme Court was on same lines with regard to the duration of anticipatory bail and that it should be limited on the point of time. The Apex Court, in the subsequent judgment in the case of Naresh Kumar Yadav (supra) has again reiterated the same view with regard to duration of anticipatory bail.

44. From the analysis of the aforesaid decisions of the Apex Court, one can legitimately infer that there are two views of the Supreme Court on one issue. One view holding that the normal rule should be not to limit the operation of the pre-arrest bail in relation to point of time, but it can be for a short period, for the reasons to be recorded and that other view is that the order should always be for a limited period.

45. At the first flush, one can form a legitimate opinion that there are two divergent views on the same issue. As a matter of fact, this prima facie opinion has resulted in a reference to the Full Bench of Madras High Court in the case of Palanikumar v. State 2007 (4) CTC 1; wherein after detailed examination of the judgments of the Supreme Court on the issue, the Court held that subsequent judgments are in conflict with the decisions of the Constitution Bench of the Supreme Court in the case of Gurbaksh Singh and, in accordance with law of precedent, the judgment of the Constitution Bench must prevail over the others and held that the anticipatory bail should not be limited in period of time.

46. The very same issue came up for consideration before the learned Single Judge of High Court of Punjab and Haryana in Criminal Misc. Application No.21713 M of 2007 in the case of Armindar Singh v. State of Punjab decided on 30th July, 2007 (unreported); wherein learned Judge did not accept the contention that there is conflict between the decision rendered by the Constitution Bench in Gurbaksh Singh case (supra) and the law laid down in the subsequent judgements starting from Salauddin's case onwards and the learned Judge went on to hold that ratio laid down in the Constitution Bench decision can be reconciled with the subsequent view taken by the smaller Benches of the Supreme Court. While reconciling two views of the Supreme Court the learned Judge went on to hold that the duration of order of anticipatory bail can be till

the time viable change takes place or till completion of investigation and filing of charge-sheet as specifically held in Salauddin's case followed in series of subsequent judgments referred to in para-7 (supra). The said view is taken on the basis of the observations made in Gurbaksh Singh's case wherein it is said that:

Court may, if there are reasons for doing so, limit duration of the order to short period until after filing of the FIR in respect of the matter covered by the order. The applicant may, in such case, be directed to obtain order of bail u/s 437 or 439 of the Code within a reasonable short period after filing of the F.I.R. as aforesaid.

47. Thus, the learned Single Judge reconciled the difference of opinion between the Constitution Bench judgment rendered in the case of Gurbaksh Singh's case and the view taken by the Supreme Court in various subsequent judgments.

48. I may place it on record that I have had an advantage of perusing both views i.e. one taken by the Full Bench of Madras High Court and another taken by the learned Single Judge of High Court of Punjab and Haryana, referred by the advocates during the course of hearing. I express, with due respect to the learned Full Bench of the Madras High Court, my inability to concur with their view and I prefer to follow the view taken by the learned Single Judge of the Punjab and Haryana High Court in the case of Armindar Singh (supra) for the reasons recorded. Consideration:

49. Having heard various learned advocates, appearing for various applicants and learned Public Prosecutor, the substantial controversy revolves around the permissibility of fixation of outer limit in granting anticipatory bail.

50. Anticipatory bail is a shield against arrest erupting from "reasons to believe". It is a social lubricant available to a petitioner to protect him from ignominy, harassment and vexatious allegations.

51. The genesis of the controversy is to be found in Salauddin's case (supra) which, according to the majority submissions, is contrary to the principles of law and in breach of judicial discipline. The thrust of the submission is that the decision in the case of Salauddin and all subsequent judgments based thereon can neither acquire any legal force nor any persuasive value to become binding upon all the courts in India, especially, when the Supreme Court has not disturbed, modified, analysed and distinguished the Constitution Bench judgment of Gurbaksh Singh (supra). The bold submission advanced by some of the advocates is that all the decisions right from Salauddin case till Adri Dharan Das (supra) are per incuriam and hence they have no binding force of law as all these cases are contrary to law laid down by the Constitution Bench in Gurbaksh Singh (supra). That the decision rendered by the Constitution Bench could only be altered, modified and distinguished by the decision of a larger bench. Thus, submission in short is: the lift of anticipatory bail cannot be curtailed. It must enure till the end of the trial.

52. In order to answer the controversy raised, one has to turn to the text of Section 438 in general and Sub-section (2) thereof in particular which permits the High Court or the Court of Sessions to put such conditions and/or directions in the light of the facts of particular case as the Court may think fit in addition to the conditions envisaged in Section 438(2)(i)(iv) of the Code. Thus, the source of power to put conditions can be traced in the substantive provision of Section 438 itself. Similar power is to be found in favour of the Courts under Sub-section (2) of Section 438 of the Code as amended by the State of Maharashtra.

53. Let me consider the question from another angle based on the scheme of the Code itself. Chapter XII relates to the information to the Police and their power to investigate. Chapter XXXIII relates to the provisions as to bail and Bonds. Minute examination of these two chapters of the Code gives an indication about their close relationship. Section 173 falling in Chapter XII of the Code relates to the report of the Police Officer on completion of investigation for which outer limit is prescribed in the Code. The investigation is not to terminate at the pleasure of the investigating agency. If the investigation is not completed within the period stipulated and the accused is prepared to give bail, he is entitled to a permanent bail, normally referred to as compulsory bail or bail-in-default subject to the order of the Magistrate in that behalf.

54. In case of anticipatory bail, arrest remains in a state of suspended animation and in the event of arrest, the arrested person is admitted to bail u/s 438(3) of the Code. Sub-section (3) of Section 438 has two parts. In the first part it refers to a preparedness of the person arrested to give bail before the Police.

55. The second part, on the other hand, authorising issuance of warrant of arrest (bailable) indicates that the bail bonds furnished by the accused before the Police or the Magistrate in pursuance of the anticipatory bail is temporary having no binding effect after cognizance is taken of when the accused appears or surrenders before the Magistrate. Had it not been so, there was no necessity to permit the Magistrate taking cognizance to issue warrant of arrest initially for appearance of the accused u/s 204.

56. Section 441 of the Code deals with the release of the accused on bail either on his own bond on determination of the value of the bond to the satisfaction of the Police Officer. The order of anticipatory bail is effective only before the Police Officer.

57. Section 204 of Cr.P.C. provides for issue of summons or a warrant, as the case may be, after a charge-sheet is filed. Thus, on production or appearance of an accused before the trial court pursuant to the warrant or summons issued u/s 204 after charge-sheet, it is upto the trial court to grant him bail. Thus, the order of anticipatory bail granted at a pre-trial stage can be made operative till the filing of a charge-sheet. This interpretation is in tune with Section 204 of Cr.P.C.

58. Sections 208 and 209 of the Code provide for committal proceedings when the cases are exclusively triable by the Court of Session. The supply of copies of

statement and documents to the accused in respect of the cases triable by the Court of Session is not possible unless accused appears or surrenders before the committal Court. The accused cannot receive copies of statement and documents without appearing or surrendering before the Magistrate Court. The moment accused surrenders before the Court for participating in the proceedings after submission of charge-sheet is entitled to ask for bail.

59. While interpreting the expression "in custody" within the meaning of Section 439 of Code, Krishna Iyer, J. speaking for the Bench in *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote* 1980 (2) SCC 539, clearly stated that "he can be stated to be in judicial custody when he surrenders before the Court and submits to its direction". Therefore, the term "appears" in Section 437 means and includes voluntary appearance before the Court without intervention of any agency and act of surrender before the Court coupled with submission to its directions. Thus, physical presence and surrender before the Court to apply for bail is sufficient and in accordance with law.

60. In the *Directorate of Enforcement Vs. Deepak Mahajan and another*, , the Supreme Court made the following observations:

Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further when an accused persons appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law....

61. In *B. Narayanappa and Others Vs. State of Karnataka*, , the High Court of Karnataka referring to the judgment of the Supreme Court in the case of *Niranjan Singh v. Prabhakar Rajaram Kharote* (supra) observed as under:

In the present case also the accused having appeared before the Court had submitted to the jurisdiction of the Court and asked for bail. As enunciated in the above decision, if the surrender and the physical presence of the accused with submission to the jurisdiction and orders of the Court is judicial custody, then the accused-petitioner herein having appeared before the Court and asked of bail, they were under restraint and they had submitted to the jurisdiction of the Court....

62. Some what similar observations are also made by this Court in its judgment dated 28th February, 2008 passed in Criminal Application Nos.35 and 36/2008 (unreported) that Section 439 of the Code empowers the Sessions Court or the High Court to grant bail to a person accused of an offence and who is in custody. However, what is the meaning of the expression "person in custody"? A person, who goes before a Magistrate (or Court of Sessions) and applies for bail by personally appearing before him subjects himself to the jurisdiction of the Magistrate. Can he be regarded as a person in custody for the purpose of grant of bail? In my view, the question must be answered in the affirmative. When a person personally present in the Court makes application for bail, he subjects

himself to the jurisdiction and command of the Court. He can be regarded as a person in custody of the Court and would be entitled to apply for bail. I am fortified in my view by a decision of the Supreme Court rendered in *Niranjan Singh v. Prabhakar Rajaram Kharote* 1980 SCC (Cri.) 508. In para 7 of the said decision, the Supreme Court has observed:

7. When is a person in custody, within the meaning of Section 439 Cr.P.C.? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by the judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person.

Somewhat similar observations are also made in *Sunitadevi v. State of Bihar* 2005 (2) Mah.L.J. 534. In para 15 of the decision, the Supreme Court has observed:

15. Since the expression "custody" though used in various provisions of the Code, including Section 439, has not been defined in the Code, it has to be understood in the setting in which it is used and the provisions contained in Section 437 which relate to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterised as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which the Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate.

63. Following aforesaid decisions, one has to conclude that when an accused appears before a court, he is under the control of the court and is entitled to apply for bail. When a person accused of an offence personally attends the court and applies for bail, he subjects himself to the control of the court and the court in such case can consider his application for bail treating him as a person "in custody" for the purpose of Section 439 of the Code.

64. Having said so, let me now deal with the submissions of Mr.Gupte that the decision in the case of *Salauddin* case (supra) and all other judgments based thereon are per incuriam having no binding force of law being contrary to law laid down by the Constitution Bench of Supreme Court in the case of *Gurbaksh Singh* (supra).

65. A careful reading of all the decisions and the facts on which they were based

would reveal that it is possible to harmoniously construe all subsequent judgments of the Apex Court rendered by the Benches of the smaller strength with that of the Constitution Bench in the case of Gurbaksh Singh (supra), particularly, in view of para-42 of the said judgment which reads as under:

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

66. The above para-42 lays down that an order of anticipatory bail need not be "necessarily" limited in time. The judgment says that normal rule should be not to limit the operation, however, for reasons to be recorded the same can be limited. The situation discussed in the said para-42 is a situation taken by way of illustration where an FIR is not registered and an arrest is apprehended in anticipation of registration of FIR. In such a case, an order may be limited in time to operate till some time after registration of FIR. Thus, the law laid down in the said para-42 does not lay down an absolute proposition of law that the anticipatory bail must be limited only or must not be limited at all. It only lays down a normal rule that it should not be limited. This duration, in my considered opinion, can be upto the time, when some viable change takes place in fact situation like completion of investigation or filing of the charge-sheet as is specifically held in Salauddin's case (supra) However, in special circumstances, it may be limited. Thus, it is desirable to construe that the order of anticipatory bail must normally enure till the time charge-sheet is filed and thereafter it may be left to the trial court to grant regular bail. This interpretation is not contrary to the dictum in para 42 of Gurbaksh Singh's case.

67. The decisions subsequent to Gurbaksh Singh, unmistakably, reveal that there is no irreconcilable conflict between them and the judgment in Gurbaksh Singh case. The facts make it clear that the only effect of the subsequent decisions is that anticipatory bail normally should operate till the charge-sheet is filed.

68. It also must be noted that the decision in Gurbaksh Singh is purely for the purpose of laying down the law on anticipatory bail and is not made in the facts of a particular case. On the other hand, the judgments in Salauddin, K.L. Verma

and Sunita Devi have been passed in the peculiar facts of those cases, which arose after filing of the charge-sheet and in heinous crimes.

69. As regards Salauddin and K.L. Verma, the facts involved and the observations made therein show that the same are made on a footing that it was a post charge-sheet scenario. The real purport of the said rulings is that an order of anticipatory bail should continue till charge-sheet is filed and, thereafter, it should be left to the trial court (not remand court) to decide the regular bail after considering all the material which will be available to the trial court only after the charge-sheet is filed. It also must be noted that the offences involved in the said cases were heinous which weighed in the mind of the Court while limiting the operation of the order. The words employed in the case of Salauddin (supra) are:

...Should be limited in duration only and ordinarily.

The words used give sufficient indication that the directions are not mandatory but they are directory.

70. If one considers the aforesaid construction of the said two judgments, the same is not in conflict with the dictum of Gurbaksh Singh. The judgment in Gurbaksh Singh does not lay down an absolute rule. It lays down a normal rule and leaves it to the Court to depart from it for reasons to be recorded. The interpretation that an order of anticipatory bail should normally operate till charge-sheet is filed is totally in consonance with the said judgment of the Constitution Bench.

71. The recent trend in the matters of seeking pre-arrest bail is to invoke jurisdiction of the High Court or the Sessions Court u/s 438 of the Code in the same week in which FIR is filed. When the matters come before the Court for consideration, invariably the investigation is half way. Entire material is normally absent before the Court while considering prayer u/s 438. The Courts are called upon to consider the question on the basis of inadequate material or incomplete investigation. The High Court or the Sessions Court while considering the bail application u/s 438 does not assume the role of the trial Court. Exhaustive exploration on the merits of the case is not contemplated though a Court dealing with the basic application is required to be satisfied as to whether there is prima facie case. In the wake of this scenario, the condition fixing the duration of anticipatory bail cannot be said to be unjustified. It can very well be justified on the text of Section 438 of the Code itself.

72. Can a formula be devised conferring the power of granting anticipatory bail in strait jacket?

73. Answering this question in negative, the Constitution Bench in Gurbaksh Singh (supra) observed that while laying down cast iron rule in a matter like granting anticipatory bail, it is not to be overlooked that even Judges can have but an imperfect awareness of the needs of the situation. Judges have to decide cases as they come before them, mindful of the need to keep passions and

prejudices out of their decisions and it will be strange if by employing judicial artifices and techniques, discretion conferred upon the Courts is cut down by devising a strait jacket formula.

74. In the ultimate analysis, I hold that anticipatory bail can be for a limited duration upto the time when viable change takes place in fact situation like completion of investigation or filing of charge-sheet and that Salauddin's case (supra) which is the forerunner for all subsequent cases to conclude that anticipatory bail could be only for a limited period is not at variance with the judgment of the Constitution Bench in the case of Gurbaksh Singh (supra).

75. In view of this order, the application be placed for further hearing on merits.