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IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Criminal Petition for Leave to Appeal Nos. 107-113 of 2019, Crl.P. Nos. 54-55 of 2019, 1202-1216, 1223, 1225, 1252-1255, 1385 of 2018 and 378 of 2019

Decided On: 18.04.2019

The State **Vs.** Morshed Hasan Khan and Ors.

Hon'ble Judges/Coram:
Syed Mahmud Hossain, C.J., Muhammad Imman Ali, Hasan Foez Siddique, Mirza Hussain Haider, Zinat Ara, Abu Bakar Siddiqee and Md. Nuruzzaman, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Mahbubey Alam, Attorney General, Murad Reza and Mamtajuddin Fakir, Additional Attorney Generals, Biswajith Debnath, D.A.G. instructed by Sufia Khatun, Advocate-on-Record

For Respondents/Defendant: Khondker Mahbub Hossain, Moudud Ahmed, Zainul Abedin, Senior Advocates, A.M. Mahbub Uddin, Ruhul Quddus and Md. Sagir Hossain Leon, Advocates instructed by Shahanara Begum, Advocate-on-Record

JUDGMENT

Hasan Foez Siddique, J.

The question raised in all these leave petitions is whether order of granting anticipatory bail should be for a limited period or not.

These petitions involved issue of great public importance pertaining to the importance of individual personal liberty and greater interest of the society at large. Society has a vital interest in granting anticipatory bail or refusal of the same because every criminal offence is an offence against the State.

The horizon of human rights is expanding all over the world, at the same time, crime rate is also increasing. Of late, this Court has been receiving repeated complaints about the violation of human rights because of indiscriminate arrest by the police. We need to strike the right balance between the two. The order of granting or refusing of anticipatory bail must reflect perfect balance between the two conflicting interests, namely, sanctity of individual liberty and the interest of the informant and society. Therefore, realistic approach must be made in this regard. In the case of Nandini Satpathy-Vs- P.L. Dani (AIR 1978 (SC) 1025), it was observed by the Supreme Court of India that-

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

Historical perspective as to provision of anticipatory bail.

The Code of Criminal Procedure, 1898, at its initiation had no specific provision of anticipatory bail. In 1978, by the Law Reforms Ordinance provision was incorporated for direction to grant of bail to person apprehending arrest, by inserting Section 497A in the Code of Criminal Procedure. The said section reads as follows:

> "497A. 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 Division or the Court of Session or the Sub-divisional Magistrate for a direction under this section; and that Court or the Magistrate may, if it or he thinks fit, direct that in the event of such arrest, he shall be released on bail.
>
> (2) When the High Court Division or the Court of Session or the Sub-divisional Magistrate makes or gives a direction under sub-section (1), it or he may include such conditions in such directions in the light of the facts of the particular case, as it or he may think fit.
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> (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 or the Sub-divisional Magistrate under sub-section (1)".

Thereafter, the said provision was omitted from the Code by the Code of Criminal Procedure (Amendment) Ordinance, 1982 (Ordinance No. IX of 1982). Relevant provision of the said Ordinance runs as follows:-

> "2. Omission of section 497A, Act, V of 1978; In the Code of Criminal Procedure, 1898 (Act V of 1898), herein referred to as the said Code section 497A shall be omitted."

After omission of Section 497A from the Code of Criminal Procedure, the legislature did not take any step to reintroduce any such provision in the Code of Criminal Procedure, that is, at present there is no specific law in the Code of Criminal Procedure or in any other law for granting anticipatory bail.

Jurisprudence build up in respect of granting anticipatory bail in different leading cases in our apex Court:

In the case of [Crown Vs. Khushi Muhammad reported V DLR (FC) page 86] respondent Khusi Mohammad made a prayer before the Sessions Judge for releasing him on bail in pending investigation. The Sessions Judge rejected the prayer for bail. Then he went to the High Court, Kayani, J. made the following order:

> "I would accept this petition and direct that if it is intended to arrest him he should be released by the District Magistrate if a bail bond is furnished to his satisfaction".

Against the said decision, the petition for special leave to appeal was filed before the Federal Court. Full Bench of Federal Court granted leave to consider the question, "whether the High Court can grant any relief, and if so, to a person seeking an order of bail, in anticipation of his arrest for a offence?".

While setting aside the order of bail passed by Kayani, J. Abdul Rashid C.J. observed:

> "After a careful examination of the provisions of section 496 and 497 and 498 of the Code, I have reached the conclusion that person cannot be admitted to bail against whom a report has been lodged at the police station but who has not been placed in custody, or under any other form of restraint, or against whom no warrant for arrest, has been issued. In the case of a person who is not under arrest, but for whose arrest warrants have been issued, bail can be granted under Section 498 if he appears in Court and surrender himself."

In the case of Sadiq Ali Vs. State, [18 DLR (SC) 28], the appellant Sadiq Ali made ar application before the Sessions Judge for anticipatory bail and the learned Sessions Judge granted him ad-interim bail and issued notice to the Public Prosecutor. On the date fixed the appellant and Public Prosecutor were heard and finally, the application for bail was rejected and appellant Sadiq Ali was ordered that he be remanded to Police custody but he escaped from that custody. He moved a petition in the High Court Division, the High Court Division directed him to appear before the Subordinate Judge but in the meantime, the police had sent up chargesheet against him. Ad-interim order was extended till that date. The matter went before the Supreme Court to resolve the question of general importance affecting the power of Criminal Courts to grant bail before arrest. S.A. Rahman, J. finally observed in the case of Sadiq Ali as under:

> "It seems there is no decided case in England in which anticipatory bail might have been allowed to an accused person, threatened with arrest by the police. The practice of the English Courts, however, cannot be decisive of the point that confronts us in this case and which calls for decision on interpretation of the language of our own written Codes, in the light of conditions prevailing in this country. Of course, even in the case of an imminent police arrest, no order should be passed for grant of bail by a Court, unless the petitioner personally appears before the Court, even under Pakistan law.
>
> As a result of the above discussion, I have reached the conclusion that the rule laid down in Khushi Muhammad's case could be safely extended to a direction for the grant of bail to a person, whose arrest, on a criminal charge by the police, without a warrant, is proved to be imminent and certain, and where the circumstances would justify the grant of bail. Such an interpretation, in my humble judgment, is consistent with the language of sections 496 and 497 of the Code and involves no widening of the scope of the power given by section 498 as compared with its extent under the former sections. Indeed, such an order might be eminently called for, in certain circumstances of grave character, affecting the liberty of a citizen. Indiscriminate grant of bail, however, merely on the request of a person, who appears in Court, and thereby surrenders himself to that Court, without the other conditions for such bail being satisfied, would amount to an act of judicial extravagance which cannot be countenanced."

Next case is the case of Md. Ayub Vs. Md. Yaqub and another reported in 19 DLR (SC)38. In that case, respondent Md. Yaqub moved a petition for bail in the High Court which was dismissed. Thereafter, he filed another petition before another Judge and obtained bail. The complainant went to the Supreme Court. Five members of Bench of the Supreme Court heard the matter. S.A. Rahman J., observed in that case:

> "I have come to the conclusion that the view in Sadiq Ali case may require a

> little modification in so far as the word " appears" in section 496 and 497, need not be construed to include voluntary appearance, even in circumstances of grave apprehension of arrest. This more may be taken to have been used in sections 496 and 497, in the same sense as in section 242 or 252 of the Code, which obviously contemplate appearance in answer to a process issued by a Court."

Fazle Akbar, J. agreed with the judgment delivered by S.A. Rahman, J. While agreeing with the judgment delivered by S.A. Rahman, J. C.J. Cornelius observed:

> "I consider that, on recognised principles of statutory construction, the effect of section 498, can be reconciled with that of section 497, without doing violence to the meaning of any expression used in either section, and at the same time, with complete adequacy, on the reasoning set out in the judgment of my learned brother, S.A. Rahman, J."

Hamoodur Rahman, J. made his observation with following language:

> "Taking into account the context in which section 498 appears and the wide words deliberately used in it in respect of the power of granting bail it seems to me that it is in the nature of a residuary and supplementary provision giving to superior criminal Courts, namely, the High Court and the Court of Session, a wider power to grant bail in appropriate cases, to persons to whom bail cannot be granted under sections 496 and 497. In what manner this power should be exercised or what principles these superior Courts should be guided in exercising their discretion is an altogether different question and should not, in my view, be taken into account for determining the true scope of this section. In my view, there can be no doubt that section 498 gives extended and wider powers to the High Court and the Court of Sessions but this power will no doubt normally be exercised in a reasonable and judicial manner taking into account the limitations placed by other provisions of the Code upon subordinate authorities and that a rule founded on justice and equity will not be disregarded unless there be exceptional circumstances. But this is a self imposed restriction and not a restriction imposed by anything contained in the section. Normally this general salutary principle will no doubt be kept in view and will not be lightly departed from but this should not, in my view, be held to debar the High Court and the Court of Session from deviating from it in exceptional cases or a controlling the wide words of section 498 as a matter construction of the section. This principle is invoked in aid more as a precaution against the indiscriminate grant of bail and not as a statutory Prolog upon the powers of these Courts."

On the other hand, Muhammad Yaqub Ali, J. made observation with the following words:

> "The words "in any case" do away with the distinction made in section 497 between cases punishable with transportation for life and death and cases involving lesser penalty. Similarly the use of the words "any person" confer jurisdiction in respect of person who may not be under arrest and does not appear in obedience to the process issued by the Court or are not brought before the Court as envisaged in Section 497. It is the effect of these words which, in my opinion, justify grant of bail before arrest and not the subtle difference between the words "release on bail" and "admit to bail" used in

section 497 and 498 respectively."

In the case of Golam Sarwar Kamal Vs. The State, reported in 1986 BLD (AD) 110 while granting anticipatory bail, this Division observed as follows:

> "From the facts stated in the petition and the circumstances mentioned therein, it appears that the appellant may reasonably apprehend that the police might arrest him to prevent his participation in the election."

Accordingly, bail was granted to the appellant by this Court on 28-1-84 till one week after holding of the postponed election.

In the case of Jahanara Immam and others Vs. The State, reported in 46 DLR (HCD) page 315, the High Court admitted the petitioners on bail and directed the Metropolitan Magistrate to pass an order immediately admitting them to bail after their surrender within 3(three) weeks from the date of his order.

The next case is the case of State Vs. M.A. Maleque, reported in 47 DLR(AD)33. In that case, the High Court Division directed the respondent M.A. Maleque to surrender before the concerned Court within 14(fourteen) days. Against which, the State filed criminal petition in the Appellate Division. While disposing of the petition, the Appellate Division, considering the special facts of the case, observed that it was difficult to hold that High Court exercise its decision unreasonably and unfairly.

In the case of Atiquallah Khan Masud Vs. The State, reported in 15BLD(AD) page 14 the High Court Division rejected the prayer for anticipatory bail. Atikullah Khan Masud came to the Appellate Division. This Division in the said case observed that unquestionably, the High Court Division has power under Section 498 of the Code of Criminal Procedure to grant bail to the appellant.

Important case in this regard is in the case of State Vs. Abdul Wahab Shah Chowdhury reported 51 DLR (AD) page 42. Five members Bench of this Division (main judgment was written by A.T.M. Afzal, C.J.) taking into consideration of the above mentioned decisions observed that in our country, it has almost become customary by practice through decades to approach the higher Court straight way if there was a prayer for anticipatory bail which was very rare. Apart from practice we consider it appropriate and desirable that the remedy being extra-ordinary such matters should be considered at the level of the High Court Division. It was further observed:

> "Now we come to the real point at issue as to the conditions and circumstances under which an application for pre-arrest or anticipatory bail can be considered under section 498 of the Code of Criminal Procedure. We wish to lay down as a first proposition that it is an extraordinary remedy, and an exception to the general law of bail which can be granted only in extraordinary and exceptional circumstances upon a proper and intelligent exercise of discretion."
>
> (underlined by us).
>
> "Generally speaking the main circumstances as would entitle an order for extra-ordinary remedy of pre arrest bail is the perception of the Court upon the facts and materials disclosed by the petitioner before it that the Criminal proceeding which is being or has been launched against him is being or has been taken with an ulterior motive, political or otherwise, for harassing the accused and not for securing justice, in a particular case".

In cited case Latifur Rahman, J. wrote separate judgment with the following observation:

> "Anticipatory bail should be granted by the High Court Division for a limited period or till filing of the charge-sheet whichever is appropriate in the circumstances of the case. After expiry of the period or filing of the charge-sheet, as the case may be, the accused must appear before the Court concerned and obtain fresh bail from the Court on the merit of the case."

Finally, it was observed:

> "Before parting with the cases, I feel that since there is a Law Commission in Bangladesh the matter may be referred by the Government before the Law Commission for incorporating a section in the Code of Criminal Procedure for granting anticipatory bail as has been done by the Law Commission of India by inserting section 438 in the Indian Criminal Procedure Code. By such legislation there will be a specific statutory sanction of granting anticipatory bail with positive conditions and directions."

We are not informed as to whether the Law Commission has taken any such step in the light of observation made above till today.

In the case of State Vs. Jakaria Pintu reported in 62 DLR (AD) page 420 6(six) members bench of this Division (judgment was delivered by A.B.M. Khairul Haque, J) has observed-

> "Let me now consider the impugned order. With great respect, the order passed by the learned Judges gives an impression that they did not even go through the first information report in considering the petition for bail. The order does not reflect it at all. It does not state a word about the incident which resulted the death of a human being but granted bail, an anticipatory one, to the main accused on invoking the Constitutional right of the accused. But it was the first legal duty of the accused persons to surrender either before the police or before the concerned Magistrate before invoking their Constitutional right, although we are not aware of their any other right but the obligation to surrender as above. After all, the victims also have their various rights under the same very Constitution."

> "This petition also gives me an opportunity to remind all concerned which is sometimes forgotten that a bail although may often be right to an accused but sometimes it is imperative on the part of the Court to refuse if there is serious allegations against him, like murder, rape, violence etc., because the Court must always keep in mind that justice must ultimately be done by ensuring punishment upon the offender, otherwise, the offenders will get upper hand and the sober section of the society will suffer, which will destroy the fabrics of the civilised society."

In the case of State Vs. A. Haque reported in 15 MLR (AD)151 this Division discouraged in granting anticipatory bail indiscriminately holding that the High Court Division will be slow in granting consequential relief under Section 498 on an application for anticipatory bail.

The next case is the case of the State Vs. Md. Monirul Islam @ Nirob and others reported in 16 BLC (AD) page 53. (judgment was delivered by A.B.M. Khairul Haque,

C.J.) In that case it was observed,

"We have gone through the Order dated 08.06.2010 passed by the learned Judges of the High Court Division. The Order granting the ad interim anticipatory bail is absolutely mechanical and does not give any reason for giving such an exceptional relief. This kind of blanket order allowing anticipatory bail should not be passed. True it is, that it is an ad interim bail but it is still a bail. As such, the learned judges ought to be satisfied before allowing anticipatory bail, ad interim or otherwise as under:

i) The allegation is vague,

ii) No material is on record to substantiate the allegations,

iii) There is no reasonable apprehension that the witnesses may be tampered with,

iv) The apprehension of the applicant that he will be unnecessarily harassed, appears to be justified before the Court, on the materials on record,

v) Must satisfy the criteria for granting bail under section 497 of the Code,

vi) The allegations are made for collateral purpose but not for securing justice for the victim.

vii) There is a compelling circumstance for granting such bail,

In this connection, we should all remember that the power to grant bail, an anticipatory one, should not be exercised arbitrarily. This is an extraordinary relief and should be granted judiciously and sparingly only in an exceptional circumstances as stated above and not otherwise. The status of the applicant or his high station of life, affluence is not at all relevant in considering the application for anticipatory bail. But if there is apprehension that granting of bail may impede public interest such as security of the State or hamper investigation by the police, the application for bail should be refused.

Since power of the Court to grant anticipatory bail was allowed by insertion of section 497A which was again promptly repealed within a very short-time, the indication is clear, showing legislative apathy towards granting of such bail. In these days, no body seems to remember the sad plight of the victims and their relations. We must remember and appreciate that they are also equally seeker of even handed justice. A Judge should never be oblivion of their sufferings, indignity and harassment whenever he considers the question of bail, anticipatory or otherwise. He must always remember that the administration of justice is the ultimate aim whenever he passes any order.

In dealing with an application for bail the Judge must also remember that the course of investigation should never be impeded, otherwise, the course of justice may be frustrated. That cannot be allowed. The Judge must also remember that the purpose of allowing an anticipatory bail is to give the applicant a temporary respite in a proceeding which is apparently commenced not for securing justice but for some collateral purpose. But ultimately he has

to appear before the concerned Court of the Magistrate. As such, in proper cases anticipatory bail may be granted but for a very short period, such as between 2 to 4 weeks and not for a long period of time. (underlined by us). It must also be remembered that sooner he appears before the Magistrate the better. The Magistrate after hearing both the parties would do the needful. If any of the parties is aggrieved, he may always seek justice in a higher forum. But such a bail should not be for a longer period which may impede the investigation."

That is, in this case it has been specifically stated that anticipatory bail may be granted for a very short period. It is more specifically mentioned that the same may be for a period from 2 to 4 weeks.

Thereafter, this Division in the case of Durnity Daman Commission and another Vs. Dr. Khandaker Mosharraf Hossain and another reported in 66 DLR(AD) 92 (judgment was delivered by A.H.M. Shamsuddin Choudhury, J) has observed as under:

"A metaphorical avowal that the Magistracy/lower judiciary is controlled by the executive should not be treated as specific because Magistrates/lower court/tribunal Judges do no longer dwell in the realm governed by the executive. If allegation of bias is aired against a particular or a group of Magistrates/Judges, cause of suspicion must be specifically spelt out. The Judges concerned, shall give reasons for their satisfaction on this unraveling point

(b) Political threshold of the petitioner or claimed rivalry, by itself, without further ado, shall not be a ground for entertaining an application.

(c) Non-bailability of the offence cited in the FIR cannot be a reason for the High Court Division's intervention for even the Magistrates/lower court/tribunal Judges are competent enough to enlarge on bail a person accused of non-bailable offences in deserving cases.

(d) Effect of the accused's freedom on the investigation process must not be allowed to float on obfuscation.

(f) The High Court Division must scrutinize the text in the FIR with expected diligence and shall ordinarily be indisposed to grant anticipatory bail where the allegations are of heinous nature, keeping in mind the ordains figured at paragraph 19 of the case reported in 51 DLR(AD), 242. Claim that the allegations are cooked up shall also not be adjudged at that of point if the FIR or the complaint petition, as the case is, prima facie, discloses an offence. Whether the allegations are framed or genuine can only be determined through investigation and sifting of evidence.

(g) Interest of the victim in particular and the society at large must be taken into account in weighing respective rights.

(h) If satisfied in all respect, the High Court Division shall dispose of the application instantaneously by enlarging the accused a limited bail, not normally exceeding four weeks, without issuing any Rule. It must be conspicuously stated in the bail granting order that in the event of any filance of bail application, the Court below will consider the same using its own legal discretion without reference to the High Court Division's anticipatory bail order.

> Anticipatory bails shall not survive post charge-sheet stage."

In the case of State Vs. Mirza Abbas and others reported in 67 DLR (AD)182, this Division again observed,

> "Such discretion has to be exercised with due care and circumspection depending on circumstances justifying its exercise. No blanket order of bail should be passed. Such power of the High Court Division is not unguided or uncontrolled and should be exercised in exceptional case only.
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> Court must apply its own mind to the question and decide whether a case has been made out for granting such relief. Court must not only view the rights of the accused but also the rights of the victims of the crime and the society at large while considering the prayers. An overgenerous infusion of constrains and conditions are not available in the guidelines indicated by this Division."

In the aforementioned cases, jurisprudence has been built up in our jurisdiction in respect of anticipatory bail even after deletion of 497A from the Code of Criminal Procedure.

We have found that Latifur Rahman, J. in the case reported in 51 DLR (AD) 242 made specific observation that since there is a Law Commission in Bangladesh the matter may be referred by the Government before the Law Commission for incorporating a section in the Code of Criminal Procedure for granting Anticipatory bail as has been done by the Law Commission of India by inserting section 438.

From the decisions as referred above, it appears that in the cases of M. Monirul Islam and Dr. Khandaker Mosharraf Hossain this Division specifically observed that the High Court Division shall dispose of the application instantaneously by enlarging the accused petitioners on anticipatory bail for a limited period not normally exceeding four weeks.

Submission of learned Attorney General for the petitioner in all the petitions is that the order of granting anticipatory bail by the High Court Division till submission of the police report in some cases and 6 months after submission of the police report in some cases were ordered ignoring the decisions of the apex Court which are very unfortunate and, as such, all the orders are liable to be set aside.

On the other hand, the learned Counsel for the respondents in their submissions contended that the instant cases have been filed only to harass and humiliate the respondents simply on political vendetta. The police misusing the power have filed those criminal cases only for harassment and humiliating them which are apparent from the First Information Reports so they are entitled to get protection from the Apex Court. They submit that some of the respondents are leaders of the opposition political party and some of them are senior members of the Supreme Court Bar Association and some of them are teachers of the University. They are not in any way connected with the offences as alleged. The respondents produced some news items published in different newspapers in support of their respective cases for establishing the facts of their harassment and humiliation by the police and falsity of the cases.

In India, the Code of Criminal Procedure adopted in 1973 provides specific provision for direction for grant of bail to person apprehending arrest incorporating section 438 in the Code which runs 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.

There are controversy in respect of time limit in the order of anticipatory bail in India as well. Supreme Court of India interpreted the provision of section 438 of the Code which provides for relief for pre-arrest bail. The reasonings given for such interpretation is that, they feel, provision for anticipatory bail exists for the sole purpose for providing the accused person some time to enable him to apply to the regular court. An order granting anticipatory bail will operate only until regular bail of the accused person is finally disposed of. This line of reasoning get its backing from certain judgment of the Supreme Court of India where it has been held that an order of anticipatory bail is not an order until the end of trial but is an order which can only be passed for a limited duration.

Bhagwati J. in the case of Shri Balachand Jain V. State of Madhya Pradesh reported in MANU/SC/0708/1976 : (1976) 4 SCC 572 has said that, "anticipatory bail" is a misnomer. It is not as if bail is presently granted by the Court in anticipation of arrest. When the court grants anticipatory bail, what it does is to make an order that in the event of arrest, a person shall be released on bail.

In the case of Gurbaksh Singh Vs. State of Punjab reported in MANU/SC/0215/1980 : AIR 1980 SC 1632, it was observed that,

"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 a 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."

It was further observed,

> "Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily."

In the case of Salauddin Abdul Samad Shaikh Vs. State of Maharashtra reported in MANU/SC/0280/1996 : (1996)1 SCC 667 Indian Supreme Court observed,

> "Under Section 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 Session 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 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 realised 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 place before it after the investigation has made progress or the charge-sheet is submitted.
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> 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."

Supreme Court of India again in the case of K.L. Verma v. State and another reported in (1998), SCC 348 has observed that,

> "By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire. This decision was not intended to convey that as soon as the accused persons are produced before

> the regular court the anticipatory bail ends even if the court is yet to decide the question of bail on merits. The decision in Salauddin case has to be so understood."

In the case of Sunita Devi Vs. State of Bihar and another reported in MANU/SC/1032/2004 : (2005)1 SCC 608 it has observed that,

> "If the protective umbrella of Section 438 is extended beyond what was laid down in Salauddin case the result would be clear by passing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner.
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> These aspects were recently highlighted in Nirmal Jeel Kaur v. State of M.P. Therefore the order of the High Court granting unconditional protection is clearly untenable and is set aside. However, the petitioner is granted a month's time from today to apply for regular bail after surrendering to custody before the court concerned which shall deal with the application in accordance with law."

In the case of Joginder alias Jindi Vs. State of Haryana reported in (2008)10 SCC 138, it was observed that,

> "Since the petitioner alleges that the offences charged are bailable offences, the High Court was not justified in holding that custodial interrogation was necessary. Section 438 CrPC in terms relates to non-bailable offences. Therefore, a petition under section 438 CrPC in relation to bailable offences is misconceived, even if it is accepted that alleged offences are bailable. However, if the petitioner surrenders and seeks regular bail, the same shall be considered uninfluenced by any observations made by the High Court. The special leave petition is disposed of accordingly."

In the case of Siddharam Satlingappa Mhetre v. State of Maharashtra and others reported in MANU/SC/1021/2010 : (2011) 1 SCC 694, Indian Supreme Court has observed that,

> "The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:
>
> (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
>
> (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;
>
> (iii) The possibility of the applicant of flee from justice;
>
> (iv) The possibility of the accused's likelihood to repeat similar or other offences;
>
> (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;
>
> (vi) Impact of grant of anticipatory bail particularly in cases of large

magnitude affecting a very large number of people;

(vii) The Courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be cause to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

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

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

In Pakistan, Section 498A has been incorporated in Code of Criminal Procedure where it has been provided:

> "498A No bail to be granted to a person not in custody in Court or accused whom no case registered etc. Nothing in Section 497 or sections 497 or section 498 shall be deem to require or authorise a court release on bail, or to direct to be admitted to bail any person who is not in custody or is not present in Court or against him. No case stand registered that the time being and an order or the release of a person on bail, for a direction that a person being admitted to bail, shall be effective only in respect of the case that so stand registered against him and is specified in the order for direction.

In the case of Ajmal Khan Vs. Liaqat Hayat reported in PLD 1998(SC)97, it was observed that there is abundant case law for the proposition that apprehension of arrest of an accused being for ulterior motive, for example, that of humiliation and unjustified harassment is a sine qua non for pre-arrest bail.

Recently, in Sushila Aggarwal V. State (NCT of Delhi)2018 SCC (online) 531 a bench of the Supreme Court of India has made a reference for a larger bench to address the issue as to "whether an order granting anticipatory bail should be restricted in time or not?"

Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. It is the obligation that the accused shall make himself available for interrogation by the investigating officer as and when required. Normally the Court should not interfere with the process of investigation in any way. The accused may have to be questioned in detail regarding various facts, motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable

the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For those or other reasons, arrest may become an inevitable part of the process of investigation. However, it is also to be borne in mind that the protection of personal liberty stands expanded to make the right to life or personal liberty save in accordance with law under Article 32 of the Constitution. The language of this article itself recording of an exception indicating thereby that a person may be deprived of his liberty in accordance with the procedure established by law. It is also to be remembered always that personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the facts and circumstances of the case. It is expected that every arrest must be in accordance with the procedure establish by law. Personal liberty deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 32 that the crucial power to negate it is a great trust exercisable, not casually but judicially.

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 emphasis; of deciding which comes first-the criminal or society; the law violator or the law abider; of meting the challenge which 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 in law, the society came first, and that the criminal should not go free because the constable blundered. [Juginder Kumer V. State of U.P. MANU/SC/0311/1994 : (1994) 4 SCC 260]

In Fried Re 161 F 2d 453 it was observed:

> "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 compromise."

No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. No attempt should be made to provide right and inflexible guidelines in this respect because all circumstances and situations of future can not be clearly visualised for the grant or refusal of anticipatory bail. Few principles for grant of anticipatory bail can be summarised as follows:

(i) The F.I.R. lodged against the accused needs to be thoroughly and carefully examined;

(ii) The gravity of the allegation and the exact role of the accused must be properly comprehended;

(iii) The danger of the accused absconding if anticipatory bail is granted;

(iv) The character, behaviour, means, position and standing of the accused;

(v) Whether accusation has been made only with the object of injuring or humiliating the applicant by arresting him. Because it is to be remembered that a worst agony, humiliation and disgrace is attached to arrest. Arrest leads to many consequences not only for the accused but for his entire family and at the

same time for the entire community;

(vi) A balance has to be struck between two factors, namely, no prejudice should be caused to free, fair and thorough investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(vii) The anticipatory bail being an extra ordinary privilege, should be granted only in exceptional cases. Such extraordinary judicial discretion conferred upon the Higher Court has to be properly exercised after proper application of mind to decide whether it is a fit case for granting anticipatory bail not according to whim, caprice or fancy;

(viii) A condition must be imposed that the applicant shall not make any inducement or threat to the witnesses for tampering the evidence of the occurrence;

(ix) The apprehension that the accused is in a position to influence, induce or coerce witnesses to desist from furnishing relevant information to the investigating agency cannot be considered to be imaginary and the court ought to have considered that aspect seriously before granting anticipatory bail.

(x) In the cases involve grave offence like murder, dacoity, robbery, rape etc. where it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims the accused should never be enlarged on anticipatory bail. Such discretion should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise.

(xi) It is to be borne in mind about the legislative intention for the purpose of granting anticipatory bail because legislature has omitted the provision of Section 497A from the Code.

(xii) It would be improper exercise of such extraordinary judicial discretion if an accused is enlarged on anticipatory for a indefinite period which may cause interruption on the way of holding thorough and smooth investigation of the offence committed.

(xiii) The Court must be extremely cautious since such bail to some extent intrudes in the sphere of investigation of crime.

(xiv) While enlarging an accused on anticipatory bail, the Court must direct the applicant to co-operate with the investigating officer in every steps of holding proper investigation if the same is needed.

(xv) The anticipatory bail granted by the Court should ordinary be continued not more than 8(eight) weeks and shall not continue after submission of charge sheet, and the same must be in connection with non-bailable offence.

(xvi) The Court granting anticipatory bail will be at liberty to cancel the bail if a case for cancellation of bail is otherwise made out by the State or complainant.

The indicatives of this Division given in the case of State V. Abdul Wahab Shah Chowdhury that "such extraordinary remedy, and exception to the general law of bail should be granted only in extra-ordinary and exceptional circumstances upon a proper and intelligent exercise of discretion" should be followed strictly.

Since all the respondents have been enjoying the privilege of anticipatory bail beyond the period as indicated earlier, the proper course for them would be to appear before the concerned Courts to seek regular bail. It is to be mentioned here that on behalf of the State no allegation has been brought against the respondents regarding the misuse of privilege of anticipatory bail. No allegation of interruption on the process of investigation has been brought to the notice of this Court.

With the observation made above, all the petitions are disposed of. The respondents are directed to appear before the concerned Courts within two weeks from the date of receiving copy of the judgment by the concerned Courts and to approach the respective Courts for their regular bail. The concerned Courts shall consider their prayers for regular bail in accordance with law and facts of the respective cases, if those are so made.