(CR)

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 11TH DAY OF APRIL 2023 / 21ST CHAITHRA, 1945

BAIL APPL. NO.4421 OF 2022

[CRMP 2358/2018 OF DISTRICT COURT & SESSIONS COURT, PATHANAMTHITTA]

(ARISING OUT OF CR.NO.628/2018 OF KOIPURAM POLICE STATION, PATHANAMTHITTA DISTRICT),

BAIL APPL.NO 1377/2020 OF HIGH COURT OF KERALA

PETITIONER/ACCUSED NO.1:

ANU MATHEW
AGED 37 YEARS
W/O.BINU PUNNAYIL THOMAS, THAYYIL HOUSE, VENNIKULAM, THELLIYOOR P.O., THIRUVALLA VIA, PATHANAMTHITTA, WORKING AS A TEACHER IN KUWAIT., PIN - 689544

BY ADVS.
E.D.GEORGE
LINU G. NATH

RESPONDENT/STATE:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, PIN - 682031

SRI.S.U.NAZAR - ADDL. PUBLIC PROSECUTOR,
SRI.TOM JOSE PADINJAREKKARA - AMICUS CURIAE,
SRI.SUMAN CHARAVARTHY - AMICUS CURIAE,
SMT.SAIPOOJA - AMICUS CURIAE

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 11.04.2023, ALONG WITH BAIL APPL.NO.4983/2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 11TH DAY OF APRIL 2023 / 21ST CHAITHRA, 1945

BAIL APPL. NO.4983 OF 2022

(ARISING OUT OF CR.NO.302/2022 OF KALAMASSERY POLICE STATION, ERNAKULAM DISTRICT)

PETITIONER

MOHAMMED ANEES
AGED 35 YEARS
S/O. N.M.ABDUL RAHIMAN, NEERUNGAL HOUSE, KARIPAI ROAD, RAJAGIRI P.O, SOUTH KALAMASSERY, ERNAKULAM DIST., PIN - 683104

BY ADVS.
P.A.ABDUL JABBAR
MUHAMMED SHAFFI
SHAHIM BIN AZIZ
EHLAS HALEEMA C.K.

RESPONDENTS/COMPLAINANT/STATE:

1 **STATE OF KERALA**
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, PIN - 682031

2 **THE STATION HOUSE OFFICER, KALAMASSERY POLICE STATION ERNAKULAM DISTRICT., PIN - 683504**

BY ADVS.

SRI.S.U.NAZAR - ADDL. PUBLIC PROSECUTOR,
SRI.TOM JOSE PADINJAREKKARA - AMICUS CURIAE,
SRI.SUMAN CHARAVARTHY - AMICUS CURIAE,
SMT.SAIPOOJA - AMICUS CURIAE

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 11.04.2023, ALONG WITH BAIL APPL.NO.4421/2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

(C R)

ALEXANDER THOMAS & C.S.SUDHA, JJ.

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B. A. No.4421/2022

(arising out of Cr.No.628/2018 of Koipuram Police Station, Pathanamthitta District),

&

B. A. No.4983/2022

(arising out of Cr. No.302/2022 of Kalamassery Police Station, Ernakulam District)

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Dated this the 11th day of April, 2023

O R D E R

Alexander Thomas, J.

> *"....the issue (of bail) is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process."*
>
> *- **Justice V R Krishna Iyer** in **G. Narasimhulu v. P.P.**, [(1978) 1 SCC 240, p. 242, para 1]*

The afore captioned applications have been instituted under Sec.438 of the Code of Criminal Procedure, 1973, seeking for grant of anticipatory bail to the applicants concerned, in respect to their involvement as accused persons in the crimes concerned.

2. These bail applications have come up for consideration before the Division Bench pursuant to the reference orders made by the Single Benches concerned, as per order dated 27.6.2022 in B.A.No.4421/2022 and order dated 28.6.2022 in B.A.No.4983/2022, whereby the cases have been referred to the Division Bench in exercise of the powers under the proviso to Sec.3 of the Kerala High Court Act, 1958. The sole issue has been referred for determination in B.A.No.4983/2022 and 3 issues have been

referred for determination before the Division Bench in B.A.No.4421/2022. The said 4 issues in referred to the Division Bench for determination are as follows:

> *(i) Whether, in the light of the fundamental right of a citizen, to have access to a court of law and the fundamental right of a citizen to travel abroad, apart from the directions in* ***Sushila Aggarwal's case*** *supra [(2020) 5 SCC 1], the presence of the petitioner inside the country is mandatory, at the time of filing an application under Sec.438 Cr.P.C ?*
>
> *(ii) If a person, who is an accused in a case, absconded from India and went abroad, after fully knowing about the registration of a non-bailable offence against him and thereafter, if he files application under Sec.438 Cr.P.C., whether the bail court should entertain such an application ?*
>
> *(iii) when an accused went abroad, after knowing that he is an accused in a non-bailable offence and thereafter, files a bail application before this Court, whether he is entitled for interim bail, as per Sec.438 (1) Cr.P.C ?*
>
> *(iv) whether bail court has no restriction to pass orders restraining the Police in arresting the accused, without interim bail orders, as per Sec.438 (1) Cr.P.C. ?*

It is on this basis that the aforesaid 2 anticipatory bail applications have come up for consideration before this Division Bench.

3. Earlier, with the consent of both sides, we had appointed Sri. Tom Jose Padinjarekkara, learned Advocate [formerly, Addl. Director

General of Prosecution and Addl. State Prosecutor of this Court] and Sri. Suman Chakravarthy, learned Advocate [formerly, Senior Government Pleader - cum - Public Prosecutor of this Court] as Amici Curiae in these cases and it was also ordered that Smt. Saipooja, learned Advocate will assist both the Amici Curiae in these cases.

4. Heard Sri. E.D. George, learned counsel appearing for the sole applicant in B.A.No.4421/2022, Sri. P.A. Abdul Jabbar, learned counsel appearing for the sole applicant in B.A.No.4983/2022, Sri. S.U. Nazar, learned Prosecutor (Senior Government Pleader (Criminal)), Sri. Tom Jose Padinjarekkara, learned Amicus Curiae and Sri. Suman Chakravarthy, learned Amicus Curiae, both instructed and ably assisted by Smt. Saipooja, learned Advocate.

5. We have extensively heard the learned Advocates concerned, including the learned Amici Curiae and hearing has been conducted on various days. We have considered the submissions of the parties and the learned Amici Curiae and have also considered the various rulings cited by them. There is no necessity for us to get into the details of the submissions and we will deal with those issues hereinafter. Initially, we will be referring to the recommendations of the 41st Law Commission Report, which led to the enactment of Sec.438 Cr.P.C and then we will be dealing with various relevant case laws on the subject and the reference issues and the conclusions thereof. Then we will deal with the facts of each of the two

cases to ensure the final disposal of the main matters. It has to be borne in mind that, in view of the reference made in terms of the proviso to Sec.3 of the Kerala High Court Act, 1958, the Division Bench is to answer not only the reference issues but should also dispose of the main matters. Accordingly, we proceed as hereunder.

We will refer to the Law Commission recommendation, provisions in Sec.438 of the Cr.P.C. and the various case laws on the subject.

Recommendations of the 41st Law Commission Report, which led to the enactment of Sec. 438 Cr.P.C.

6. The matter relating to empowering the Courts concerned, for directing the release of an accused on bail prior to his arrest, commonly known in legal parlance as 'anticipatory bail', was considered in the 41st Law Commission Report, especially, in paras 320 & 321 thereof and the same read as follows:

> *"The necessity for granting anticipatory bail mainly arises because sometimes influential persons try to implicate their rivals in false causes for disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.*
>
> *"We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as pre -judging (partially at any rate) the whole case. Hence, we would leave it to the discretion of the court and prefer nor to fetter such discretion in the statutory provision itself. Superior courts will undoubtedly, exercise their discretion properly and not make any*

observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused."

Rule 31 of the Criminal Rules of Practice, Kerala, 1982 and Rule 17 proviso of the Rules of the High Court of Kerala, 1971:

7. The Rules of the Criminal Rules of Practice, Kerala, 1982, has been framed in exercise of the powers conferred under Art.227 of the Constitution of India, Sec.477 Cr.P.C. etc. Rule 31 of Criminal Rules of Practice provides as follows:

*"**31. Pleader to file Memo of Appearance** – Every pleader as defined in clause (q) of Section 2 of the Code of Criminal Procedure, 1973, other than a Public Prosecutor, appearing either on behalf of the complainant or the accused, shall file a memorandum of appearance containing the following particulars:*
(i) A declaration that he has been duly instructed by or on behalf of the party whom he claims to represent;
(ii) Number and year of proceedings;
(iii) Name of the parties to the proceedings;
(iv) Name and position in the proceeding of the party for whom he appears;
(v) Roll Number;
(vi) Address of the Advocate"

Sec.2(q) of the Cr.P.C. defines *"pleader"* as follows:

"Sec.2(q) "pleader", when used with reference to any proceeding in any Court, means a person authorised by or under any law for the time being in force, to practise in such Court, and includes any other person appointed with the permission of the Court to act in such proceeding;"

8. Chapter II of the Rules of the High Court of Kerala, 1971 deals with '*Advocates and their Registered Clerks*'. Rule 17 under Chapter II deals with '*Production of Vakalath*'. However, the 2nd proviso to Rule 17(1) stipulates as follows:

"Provided further that an Advocate appearing for an accused person in a criminal proceeding may, instead of filing a vakalath, file a memorandum of appearance containing declaration that he has been duly instructed to appear by/or on behalf of the accused."

9. Sec.438 of Cr.P.C., as it stands now in the Statute book, reads as follows:

> *"**Sec.438. Direction for grant of bail to person apprehending arrest** -*
> *(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.*
> *(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including - (i) a condition that the person shall make himself available for interrogation by a police officer as and when required; (ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer; (iii) a condition that the person shall not leave India without the previous permission of the Court; (iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.*
>
> (3) *If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in confirmity with the direction of the Court under sub-section (1)."*

10. Sec.438 of the Code of Criminal Procedure (Amendment) Act, 2005 [Act No.25/2005] provided for amendment of Sec.438 and for sub-section 1 thereof, the following subsections shall be substituted, i.e, by insertion of subsections (1A) and (1B) of Sec.438. The said Amendment reads as follows:

> "***Sec.438. Direction for grant of bail to person apprehending arrest*** *-(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non- bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the*

following factors, namely:-

(i) the nature and gravity of the accusation;
(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
(iii) the possibility of the applicant to flee from justice; and
(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail: Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub- section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in- charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

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

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

11. However, it is to be noted that Sec.1(2) of the afore Amendment Act, 2005 has stipulated that, save as otherwise provided in the said Act, it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. Later, the Government of India in the Ministry of Home Affairs has issued notification dated 23.06.2006, as per statutory order S.O.No.923(T) published in Gazette of India Extraordinary dated 23.6.2006, wherein it has been notified that, in exercise of the powers conferred under Sec.1(2) of the Code of Criminal Procedure (Amendment) Act, 2005 [Act No.25 of

2005], the Central Government thereby appoints 23rd June, 2006 as the date on which the provisions of the said Act, except the provisions of Secs.16, 25, 28(a), 28(b), 38, 42(a), 42(b), 42(f)(3)(iii) & (iv) and Sec.44(a) shall come into force. In other words, Sec.38 of the afore Amendment Act, 2005, which provided for the amendment of Sec.438(1), as above, has not been brought into force and notified, as conceived in Sec.1(2) of the afore Amendment Act, 2005. It has been observed in para 22 on page 644 of the decision of the Apex Court in the case in ***Sundeep Kumar Bafna*** *v.* ***State of Maharashtra & Anr.*** [(2014) 16 SCC 623] and para 21 on page 69 of the case ***Sushila Aggarwal & Ors.*** *v.* ***State (NCT, Delhi) & Anr.*** [(2020) 5 SCC 1] that, the aforesaid amendment in Sec.438(1) of the Cr.P.C. has not so far been notified and brought into force. It is common ground that, as of now, Sec.38 of the afore Amendment Act, 2005, providing for amendment of Sec.438(1) Cr.P.C., has not so far been brought into force. In other words, the provisions in Sec.438 Cr.P.C., as it now stands in the statute book, are those provisions as it stood prior to the provisions in Sec.38 of the afore Amendment Act, 2005.

Various relevant case laws

(i) ***Sauda Beevi v. S.I. of Police*** *[2011 (4) KLT 52 (SB)]* (***"Souda Beevi's*** *case"* for short)

24. The abovesaid decision arose out of regular bail applications in two crimes. The first crime was Crime No.638/2007 of Pathanamthitta Police Station, which was registered for the offences punishable under

Secs.120B, 417, 420, 366, 342, 376(2)(g) & 34 of the IPC, Sec.10 read with Sec.24(b)(f)(g) of the Immigration Act, 1983 and Sec.5 of the Immoral Traffic (Prevention) Act, 1956.

25. The allegations therein were to the effect that, A-1 (Souda Beevi) and A-2 (Ahammed) had provided VISA to the lady victim, assuring her a job in a gulf country and on reaching there, she was detained in a flat and later, taken to several flats in another gulf country, wherein the victim was compelled to have sexual intercourse with several persons and the accused used to present her to customers for financial gain. It is also alleged that A-2 also committed rape on her. The period of the alleged offences was from 19.7.2007 to 29.7.2007. According to the victim, she escaped and sought refuge at the Indian Consulate, Dubai. The victim was thereafter repatriated to Kerala. The complaint of the lady victim led to the registration of the first crime, Crime No. 638/2007 on 20.08.2007.

26. Further, it appears that A-1 (Souda Beevi) filed an application under Sec.438 Cr.P.C before this Court for grant of anticipatory bail on 29.09.2009. The learned Single Judge rendered order dated 26.03.2010 in that application (B.A.No.5717/2009), ordering that the Investigating Officer will release the applicant on bail for a period of one month, in the event of her arrest, on her executing bond and furnishing two solvent sureties for the requisite amount, etc., and subject to certain conditions

directing her to report before the Investigating Officer and make herself available for interrogation. Further, it was made clear in the said order that on expiry of the said order (period of one month), the accused (Souda Beevi) shall surrender before the learned Magistrate concerned and seek regular bail, etc.

27. From a reading of para 12 of **Souda Beevi's case** supra [2011 (4) KLT 52 (SB)], it appears that though the order, granting anticipatory bail (for a period of one month) in the event of her arrest, was granted on 26.03.2010, she could not be arrested by the SHO as she was abroad and she also did not appear before the SHO within a reasonable time. As a matter of fact, she came from abroad and made her appearance before the SHO only on 20.06.2011. So, she was then arrested by the Special Investigation Team (SIT) (conducted in pursuance of the directions issued by this Court in writ proceedings initiated by the victim for proper investigation) on 20.06.2011. In this regard, it is also relevant to note that para 3 of ***Souda Beevi's*** case supra [2011 (4) KLT 52 (SB)] would disclose that, earlier, the SHO concerned completed the investigation in the said Crime No.638/2007 and filed final report on 27.8.2009 before the Magistrate's Court, stating that the crime was undetected. It is thereafter, that the victim has filed writ proceedings, seeking for effectuating proper investigation, which led to the constitution of the SIT, which eventually led to her belated arrest on 20.06.2011 and remand to judicial custody.

28. The accused, Souda Beevi thus alleged that her arrest and remand on 20.06.2011 would amount to blatant violation and disobedience of the afore order dated 26.03.2010 rendered by this Court in B.A.No.5717/2009, inasmuch as, going by the said terms and conditions, she should have been released on bail for a period of one month in the event of her arrest and then allowed her to surrender before the Magistrate Court concerned and seek regular bail. Instead of that, the Investigating Officer had arrested her on 20.06.2011 and got her remanded to custody and it amounts to violation of the above order. Accordingly, Contempt of Court case was filed. Para 12 of **Souda Beevi's case** supra [2011 (4) KLT 52 (SB)] would indicate that thus, she filed Cont. Case (C) No.703/2011. The contempt court has rendered judgment dated 13.11.2011, that going by the terms and conditions in the anticipatory bail order dated 26.03.2010 in B.A No.5157/2009 the accused should have surrendered before the Investigating Officer, within a reasonable time after the said order and she has involved in two other crimes later and therefore, she has virtually forfeited her rights under the said anticipatory bail order and therefore, she cannot complain and the contempt case was closed. Incidentally, a reading of para 8 of **Souda Beevi's case** [2011 (4) KLT 52 (SB)] supra, would indicate that after her arrest and remand on 20.6.2011, the investigation revealed that her Passport was forged and another crime, Crime No.398/2011 of Pallickal Police Station, Thiruvananthapuram was

registered against her for certain offences as per the IPC and the offences as per the Indian Passport Act and her arrest was recorded in that case on 02.07.2011, when she was under remand in the first crime supra. Further, a reading of para 11 of ***Souda Beevi's case*** supra [2011 (4) KLT 52 (SB)] would indicate that A-2 in the first crime was also arrested and remanded on 25.5.2011.

29. The two accused in the first crime, A-1 (Souda Beevi) and A-2 (Ahammed) filed regular bail applications before this Court, B.A.No.5198/2011 and B.A.No.5358/2011 respectively. So also, Souda Beevi, as a sole accused in the latter crime, filed Regular Bail application before this Court as B.A.No. 5620 /2011. It is these three regular bail applications filed under Sec.439 Cr.P.C. which were the subject matter of consideration of the decision in **Souda Beevi's case** supra [2011 (4) KLT 52 (SB)].

30. A reading of para 13 of **Souda Beevi's case** supra [2011 (4) KLT 52 (SB)] would clearly indicate that she had in fact filed the afore anticipatory bail application B.A.No.5717/2009 before this Court when she was not in India and she did not come to India for more than a year thereafter. Further, it also appears that the anticipatory bail application B.A.No.5717/2009 was filed before this Court on 29.09.2009.

31. Thus, she was all along in a foreign country and came to India

for the first time only on 17.06.2011 and surrendered before the Police on 20.06.2011, which led to her arrest and remand. As she was never available in India during the relevant period, she could not be arrested and released on bail, in terms of the anticipatory bail order dated 26.03.2010. Hence, this Court held, in para 13 of **Souda Beevi's case** supra [2011 (4) KLT 52 (SB)], that the said order dated 26.3.2010 has worked itself as impossible of performance and that, an order of anticipatory bail cannot be kept in cold storage for years together to facilitate the accused to avail its benefits whenever the accused finds pleasure to make herself available for arrest, etc.

32. The learned Single Judge has then posed the issue as to whether a person who is not in India can file an application for anticipatory bail under Sec.438 Cr.P.C. After considering the decision of the Apex Court in the case ***Shri Gurbaksh Singh Sibbia & Ors.*** *v.* ***State of Punjab*** [(1980) 2 SCC 565], it was noted that one of the prime conditions in Sec.438(1) is that the applicant accused must show that he has reasons to believe that he may be arrested for a non bailable offence and that, the belief that he may be so arrested, must be founded on reasonable grounds and mere fear is not relief, etc. It is thereafter that the learned Single Judge had noted in para 17 of the said decision, that Clause (iii) of Sec.438(2) Cr.P.C. empowers the anticipatory bail court to impose conditions that the person shall not leave without the previous permission

of the Court. Hence, it was observed that the aforesaid provisions would indicate that the court must be satisfied that the person concerned is either present in India or he must be able to present himself in India, immediately before the final hearing and if he is not present in India, the Court would not be able to stipulate a condition that he should not leave India without the prior permission of the Court, as conceived in Sec.438(2) (ii), that, a person absent from India cannot leave India and therefore, the only irresistible conclusion that could be arrived at is that a person, who is not in India or who does not intend to visit India soon, cannot conveniently remain abroad and move an application for anticipatory bail before a court in India.

33. It was also held that a blanket order cannot be passed to enable a person to wield that order whenever he finds pleasure to visit India and thereafter, leave the country at his pleasure and flee from justice and that, Sec. 438 Cr.P.C. is not intended for such purposes at all.

34. Para 17 of the **Souda Beevi's case** supra [2011 (4) KLT 52 (SB)]reads as follows:

> *"17. Section 438 of the Code of Criminal Procedure provides that where 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 the section and the Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. Sub-s.(2) of S.438 provides that when the court makes a direction under sub-s.(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 those mentioned in clauses (i) to (iv) in sub-s.(2). Clause (iii) thereof is "a condition that the person shall not leave India without the previous permission of the Court." The aforesaid provisions would indicate that the court must be satisfied that the person*

concerned is either present in India or he must be able to be present in India immediately before the final hearing. If the person concerned is not present in India, the court would not be able to stipulate a condition that he shall not leave India without the previous permission of the court, as contemplated in clause (iii) of sub-s.(2) of S.438. A person absent from India cannot leave India. The only irresistible conclusion that could be arrived at is that a person who is not in India or who does not intend to visit India soon, cannot conveniently remain abroad and move an application for anticipatory bail before a court in India. A blanket order cannot be passed to enable a person to wield that order whenever he finds pleasure to visit India and thereafter leave the country at his pleasure and flee from justice. S.438 of the Code of Criminal Procedure is not intended for such a purpose at all."

35. In para 18 thereof, the learned Single Judge has rejected the contentions of the accused in **Souda Beevi's case** supra [2011 (4) KLT 52 (SB)] when the Investigating Officer was not justified in arresting and producing her before the Court, which led to her remand on 20.06.2011. Certain other contentions of the accused, that registration of the crime in Kerala was illegal, as the alleged offence was committed outside India, etc., was rejected after referring to the provisions in the IPC like Secs.4, 188, etc. It is on this basis that this Court has rejected the plea for grant of regular bail for both the accused for the above question. Thus, it is to be noted that the abovesaid decision has been rendered in regular bail applications filed by the accused person under Sec.439 Cr.P.C. and not on application for anticipatory bail filed under Sec.438 Cr.P.C. Incidentally, the issue regarding the legality of the arrest and remand of the accused was considered as above. As a matter of fact, a reading of para 12 of the **Souda Beevi's case** supra [2011 (4) KLT 52 (SB)], clearly indicates that the Contempt Curt had already dismissed the COC on 13.07.2011, wherein the contention of the accused-Souda Beevi that the arrest on 20.06.2011,

would amount to disobedience of the anticipatory bail order granted on 26.03.2010 was repelled. In the said COC, this Court has already held that, by not surrendering before the IO within a reasonable time, after the rendering of the anticipatory bail order on 26.03.2010 and by involving in other two crimes, the accused has forfeited her rights under the said anticipatory bail order. The said findings in the contempt order had already become final and conclusive. The gravity of the offences were indeed serious and grave, as it involved serious offences of rape and other offences. Hence, the observations in para 17 of **Souda Beevi's case** supra [2011 (4) KLT 52 (SB)], has to be appreciated in the above factual context. Moreover, the observations therein that *".....the only irresistible conclusion that could be arrived at is that a person who is not in India or who does not intend to visit India soon, cannot conveniently remain abroad and move an application for anticipatory bail before a court in India."* are very pertinent. There cannot be any dispute of the correctness of the further observations therein that a blanket order cannot be passed to enable a person to wield that order whenever he finds pleasure to visit India and thereafter, leave the country at his pleasure and flee from justice and Sec.438 Cr.P.C. is not intended for such purposes.

(ii) ***Shafi** v. **State of Kerala*** [2020 (4) KLT 703]

36. The abovesaid case arose out of an anticipatory bail

application filed under Sec.438 of the Cr.P.C., in respect of the accused's involvement in Crime No.1167/2018 of Nedumangadu Police Station, which was registered against him for offences punishable under Secs.406 & 428 of the IPC. The prosecution case was that the complainant therein had invested huge amounts in a business enterprise in Riyadh, Saudi Arabia and that the applicant/accused was managing that business and that the accused had promised to return the entire amount of Rs.3 Crores, along with 60% of the total profits, within two years, for the commencement of the business and that he paid only Rs.20 lakhs as profit in the first six months and after that, he failed to fulfill the promise and has committed the crime, etc. Para 6 of **Shafi's case** supra [2020 (4) KLT 703] would indicate that, when the above anticipatory bail plea was filed, the accused was in Riyadh, Saudi Arabia. It was also admitted before the Court that he continued to be in the said foreign country, even when the case was taken up before this Court, for consideration. There was no factual averment in the said case, as on the day on which he would come to India, except a vague averment that he is intending to visit his native place, as he is granted regular leave by his employer. So also, the learned Single Judge has noted that there are no averments in the application that there is apprehension of arrest for the accused in the country where he was then residing, based on the accusation in that case. That, in such a situation, Sec.438 Cr.P.C application cannot be entertained by this Court and that

such an application for pre-arrest bail cannot be filed before this Court by an accused sitting in an armchair in a foreign country. Thereafter, the learned Single Judge has proceeded to place reliance on the dictum laid down in para 17 of **Souda Beevi's case** supra [2011 (4) KLT 52] and has dismissed the plea for pre-arrest bail. The relevant observations in para 6 of **Shafi's case** supra [2020 (4) KLT 703], reads as follows :

> *"6. It is clear from the above averments in the bail application that this Bail Application under S.438 is filed when the petitioner was in Riyadh, Saudi Arabia. Counsel for the petitioner conceded that the petitioner is even now in Riyad, Saudi Arabia. Nothing is mentioned in the Bail Application to show that on which date the petitioner is coming back to India. A vague averment is made to the effect that he wants to visit the native place and for which, he wanted an order under S.438 of the Cr.P.C. A person sitting in another country cannot file an application under S.438 of the Cr.P.C. before this Court apprehending arrest. There are no averments in the Bail Application that there is an apprehension of arrest to the petitioner in the country where he is now residing based on the accusation in this case. Even in such a situation, an application under S.438 Cr.P.C. cannot be entertained by this court. A bail application under S.438 Cr.P.C. cannot be filed before this court by the petitioner sitting in an armchair in a foreign country. He is not entitled an order under S.438 Cr.P.C in such a situation. Jurisdiction of this Court under S.438 Cr.P.C. is discretionary. ....."*

(iii) ***Vijay Babu*** *v.* ***State of Kerala*** [2022 (4) KLT 24]

37. This case is in regard to the anticipatory bail plea made by the accused, who was alleged to have committed rape on the lady victim with the promise of marriage, on many occasions, without her consent. The prosecution would also allege that, on coming to know about the registration of the crime, the accused had gone abroad, in an attempt to flee from the long arms of the law and was sitting in comfort in another country and then, filed the application under Sec.438 of the Cr.P.C. The

applicant/accused has urged that the allegations of rape are wholly false and ill-motivated and that the victim was upset on getting information that another actress was decided to be cast as a heroine in a movie, produced by the accused. Further that, the nature of the relationship between the accused and the victim was consensual, as evident from the materials available in the mobile phones, through WhatsApp messages and Instagram chats and other materials, etc. That, the accused was constrained to go abroad for a pre-planned trip and he is ready to come to India, any time to co-operate with the Police.

38. The learned Single Judge had passed an interim order on 31.05.2022, restraining the arrest of the accused therein, by observing in paras 7 & 8 thereof, that by virtue of the dictum laid down by a Constitution Bench of the Apex Court in ***Sushila Aggarwal and Others*** *v.* ***State (NCT of Delhi) & Anr.*** [(2020) 5 SCC 1], the Courts should lean against imposition of unnecessary restrictions on the scope of Sec.438 of the Cr.P.C., especially when not imposed by the Legislature. It was also observed that the Single Bench verdict in **Souda Beevi's case** supra (2011 (4) KLT 52), can be said to be impliedly overruled and the decision in **S.M.Shafi's case** supra [2020 (4) KLT 703] could be regarded as *sub silentio* as it did not notice the decision of the Apex Court in ***Sushila Aggarwal's case*** supra [(2020) 5 SCC 1], etc.

39. The learned Single Judge has observed, in para 11 of **Vijay**

Babu's case supra [2022 (4) KLT 24], that it was noticing the intention of the accused to subject himself to the jurisdiction of this Court, that the interim order was issued not to arrest him and that, on that basis, he returned to the country and was available in Kerala, at the time when the application was disposed on 22.06.2022. It may be pertinent to refer to the contents of paras 12 to 16 of the decision in **Vijay Babu's case** supra [2022 (4) KLT 24] , which read as follows :

> *"**12**. Since the question regarding the maintainability of an application for pre-arrest bail while the applicant is residing outside the country, arises quite often, the said issue is considered. On the basis of decisions in **Souda Beevi and Another v. S.I. of Police and Others** (2011 (3) KHC 795) and **Shafi S.M. v. State of Kerala and Another** (2020 (4) KHC 510) it was argued that the presence of the petitioner outside the country disentitles the applicant to seek pre-arrest bail.*
>
> ***13**. A reading of the aforementioned two decisions shows that such an absolute restriction has not been laid down by this Court. On the other hand, all that those two decisions say is that, atleast before the final hearing, the Court must be convinced that the applicant is within the jurisdiction of the Court so that the conditions if any imposed, could be effectively enforced.*
>
> ***14**. Section 438 Cr.P.C does not contain a restrictive mandate that a person residing outside the country cannot file an application for anticipatory bail. It is possible that a person can apprehend arrest even outside the country for an offence that occurred in India. With the advancement in investigative technology and communication, the various agencies of investigation could even be deployed to arrest a person outside the country. An apprehension of arrest can arise even while the applicant is residing outside the country. Thus, when a bonafide apprehension exists, the statute confers power on such a person to seek protection from arrest. In the absence of any restrictive clauses in S.438, restricting the right of a person residing outside the country from filing an application for pre-arrest bail, court cannot read into the provision such a restriction which the legislature did not incorporate.*
>
> ***15**. In the decisions in **Sushila Aggarwal and Others v. State (NCT of Delhi) and Another** [(2020) 5 SCC 1], as well as **Shri Gurbaksh Singh Sibbia and Others v. State of Punjab** [(1980) 2 SCC 565], it was held that courts cannot read*

> *into section 438 Cr.P.C. a restriction, which the legislature had not thought it fit to impose. In fact, the Court deprecated the practice of an over-generous infusion of constraints into section 438 and even observed that such restrictions can make the provision itself constitutionally vulnerable. Therefore, I am of the considered view that an application for pre-arrest bail can be filed even by a person residing outside the country. However, the only limitation is that prior to the final hearing, the applicant must be inside the country to enable the court to impose and enforce conditions contemplated under the statutory provisions.*
>
> ***16**. Section 438 Cr.P.C has conferred a discretionary right on the higher courts to consider whether a pre-arrest bail ought to be granted under the particular circumstances of the case. The discretion conferred upon the superior courts of law, though not controlled by any specific guidelines, the same is not to be exercised arbitrarily. Law adjures such courts to utilize their trained discretion while considering an application for pre-arrest bail."*

40. In **Vijay Babu's case** supra [2022 (4) KLT 24], reliance has been placed on the decisions of the Apex Court as in **Gurbaksh Singh's case** supra [(1980) 2 SCC 565], **Sushila Aggarwal's case** supra [(2020) 5 SCC 1] and it was held that the Courts should not read into Sec.438 of the Cr.P.C, restrictions that the legislature had not thought fit to incorporate. It is on this basis, that it was held therein that an application for pre-arrest bail can be filed even by a person residing outside India and the only limitation is that, prior to the final hearing, the applicant/accused must be inside the country, to enable the Court to impose and enforce conditions contemplated under the statutory provisions.

(iv) ***Gurbaksh Singh Sibbia & Ors. v. State of Punjab*** [(1980) 2 SCC 565] (***Gurbaksh Singh***'s case/***Sibbia***' case, for short).

41. This decision is a verdict of the Constitution Bench of the Apex Court, which has dealt with questions of great public importance, bearing

on personal liberty, investigational powers of the police and scope & ambit of the powers for grant of pre-arrest bail as per Sec.438 of the Cr.P.C. In para 13 thereof, it has been held that, this is not to say that anticipatory bail, if allowed, must be granted without imposition of conditions, as it is plainly contrary to the very terms of Sec.438. As sub-section (1) thereof stipulates that the court "*may, if it thinks fit*" issue the necessary directions for bail and sub-section (2) thereof confers power on the court to include such conditions in the direction as it thinks fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of Sec.438(2). It was held that the High Court and the Sessions Court, before whom the pre-arrest bail plea is made, should be left free in exercise of their judicial discretion to grant bail, if they consider it fit to do so on the particular facts and circumstances of the case and on such conditions as it may warrant. Similarly, the said courts be left free to refuse bail, if the circumstances of the case so warrant, on considerations similar to those mentioned in Sec.437 or which are generally considered to be relevant under Sec.439 of the Cr.P.C. In para 14 it was held that generalisation and the attempts to discover formulae of universal and general application, when facts are bound to differ from case to case would frustrate the very purpose of conferring discretion and that, no two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. In para 15, it was

observed that 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, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a straitjacket Cautioning against laying down cast-iron rules in a matter like granting anticipatory bail, it was observed that life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Very crucially, it has been noted, in para 26, that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Sec.438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Sec.438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the alleged offence. An over-generous infusion of constraints and conditions which are not to be found in Se.438 was held to make its provisions constitutionally vulnerable, since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. That, no doubt can linger after the decision in ***Maneka Gandhi*** *v.* ***Union of India*** [(1978) 1 SCC 248], that in order to meet the challenge of Art.21 of the Constitution, the

procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Sec.438, in the form in which it is conceived by the legislature, is open to no exception, on the ground that it prescribes a procedure which is unjust or unfair and at all costs, we ought to avoid throwing it open to a Constitutional challenge by reading words into it which are not to be found therein. In para 32 caution was found to be necessary in the evaluation of the consideration whether the applicant is likely to abscond.

42. The conditions laid down under Sec.438(1), which are to be satisfied before pre-arrest bail could be granted, have been dealt with in paras 35 to 39 thereof. The applicant must show that he has “reason to believe” that he may be arrested for a non-bailable offence and the expression “reason to believe” shows that the belief that the applicant may be so arrested must be founded on reasonable grounds and that, mere ‘fear’ is not ‘belief”, for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds of such belief, that he may be so arrested, must be capable of being examined by the court objectively. It was emphatically held therein that anticipatory bail is a device to secure the individual's liberty and it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

43. That, the Constitution Bench, in para 40 of ***Gurbaksh Singh***'s/***Sibbia***'s case supra [(1980) 2 SCC 565], has categorically held that a "blanket order" of anticipatory bail should not generally be passed and this flows from the very language of Sec.438, which requires the applicant to show that he has "reason to believe" that he may be arrested for a non-bailable offence. There is no question that normally, a direction should not be issued under Sec.438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such an order serves as a blanket to cover or protect any and every kind of alleged unlawful activity, in fact any eventuality, likely or unlikely regarding which no concrete information can possibly be had. In para 41, it was emphasized that, there is an important principle involved in the instance that facts, on the basis of which a direction under Sec.438(1) is sought, must be clear and specific, not vague and general and it is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. 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, 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 a grave offence. Such an order will then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicted when the order was passed and the power under Sec.438 should not be exercised in a vacuum.

44. As mentioned hereinabove, the Constitution Bench of the Apex Court has dealt with the aspects regarding exercise of discretion by the court while considering pleas under Sec.438 and has cautioned about generalisation and attempts to frame formulas of universal applications, etc.

45. The Constitution Bench of the Apex Court has categorically held in para 33 that it is better to leave the High Court and the Sessions Court to exercise their discretion under Sec.438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do and the ends of justice will be better served by trusting these courts to act objectively and in consonance with the principles governing the grant of bail which are recognised over the years, than divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. Para 33 of ***Gurbaksh Singh***'s/***Sibbia***'s case supra [(1980) 2 SCC 565], reads as follows:-

> *"**33**. We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be*

> *better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."*
>
> *(emphasis supplied)*

46. It has also been *inter-alia* observed in para 21 thereof that, a wise exercise of judicial power inevitably takes care of the evil consequences, which are likely to flow out of its intemperate use and every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. That, in fact, an awareness of the context in which discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail, etc.

(v) **S*iddharam Satlingappa Mhetre* *v.* *State of Maharashtra & Ors.*** [(2011) 1 SCC 694]:

47. This two-Judge Bench decision of the Apex Court has extensively dealt with the scope and ambit of Sec.438 of the Cr.P.C. and various case laws of the Apex Court, including the Constitution Bench verdict in ***Gurbaksh Singh***'s/***Sibbia***'s case supra [(1980) 2 SCC 565], etc., and also the various aspects relating to the right to life and personal

liberty granted under Art.21 and its impact on Sec.438 of the Cr.P.C. Those aspects need not detain us, as detailed reference has already been made to ***Gurbaksh Singh***'s/***Sibbia***'s case supra [(1980) 2 SCC 565]. However, it would be very relevant and pertinent to refer to the legal principles laid down by the Apex Court in ***Mhetre****'s case supra* [(2011) 1 SCC 694] in para 112 thereof regarding some of the vital parameters and factors that can be taken into consideration while dealing with anticipatory bail.

48. In para 111 thereof the Apex Court has again reiterated the views of the Constitution Bench in ***Gurbaksh Singh***'s/***Sibbia***'s case supra [(1980) 2 SCC 565], that no inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail.

49. Para 112 of ***Mhetre****'s case supra* [(2011) 1 SCC 694] reads as follows:-

> *"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 to 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 overimplication in the cases is a matter of common knowledge and concern;*
>
> *(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;*
>
> *(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;*
>
> *(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.*"

50. So, it is to be borne in mind that the abovesaid parameters and factors are not any exhaustive enumeration of those aspects, but that those aspects have been illustrated by the Apex Court for aiding the process of proper exercise of judicial discretion in dealing with Sec.438 of the Cr.P.C.

51. It has to be borne in mind that the subsequent Constitution Bench verdict of the Apex Court, in the celebrated case in ***Sushila Aggarwal & Ors.*** *v.* ***State (NCT of Delhi) & Anr.*** [(2020) 5 SCC 1] in para 76 (see page 100 of the SCC report) and para 92.12 (see page 111 of the SCC report) has overruled the wide observations in para 105 of the two-Judge Bench decision in **Mhetre's case** *supra* [(2011) 1 SCC 694], as if no restrictive conditions at all can be imposed while granting anticipatory bail, etc. We are not concerned with those aspects and the legal principles laid down in paras 111 & 112 of **Mhetre's case** supra [(2011) 1 SCC 694],

regarding the parameters and factors to be taken into account in exercise of the discretionary power under Sec.438 of the Cr.P.C., continues to be good law.

52. This is all the more so as, in para 85.4 of **Sushila Aggarwal's case** supra [2020 5 SCC 1], the Constitution Bench has held that the courts ought to be generally guided by considerations, such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while assessing whether to grant anticipatory bail, or refuse it and whether to grant or not is a matter of discretion and equally whether, if so, what kind of special conditions are to be imposed (or not imposed) are dependent on the facts of the case, and subject to the discretion of the court. This has again been reiterated in para 92.3 of **Sushila Aggarwal's case** supra [2020 5 SCC 1], that, while considering the anticipatory bail plea, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified and ought to impose conditions spelt out in Sec.437(3) Cr.P.C., by virtue of Section 438(2). The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency, such special or other restrictive conditions may be imposed if the case or cases warrant,

but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any of the cases. However, such limiting conditions may not be invariably imposed, etc. It is again stated, in para 92.4 thereof, that the courts should be generally guided by consideration such as nature and gravity of the offences, the role attributed to the applicant and the facts of the case, etc.

53. In other words, the detailed parameters and factors, envisaged in para 112 of **Mhetre**'s *case supra* [(2011) 1 SCC 694], could be taken into account in exercise of Sec.438(1) discretion and those parameters and factors have to be assessed in the facts and circumstances of this case, so as to guide the courts concerned in their proper exercise of judicial discretion.

(vi) ***Sushila Aggarwal & Ors. v. State (NCT of Delhi) & Anr.*** [(2020) 5 SCC 1] (***Sushila Aggarwal***'s case, for short)

54. This decision has been rendered by the Constitution Bench of the Apex Court and has extensively dealt with various aspects in relation to exercise of the discretion under Sec.438 Cr.P.C., aspects relating to issues of personal liberty etc.

55. A reading of para 14 of **Sushila Aggarwal's case** supra [(2020) 5 SCC 1] would make it clear that the said Constitution Bench has placed extensive reliance on paras 12 to 14, 19, 21, 22, 26 & 33 to 43 of the earlier Constitution Bench decision in **Gurbaksh Singh's** case supra

[(1980) 2 SCC 565]. Suffice to say that, by placing reliance on para 26 of **Gurbaksh Singh's** case supra [(1980) 2 SCC 565], it has thus been reiterated in **Sushila Aggarwal's** case supra [(2020) 5 SCC 1] (para 14) thereof that Sec.438 is the procedural provision which is concerned with the personal liberty of the individual and that an overgenerous infusion of constraints and conditions which are not to be found in Sec.438 can make its provisions constitutionally vulnerable, since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions constitutionally vulnerable and to meet the challenge of Art.21. In the light of the dictum in **Maneka Gandhi's** case supra [(1978) SCC 248], the procedure established by law must be fair, just and reasonable and all efforts should be taken to avoid throwing it open to constitutional challenge, by reading words into it, which are not to be found therein etc.

56. In para 52.14 of **Sushila Aggarwal's** case supra [(2020) 5 SCC 1], the Constitution Bench has held that a blanket order under Sec.438, directing the Police not to arrest the applicant should not be issued and an order based on reasonable apprehension, relating to the specific facts is to be made and that a blanket order would seriously interfere with the duties of the police to enforce law and prevent commission of offences in the future. This has been so held by placing reliance on paras 40 & 41 of ***Gurbaksh Singh***'s/***Sibbia***'s case supra [(1980) 2 SCC 565]. However, in para 52.15 of ***Sushila Aggarwal***'s case

supra [(2020) 5 SCC 1], it has been observed that the prosecutor should be issued notice, upon considering a Sec.438 application and that an *ad interim* order can be made and the application should be re-examined, in the light of the respective contentions of the parties and that an *ad interim* order must conform to the requirements of Sec.438 and suitable conditions should be imposed on the applicant even at that *ad interim* stage.

57. In para 55, the Constitution Bench has placed reliance on the dictum laid down in para 1 of the decision in ***Gudikanti Narasimhulu & Ors.*** *v.* ***Public Prosecutor, High Court of Andhra Pradesh*** [(1978) 1 SCC 240] (judgment rendered by Justice V.R.Krishna Iyer), wherein it has been *inter-alia* observed that personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law" and that, the last four wards of Art.21 are the life of that human right.

58. The aspects dealt with in **Sushila Aggarwal**'s case supra [(2020) 5 SCC 1], relating to parameters and factors to be taken into account in the exercise of the power under Sec.438 Cr.P.C. has already been specifically covered in the earlier discussion while dealing with **Mhetre**'s *case supra* [(2011) 1 SCC 694]

(vii) **Case laws on the issue of "not to arrest**"

59. We have already referred to the dictum laid down in para 52.14 of the Constitution Bench verdict in **Sushila Aggarwal's** case supra

[(2020) 5 SCC 1, p.86], that a blanket order under Sec.438 directing the police not to arrest the applicant, should not be issued and reference therein has also been made to paras 40 to 41 of **Gurbaksh Singh**'s/**Sibbia**'s case supra [(1980) 2 SCC 565].

Reference to a few of the case laws on this point would also be useful.

(a) ***Rashmi Rekha Thatoi & Anr.*** *v.* ***State of Orissa***
[(2012) 5 SCC 690](***Rashmi Rekha Thatoi***'s case, for short)

60. A Two Judge Bench of the Apex Court in the case in ***Rashmi Rekha Thatoi & Anr.*** *v.* ***State of Orissa*** [(2012) 5 SCC 690], has *inter-alia* held, in para 33 thereof, that the court dealing with Sec.438 application cannot issue a blanket order restraining arrest. It can only issue an interim order conforming to the requirement of Sec.438 and suitable conditions should also be imposed. In other words, it has been held therein that the court dealing with anticipatory bail should not issue an order restraining arrest but can issue an order granting interim bail, if warranted, conforming to the requirements under Sec.438 etc., with suitable conditions.

(b) ***Sri.Balachand Jain*** *v.* ***State of Madhya Pradesh***
[(1976) 4 SCC 572] (***Balachand Jain***'s case, for short)

61. A three-Judge Bench decision of the Apex Court in ***Sri.Balachand Jain***'s case supra [(1976) 4 SCC 572], has *inter-alia*, held in para 15 on page 584 thereof that, in emergent cases, the courts dealing with anticipatory bail pleas could grant an interim order of

anticipatory bail, before issuing notice to the other side etc. This appears to imply that it may not be legally right for an anticipatory bail court to pass orders not to arrest or orders restraining arrest etc., and that in appropriate cases, if a strong *prima facie* case is made out, and time will be taken to hear the prosecution, then the court, dealing with anticipatory bail application, could issue notice to the prosecution and depending upon the *prima facie* case may consider passing orders on interim bail and then later, hear both sides on the main matter.

(c) ***M/s.Neeharika Infrastructure Private Limited*** *v.* ***State of Maharashtra & Ors.*** [AIR 2021 SC 1918] (***Neeharika Infrastructure Private Limited***'s case, for short)

62. A reading of para 2.1 of the above three-Judge Bench decision would indicate that the original accused mentioned in the FIR therein had filed anticipatory bail application under Sec.438 Cr.P.C. before the Sessions court concerned, and the said court had granted interim protection from arrest to the alleged accused, which interim order was extended from time to time. During the pendency of the anticipatory bail application, the original accused persons, respondents 2 to 4 who were involved in the appeal before the Apex Court, preferred petitions before the Bombay High Court under Art.226 of the Constitution of India and under Sec.482 of the Cr.P.C. for quashing the impugned FIR.

63. Later, the High Court passed the impugned interim order, in

the said quashment petition, directing that "no coercive steps shall be adopted against the petitioners therein (original accused – respondents 2 to 4 in the appeal before the Apex Court)", in respect of the impugned FIR. Then, the learned counsel appearing for the other side submitted that as the anticipatory bail application, filed by the original writ petitioners before the Sessions Court, is pending for hearing, the said Sessions court may get influenced by the said impugned order rendered by the Division Bench of the High Court and the Division Bench then clarified that the Sessions Court shall decide the anticipatory bail application on its own merits. The said impugned interim order passed by the Division Bench of the Bombay High Court ordering that "no coercive steps shall be adopted against the original accused in respect of the impugned FIR" as passed in the quashment petition, was challenged before the Apex Court, which led to the above verdict.

64. A three-Judge Bench of the Apex Court, in para 9.1 of the aforecited ***Neeharika Infrastructure Private Limited***'s case supra, has placed reliance on paras 25 & 26 of the prior decision of the Apex Court in ***State of Bihar*** *v.* ***J.A.C Saldanha*** [(1980) 1 SCC 554], which, in turn, had placed reliance on the celebrated decision of the Privy Council in the case ***King-Emperor*** *v.* ***Khwaja Nazir Ahmad*** [AIR 1945 PC 18]. Para 9.1 of ***M/s. Neeharika Infrastructure Private Limited***'s case supra reads as follows:

"para 9.1. In the case of State of Bihar v. J.A.C. Saldanha, (1980) 1 SCC 554, this Court, after referring to the precedents including the decision of the Privy Council in the case of Khawaja Nazir Ahmad (supra), has observed in paragraphs 25 and 26 as under:

"25. There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounded duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the court requesting the court to take cognizance of the offence under Section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the court the police function of investigation comes to an end subject to the provision contained in Section 173(8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the court, and to award adequate punishment according to law for the offence proved to the satisfaction of the court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate. This had been recognized by way back in King Emperor v. Khwaja Nazir Ahmad [AIR 1944 PC 18: 1944 LR 71 IA 203, 213] where the Privy Council observed as under: "In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would, as Their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it, and not until then."

26. This view of the Judicial Committee clearly demarcates the functions of the executive and the judiciary in the field of detection of crime and its subsequent trial and it would appear that the power of the police to investigate into a cognizable offence is ordinarily not to be interfered with by the judiciary." In the said decision, this Court also took note of the following

> *observations made by this Court in the case of S.M.Sharma v. Bipen Kumar Tiwari (1970) 1 SCC 653:*
>
> *It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers."*

65. In the afore decision the Apex Court has also referred to the prior decision in ***S.N. Sharma*** *v.* ***Bipen Kumar Tiwari*** [(1970) 1 SCC 653], wherein it has been held that though the Cr.P.C. gives unfettered power to the police to investigate cases, where they suspect that a cognizable offence has been committed, in appropriate cases, an aggrieved person can always seek a remedy by invoking the power of the High Court and the High Court is convinced that the power of investigation has been exercised by the police officer *mala-fide* etc., then the High Court can always issue a writ restraining the police officer from misusing his legal powers.

66. The conclusions of the three-Judge Bench are encapsulated in para 23 of ***M/s.Neeharika Infrastructure Private Limited***'s case (supra)[AIR 2021 SC 1918], which reads as follows:

> *"**23**. In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or "no coercive steps to be adopted", during the pendency of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India and in what circumstances and whether the High Court would be justified in passing the order of not to arrest the*

accused or "no coercive steps to be adopted" during the investigation or till the final report/charge sheet is filed under Section 173 Cr.P.C., while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India, our final conclusions are under;

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the 'rarest of rare cases (not to be confused with the formation in the context of death penalty),

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint.

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) *The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Thereofre, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that*

the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India.

xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that

> *it can demonstrate the application of mind by the Court and higher forum can consider what was weighed with the High Court while passing such an interim order.*
>
> *xviii) Whenever an interim order is passed by the High Court to "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied."*

67. In para 23 (xvi) it has been *inter-alia* held by the three-Judge Bench of the Apex Court that interim order should not be passed routinely or casually in quashment petitions filed under Sec.482 Cr.P.C. and or under Art.226 of the Constitution of India seeking quashment of FIR etc., and normally when investigation is in progress and the facts are hazy and the entire evidence and materials are not placed, then the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Sec.438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report or charge sheet is filed under Sec.173 Cr.P.C., while dismissing or disposing of the quashment petition under Sec.482 Cr.P.C. and/or Art.226 of the Constitution of India etc.

(e) ***A.P.Mahesh Co-operative Urban Bank Shareholders Welfare Association*** *v.* ***Ramesh Kumar Bung & Ors.*** [(2021) 9 SCC 152] {'**Ramesh Kumar Bung's** case', for short}

68. The above decision of the two-Judge Bench of the Apex Court arose out of an SLP (Crl.) filed to challenge the decision of the Telangana High Court, on two interlocutory applications, granting stay of all further proceedings, including arrest of the accused persons concerned, pending two main petitions for quashment of the FIRs in the impugned crimes. The defacto complainant had approached the Apex Court, to challenge the interim order of stay, including arrest of the accused, granted by the High Court. The two-Judge Bench of the Apex Court has held, in para 21 of **Ramesh Kumar Bung's** case supra [(2021) 9 SCC 152], that the aforecited decision of the three-Judge Bench of the Apex Court in **Neeharika's case** supra {[AIR 2021 SC 1918] = [2021 SCC Online SC 315]}, has certainly allowed space for the High Courts to pass interim order of the nature impugned in the said case i.e., "*in exceptional cases with caution and circumspection, giving brief reasons*" This is so, as the three-Judge Bench, towards the concluding part of para 21.4 thereof, has held that while passing such interim order in exceptional cases with caution and circumspection, the High Court has to give brief reasons why it is necessary to pass such an interim order, more particularly when the High Court is exercising the extraordinary and inherent powers under Sec.482 and/or under Article 226 of the Constitution of India, etc. Accordingly, the two-

Judge Bench in **Ramesh Kumar Bung's** case supra [(2021) 9 SCC 152], has held in para 21 thereof, that what is frowned upon in **Neeharika's case** supra [AIR 2021 SC 1918], is the tendency of the courts to pass blanket, cryptic, laconic, non-speaking orders, reading merely "no coercive steps to be adopted", etc. In **Ramesh Kumar Bung's** case supra [(2021) 9 SCC 152], it was held that the interim stay order impugned therein cannot be said to be bad, in the light of **Neeharika's** principles.

69. The aforesaid legal principles have been laid down by the Apex Court in **Neeharika's case** supra [AIR 2021 SC 1918] and **Ramesh Kumar Bung's** case supra [(2021) 9 SCC 152] on petitions for quashment of FIRs filed under Sec.482 and/or under Article 226. However, in the context of Sec.438 Cr.P.C applications, the Apex Court has held that, it may not be legally right to pass blanket interim orders, restraining arrest or not to arrest and that if a *prima facie* case is made out and hearing the prosecution is to take time, then the courts can consider passing interim bail orders, which should conform to the requirements of Sec.482 & Sec.438 of the Cr.P.C and after laying down necessary conditions, to regulate the grant of such interim bail, pending consideration of the main anticipatory bail application.

(viii) ***State represented by CBI v. Anil Sharma***
[(1997) 7 SCC 187]

70. Some of the leading case laws mentioned hereinabove,

including **Mhetre's case** supra [(2011) 1 SCC 694] (para 112) has held that while considering the plea for anticipatory bail, the Court will have to strike the right balance between two factors, viz., that no prejudice should be caused to the free, fair and full investigation on the one hand and the requirement to prevent the harassment and unjustified detention of the accused, on the other hand. {see clause (viii) of para 112 of **Mhetre's case** supra [(2011) 1 SCC 694]}.

71. The parameter and factor based on the necessity and imperativeness of custodial interrogation, while considering anticipatory bail plea, has been the subject matter of consideration of the aforecited Two-Judge Bench decision of the Apex Court in **State *represented by CBI*** *v.* ***Anil Sharma*** [(1997) 7 SCC 187] {**Anil Sharma's** case, for short} [authored by Justice K.T.Thomas]. In that case, the High Court granted anticipatory bail to the applicant/accused therein, on the premise that it is well-settled that bail and not jail is the normal rule. Being aggrieved thereby, the CBI had taken up the matter before the Apex Court, as they were aggrieved by the order of anticipatory bail, granted by the High Court, in favour of the accused. The Apex Court, in the aforesaid **Anil Sharma's** case supra [(1997) 7 SCC 187], held that the Court's approach in dealing with anticipatory bail plea under Sec.438, should not be the same as that in dealing with regular post- arrest bail applications and that, the High Court had erred therein by ignoring the apprehension expressed by the CBI that,

considering the high office held by the applicant and wide influence he could wield, the Investigating Agency would be subjected to great handicap in interrogating him, in case he is granted pre-arrest bail. The factors to be considered in exercise of discretion by the anticipatory bail court was reckoned and it was held therein that the advantage in custodial interrogation of eliciting more useful information and material should be kept in view and the court has to presume that Police officers would conduct the custodial interrogation in a responsible manner, without using third-degree methods, etc. The offence alleged against the accused person therein was under Sec.13(2) of the Prevention of Corruption Act, regarding amassed wealth, far in excess of his known sources of income. The operative portion of the impugned order of the High Court, granting anticipatory bail to the accused therein, reads as follows [see para 7 of **Anil Sharma's** case supra [(1997) 7 SCC 187] :

> *"Unless exceptional circumstances are brought to the notice of the Court which may defeat the proper investigation and fair trial, the Court will not decline bail to a person who is not accused of an offence punishable with death or imprisonment for life. In the present case, no such exceptional circumstances have been brought to the notice of this Court which may defeat proper investigation to decline bail to the applicant."*

72. The Apex Court held, in paras 6 & 8 of **Anil Sharma's** case supra [(1997) 7 SCC 187], as follows :

> ***"6.*** *We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed.*

Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.

xxx xxx xxx
xxx xxx xxx

8. *The above observations are more germane while considering an application for post-arrest bail. The consideration which should weigh with the Court while dealing with a request for anticipatory bail need not be the same as for an application to release on bail after arrest. At any rate the learned Single Judge ought not to have side-stepped the apprehension expressed by the CBI (that the respondent would influence the witnesses) as one which can be made against all accused persons in all cases. The apprehension was quite reasonable when considering the high position which the respondent held and in the nature of accusation relating to a period during which he held such office."*

73. In para 6 thereof, their Lordships of the Supreme Court held that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Cr.P.C and in a case like this, effective interrogation of a suspected person is of tremendous advantage in disinterring many useful information and also materials which would have been concealed and success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order, during the time he is interrogated. Very often, interrogation in such a condition would reduce to a mere ritual, etc. In that view of the matter, the Apex Court held that the High Court has misdirected itself in exercising the discretionary power under Sec.438 of the Cr.P.C, by granting pre-arrest bail to the

respondent/accused therein and accordingly, the impugned order of the High Court, granting anticipatory bail, was set aside.

(ix) **Important case laws on Sec.41 & Sec.41A Cr.P.C.**

(a) ***Arnesh Kumar*** *v.* ***State of Bihar*** [(2014) 8 SCC 273]

(b) ***Satender Kumar Antil*** *v.* ***CBI & Anr.*** *[(2022) 10 SCC 51]*

74. The aforecited two decisions of the Apex Court have dealt with the scope and ambit of Secs.41 & 41A of the Cr.P.C, in respect of cognizable offences punishable with imprisonment, for a term which may be less than seven years or which may extend to seven years (i.e., the maximum sentence shall not exceed seven years). Reference in this connection would be made in paras 7 to 10 of **Arnesh Kumar's** case supra [(2014) 8 SCC 273]. The Apex Court, in para 11 of **Arnesh Kumar's** case supra [(2014) 8 SCC 273], more particularly paras 11.1 to 11.8 thereof, have issued various strict directives and guidelines for the proper enforcement of Secs.41 & 41A of the Cr.P.C. Reference could also be made to paras 23 to 26 of **Satender Kumar Antil's** case supra [(2022) 10 SCC 51]. The summary and conclusions are dealt with in para 100, more particularly, in 100.1 to 100.12 of **Satender Kumar Antil's** case supra [(2022) 10 SCC 51], and it has been held in para 100.3 thereof, that the courts will have to satisfy themselves on the compliance of Secs.41 & 41A of the Cr.P.C., and that any non-compliance would entitle the accused for grant of bail in such cases.

(x) **Case laws of other High Courts on anticipatory bail pleas filed by the accused, who are in a foreign country at the time of filing of the application**

(a) ***Kulwinder Kaur*** *v.* ***State of Punjab***
[(2022) Livelaw (P & H) 263]

&

(b) ***Hiteshkumar Vadilal Shah & Anr.*** *v.* ***State of Gujarat***
[(2012) SCC Online (Guj) 3778]

75. In **Kulwinder Kaur's** case supra [(2022) Livelaw (P & H) 263], the Punjab & Haryana Court dealt with an anticipatory bail plea filed by an accused, who was alleged to have committed offences as per Sec.306 read with Sec.34 of the IPC. The applicant/accused left for Canada in February, 2020. The crime incident is said to have happened on 25.09.2020 and the FIR was registered on 26.09.2020. The case of the accused was that there was no specific allegations against him, except generalized allegations and that the alleged suicide note has been produced after 15 days of the incident and the authenticity of the same was seriously challenged by him and that, even after the lapse of two years, after the registration of the FIR, no serious proceedings were taken by the Police. The applicant therein relied on the decisions of the Gujarat High Court in ***Hiteshkumar Vadilal Shah & Anr.*** *v.* ***State of Gujarat*** [(2012) SCC Online (Guj) 3778]. The Punjab & Haryana High Court, as per the decision rendered on 10.10.2022, had allowed the plea for anticipatory bail to the said accused

and he was also directed to join the investigation on or before 15.11.2022. No detailed consideration or reasonings are given in the said decision, as to why an anticipatory bail plea can be maintained by an accused, who is in a foreign country at the time of the institution of the application, etc. In **Hiteshkumar Vadilal Shah's** case supra [(2012) SCC Online (Guj) 3778], the Gujarat High Court considered the pre-arrest bail plea of the applicant therein, who was alleged to have committed offences as per Secs.406, 420, 467, 468, 471, 477 (A) of the IPC, etc. A reading of para 2 thereof would indicate that the applicants were in Dubai, when the FIR was registered and that, they could not know about the FIR and immediately on coming to know about the FIR, they had approached the Sessions Court concerned seeking anticipatory bail, which was rejected by the Sessions Court, on the ground that they were residing abroad and they had not appeared, etc. Para 2 thereof would also indicate that at the time when the anticipatory bail plea was considered by the High Court, the applicants had come to India and it was undertaken that they would co-operate with the Investigating Officer, etc. Moreover, final report/charge sheet was already by then filed and all other co-accused were released on bail. Taking note of these factual aspects, the Gujarat High Court held that, in view of the dictum laid down by the Apex Court in **Gurbaksh Singh's** case supra [(1980) 2 SCC 565], **Siddharam Satlingappa Mhetre's** case supra [(2011) 1 SCC 694], etc., the applicants therein could be granted

anticipatory bail and they were further directed to co-operate with the investigation and make themselves available for investigation, whenever required and various other conditions were also laid down therein. It was also ordered therein that they shall not leave India, without the permission of the Court and they should also surrender their passport before the trial court immediately, etc. Except mentioning the decisions of the Apex Court in **Gurbaksh Singh's** case supra [(1980) 2 SCC 565] and **Mhetre's** case supra [(2011) 1 SCC 694], no detailed considerations or reasonings were rendered in that decision of the Gujarat High Court, for justifying the stand of the court that an anticipatory bail plea can be maintained by an accused, who is in a foreign country, at the time of filing of an application, etc.

76. **Reference Issues** :-

The referred issues in B.A.No.4983/2022 & B.A.No.4472/2022, as already mentioned hereinabove, are as follows :

(i) Whether, in the light of the fundamental right of a citizen, to have access to a court of law and the fundamental right of a citizen to travel abroad, apart from the directions in ***Sushila Aggarwal's case*** *supra [(2020) 5 SCC 1], the presence of the petitioner inside the country is mandatory, at the time of filing an application under Sec.438 Cr.P.C ?*

(ii) If a person, who is an accused in a case, absconded from India and went abroad, after fully knowing about the registration of a non-bailable offence against him and thereafter, if he files application under Sec.438 Cr.P.C.,

whether the bail court should entertain such an application ?

(iii) when an accused went abroad, after knowing that he is an accused in a non-bailable offence and thereafter, files a bail application before this Court, whether he is entitled for interim bail, as per Sec.438 (1) Cr.P.C ?

(iv) whether bail court has no restriction to pass orders restraining the Police in arresting the accused, without interim bail orders, as per Sec.438 (1) Cr.P.C. ?

77. It is trite that whether a Court, Tribunal or an authority has jurisdiction over a subject matter is one thing and if it has jurisdiction, then the exercise of such jurisdiction is a different aspect of the matter. Therefore, it is elementary that there should be clarity as to the fine and substantial distinction, as to whether the Court, Tribunal or authority has jurisdiction and competence in the matter and if so, as to whether the exercise of such jurisdiction, especially discretionary one, is proper and legally correct.

Whether there is jurisdiction to entertain a pre-arrest bail in a case where the applicant-accused is in a foreign country at the time of filing of the application under Sec.438 Cr.P.C. ?

78. So we will first consider the issue as to whether an anticipatory bail court has jurisdiction to entertain a pre-arrest bail plea under Sec.438 Cr.P.C., if the applicant-accused is in a foreign country at the time of filing of such application. In other words, this issue is only a rephrasing of the first issue referred supra, i.e, the issue referred in B.A.No.4983/2022. The

afore discussion on the case laws would clearly establish that it has been consistently and categorically held in the Constitution Bench verdicts of the Apex Court both in **Gurbaksh Singh Sibbia's** case supra [(1980) 2 SCC 565] and **Sushila Aggarwal's** case supra [(2020) 5 SCC 1] that, since the denial of bail amounts to deprivation of personal liberty, the Courts should lean against imposition of unnecessary restrictions on the scope and ambit of Sec. 438, especially when no such restrictions have been imposed by the Legislature in terms of the section. Since Sec.438 is a procedural provision, which is concerned with personal liberty of an accused, who is generally entitled to the presumption of innocence, as he is not, on the date of his application for pre-arrest bail, convicted for the offence in respect of which he seeks bail, etc., over generous institution of constraints and conditions, which are not to be found in Sec.438, can make its provisions constitutionally vulnerable, since the right to personal freedom cannot be made to depend on compliance with unreasonable prescriptions.

79. The Constitution Bench has held that the beneficial provision contained in Sec.438 must be saved, not jettisoned and after the decision in **Maneka Gandhi's** case supra [(1978) 1 SCC 248], to meet the challenge of Art.21 of the Constitution, the procedure established by law, for depriving a person of his personal liberty, must be fair, just and reasonable. Further, at all costs, the perspective should be to avoid throwing it open to a constitutional challenge by reading words in the provision in Sec.438

which are not be found therein (See para 26 of **Gurbaksh Singh's** case supra). These aspects of the matter have been reiterated by the subsequent Constitution Bench verdict in **Sushila Aggarwal's** case supra [(2020) 5 SCC 1], as can be seen from para 14(26) on page 56 of the SCC Report. Further, it has been held by the Apex Court in the decisions as in the Constitution Bench verdict in ***Anita Kushwaha*** *v.* ***Pushap Sudan*** [(2016) 8 SCC 509] that in the light of the broad interpretation of the word *"life"* appearing in Art.21, on the broad spectrum of rights considered incidental and/or integral to the Right to life, the *Right to access to justice* stands recognized as part and parcel of Art.21 of the Constitution of India. That, if life implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or other basis for holding that denial of "access to justice" will not affect the quality of human life, so as to take access to justice out of the purview of the right to life, guaranteed under Art.21. Hence, it was held therein that access to justice is indeed a facet of the Right to life guaranteed under Art.21 and further that, access to justice is also a facet of the Right to life guaranteed under Art.14, which guarantees equality before law and equal protection of law to not only citizens but also to non citizens as well. That, equality before law and equal protection of law is available not only in the realm of executive actions that encompasses the law but also in relation to proceedings before courts and tribunals and adjudicatory Fora, where law is applied and justice is

administered. The inability of citizens to access courts or any other adjudicatory mechanism for determination of rights and obligations is bound to result in denial of the guarantees contained in Art.14 & Art.21 of the Constitution, etc. In para 33, the Constitution Bench in **Anita Kushwaha's** case supra [(2016) 8 SCC 509] has held that the four main facets that constitute the essence of access to justice are:

> *"(i) the State must provide an effective adjudicatory mechanism;*
> *(ii) the mechanism so provided must be reasonably accessible in terms of distance;*
> *(iii) the process of adjudication must be speedy; and*
> *(iv) the litigant's access to the adjudicatory process must be affordable."*

80. While dealing with the the first facet of the need for adjudicatory mechanism, the Apex Court has held in para 34 thereof as follows:

> ***"34.*** *One of the most fundamental requirements for providing to the citizens access to justice is to set up an adjudicatory mechanism whether described as a court, tribunal, commission or authority or called by any other name whatsoever, where a citizen can agitate his grievance and seek adjudication of what he may perceive as a breach of his right by another citizen or by the State or any one of its instrumentalities. In order that the right of a citizen to access justice is protected, the mechanism so provided must not only be effective but must also be just, fair and objective in its approach. So also the procedure which the court, tribunal or authority may adopt for adjudication, must, in itself be just and fair and in keeping with the well-recognised principles of natural justice."*

81. Further, from the submissions of the parties and the learned Amici Curiae, this Court has to take cognizance of the social fact and reality that lakhs of individuals, both from this State as well as from various other States in our Country are having gainful employment, not only in the Gulf countries but various other countries. With the upliftment of the socio-

economic conditions and the consequent structural changes in the society and economy, thousands and thousands of people are travelling abroad from our country for various purposes. It is by now well established that a series of decisions of the Apex Court, commencing from the celebrated decision in **Maneka Gandhi's** case [(1978) 1 SCC 248], a citizen has a Fundamental Right flowing out from Art.21 to travel abroad. Hence, by cumulative understanding of the dictum laid down by the Constitution Bench verdicts of the Apex Court in decisions as in ***Gurbaksh Singh's*** case supra [(1980) 2 SCC 565], ***Sushila Aggarwal's*** case supra [(2020) 5 SCC 1], which emphasizes on leaning against over infusion of restrictions on the scope and ambit of Sec.438 and also viewing Sec.438 Cr.P.C. from the prism of procedure established by law envisaged by Art.21 as well as from the perspective of the *Right to access to justice* for an accused involved in a non bailable offence in his endeavor to defend his personal liberty, and also taking into account that the right to travel abroad is a fundamental right and also taking into account the social reality that lakhs of individuals from the state and other parts of the Country are settled, by way of employment, etc., in various foreign countries and also the scenario of travelling abroad by individuals for various other purposes, it is only to be held that the mere fact that an accused happens to be in a foreign country, at the time he institutes an application for pre-arrest bail under Sec.438 Cr.P.C., will not be a ground to hold that such an applicant cannot

legally maintain his plea for pre-arrest bail.

82. There is yet another perspective of the matter. Though Rule 17(1) of the Kerala High Court Rules mandates that no advocate shall be entitled to act in any proceeding, unless he files a vakalath, etc., the second proviso thereto clearly stipulates that an advocate appearing for an accused person in a criminal proceeding, may, instead of filing of a vakalath, file a memorandum of appearance, containing declaration that he has been duly instructed to appear by or on behalf of the accused. Further, Rule 31 of the Criminal Rules of Practice (Kerala) stipulates that every pleader, as defined in Sec.2(q) of the Cr.P.C., 1973, other than a Public Prosecutor, appearing either on behalf of the complainant or accused, could file a memo of appearance containing the particulars mentioned therein, especially a declaration that he is duly instructed by and on behalf of the party whom he claims to represent, etc. The abovesaid procedural rights covered by Rule 17 supra and Rule 31 supra are conferred on all accused persons irrespective as to whether the accused is in India or abroad. One cannot see any implicit restrictions in the abovesaid provisions as in Rule 17 supra and Rule 31 supra, that the said provisions can be invoked only if the accused is in India and not if he is abroad, etc. The Rules of the High Court of Kerala, 1971, have been framed in exercise of the constitutional powers conferred under Art.225 of the Constitution of India, etc., and all other enabling powers in that regard. The Criminal Rules of Practice, Kerala, have been

framed in exercise of the constitutional powers conferred under Art.227 of the Constitution of India read with Sec.477 of the Cr.P.C. and all other enabling powers. Hence, it can be seen that the afore constitutionally and statutorily framed rules which can be treated as subordinate legislation has clearly envisaged that a procedure whereby if the accused is abroad there is no necessity for him to file any vakalath. If an accused is either in the country or abroad, there is no necessity or compulsion that he should necessarily file a vakalath through an advocate. But he is authorized to engage a counsel of his choice and instruct and authorize him to file a memo of appearance on his behalf before the competent criminal court concerned in order to initiate a matter in relation to any criminal proceedings in which he is an accused. So, it can be seen that even the legislature/subordinate legislature has envisaged that in a case where the accused is abroad, further roadblocks need not be placed in regard to his *Right to access to justice* and like any other accused who is in India, he is also entitled to engage a counsel of his choice through a memo of appearance and not necessarily by execution and filing of vakalath. This incidental aspect of the matter is also having a significant dimension as far as understanding the nature and scope of the "procedure established by law" that has to meet the test of Art. 21 of the Constitution of India. So, this is yet another ground which would persuade this Court to reiterate aforesaid legal position. In other words, to put it simple terms, an

anticipatory bail Court has jurisdiction to entertain and consider a pre-arrest bail plea filed under Sec.438 Cr.P.C., even if the applicant accused is abroad at the time of filing of application.

83. These aspects would answer the reference on the first issue supra, i.e., issue referred in BA No.4983/2022.

84. Before getting into the other aspects of the matter, we would also examine the perspectives to be taken in a contextual understanding of the Single Bench verdict rendered in **Souda Beevi's** case supra [2011 (4) KLT 52] as well as the subsequent Single Bench decision in **Shafi's** *case supra* [2020 (4) KLT 703], as discussed in detail in the preceding paragraphs, the decision in the **Souda Beevi's** case supra [2011 (4) KLT 52], actually arose out of regular bail application filed by the accused persons under Sec.438 of the Cr.P.C. consequent to their arrest and remand and not on anticipatory bail application filed by them. From a cumulative reading of the totality of the facts and circumstances of the case, the observations made in para 17 of **Souda Beevi's** case supra [2011 (4) KLT 52] has to be understood in the light of its factual background. Moreover, the learned Single Judge very carefully and guardedly observed in para 17 that "..... the only irresistible conclusion that could be arrived at is that a person who is not in India, ***or who does not intend to visit India soon***, *cannot conveniently remain abroad and move an application for anticipatory bail* before a Court in India." Therefore, the said observations

made in para 17 supra would also clearly indicate that the learned Single Judge held that, where an accused is abroad at the time of filing of the anticipatory application and if he does not even intend to visit India soon, then there is no question of entertaining and allowing the plea of such a person. There cannot be any quarrel with the further observations of para 17 that "a blanket order cannot be passed to enable a person to wield that order whenever he finds pleasure to visit India and thereafter, leave the country at his pleasure and flee from justice ..... and Sec.438 of Cr.P.C. is not intended for such a purpose at all." It has been consistently held by the Apex Court not only in the Constitution Bench verdicts in ***Gurbaksh Singh's*** case supra [(1980) 2 SCC 565], ***Sushila Aggarwal's*** case supra [(2020) 5 SCC 1] and a catena of decisions that the anticipatory bail court shall not pass any blanket order of bail which would amount to stultifying the lawful process of police investigation. So also, it is well settled, in exercise of the powers conferred under Sec.438 Cr.P.C., the courts may not pass blanket orders in such a manner that the accused can take up the plea that he need not co-operate with investigation or be available for the trial.

85. **Shafi's** case supra [2020 (4) KLT 703] has also mainly relied on the observations on para 17 of **Souda Beevi's** case supra [2011 (4) KLT 52]. After in-depth consideration of these mattes, we are of the view that **Souda Beevi's** case supra [2011 (4) KLT 52], cannot be understood to mean as if the court has no jurisdiction to entertain an anticipatory bail

plea filed under Sec.438 Cr.P.C., merely because the accused is abroad at the time of filing of application. In the subsequent discussion, we will also deal with various scenarios whereby, accused persons may not be available in India at the time of registration of crime and they may have the bonafides and willingness to come over to the country and co-operate with the investigation and trial process. So also, there could be various contingencies whereby the accused persons who are in foreign country have bonafide gone abroad as part of their employment on account of their job compulsions, etc. Those are all aspects at the stage of exercise of jurisdiction. In other words, if **Souda Beevis** case supra [2011 (4) KLT 52] and **Shafi's case** supra [2020 (4) KLT 703], are understood as if it has been laid down as a rule of universal and general application, that the anticipatory bail court does not have jurisdiction to entertain a pre-arrest bail plea merely because the accused is abroad at the time of filing of application, then it cannot be said to have reflect the correct legal position. As already stated hereinabove, such a reading of the dictum laid down in the afore decisions, is not warranted or justified.

Matters of proper, reasonable and legally correct manner of the exercise of discretionary power under Sec.438 Cr.P.C. where the accused is abroad at the time of filing of application.

86. As discussed earlier, conferment or existence of power or jurisdiction is one thing. The issue as to whether the court or tribunal or authority have jurisdiction on the subject matter is one thing and if

jurisdiction is available, then the exercise of such jurisdiction or power, especially discretionary one, is a different aspect of the matter. Now, we will deal with some of the aspects as to whether the exercise of discretionary power under Sec.438 Cr.P.C. would be proper, reasonable and legally correct or otherwise. The said discussion is informally necessary for dealing with the other three issues mentioned supra.

87. The Constitution Bench verdict in **Gurbaksh Singh's** case supra [(1980) 2 SCC 565] has considered some of the general issues relating to exercise of discretion under Sec.438 Cr.P.C., as can be seen from the reading of paras 30 to 50 thereof. The High Courts and Sessions Court should be left free in the exercise of its judicial discretion to grant bail, if they consider it fit to do so on the particular facts and circumstances of a case and on such conditions as the case may warrant. So also, the Courts must be left free to refuse bail if the circumstances of the case so warrant, etc. Further, the Constitution Bench has cautioned against generalization of matter for attempting to discover formulae of universal application in the matter of exercise of discretion under Sec.438 when facts are bound to differ from case to case and as no two cases would be alike on facts and therefore, the Courts should be allowed little free play in their joints if the conferment of discretionary power is to be meaningful. Further that, the said discretion has to be exercised by the Courts judicially and not according to whim, caprice or fancy. So also, there is a risk in foreclosing

categories of cases in which anticipatory bail may be allowed because life throws up unseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges (See para 14). Para 15 thereof again cautioned against attempts to make unnecessary formulas within a straight-jacket, etc. Very crucially, it has been held by the Constitutional Bench of the Apex Court in ***Gurbaksh Singh's*** case supra [(1980) 2 SCC 565] in para 33 thereof that the The High Court and the Court of Session should be left to exercise their jurisdiction under Sec.438 by a wise and careful use of their discretion which by their long training and experience, they are ideally suited to do. So in other words, the first supra issue as to whether the court has jurisdiction to entertain the plea, where the accused is abroad at the time of filing of the application, etc., is only the tip of the iceberg and there could be various issues which would even be complex in the facts of each case, that will be confronted to the court, in such cases where the accused is abroad at the time of the filing of the application. Those issues will have to be tackled by judicially and judiciously by the wise and prudent exercise of discretion and by the aid of experience and practice.

88. Justice V.R.Krishna Iyer in the celebrated decision in **Narasimhulu's case supra** [(1978) 1 SCC 240], has inter alia observed in para 1 thereof, that the subject of bail belongs to blurred area of the

criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The said interesting observations in the beginning portion of para 1 of **Narasimhulu's case supra** [(1978) 1 SCC 240], reads as follows:

> *'"Bail or jail ?"... at the pre-trial or post-conviction stage-belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion.'*

89. Thereafter, the Apex Court has referred to the views of Justice Benjamin Cardozo on judicial discretion in the beginning portion of para No.3 thereof, which reads as follows:

> *"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined. by system, and subordinated to 'the primordial necessity of order in the social life. Wide enough in all conscience is the, field of discretion that remains."*

90. The views of Lord Camden on discretion of the Judge has thereafter been referred to in para 3 thereof, which reads as follows :

> *"the discretion of a Judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable...." [1 Bovu, Law Dict., Rawles' III Revision p. 885 — quoted in Judicial Discretion — National College of the State Judiciary, Rano, Nevada p. 14]*

91. Justice Benjamin Cardozo has elegantly expressed views on the manner of reasonable and proper exercise of judicial discretion. Lord Camden's views pithily expresses the complexities and pragmatic difficulties in the proper exercise of discretion in the context of hard

realities and metaphorically, it can be appreciated as the "*dark night of the soul*" to be experienced by a Judge in the process of exercise of discretion. In other words, the practice in the manner of exercise of judicial discretion could be far from easy in many a case. It could be precisely for these reasons that the Constitution Bench of the Apex Court has observed in para 33 of **Shri Gurbaksh Singh Sibbia's case** supra [(1980) 2 SCC 565], that the exercise of jurisdiction under Sec.438 is to be effectuated by a wise and careful use of judicial discretion which, Judges by their long training and experience, could be ideally suited to do so and that the ends of justice will be better served by trusting the courts to act objectively and in consonance with the principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application, etc.

92. It may also be pertinent to refer to para 5 of **Narasimhulu's case** supra [(1978) 1 SCC 240], which was dealt with the parameters and criteria that could be taken into account for exercise of bail jurisdiction and the same reads as follows :

> ***"5.*** *Having grasped the core concept of judicial discretion and the constitutional perspective in which the Court must operate public policy by a restraint on liberty, we have to proceed to see what are the relevant criteria for grant or refusal of bail in the case of a person who has either been convicted and has appealed or one whose conviction has been set aside but leave has been granted by this Court to appeal against the acquittal. What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said [R. v. Rose, (1898) 18 Cox CC 717 : 67 LJ QB*

289 — Quoted in 'The Granting of Bail', Modern Law Rev., Vol. 81, Jan. 1968, pp. 40-48] :

> *"I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial."*

This theme was developed by Lord Russel of Kollowen, C.J., when he charged the grand jury at Salisbury Assizes, 1899: [(1898) 63 JP 193, Mod. Law Rev. p. 49 ibid.]

> *"... it was the duty of Magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice."*

In Archbold it is stated that [Mod. Law Rev. ibid. p. 53 — Archbold. Pleading Evidence and Practice in Criminal Cases, Thirty-Sixth Edn., London, 1966, para 203] :

> *"The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial ....*
>
> *The test should be applied by reference to the following considerations:*
>
> *(1) The nature of the accusation ....*
>
> *(2) The nature of the evidence in support of the accusation ....*
>
> *(3) The severity of the punishment which conviction will entail ....*
>
> *(4) Whether the sureties are independent, or indemnified by the accused person...."*

Perhaps, this is an overly simplistic statement and we must remember the constitutional focus in Articles 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr Bottomley. [The Granting of Bail, Principles and Practice, Mod. Law Rev. ibid. pp. 40 to 54]"

93. After referring to such parameters and criteria, it is observed in the concluding portion of para 5 supra, that such statement of the legal position may be overly simplistic and that, advertence should also be made to the constitutional focus in Article 21, etc. Further, in paras 7, 8 & 9 of

Narasimhulu's case supra [(1978) 1 SCC 240], the Apex Court has referred to various other parameters and criteria, as the nature of the charge, the nature of the evidence, the punishment which the accused may be liable to face, if convicted or is convicted and whether the course of justice would be thwarted by the accused, who seek the benignant jurisdiction of the court, the likelihood of the accused interfering with the witnesses for prosecution or otherwise polluting the process of justice. The antecedents of the accused, as to whether he has a bad record, particularly a record which suggests that he is likely to commit serious offences while on bail, etc.

94. Further, the Constitution Bench in **Sushila Aggarwal's case** supra [(2020) 5 SCC 1], paras 85.3, 85.4, 92.3, etc., has *inter alia* held that the parameters and factors to be taken into account for exercise of anticipatory bail discretion, are the nature of the offence, role of the person, the likelihood of the accused influencing the course of the investigation or tampering with the evidence, including intimidating witnesses, likelihood of fleeing justice, such as leaving the country. More detailed parameters and criteria in exercise of discretion have been enumerated on illustrative basis in para 112 of **Mhetre's case** supra [(2011) 1 SCC 694]. So, in cases of this nature, when the courts are faced with applications for anticipatory bail filed by an accused, who is abroad at the time of filing of an application, then the courts may examine the

factual submissions of both sides to ascertain whether the accused has made out a bonafide apprehension of arrest in a non bailable offence and may ascertain from the prosecution records, etc., as to whether the case is one in which exercise of jurisdiction could be considered and with reference to the various parameters and factors mentioned above. If at the threshold itself, the court is convinced on the basis of available materials that the applicant/accused is likely to flee from justice or is not likely to co-operate with the investigation process and the trial process, etc., necessary assessment in that regard may be made. Other vital parameters like, the gravity and seriousness of the offences, the nature of the factual allegations, etc., could also be properly assessed. Yet another important parameter and criteria would be for the court to assess, as to whether the custodial interrogation of the accused is necessary and imperative in the facts of the case and therein, the guidelines and perspective taken by the Apex Court in **Anil Sharma's case** supra [(1997) 7 SCC 187] in paras 6 & 8, etc., should be taken into account. Keeping in view the salutary approach therein that success in interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated by the Police and that, very often interrogation in such a condition would reduce to a mere ritual, etc. If, after assessing the factual scenario in a particular case *vis-a-vis*, such

parameters and factors, if the court is inclined to take a negative view against the accused, it is for the court to take a call thereon.

95. In the present two cases as well as in the other connected cases, which were heard, along with this case, the applicant/accused had taken the definite stand that though were abroad at the time of filing of the application, they would immediately come back to India and co-operate with the investigation and the trial process, etc. In many a case, the accused might have been abroad even at the time of registration of the crime and that could be a clear indicator that there was no intention of the accused to flee away from the arm of the law. Though, the accused would have left the country after the registration of the crime, he may come with pleas that the said action was bonafide and genuine, as he was constrained to go abroad in view of his employment compulsions and that, he would immediately come back to India and co-operate with the investigation and the trial. Such factual submissions of the applicant/accused should be carefully assessed and weighed by the court and it may be examined as to whether such pleas are genuine and bonafide or whether such pleas are made only to hoodwink the court. Many a time, the courts could take cognizance of the social reality that various individuals go abroad out of employment requirements and especially, in view of the strict labour law regime in certain countries like the Gulf countries. The person concerned may lose his means of livelihood, if he does not meet the timeline and

reporting for duty. The courts should always have the "third eye", to discern the genuineness and bonafides of such pleas, bearing in mind that, the serious issues of personal of liberty are entailed in consideration of such bail pleas. So also, the Courts should intensely apply its mind as to whether the attempt of the accused who is abroad, is to buy time and stultify the investigation and the trial. Needless to say, there is no question of this Court or any court for that matter laying down any general rules of universal application, which would more often than not fall in straitjackets, which is highly undesirable and goes against the essence of the jurisprudential idea of judicial discretion and duty of Judges.

96. To quote the words of the Constitution Bench in the concluding portion of para 21 of **Shri Gurbaksh Singh Sibbia's case** supra [(1980) 2 SCC 565], "..... *an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.".*

97. In other words, a cause of obsessive fear and anxiety, is an anathema to the exercise of sound and good judicial discretion. At the same time, the cautious, wise and prudent approach would always be the hallmark for sound exercise of discretion.

98. After consideration of such parameters and criteria, the court takes a view that anticipatory bail could be granted to such an accused, who is abroad at the time of filing of an application, then the serious issue of laying down conditions to regulate the grant of bail, should be seriously considered, as envisaged in Sec.438(2) of the Cr.P.C. Some of such illustrative conditions to regulate the grant of bail, as envisaged in Sec.438(2) are referred to in clauses (i) to (iv) thereof. Condition No.(i) is that the accused should make himself available for interrogation by a Police Officer as and when required and condition no.(iii) is that the person shall not leave India, without previous permission of the court concerned. Condition No.(iv) is such other conditions as may be imposed under Sec.437 (3), as if the bail granted under that Section.

99. In that regard, it has to be noted that Sec.438(1) envisages that where the person has reasons 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 a Sessions Court, for a direction under that Section and the Court may if it thinks fit, direct that in the event of such arrest, he shall be released on bail. Sub-section (2) of Sec.438 further stipulates that when the court concerned while making a direction under Sec.438 (1), in the matter of grant of anticipatory bail, may include such conditions in such directions, in the light of the facts of the particular case, as it may think fit and the conditions enumerated as clauses (i) to (iv) therein, are

illustrative in nature and not exhaustive and discretion has to be exercised, as to whether such conditions are to be included to regulate the grant of bail in the light of the facts and circumstances of the case on hand. For the limited purpose of the considering of the issues in this case, it may not be out of place to focus more on condition no.(i) and condition no.(iii). Condition No.(i) is that the person shall make himself available for interrogation by a Police Officer, as and when required and condition no. (iii) is that the applicant shall not leave India without the previous permission of the Court.

100. To understand the jurisprudential basis of the reasons for the Legislature incorporating such conditions, as above in Sec.438(2), it may be apposite to refer to the elementary definitional contours of bail. The definition of bail has been mentioned in paras 9 to 11 of **Satender Kumar Antil's case** supra [(2022) 10 SCC 51] p.76, wherein it has been stated that the term *'bail'* has not been defined in the Cr.P.C, though is used very often and that, bail is nothing but a surety, inclusive of a personal bond from the accused and it means the release of an accused person, either by orders of the court or by the Police or by the Investigating Agency. It has been conceived as a set of pre-trial restrictions imposed on a suspect while enabling any interference in the judicial process and so, it is a conditional release on the solemn undertaking by the suspect/accused that he would co-operate both with the investigation and the trial.

101. The word *"bail"* has been defined in Black's Law Dictionary, 9th Edn., p. 160 as: "*A security such as cash or a bond; esp., security required by a court for the release of a prisoner who must appear in court at a future time.*".

102. That in Wharton's Law Lexicon, 14th Edn., p.105 defines *"bail"* as: "*to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely protected from prison, to which they have, if they fear his escape, etc. the legal power to deliver him.*".

103. Further, it is also be noted that Law Lexicon by Ramanath Aiyer (3rd Edn.) defines *"bail"* as "*the security for the appearance of the accused person on which he is released, pending trial or investigation".*

104. Black's Law Dictionary, 4th Edn., p.177 has stated that – what is contemplated by bail is to "*procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and subject him/herself to the jurisdiction and judgment of the court."*

105. It may be pertinent to refer to para 40 of the decision of the Apex Court in ***Sanjay Chandra*** *v.* ***CBI*** [(2012) 1 SCC 40], p.63, which reads as follows :

> ***"40.*** *The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. ..... The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required."*

106. Therefore, one of the primary purposes and objectives in the grant of bail in criminal cases is to relieve the accused of imprisonment, if warranted and also to relieve the state of burden of keeping him, pending trial and to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance in the court whenever his presence is required. So, in other words, bail can be conceived as a security for the appearance of the accused on which he is released, pending trial or investigation, etc. So, one of the prime objectives and purposes of grant of bail is to relieve the accused of the imprisonment, if it is justified in terms of the parameters and criteria for grant of bail and thus, to relieve the state of burden of keeping him, pending trial and also to ensure that he co-operates with the investigation and trial. It is precisely for these reasons, that the Legislature in its wisdom has conceived that the bail court in its discretion may consider in the facts and circumstances of the

particular case, as to whether to consider the imposition of conditions as in clauses (i) & (iii) of Sec.438(2) of the Cr.P.C., i.e., the accused person shall make himself available for interrogation by a Police Officer, as and when required and further that, he/she shall not leave India, without the permission of the court, etc. Therefore, once the anticipatory bail court, after due assessment is of the considered opinion that the discretion could be exercised for granting an order, as per Sec.438(1) that in the event of his arrest, he shall be released on bail, then it is also the obligation of the court to consider the facts of the particular case and make a call, as to the necessity of imposing appropriate conditions, including those conditions, as envisaged in clauses (i) & (iii) of Sec.438(2). Since the cardinal purpose of bail is the security for appearance of the accused persons, on which he is released pending trial or investigation, etc. The courts have an obligation to consider the imposition of appropriate conditions, especially where the accused is abroad at the time of making the application, to consider as to whether conditions as in clauses (i), (iii), etc., are to be imposed.

107. This is all the more so, where the accused is in a foreign country at the time of submitting the application and at the time when the plea is urged before the Court.

108. In that regard, it is to be borne in mind that the Apex Court and the various High Courts, including the aforecited Constitution Bench verdicts, have time and again cautioned that the High Courts and the

Sessions Court shall not grant blanket orders while rendering anticipatory bail orders under Sec.438 (1), as such blanket orders would have the serious consequence of stultifying the proper effectuation of the investigation and also enabling the accused to place obstacles in such proper and efficient investigation. As observed in para 40 of **Gurbaksh Singh Sibbia's case** supra [(1980) 2 SCC 565], a blanket order may enable the accused to cover or protect various kinds of alleged unlawful activities and it would also enable the accused to stultify the course of the investigation. In that regard, it may be pertinent to refer to the factual scenario confronted to the court in **Souda Beevi's case** supra [2011 (4) KLT 52], wherein initially the said accused was granted anticipatory bail order, while she was abroad, that, in the event of her arrest, she shall be released on bail for a period of one month and thereafter she should surrender before the Police and seek for regular bail for a period of one month, etc.

109. It appears that, there was no condition in the afore case, as envisaged in Sec.438(2), in the said order to regulate the anticipatory bail order, granted as per Sec.438(1), by imposing conditions that the accused who was then abroad, should come to India, and co-operate with the investigation process, etc., within a specified reasonable time limit, eventhough there was a condition that the accused must co-operate with the police interrogation, etc. Since the courts are empowered as per Clause

(i) of Sec.438 (2) to impose a condition that the accused shall make himself available for interrogation by a Police officer as and when required, the court will also have the ancillary and incidental power to impose a condition that the accused, who is abroad at the time of the grant of the order, should necessarily come to India and co-operate with the Police, within a definite time limit. Absence of such a condition that the accused, who is abroad and who is granted anticipatory bail, should necessarily come to India within a reasonable time limit and co-operate with the Police investigation and interrogation process will, more often than not, lead to misuse as has happened in ***Souda Beevi's case*** supra [2011 (4) KLT 52]. Therein, ultimately, the accused could misuse the said order virtually as a blanket order and she never, even, cared to come to the country and co-operate with the Police, for a very long time, after the grant of the anticipatory bail order and when she was arrested and remanded, she could even threaten the Police with contempt proceedings, where, in fact, instituted, though it was ultimately repelled by this Court. Still further, the accused therein went to the extent of contending before the regular bail court that she is entitled for regular bail on the mere ground that her arrest is in disobedience of the anticipatory bail order, which she herself flouted. The premise of this argument was that since there was no condition that she should come to India and co-operate with the Police investigation, within a reasonable time limit, she could choose to come to the country at

any time of her liking and that, therefore, at the time she comes to the country and reports before the Police, even if she is arrested, she is to be immediately released on bail for a period of one month, etc. This Court had rightly repelled such hypertechnical and extreme contentions taken by an accused, who has abused and misused the bail order. So, these aspects, how cleverly some of the accused persons who misuse such bail orders, if not hedged with effective conditions, as above.

110. Suffice to say, the courts may have to cautiously and prudently assess the scenario and in such cases, it may be only in the fitness of things and to avoid giving leverage to the accused to abuse or misuse the grant of the bail order to stipulate a condition as per Sec.438(2) to regulate the bail order granted as per Sec.438(1) that the accused should come back to the country and co-operate with the Police investigation within a reasonable time limit. So also, the courts could impose conditions in the nature of Clause (iii) of Sec.438(2) that, in such a scenario the accused shall not leave India without the prior permission of the jurisdictional court concerned. In cases of this nature, conditions as per clauses (i) & (iii) of Sec.438(2), would be necessary to effectuate the very purpose of grant of bail, which is to ensure that the accused co-operates with both the investigation and the trial.

111. It is for the bail courts concerned to decide on the manner and methodology for exercise of the discretion. The abovesaid observations

made by us are only made in the context of the cases presented before us and in the light of the factual scenarios dealt with in some of the reported case laws.

112. Further, since the conditions, as envisaged in clauses (i) & (iii) of Sec.438(2), form the very bedrock of the purposes and objectives of grant of bail so as to ensure that the accused co-operates with the investigation and trial, etc., the anticipatory bail court will also have jurisdiction to order that if such conditions imposed by the said court that the accused, who is abroad, should come back to India and co-operate with the police investigation within a stipulated time limit, etc., is not complied with by the accused, then, the order granting anticipatory bail, under Sec.438(1) could be ordered to be vacated, etc.

113. If the Court is satisfied about the parameters and criteria for grant of bail in a given case, where the accused is abroad, then the court, in its discretion, could consider the grant of interim bail order subject to satisfying the strict requirements of Sec.438. Once the Court grants such bail order, then it shall be the duty of the Police authorities and law enforcement agencies to honour such bail order granted to an accused, who is abroad, so that he can come to the country and execute the bail bonds, etc. Therein, the court can also stipulate that one of the conditions to regulate the grant of interim bail, which is an ancillary power under Sec.438(1), by imposing condition as in clause (i) of Sec.438(2) that, the

applicant/accused should come back to India and co-operate with the interrogation process within a specified, reasonable time limit, etc. As and when the court thereafter considers the disposal of the main application, it is found that the accused has not complied with the condition to come to India and to co-operate with the Police investigation, etc., within the stipulated time limit, and the court is convinced about the lack of *bona fides,* etc., then the court will also have the discretion to dismiss the main application and to consequently order that the order granting interim bail will stand vacated and the main application itself could be dismissed. Such approach in appropriate cases would also be conducive of the legislative intention conceived in the engraftment of the discretion granted to the bail court to impose conditions as in Clauses (i) & (iii) of Sec.438(2) to regulate the grant of bail that the accused shall co-operate with the police investigation and shall not leave India without the permission of the jurisdictional court concerned. In other words, this option can be a basis for the court to be assured that the bail granted on interim basis is not abused or misused by the accused and to ensure the effectuation of the condition that the accused should be in India, as envisaged in Clause (iii) of Sec.438(2).

114. The learned Amici Curiae have submitted that in appropriate cases, if the Court finds that the case is free of complications and the case of the accused, who is abroad, fulfils the parameters and factors for grant of

bail under Sec.438(1), then the Court will also have the discretion to dispose the main application granting bail, subject to strict condition, including the condition that the accused should come over to the country within a specified reasonable time limit to co-operate with the police investigation and shall not thereafter leave India, without the prior permission of the jurisdictional court, etc. That in such cases, the Court will also have the power to lay down a further condition that if the accused does not come to India, within the above specified time limit, then the bail so granted would stand vacated on expiry of the said time limit. That such a power is ancillary and incidental to the primary objectives of grant of bail which are to ensure the co-operation of the accused with the investigation and trial, etc.

115. It is also pointed out that if the Court can pass interim bail order to an accused who is abroad and can later vacate the interim bail order and dismiss the main bail application, if he does not comply with the condition to come to India within a specified time limit to co-operate with the police investigation, then the aforesaid option of passing a final order granting bail, with the afore conditions is also a lawful option in the exercise of discretion. In this regard, it is to be noted that such an option will also be open to the Court, depending upon the facts and circumstances of the case and if the Court is convinced that such discretion in that regard could be prudently exercised, so as to avoid misuse of the bail orders

secured by accused, who is abroad.

116. In this regard, it may be pertinent to note the dictum laid down by the Constitution Bench of the Apex Court in para 92.3 of ***Sushila Aggarwal's*** case supra *[(2020) 5 SCC 1, p. 110]* that, wherein it has been *inter alia* held that, while considering an anticipatory bail application, the court has to consider various parameters like, the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, likelihood of fleeing justice (such as leaving the country), etc., and the courts would be justified and ought to impose conditions spelt out in Sec.437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed, etc.

117. Further, it is to be noted that it is well-settled that it may not be right and proper for the anticipatory bail courts to pass interim order, etc., restraining the arrest of the applicant/accused. The complementarity of the functions of the Investigating Agency *vis-a-vis* the judicial functions,

has to be borne in mind. If the bail court is convinced that the accused has made a good case, after evaluating the various parameters and criteria, etc., then the allotted province of the judicial wing is to consider whether bail or interim bail is to be granted, which is to be effectuated as and when the accused is arrested by the Police. Whether or not to arrest the accused in the facts of a given case, would fall within the investigation domain of the Police. While considering bail jurisdiction, it will be outside the province of the bail court concerned, to restrain the arrest of the accused. The case laws on the above aspects have already been dealt with in detail in the preceding paragraphs.

118. The core of the aspects mentioned hereinabove would substantially answer the other referred issues. However, the issues 2 & 3 supra, i.e. the first two issues covered by the reference order dated 27.06.2022 in the former case, B.A.No.4421/2022 are essentially linked to the factual premises stated therein. The said specific factually premised issues can be answered by holding that the factual premises stated therein are assumed to be established. This we say so as such factually premised issues can be determined only when understood in the context of the actual facts and circumstances of the case and not in abstract. So, for answering such issues, we proceed as if those factual premises of those issues are established in a given case. Hence, we endeavour to answer those factually premised issues in the light of the legal position discussed above, in regard

to the exercise of discretion under Sec.438 of the Cr.P.C.

119. So, if in a case it is established and the Court is convinced that the accused/bail applicant had absconded from India and had gone abroad, after fully knowing about the registration of a non-bailable offence against him and thereafter, he files a bail application under Sec.438 of the Cr.P.C. while he is still abroad, then it may not be proper exercise of discretion to grant bail in such a case. This is not to say that the Court has no jurisdiction to entertain a bail application under Sec.438, merely because the accused/applicant is abroad at the time of filing of the application. We are answering this factual premised issue only in the context of the issue as to whether it would be right and proper exercise of discretionary jurisdiction. So also, if such an accused had absconded from India and had gone abroad knowing fully well about the registration of a crime in respect of a non bailable offence, then thereafter, though he may technically have the *locus standi* to maintain a pre-arrest bail plea, but if as a matter of fact, the Court is convinced that he has absconded and fled away from the law enforcement agencies, etc., then it may not be right and proper exercise of jurisdiction to grant interim bail to such an accused who is abroad.

120. In this regard, the Courts may examine whether the accused was already abroad at the time of registration of crime. Even if the accused had gone abroad after registration of the crime, it may be ascertained whether he had bonafide gone abroad in view of his employment or

professional compulsions, etc. General relevant facts should be ascertained by the Court, before reaching factual conclusions, as above.

121. The third referred issue in B.A.No.4421/2022 (which is the 4th issue mentioned supra) is as to whether the Bail Court has jurisdiction to pass orders restraining the Police from arresting the accused without passing interim bail orders as per Sec.438(1) of the Cr.P.C. In the light of the dictum laid down by the Constitution Bench of the Apex Court in para 52, more particularly, para 52.14, of ***Sushila Agarwal*** *v.* ***State (NCT, Delhi) & Anr.*** *[(2020) 5 SCC 1, p.86]* and paras 40 & 41 of ***Gurbaksh Singh Sibbia*** *v.* ***State of Punjab*** [(1980) 2 SCC 565, pp. 590 – 591], it is not right and legally correct for an Anticipatory Bail Court to pass orders or interim orders restraining the arrest of the accused or directing not to arrest the accused, etc. However, as categorically held in para 42 of **Gurbaksh Singh's** case supra [(1980) 2 SCC 565, p.591] and various other decisions, the Anticipatory Bail Court, in appropriate cases, will have the discretionary power to issue interim bail order/*ad-interim* bail order if the Court is convinced that it is so warranted, pending consideration of the main bail application. But, while considering passing of such interim bail orders, the Court should ensure strict conformity with the requirements of Sec.438. The last referred issue in B.A. No.4421/2022 will also, thus, stand answered.

122. While concluding, we would only venture to observe that the

hard and difficult task for the Bail Court, in the matter of finding the right path for proper and legally correct exercise of discretion under Sec.438(1), no generalized rules of universal application or formulae in straitjacket can be envisaged or contemplated. The Courts should grapple with the facts of each case and identify as to how discretion is to be exercised in a sound and wise manner, as enunciated in the words of Justice Benjamin N. Cardozo quoted hereinabove [See "The Nature of the Judicial Process", Yale University Press (1921)]. So also, all efforts should be taken by the Courts to ensure that the pitfalls of improper exercise of jurisdiction, underscored in the words of Lord Camden quoted hereinabove, should be avoided.

123. We would also hasten to further add that there cannot be any fixed formulae for finding out of the right path in a given case and the Courts should be guided by the underlying principles of adopting wise and prudent exercise of discretion, as enunciated in para 33 of the Constitution Bench verdict of the Apex Court in **Gurbaksh Singh*'s*** case supra [(1980) 2 SCC 565, p.589].

Now we will proceed to deal with the facts of the case for the final disposal of the two referred Bail Applications.

B.A No.4421 of 2022

124. The basic facts of this case have already been stated in the initial portions of this order. In short, the gist of the allegations in this crime is that the accused has portrayed the minor victim girl aged 13 years

and her mother in bad light and has uploaded the morphed naked photos of the minor victim girl in a pornographic site and has also sent threatening messages to the defacto complainant by Facebook messages and has thus defamed them. The date of the offence is said to be 09.04.2016. The accused was in Kuwait, even before that. The date of lodging of the FIS is on 04.06.2018 and the FIR has been registered on 16.06.2018. The applicant who is a teacher has been working in Kuwait and residing there for the last 17 years, etc. Further, the learned Single Judge has granted interim bail in this case on 27.06.2022 and the accused was in India as on the date of the said order. The learned Single Judge, as per para 9 of the order dated 27.06.2022, has granted interim bail to the applicant/accused till the disposal of the application, by invoking the powers under Sec.438(1) of the Cr.P.C. It has been specifically ordered therein that in the event of the arrest of the applicant in connection with the above crime, she shall be released on bail on executing a bond of Rs.25,000/- and on furnishing two solvent sureties for the like sum, both to the satisfaction of the arresting officer. It is made clear that the Investigating Officer is free to interrogate the applicant, for the purpose of investigation, etc.

125. After hearing both sides, we are of the view that in the facts of this case, the applicant/accused has not shown any proclivity or the remotest intention to abscond or flee away from the long arms of the law.

She was in Kuwait, even prior to the alleged commission of the offence and even thereafter. She was willing to come to India and to co-operate with the Police. So, according to us, the learned Single Judge has rightly granted interim bail to her.

126. Further, Sri.E.D.George, the learned counsel for the applicant would point out that A-2 in this case, who is the father of the applicant (A-1), who received Annexure-A13 letter dated 04.11.2022 from the District Police Chief, Pathanamthitta, stating that the petition enquiry has been conducted in the matter, which has led to Annexure-A13(2) petitioner enquiry report submitted by the Dy.Superintendent of Police, Crime Branch, Pathanamthitta to the District Police Chief, Pathanamthitta. Further that, Annexure-A14 is the letter dated 04.07.2022 sent by the Dy.Superintendent of Police, Thiruvalla, addressed to A-2 [the father of applicant (A-1)] that, in the instant crime, report has been submitted before the competent court, stating that the same is undetected. The Investigating Officer has filed a report dated 02.01.2023 before this Court in this case, which has been produced along with memo dated 03.02.2023 of the Spl.Government Pleader and in column No.17 of the said report regarding the charge (presumably thereby meaning final report/charge sheet) given to the court if any, it is stated therein that the report of undetected case has been submitted on 12.05.2022, presumably thereby meaning that the final report has been submitted before the competent

court, stating that the crime is undetected. Column No.18 of the said report dated 02.01.2023 has also reiterated the aspects that undetected (UN report) was submitted before the competent court on 12.05.2022, etc. Moreover, the applicant has got a specific case that the allegations are falsely foisted against her and it is counterblast to a series of cases initiated by her or her family members as against the de-facto complainant in the present case, the details of which have been stated earlier hereinabove. In view of these aspects, it is ordered that the interim bail granted to the applicant/accused (A-1), as per para 6 of the order dated 27.06.2022 is made absolute. Needless to say, the petitioner should co-operate with the Investigating Agency, if investigation is pending. No other orders and directions are called for.

With these observations and directions, B.A No.4421/2022 will stand disposed of.

B.A No.4983 of 2022

127. The facts of the case involved in B.A.No. 4983/2022 have also been dealt with in the earlier portions of this order. The applicant is A-1 among the three accused in Crime No.302/2022 of Kalamassery Police Station, Ernakulam, in respect of offences as per Sec.498A read with Sec.34 of the IPC. The applicant has got a specific case that he has left India and has been in Saudi Arabia since 2019. The period of the alleged offence comes within 15.04.2012 to 22.02.2022. The date of registering of

the FIR is on 26.02.2022. The allegation is that the accused persons have treated the de-facto complainant, who is the wife of the applicant with cruelty and harassment and that they have demanded dowry and they have thus committed the offence, as per Sec.498A of the IPC. The applicant was in Saudi Arabia at the time of the registration of FIR in Kerala. The applicant has got a specific case that his application was filed on 27.06.2022, that he desires to come to India on 10.07.2022 and has booked his ticket (see para 7 on page 5 of this bail application). The Division Bench of this Court, after considering the totality of the facts and circumstances of this case, has passed interim order dated 05.07.2022, granting him interim bail in the present crime. The conditions in the said interim bail, given in pages 4 & 5 of the said interim order, are as follows :

> *"(1) The petitioner shall execute a bond for Rs.50,000/- (Rupees fifty thousand only) with two solvent sureties, each for the like sum, to the satisfaction of the jurisdictional Magistrate.*
>
> *(2) The petitioner shall appear before the investigating officer on all Saturdays at 11 a.m., for a period of three weeks, and thereafter, as and when required by the investigating officer in writing to do so.*
>
> *(3) The petitioner shall fully co-operate with the investigation.*
>
> *(4) The petitioner 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/her from disclosing such facts to the court or to any police officer.*
>
> *(5) He shall not leave the State of Kerala, except with the prior permission of the jurisdictional Magistrate, for which he can approach the jurisdictional Magistrate which will be considered on merits."*

128. The maximum punishment for the offence as per Sec.498A of

the IPC is upto three years.

129. After hearing both sides, we are of the view that the interim bail has been rightly granted in the facts and circumstances of the case. The applicant was in the said foreign country since 2019. Later, he has come down to India on 11.07.2022, as undertaken by him in his pleadings and later, he was arrested on 12.07.2022 by the Investigating Officer and was released on interim bail. Further, the Investigating Officer has filed a statement dated 28.01.2023 in this case produced, along with memo dated 30.01.2023 of the Spl. Government Pleader (Crl.), in which it has been *inter alia* stated as against Sl.Nos.19 & 21 thereof, that the Investigating Officer has completed the investigation and has filed the final report by way of charge sheet on 15.08.2022. So the investigation is now completed. Accordingly, the interim bail order granted to the applicant herein, as per interim bail order dated 28.06.2022 in this case is made absolute. No other orders and directions are called for.

With these observations and directions, B.A No.4983/2022 will stand disposed of.

130. Before parting of these cases, we are obliged to place on record our deep sense of appreciation to the valuable services rendered by the learned Advocates concerned who have appeared in these cases, more particularly, Sri.Tom Jose Padinjarekara, learned Amicus Curiae (former Addl.DG of Prosecution & Addl. State Prosecutor

of this Court); Sri.Suman Chakravarthy, learned Amicus Curiae (former Sr.Government Pleader & Prosecutor); Smt.Saipooja, learned counsel, who has ably assisted the Amici Curiae and Sri.S.U.Nazar, the learned Addl.Public Prosecutor appearing for the respondent-State. The Amici Curiae have devoted their valuable time and energy to exhaustively examine various aspects of the matter and have made detailed submissions, which has substantially aided us in the resolution and determination of the issues involved in these cases.

Sd/-
ALEXANDER THOMAS, JUDGE

Sd/-
C.S.SUDHA, JUDGE

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APPENDIX OF BAIL APPL.NO.4421/2022

PETITIONER'S ANNEXURES

ANNEXURE-A1	**TRUE COPY OF THE F.I.R.628/2018 OF KOYIPURAM POLICE STATION, PATHANAMTHITTA DISTRICT, DATED 15/6/2018.**
ANNEXURE-A2	**TRUE COPY OF THE CRL.M.P.2358/2018 FILED BEFORE THE ADDL. DISTRICT AND SESSIONS COURT- 1, PATHANAMTHITTA (SPECIAL COURT) DATED 12/6/2018**
ANNEXURA3	**TRUE COPY OF THE ORDER NO.D7-121116/2018/PHQ DATED 10/8/2018 ISSUED BY STATE POLICE CHIEF, POLICE HEADQUARTERS, THIRUVANANTHAPURAM.**
ANNEXURE-A4	**TRUE COPY OF THE CRIME NO.790/2017 REGISTERED IN THE ETTUMANOOR POLICE STATION**
ANNEXURE-A5	**TRUE COPY OF THE CRIME NO.848/2019 REGISTERED IN THE ETTUMANOOR POLICE STATION.**
ANNEXURE-A6	**TRUE COPY OF THE CRIME NO.1777/2017 REGISTERED IN THE KURAVILANGAD POLICE STATION.**
ANNEXURE-A7	**TRUE COPY OF THE CRIME NO.1836/2017 REGISTERED IN THE ERATTUPETTA POLICE STATION.**
ANNEXURE-A8	**TRUE COPY OF THE CRIME NO.502/2019 REGISTERED IN THE KOOTHATTUKULAM POLICE STATION**
ANNEXURE-A9	**TRUE COPY OF THE CRIME NO.102/2019 REGISTERED IN THE POTHUKAL POLICE STATION.**
ANNEXURE-A10	**TRUE COPY OF THE CRIME NO.404/2019 REGISTERED IN THE KALLOORKAD POLICE STATION.**
ANNEXURE-A11	**TRUE COPY OF THE CRIME NO.1722/2017 REGISTERED IN THE KOIPURAM POLICE STATION.**

ANNEXURE-A12	**TRUE COPY OF THE ORDER DATED 10/8/2020 IN BAIL APPL.NO.1377/2020, ON THE FILE OF THIS HON'BLE COURT.**
ANNEXURE A13	**TRUE COPY OF THE REPORT SENT BY THE DISTRICT POLICE CHIEF DATED 04/11/2022**
ANNEXURE A14	**TRUE COPY COMMUNICATION BY THE DEPUTY SUPERINTENDENT OF POLICE DATED 04/07/2022**

APPENDIX OF BAIL APPL.NO.4983/2022

PETITIONER'S ANNEXURES

ANNEXURE- A1 **TRUE COPY OF THE AIR TICKET.**