IN THE HIGH COURT AT CALCUTTA

CRIMINAL MISCELLANEOUS JURISDICTION.

CRM No. 2739 of 2021

In Re: An Application for anticipatory bail under section 438 of the Code of Criminal Procedure filed in connection with Raghunathganj Police Station case no. 12 of 2021 dated 07.01.2021 relating to offences under Section 341/325/326/307/302/34 of the Indian Penal Code.

In the matter of : Suhana Khatun & Others

versus

State of West Bengal

Present:

The Hon'ble Justice Arijit Banerjee

And

The Hon'ble Justice Bivas Pattanayak

For the Petitioners : Mr. Ayan Bhattacharyya, Adv.
Mr. B. Banerjee, Adv.

For the State : Mr. Swapan Banerjee, Adv.
Mr. Suman De, Adv.

Heard on : 27.09.2021
Judgment on: 20.01.2022

Bivas Pattanayak, J. :-

1. This is an application for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) at the instance of four minor/juvenile persons filed in connection with

Raghunathganj Police Station case no. 12 of 2021 dated 07.01.2021 relating to offences under Section 341/325/326/307/302/34 of the Indian Penal Code.

2. Precisely the allegations levelled against the petitioners and the other FIR named accused persons in the instant case is that in relation to a civil dispute the accused persons on 06.01.2021 at about 11PM attacked and assaulted the father-in-law of the complainant and when the family members of the complainant tried to restrain them they were also assaulted by the accused persons. In consequence of such assault several persons sustained injuries and were treated in the hospital. Out of several injured, the mother-in-law of the complainant namely Patani Bibi, being one of the injured, was declared dead by the attending doctors. On the basis of the aforesaid allegations FIR was registered against the petitioners and others and the case was taken into investigation.

3. The principal question pertaining to the instant petition is whether an application for anticipatory bail under Section 438 of the Code at the behest of a juvenile/minor is maintainable. Therefore, before delving into any other points involved in the case, the question of maintainability of the present application for anticipatory bail preferred at the instance of juveniles/minors under Section 438 of the Code is to be decided.

4. It was submitted by the learned counsel for the petitioners that from the provisions of law embodied under the Juvenile Justice Act of 2015, no

mechanism is in place to deal with child/juvenile till the time such child is apprehended or is brought before the Board. Section 12 of the Act of 2015, takes into its sweep the modalities to be followed when a child/juvenile is placed before the Board whereas Section 10 of the Act of 2015, provides the mechanism of apprehension of a child/juvenile. Further the non-obstante clause as occurred in Section 12 of the Act of 2015, carves out an exception from the general provisions of bail and bonds as enumerated under the provisions of Criminal Procedure Code. The said non-obstante clause however does not abrogate the provision of anticipatory bail/pre-arrest bail as provided under Section 438 of the Code He further stressed on this aspect that though Section 4(2) of the Code provides that the special provisions will prevail upon the provisions of the Code for grant of bail but that cannot *per se* exclude the rest of the provisions of the Code. Further, the provisions under Section 438 of the Code for anticipatory bail create a different niche and therefore the same cannot be construed to be excluded by way of necessary implication and a person has a right not to be hounded by the police and the mechanism provided under the Act of 2015, which is silent about the stage anterior to apprehension/production of a child/juvenile cannot be interpreted to exclude the provision of Section 438 of the Code. Moreover, the provisions of Section 3 of Act of 2015, if interpreted can safely be concluded that the structure of Act of 2015 does not exclude the provisions of anticipatory bail/pre-arrest bail under Section 438 of Criminal Procedure Code. Moreover, he drew our

attention that the Act of 2015 is a beneficial legislation and on necessary implication cannot be construed to exclude another beneficial provision which is a component of Article 21 of the Constitution of India.

It was further submitted on behalf of the petitioners that the legislatures in some of the Special enactments namely Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 have expressly excluded the provisions of Section 438 of the Code but there is no such legislative prescription excluding such provisions from Act of 2015 expressly. Therefore, the exclusion of the provisions of section 438 of the Code cannot be implanted by way of judicial interpretation.

Furthermore, it was submitted on behalf of the petitioners that the legislature might have used the term "apprehension" in place and instead of "arrest" in Act of 2015 having different connotations but the consequences are the same.

Further learned Advocate for the petitioners submitted that the purpose of the Act of 2015 is to protect a juvenile/child in conflict with law and therefore when two views are possible, the one that would favour the child in conflict with law should be adopted and he placed his reliance on the decision of Hon'ble Supreme Court of India in ***Shilpa Mittal versus State (NCT of Delhi)*** reported in ***(2020) 2SCC 787, para 31/35***. Moreover, law places the juvenile in conflict with law on a more advantageous pedestal

than an adult accused and therefore by no interpretation the child in conflict with law can be placed in a disadvantageous position.

In the light of his above submissions learned counsel for the petitioners prayed that prayer for anticipatory bail of the petitioners (minors) is maintainable and should be allowed in the interest of justice.

Learned Advocate for the petitioners has placed his reliance on the following orders/judgements of different High courts relating to maintainability of the application for anticipatory bail on behalf of minors.

(i) ***Saud Sk (minor) represented by his father Morful Sk.CRM no. 5419 of 2021*** of Hon'ble High Court, Calcutta.

(ii)***Miss A versus State of M.P*** reported in ***ILR (2019) MP 662*** of Hon'ble Madhya Pradesh High Court.

(iii)***Birbal Munda & Ors versus The State of Jharkhand*** reported in ***Manu/JH/1400/2019*** of Hon'ble Jharkhand High Court.

(iv)***Sudhir Sharma versus State of Chhattisgarh*** reported in ***2017 SCC Online Chh 1554*** of Hon'ble Chhattisgarh High Court.

(v) ***Mr X (Prashob), S/o Baby V.M versus State of Kerala*** reported in ***2018 (3) RCR (Cri) 327*** of Hon'ble Kerala High Court.

(vi) ***Krishan Kumar Minor thrugh his mother versus State of Haryana*** reported in ***2020 (3) RCR (Cri) 180*** of Hon'ble Punjab & Haryana High Court.

(vii) ***Kureshi Irfan Hasambhai thro Kureshi Kalubhai Hasambhai versus State of Gujarat*** reported in **2021** ***(O) AIJEK-HC-243111*** of Hon'ble Gujarat High Court.

Learned Advocate for the petitioners in his usual fairness has also placed before us the following judgments of different High courts negating the maintainability of the application for anticipatory bail on behalf of minors.

(i)***CRM 10177 of 2016, Jiban Mondal, In Re*** reported in ***2017 SCC Online Cal 1919*** of Hon'ble High Court, at Calcutta.

(ii) ***Krishna Garai & Ors versus The State of West Bengal*** reported in ***(2016) 2 C Cr LR (Cal) 561*** of Hon'ble High Court, at Calcutta.

(iii) ***CRM 2206 of 2015, Taimina Bibi*** reported in ***2015 SCC Online Cal 4299*** of Hon'ble High Court, at Calcutta.

(iv)***Shahaab Ali & Anr versus State of Uttar Pradesh*** reported in ***2020 CriLJ 4479*** of Hon'ble Allahabad High Court.

(v***) K.Vignesh versus State*** reported in ***2017 SCC Online Mad 28442*** of Hon'ble Madras High Court.

(vi) ***Kamlesh Gurjar versus State of M.P*** reported in ***2020 (1) RCR (Cri) 434*** of Hon'ble Madhya Pradesh High Court.

5. In reply to the aforesaid contention advanced on behalf of the petitioners, learned advocate appearing on behalf of the State in opposition submitted that an application under Section 438 of the Code at the behest of a minor is not maintainable since the apprehension of arrest is misplaced. Further Section 10 and 12 of the Act of 2015, puts in place a detailed procedure to deal with investigation and trial in respect of cognizable offence that may be committed by a minor. He further drew our attention to the fact that in terms of Section 10 of the Act of 2015, a child cannot be arrested and he can at best be apprehended and placed in charge of Special Juvenile Police Unit (SJPU) or Designated Child Welfare Police Officer (CWPO) for production before the concerned Juvenile Justice Board within 24 hours of such apprehension and therefore the jurisdiction of the court under Section 438 of the Code is not liable to be invoked. Both the aforesaid provisions neither entail nor envisage the detention or placement of the child in jail or police lock up.

Moreover, before the production of the child in conflict with law, he is to be placed in an observation home and the provisions do not empower the authorities to question or interrogate. Furthermore, it was submitted that the provisions of pre-arrest bail as made in Section 438 of the Code will

impede, hinder and may even disrupt the mandatory statutory procedure laid down in the Act of 2015 and the Model Rules.

On such submissions learned counsel for the State pressed that the application for anticipatory bail on behalf of a minor is not maintainable.

6. We have heard the learned advocates for the petitioners as well as the State and also perused the materials in the case-diary.

7. The principal question which is raised before us is whether a petition under Section 438 of the Code for anticipatory bail at the behest of a child in conflict with law would be maintainable.

8. Section 438 of the Code provides that 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 the section that in the event of such arrest he shall be released on bail and the court may entertain such prayer after taking into consideration the factors noted therein. Therefore it is apparent from the aforesaid provisions that in order to invoke section 438 of the Code the foremost qualification is that the person making such application must have reason to believe that he may be arrested on accusation of having committed a non-bailable offence. At this juncture we may try to understand the meaning of the word “arrest” as appearing in the Code.The word“arrest” has not been defined in the Code. However, it’s meaning can

be ascertained from Section 46, Section 57 and Section 167 of the Code which are reproduced hereunder:-

> ***" Section 46 – Arrest how made****(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action …..*
>
> *(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade arrest, such police officer or other person may use all means necessary to effect the arrest……"*
>
> ***"Section 57- Person arrested not be detained more than 24 hours-*** *No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary in the journey from the place of arrest to the Magistrate's court."*
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> ***"Section 167-Procedure when investigation cannot be completed in twenty four hours.****-(1)Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well- founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to*

the case, and shall at the same time forward the accused to such Magistrate.

(2)The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c)no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

The corollary that proceeds from the aforesaid provisions of the Code clearly indicates "arrest" to be confinement of a person by necessary means, detention in custody (police custody or jail custody). Therefore, the connotation of the words *"any person has reason to believe that he may be arrested"* appearing in Section 438 of the Code signify likelihood of a person being confined or put on detention in police custody or jail custody.

9. Now let us find out as to whether a minor/juvenile has any likelihood of being arrested by the law enforcing agencies under the purview of Juvenile Justice Act applicable to them.

In this regard we may reproduce Section 10 of the Juvenile Justice (Care and Protection of Children) Act, 2015 which reads as hereunder:

"Section 10. Apprehension of child alleged to be in conflict with law-(1) *As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall*

be placed under the charge of the special juvenile police unit or the designated Child Welfare Police Officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

*Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lock-up or lodged in jail……..***"**

From the proviso to the aforesaid section of the Act, it is manifestly clear that under no circumstances a juvenile or a child in conflict with law can be put behind bars either in police lock-up or in jail. It is further noted that confinement of juvenile in conflict with law or detention in police custody or jail custody of the child in conflict with law is foreign to the Juvenile Justice Act.

We also find a significant amendment to section 12 of the Act of 2000 which is incorporated in Act of 2015. For the sake of convenience of discussion the previous and the present provisions of section of 12 of the Juvenile Justice Act is enumerated hereunder.

Section 12 of the Act of 2000-Bail of Juvenile. reads as follows*:-"* *(1) When any person accused of a bailable or non-bailable offence and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure 1973(2 of 1974) or in any other law for the time being in force , be released on bail with or without surety*

(or placed under the supervision of a Probation officer or under the care of any fit institution or fit person) but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice……"

Section 12 of the Act of 2015 reads as hereunder- Bail to a person who is apparently a child alleged to be in conflict with law- (1)*When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure 1973(2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or that his release would defeat the ends of justice and the Board shall record the reasons for denying the bail and jurisdiction that led to such a decision……."

Upon going through the aforementioned provisions embodied previously under section 12 of 2000 Act and the subsequent amendment in the said provisions in the 2015 Act, we find that the word "arrested" has been

consciously done away with in the subsequent Act of 2015 by the legislature and replaced with the word "apprehended". Thus, such purposive omission of the word "arrest" clearly shows the intention of the legislature not to apply any coercive measures as far as apprehension of any child in conflict with law is concerned. It has been argued on behalf of the petitioners that the legislature might have used the term "apprehension" in place and instead of "arrest" in Act of 2015 having different connotations but the consequences are the same. We most humbly cannot accept the aforesaid contention made by learned advocate for the petitioners in view of the fact that proviso to Section 10 of the Act says that in no case a child to be alleged in conflict with law shall be placed in police lock-up or lodged in jail. Accordingly, from section 10 and 12 of the Act, 2015 it is quite apparent that the legislature never intended to put a child in conflict with law behind bars and as such laid down varied procedures to be followed in case of apprehension of a child in conflict with law such as (i) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated Child Welfare Police Officer, who shall produce the child before the Board without any loss of time; (ii) The Board shall notwithstanding anything contained in the Code of Criminal Procedure 1973(2 of 1974) or in any other law for the time being in force, release such child on bail with or without surety or place under the supervision of a probation officer or under the care of any

fit person, provided that such child shall not be released if there appears reasonable grounds for believing that the release is likely to bring the child into association with any known criminal or expose the child to moral, physical or psychological danger or that his release would defeat the ends of justice and the Board shall record the reasons for denying the bail and jurisdiction that led to such a decision. Therefore it manifests a definite purpose behind such legislation while making a distinct deviation from the procedure of the Code relating to arrest of a person. Accordingly using the word "apprehension" in place and instead of "arrest" by legislature does not lead to the same consequence. Rather we observe that those words though have similar meaning literally yet its application in the enactment should be construed differently for the reason that the legislature never had the intention of confinement or arrest and detention of the child in conflict with law in any police lock-up or in jail.

10. Further in exercise of powers conferred by section 110 of the Act, 2015 the Union Government has also framed Model Rules namely Juvenile Justice (Care and Protection of Children) Model Rules, 2016. As per the Proviso appended to Rule 8(1) of the Model Rules, no child is to be apprehended except in case of commission of heinous offence or where it is otherwise in his best interest. In all other cases where apprehending the child is not necessary in the interest of the child, the police or Special Juvenile Police Unit or Child Welfare Police Officer shall forward the

information regarding the nature of offence alleged to be committed by the child along with his social background report in Form I to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board. Rule 8(3) reiterates the statutory restraint against transmitting the child to jail, placement of handcuffs, chain or otherwise fetter a child and shall not use any coercion or force on the child and on being apprehended the police officer may send the child to a welfare home till his production before Board. Moreover it mandates that the child be apprised of the charges levelled against him and also be provided with a copy of the FIR if lodged, provide appropriate medical assistance, assistance of interpreter or special educator or any other assistance which the child may require. Additionally, it requires that the child shall not be compelled to confess his guilt and shall be interviewed at Special Juvenile Police Unit or at child friendly premises and it requires the presence of the parents or guardian of the child during such interview and also obliges the authorities to inform the District Legal Services Authority to enable it to provide legal aid to the child. The Rule further prescribes that the juvenile shall not be compelled to sign any statement. Upon completion of the above formalities the child is to be produced before the concerned Board not later than 24-hours from apprehension. Upon reading the aforesaid Rule and various obligations and safeguards put in place it is manifest that apprehension of the child under the Act, 2015 is not akin to arrest or incarceration as otherwise effected under the Criminal

Procedure Code. Thus it is quite apparent that by virtue of the 2015 Act, a distinct, comprehensive and special procedure has been pioneered and introduced relating to apprehension of a child in conflict with law.

The primary issue on presentation of the child before the Board is consideration of Bail. As per provisions of section 12 of the 2015 Act, the Board is required to release the child on bail unless it forms the opinion that the child is likely to fall into the association of known criminals, the release is likely to have a negative physical, moral or psychological impact or otherwise defeat the ends of Justice. When the Board decides to refuse bail, the child is liable to be placed in an observation home till the completion of enquiry initiated under the 2015 Act. Rule 9 of the Model Rules also contains similar provisions as is appearing in section 12 of the 2015 Act.

Accordingly it is found that the 2015 Act and the Model Rules lay down a special procedure in order to deal with the apprehension of a child in conflict with law and the procedure so laid down constitutes a significant departure from the power and procedure for arrest and detention as contained in the Criminal Procedure Code. Upon enactment of the 2015 Act and the Model Rules the legislature intended to put in place a self-contained, comprehensive and inclusive procedure to deal with the apprehension and enquiry of a child in conflict with law.

11. Further Section 1(4) of the Juvenile Justice Act (Juvenile Justice Care and Protection of Children) Act, 2015, provides as hereunder:-

> *"Notwithstanding anything contained in any other law for the time being in force, the provisions of the Act shall apply to all matters concerning children in need of care and protection and children in conflict with law including:-*
>
> *(i)apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social reintegration of children in conflict with law.*
>
> *(ii)procedures and decisions or orders relating to rehabilitation, adoption, reintegration and restoration of children for need of care and protection.*

In view of such provisions of the Act of 2015, the apprehension and/or detention of the child in conflict with law has to be made as per the provisions of the Act namely Section 10 and Section 12 and other provisions. The aforesaid provision also clearly puts in place the overriding effect of the special enactment of 2015 as far as apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social integration of children in conflict with law are concerned. The essential intent underlying section 1(4) underscores that the provisions of the 2015 Act relating to apprehension, detention, prosecution, penalty or imprisonment would apply in respect of children in conflict with law notwithstanding anything contained in any other law for the time being in force.

In order to give effect to certain objects the Act of 2000,was repealed and replaced by the 2015 enactment which came into force on 31 December, 2015 and the statement of objects and reasons of the amending Act is accordingly reproduced hereunder:-

> *"**Statement of objects and reasons**:-Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Articles 39(e) and (f), 45 and 47 further makes the State responsible for ensuring that all needs of the children are met and their basic human rights are protected.*
>
> *2.The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate measures in case of a child alleged as, or accused of, violating any penal law, including (a) treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth (b) reinforcing the child's respect for the human rights and fundamental freedoms of others (c) taking into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*
>
> *3. The Juvenile Justice (Care and Protection of Children) Act was enacted in 2000 to provide for the protection of children. The Act was amended twice in 2006 and 2011 to address gaps in its implementation and make the law more child-friendly. During the course of the implementation of the Act, several issues arose such as increasing incidents of abuse of children in institutions, inadequate facilities, quality of care and*

rehabilitation measures in Homes, high pendency of cases, delays in adoption due to faulty and incomplete processing, lack of clarity regarding roles, responsibilities and accountability of institutions and, inadequate provisions to counter offences against children such as corporal punishment, sale of children for adoption purposes, etc. have highlighted the need to review the existing law.

4. Further, increasing cases of crimes committed by children in the age group of 16-18 years in recent years makes it evident that the current provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000, are ill equipped to tackle child offenders in this age group. The data collected by the National Crime Records Bureau establishes that crimes by children in the age group of 16-18 years have increased especially in certain categories of heinous offences.

5.Numerous changes are required in the existing Juvenile Justice (Care and Protection of Children) Act, 2000 to address the above mentioned issues and therefore, it is proposed to repeal existing Juvenile Justice (Care and Protection of Children) Act, 2000 and re-enact a comprehensive legislation inter alia to provide for general principles of care and protection of children, procedures in case of children in need of care and protection and children in conflict with law, rehabilitation and social re-integration measures for such children, adoption of orphan, abandoned and surrendered children and offences committed against children. This legislation would thus ensure proper care, protection, development, treatment and social re-integration of children in difficult circumstance by adopting a child-friendly approach keeping in view the best interest of the child in mind.

6. The notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives."

Keeping in mind the above objectives the legislature promulgated the 2015 Act repealing the old Act of 2000. As per various provisions of the 2015 Act and the Model Rules it can well be understood without any doubt whatsoever that a child in conflict with law cannot be arrested and thus there cannot be apprehension of arrest of the child. Accordingly, the legislature in its wisdom has done away with the provision of anticipatory bail in the 2015 Act as it intended that a child in conflict with law should not be arrested and put behind bar under no circumstances and the apprehension should be strictly as provided in the 2015 Act. Section 1(4) of 2015 Act is a clear manifestation of the intent of the legislature that the provisions dealing with apprehension and detention of the child will prevail over any other law for the time being in force. For the sake of completeness it may be noted that by the amendment Act 2021 which is introduced by Gazette of India dated 09th August, 2021, no substantial amendment has been made in Section 10 and Section 12 of the Act of 2015 excepting that in Section 12 in sub-section (2), after the words 'observation home', the words ' or a place of safety as the case may be' has been inserted.

12. It has been seriously pressed into service on behalf of the petitioners that in the absence of provisions for anticipatory bail in the 2015 Act,

section 4(2) of the Criminal Procedure Code would not exclude a child in conflict with law to seek anticipatory bail. It is a fact that the 2015 Act is bereft of any provision enabling a child in conflict with law to move an application for anticipatory bail. Section 4(2) of the Criminal Procedure Code provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Thus section 4(2) of the Code would have limited application and be recognised as governing the field in areas for which no special procedure or provision is made as under the 2015 Act. Now the pertinent question which arises at this juncture is whether in its limited application as indicated above, section 4(2) of the Code enables a child in conflict with law to seek anticipatory bail?

Assuming for the sake of argument that if by virtue of the provision of section 4(2) of the Code, section 438 of Criminal Procedure Code for anticipatory bail is made applicable in case of a child in conflict with law, and then in such event we may precisely deal with the consequences that follow therefrom. Generally any application filed before a court of law has two-fold consequences namely the application may be allowed or the same may be rejected. Likewise an application under Section 438 of the Code also carries with it similar consequence as indicated above. Now, the

question arises if an application filed at the instance of the minor for anticipatory bail is rejected what would be the consequence? To find an answer to the aforesaid query we may profitably refer to the proviso to Section 438 of the Code which reads as thus:

> *"provided that, where the High Court, 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 the officer-in-charge of the Police Station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application."*

Therefore rejection of an application for anticipatory impliedly authorises the police to arrest the applicant. However, it should be borne in mind that as per section 10 of the 2015 Act a child in conflict with law under no circumstances is to be put in police lock-up or lodged in jail. Thus the proviso to section 438 of the Code as indicated above gives rise to a situation, upon rejection of an application for anticipatory bail of a minor/child, which is totally contrary to the import of the special legislation of 2015 Act which provides that under no case the child would be put in police lock-up or lodged in jail. We may now look to the other consequence where an application for anticipatory bail of the child in conflict with law is allowed. As per Section 12 of 2015 Act whenever a child is apprehended or detained by the police or appears or brought before the Board, it shall notwithstanding anything contained in the Code of Criminal

Procedure 1973(2 of 1974) or any other law for the time being in force, release the child on bail with or without surety or place the child under the supervision of a probationary officer or under the care of any fit person. The section further empowers the Board not to release such child if it has reasonable grounds to believe that the release of the child is likely to bring the child into association with any known criminal or expose the said person to moral, physical or psychological danger or that his release would defeat the ends of justice. Therefore, we find that there are several statutory parameters to be gone into by the Board while deciding the release of a child in conflict with law upon presentation. The allowing of an application for anticipatory bail of the child in conflict with law may lead to direct intervention into the aforesaid powers of the Board to decide the statutory parameters while releasing a child as envisaged in the provisions.

Thus mere absence of any provision for anticipatory bail in the 2015 Act does not *per se* entitle a child to approach for anticipatory bail under 438 of the Code for the reasons that it impairs the provisions of the 2015 Act and leads to consequences, as discussed above, which are contrary to the provisions of the 2015 Act, if applied.

13. It has been vociferously argued on behalf of the petitioners that there are no express provisions putting embargo in invoking Section 438 of the Code in case of a minor and accordingly, the same is impliedly applicable

in the absence of such express bar and the provisions of Section 3 of Act of 2015, if interpreted can safely be concluded that the structure of the Act of 2015 does not exclude the provisions of anticipatory bail/pre-arrest bail under Section 438 of Criminal Procedure Code. It is a fact that the 2015 Act does not contain any provision expressly putting bar in applicability of section 438 of the Code for anticipatory bail. Be that as it may, we are of the considered view that such aspect automatically does not create any right in the child in conflict with law to seek anticipatory bail for the reason that the 2015 Act represents an all-encompassing, self-contained and exhaustive code laying in place a separate and distinct procedure required to be followed in case of apprehension or detention of a child in conflict with law along with significant and special safeguards in respect of apprehension of a child in conflict with law. Further, as the "apprehension" appearing in the Act of 2015 in that sense is not incarceration or detention by the police as normally understood, hence the anticipation of arrest of a child is misplaced and for that reason, in our view, the legislature did not choose to put any express bar in applicability of section 438 of the Code for anticipatory bail in respect of a child. The extension of provisions of section 438 of the Criminal Procedure Code would apparently interfere with and disrupt the statutory process that is otherwise prescribed to be followed upon apprehension of a child in conflict with law. Further, the provisions of section 3 of the Act of 2015 are

general provisions and it does not extend the applicability of section 438 of the Code.

14. It was further argued that the interpretation which benefits a child in conflict with law should be adopted for ends of justice. In this regard, we are of the opinion that purposive construction must be adopted for ascertaining the true intent of the Parliament as far as the Juvenile Justice Act is concerned. Whether releasing a child in conflict with law is beneficial or keeping him in an observation home is more desirable, are squarely matters which are to be decided by the Board as envisaged under Section 12 of the Juvenile Justice Act and merely allowing the application for anticipatory bail cannot be said to be beneficial for a child in conflict with law.

15. Having noticed the relevant provisions and the underlying scheme of the 2015 Act, the stage is now set to consider the decisions rendered by different High Courts on the subject, placed before us, including our Court.

Let us first deal with the judgments which have held an application for anticipatory bail at the instance of a child in conflict with law to be maintainable.

15.1. In the case of ***Miss A versus State of M.P*** reported in ***ILR (2019) MP 662*** the Madhya Pradesh High Court held that no provision in the Act of

2015, either expressly or by necessary implication, excludes applicability of Section 438 of the Code which provides for grant of anticipatory bail. In the absence of any special provision dealing with grant of anticipatory bail to a juvenile/CICL, the provisions contained in the Code regarding anticipatory bail shall be applicable. The Act of 2015 even otherwise does not exclude general application of the Code, therefore, it cannot be inferred that the legislature intended to give overriding effect to the statutory scheme of the Act of 2015 over the provisions of general application contained in the Code.

15.2. In its decision in the case of ***Birbal Munda & Ors versus The State of Jharkhand*** reported in ***Manu/JH/1400/2019,*** the Jharkhand High Court has held an application under section 438 of the Criminal Procedure Code to be maintainable at the instance of a child in conflict with law on two fold score; firstly, that the non-obstante clause appearing in section 12 of Juvenile Justice (Care and Protection) Act, 2015 does not take away various provisions of bail or anticipatory bail envisaged in the Criminal Procedure Code and secondly apprehending means arrest of a person and such apprehension curtails the personal liberty of a person.

15.3. Similarly, the Chhattisgarh High Court in its decision in ***Sudhir Sharma versus State of Chhattisgarh*** reported in ***2017 SCC Online Chh 1554*** held the application for grant of anticipatory bail under section 438 of the Criminal Procedure Code maintainable at the behest of a child

in conflict with law on the ground that the said remedy is not excluded by operation of section 12 of Act of 2000 or section 12 of Act, 2015.

15.4. Further in its decision *in* ***Mr X (Prashob), S/o Baby V.M versus State of Kerala*** reported in ***2018 (3) RCR (Cri) 327*** the Kerala High Court held that the provisions contained in section 12(1) does not take away the jurisdiction of High Court or Court of Session under section 438 of the Code even by implication and the provision of anticipatory bail is not expressly excluded and merely for reason that the Act provides for apprehending a child in conflict with law and not for arresting him, it cannot be held that the application under section 438 of Code by him is not maintainable.

15.5. In its judgment in the case of ***Krishan Kumar Minor thrugh his mother versus State of Haryana*** reported in ***2020 (3) RCR (Cri) 180*** the Punjab & Haryana High Court held the application for grant of anticipatory bail under section 438 of the Criminal Procedure Code to be maintainable at the behest of a child in conflict with law on the ground that no inference can certainly be drawn that the legislature intended to debar a juvenile from seeking relief of pre-arrest bail and if it was so, then specific provision in that regard should have been there.

15.6. The Gujrat High Court in its decision in ***Kureshi Irfan Hasam bhai thro Kureshi Kalubhai Hasambhai versus State of Gujarat*** reported in ***2021 (O) AIJEK-HC-243111***held the application for anticipatory bail at

the instance of a child in conflict with law to be maintainable on the score that the word 'apprehension' in section 10 of the Act, 2015 is at par with and synonymous with 'arrest' used in section 438 of the Code and further the Act of 2015 does not expressly bar application of section 438 of the Code.

15.7. Upon going through the aforesaid judgements of the different High courts it is found that in ***Birbal Munda & Ors versus The State of Jharkhand (supra)*** *and* ***Kureshi Irfan Hasambhai thro Kureshi Kalubhai Hasambhai versus State of Gujarat (supra)*** it is held that the word 'apprehension' in section 10 of the Act, 2015 is at par with and synonymous with 'arrest' used in section 438 of the Code. Further in all the aforesaid decisions it has been held that as the Act of 2015 does not expressly bar application for anticipatory bail hence the provisions of section 438 of the Code for anticipatory bail are applicable in case of a child in conflict with law. We have already dealt with the aspect that the apprehension appearing in the 2015 Act in that sense is not an incarceration or detention by the police as normally understood. Moreover, we are of the considered view that although the Act of 2015 does not expressly bar application for anticipatory bail, yet that does not *ipso facto* create any right in a child in conflict with law to seek anticipatory bail for the reason that the 2015 Act is a compendious and comprehensive code laying in place a separate and distinct procedure liable to be followed in

case of apprehension or detention of a child in conflict with law including special safeguards in respect of apprehension of a child in conflict with law. Further the legislature in its wisdom has not expressly barred the applicability of section 438 of the Code as the 2015 Act does not provide for detention of the child in police custody or jail and there is no anticipation of arrest. Accordingly we most respectfully cannot agree with such decisions of the aforesaid High Courts.

15.8. In the decision of a co-ordinate bench of this court in ***CRM 5419 of 2021 [Saud (minor) represented by his father Morful Sk*]** as relied upon, the Court granted anticipatory bail to the minor petitioner. However, no issue regarding maintainability of an application for anticipatory bail at the instance of a minor was considered in the said decision.

16. Now we shall proceed to deal with the judgements which say that the application for anticipatory bail at the instance of a child in conflict with law is not maintainable.

16.1. In ***CRM 10177 of 2016, Jiban Mondal, In Re*** reported in ***2017 SCC Online Cal 1919*** a Co-ordinate Bench of this Court held that an application under section 438 of the Code at the instance of a minor is not maintainable as from the sections dealing with the subject it is clear that a child in conflict with law is to be placed under charge of Special Juvenile Police Unit or designated Child Welfare Police Officer and has to be produced before the J.J Board within 24 hours.

16.2. In ***Krishna Garai & Ors versus The State of West Bengal*** reported in ***(2016) 2 C Cr LR (Cal) 561*** a Co-ordinate Bench of this Court held that the Act of 2000 is a special Act carved out from the 1973 Act and meant especially for juveniles and therefore will prevail over the 1973 Act and an application for anticipatory bail by a minor is not maintainable.

16.3.*In* ***CRM 2206 of 2015, Taimina Bibi*** reported *in* ***2015 SCC Online Cal 4299*** a Co-ordinate Bench of this Court held that as the petitioner no.5 in that case was below the age of 18 years, her case be considered by the concerned Juvenile Justice Board and not by them.

16.4. The Allahabad High Court in its decision in ***Shahab Ali (minor) and another versus State of Uttar Pradesh*** reported ***2020 CriLJ4479*** held that the provisions of Section 438 are impliedly excluded after registration of FIR and section 10 of the 2015 Act comes to play and hence an application under section 438 of the Criminal Procedure Code at the behest of a juvenile is not maintainable.

16.5. In the decision in ***K.Vignesh versus State reported in 2017 SCC Online Mad 28442*** the Madras High Court held that from the provisions of the 2015 Act it can well be understood without any doubt whatsoever that a child in conflict with law cannot be arrested and thus there cannot be apprehension of arrest of the child and hence application for anticipatory bail at the instance of a minor is not maintainable.

16.6. The Madhya Pradesh High Court in its decision passed in ***Kamlesh Gurjar versus State of M.P*** reported in ***2020 (1) RCR (Cri) 434*** held that in the absence of specific provisions in the Act of 2015, a juvenile is not entitled to move an application under section 438 of the Criminal Procedure Code, 1973.

16.7. At the outset we accept and concur with the observation of a co-ordinate Bench of this Hon'ble court made in ***Krishna Garai & Ors versus The State of West Bengal (supra)*** that the special law will prevail over the 1973 Code and thus the Juvenile Justice Act has an overriding effect over any other law for the time being in force. Hence, an application for anticipatory bail at the instance of a minor is not maintainable. This court further in ***Jiban Mondal, In Re (supra)*** *and* ***Taimina Bibi (supra)*** held the an application for anticipatory bail at the instance of a minor to be not maintainable, due to statutory obligation envisaged in the Act and we respectfully agree with such observations. We also agree with the observations of the courts made in ***Shahaab Ali (minor) and another versus State of Uttar Pradesh (supra)*** regarding exclusion of the provisions of Section 438 of the Code upon registration of FIR and in ***K.Vignesh versus State (supra)*** making an application for anticipatory bail not maintainable at the instance of a minor as there is no apprehension of arrest of a child in conflict with law. As regards ***Kamlesh Gurjar versus State of M.P (supra)*** we are of the considered view that

absence of provisions for anticipatory bail in the 2015 Act cannot be the only ground of disentitling a minor from seeking anticipatory bail.

17. Learned Advocate appearing for the petitioners placing reliance on the decision of Hon'ble Apex Court *in* ***Shilpa Mittal versus State (NCT of Delhi) (supra)*** argued that the purpose of the Act of 2015 is to protect a juvenile /child in conflict with law and therefore when two views are possible, the one which favours the child in conflict with law should be adopted. In the aforesaid decision the Hon'ble Apex Court had the occasion to deal with the category of offences under the Juvenile Justice Act and observed that where the offence is not covered under section 2(33) of the Act the same should be treated as 'serious offence' within the meaning of section 2(54) till the Parliament takes steps to clarify the position and while dealing with the said aspect observed that when two views are possible, the one that would favour the child in conflict with law should be preferred. In the case in hand we are dealing with maintainability of an application for anticipatory bail which cannot be equated with the legal question that was before the Hon'ble Apex Court in the aforesaid decision and as such the ratio does not apply in the present case.

18. It is found that there are various safeguards provided to a child in conflict with law in the event the child is apprehended by the police. Taking into consideration the safeguards provided under the 2015 Act and in the light of the legal position that a child in conflict with law cannot be

arrested, the question of granting bail in anticipation of arrest of a child in conflict with law does not arise at all. In the 2015 enactment the legislature did not, consciously, empower the police to arrest a child in conflict with law. Accordingly, we are of the considered view that an application for anticipatory bail under section 438 of the Criminal Procedure Code at the instance of a child in conflict with law is not maintainable.

19. The interim order, accordingly, stands vacated.

20. In the light of above observation, CRM no. 2739 of 2021 is dismissed.

21. However, although neither of the sides drew our attention to the Judgment of a Division Bench of this Court, the Judgment in the case of ***Miss Surabhi Jain (Minor) & Ors. in CRM 405 of 2021*** has come to our notice. In that Judgment, a Coordinate Bench has come to the conclusion that an application for anticipatory bail at the instance of a minor/juvenile is maintainable. That Bench has differed from the conclusion reached by an earlier Division Bench of this Court in the Case of ***Krishna Garai v. The State of West Bengal, 2016 (5) CHN (Cal) 157*****,** wherein it was held that such an application is not maintainable. The Division Bench in the case of ***Miss Surabhi Jain (Minor) & Ors. in CRM 405 of 2021,*** referred the issue to the Chief Justice to constitute a larger Bench to decide the point. However, the Division Bench, being of the view that such an application is maintainable, allowed the application on merit.

We respectfully disagree with the conclusion reached by the coordinate Bench in the case of ***Miss Surabhi Jain (Minor) & Ors. in CRM 405 of 2021.*** We have recorded our detailed reasons hereinabove as to why in our opinion, an application for anticipatory bail at the instance of a minor/juvenile is not maintainable. Accordingly we have dismissed the application. However, we also request the Hon'ble Chief Justice to constitute a larger Bench to decide as to whether or not an application for anticipatory bail under section 438 of the Cr.P.C at the instance of a minor/juvenile is maintainable, in view of the fact that there is divergence of opinion between coordinate benches of this Court in that regard.

22. Accordingly, CRM no.2739 of 2021 stands disposed of.

23. All parties shall act on the server copies of this order duly downloaded from the official website of this Court.

Bivas Pattanayak, J

I Agree,

Arijit Banerjee, J