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WITH
[6] ANTICIPATORY BAIL APPLICATION NO. 372 OF 2021
Zoheb Nazir Ahmed Shaikh ... Applicant
Versus
The State of Maharashtra & Anr. ... Respondents

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WITH
[7] ANTICIPATORY BAIL APPLICATION NO. 397 OF 2021
Neeraj Shyam Sahay ... Applicant
Versus
The State of Maharashtra & Ors. ... Respondents

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WITH
[8] ANTICIPATORY BAIL APPLICATION NO. 399 OF 2021
Sonal Neeraj Sahay ... Applicant
Versus
The State of Maharashtra & Ors. ... Respondents

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WITH
[9] ANTICIPATORY BAIL APPLICATION NO. 627 OF 2018
Javed Anand and Anr. ... Applicants
Versus
The State of Gujarat & Ors. ... Respondents

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WITH
[10] ANTICIPATORY BAIL APPLICATION (STAMP) NO.1628 OF 2020
Mohammad Hameed Shaukat Ali ... Applicant
Versus
The State of Maharashtra & Anr. ... Respondents

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WITH

[11] ANTICIPATORY BAIL APPLICATION NO. 1839 OF 2021

Kawal Chamanlal Sharma ... Applicant

Versus

The State of Maharashtra & Anr. ... Respondents

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WITH

[12] ANTICIPATORY BAIL APPLICATION (STAMP) NO.3544 OF 2020

Nandini N. Suchde ... Applicant

Versus

The State Of West Bengal & Anr. ... Respondents

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WITH

[13] ANTICIPATORY BAIL APPLICATION NO.1628 OF 2021

Vishnu @ Shreenivas Laxman
Jagdale and others ... Applicants

Versus

The State of Maharashtra ... Respondent

.....

WITH

[14] ANTICIPATORY BAIL APPLICATION NO. 1770 OF 2021

Amol Gunaji Sonawane & Anr. ... Applicants

Versus

The State of Maharashtra & Anr. ... Respondents

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Mr. Mihir Desai, Senior Advocate i/by Mr. Mihir Joshi for Applicant in
ABA/627/2018.Mr. Amit Desai, Senior Advocate a/w Mr. Gopalakrishna Shenoy and Mr.
Mitesh Jain, Jarin Doshi i/by Mr. Kalpesh Joshi Associates for Applicant in
ABA/162/2022.

Mr. Satish Maneshinde a/w Deepal Thakkar i/by Ms. Anandini Fernandes for

Applicant in ABA/397/2021 and ABA/399/2021.

Mr. Ashok Bhatia, for Applicant in ABA/161/2022.

Mr. Ram Mani Upadhyay for Applicant in ABA/1839/2021.

Mr. Alankar Kirpekar a/w Mr. Sagar Kasar i/by VMK Legal for Applicant in ABA/186/2022.

Mr. Onkar Chandurkar a/w Rajesh Devgharkar, Umeash Waydande, Neha Patail and Meghnesh Birwadkar i/by Akshay Vijay Kamble for Applicants in ABA/1770/2021.

Ms.Saima Ansari i/b. Hulylkar & Associates in ABAS/1628/2020

Mr. Anil C. Singh, Ld. ASG a/w Mr. Aditya Thakkar, Ms. Savita Ganoo, Dr. D. P. Singh, Ms. Smita Thakur and Mr. Pranav Thackur for Respondent / Union of India.

Mr. A. A. Kumbhakoni, Ld. A.G. a/w. Smt. G. P. Mulekar, APP and Shri. Manoj Badgujar for Respondent-State.

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**CORAM : S. S. SHINDE AND
SARANG V. KOTWAL, JJ.**

**RESERVED ON : 22nd APRIL, 2022
PRONOUNCED ON : 05th MAY, 2022**

ORDER : [PER SARANG V. KOTWAL, J.]

1. This matter is placed before us to answer the reference made by a Single Judge of this Court (Coram: Revati Mohite Dere, J.) in Anticipatory Bail Application No.627/2018 vide order dated 5.4.2018 and the corrected order dated 30.8.2019 in the case of **Javed Anand and another Vs. State of Gujarat and another**. Following are the issues framed for reference :

- (1) Whether an application for transit anticipatory bail for a short duration, is maintainable in order to enable the accused to approach the Court of appropriate jurisdiction for seeking regular anticipatory bail for a short duration ?
- (2) Whether the order dated 14th September, 2017 passed by Gadkari, J. in Anticipatory Bail Application No. 1599 of 2017 and other connected applications, on the basis of the observations made by the Apex Court in an interim order dated 14th June, 2013 would lay down the law, that an application seeking transit anticipatory bail is not maintainable ?
- (3) Whether the judgment of the Division Bench of this Court in the case of **N.K. Nayar, Director, Hastinapur Metals Ltd. Bombay and others Vs. State of Maharashtra and others**¹ is a binding precedent ?

2. Reference to a Larger Bench was necessitated because Her Ladyship disagreed with a view of another Bench presided over by learned Single Judge (Coram: A.S. Gadkari, J.), expressed in the order dated 14.9.2017 passed in Anticipatory Bail Application No.1599/2017 in the case of **Dr. Augustine Francis Pinto and another Vs. The State of Maharashtra and others**. Gadkari, J. took a view that such applications for transit anticipatory bail were not maintainable.

1 1985 Mh.L.J. 450 [Division Bench of Bombay High Court]

3. Though the term ‘transit anticipatory bail’ is not defined or mentioned under the Code of Criminal Procedure, generally it is understood to mean - ‘Order under Section 438 of Cr.P.C. for a short duration in respect of an offence registered in a different state to enable the Applicant/s to approach the Court in that state for obtaining regular order under Section 438 of Cr.P.C.’.

4. Both these conflicting orders make specific reference to a few judgments and orders dealing with the issue of Transit Anticipatory Bail. They are as follows:

- i. **N.K. Nayar** (supra);
- ii. **Syed Zafrul Hassan and another Vs. State**²
- iii. **Sailesh Jaiswal Vs. The State of West Bengal & others**³
- iv. **Sandeep Sunilkumar Lohariya Vs. Jawahar Chelaram Bijlani @ Suresh Bijlani and others**⁴.

5. We have heard Shri Mihir Desai, learned Senior Counsel, Shri Amit Desai, learned Senior Counsel, Shri Ashok Bhatia, learned Counsel, Shri Onkar Chandurkar, learned Counsel, for the respective Applicants in Anticipatory Bail Applications, Shri Anil

2 1986 SCC OnLine Pat 3 [Full Bench of Patna High Court]

3 1998 SCC OnLine Cal 215 [Five Judge Bench of Calcutta High Court]

4 Order dated 14.6.2013 passed by Hon’ble Supreme Court in Special Leave to Appeal (Crl.) No.4829/2013.

Singh, learned Additional Solicitor General for Union of India and Shri A. A. Kumbhakoni, learned Advocate General for the Respondent-State of Maharashtra.

6. Learned A.S.G. Shri Singh and learned A.G. Shri Kumbhakoni took the empathetic stand that such type of orders cannot be passed since legally they are not sustainable; and neither a Sessions Court nor a High Court in one State can give protection in the nature of the order under Section 438 of Cr.PC. in relation to an offence registered in a some other State. The thrust of the argument of Shri Singh, learned A.S.G., is that the order in **Sandeep Lohariya's** case (supra) has concluded the issue and there was no necessity to consider any other judgment of any other High Court to decide the issue.

7. Learned A.G. Shri Kumbhakoni submitted that such orders granting transit anticipatory bail could not be passed; however he argued that, the issues referred by learned Single Judge are important and the same need to be decided by a Larger Bench. In support of his contention that further reference be made to a Larger Bench for deciding these issues of public importance, our

attention was invited to Rule 8 of Chapter-I of the Bombay High Court, Appellate Side, Rules. Learned A.G. did not agree with the submission of learned ASG that the order in **Sandeep Lohariya's** case has concluded the issue. According to learned A.G., **Sandeep Lohariya's** order has no binding precedent.

8. Learned Senior Counsel Shri Amit Desai and Shri Mihir Desai, on the other hand, took a firm stand that by invoking Section 438 of the Cr.P.C. such orders can be passed in the interest of justice. Both of them, in fact, submitted that even final orders in the nature of protection under Section 438 of Cr.P.C. can be passed in such a situation. It is jointly submitted that order dated 14th June 2013 passed in the case of **Sandeep Lohariya's** has no binding precedent as it was passed at an interim stage. It appears from the perusal of order passed by the learned Single Judge (Coram : Revati Mohite Dere, J.) that Shri Mihir Desai's submissions in that behalf were accepted in the order of reference.

9. In addition to submissions made by Shri Mihir Desai, learned Senior Counsel, Shri Amit Desai, learned Senior Counsel submitted that the power under Section 438 of Cr.P.C. flows from

Article 21 and, therefore, in a given case it can be elevated to the pedestal of Article 21 because liberty of a person is paramount. In a given case, the statutory rights merge with the constitutional rights and, therefore, Section 438 of Cr.P.C. should be given its effect without any limitations.

10. Shri Amit Desai, learned Senior Counsel submitted that maintainability of an anticipatory bail application should not be decided on the basis of consideration of territorial jurisdiction. A reasonable apprehension of any person of his/her arrest should be the guiding factor and not the territorial jurisdiction. He submitted that giving rise to such apprehension itself is a cause of action giving jurisdiction to a Court before which such apprehension is expressed by such person. He further submitted that the Courts are empowered to pass orders under Section 438 of Cr.P.C. for a limited duration and for all practicable purposes this could be resorted to, to enable the Applicant to approach the appropriate Court.

11. Shri Amit Desai further submitted that the High Courts and the Sessions Court are empowered to grant even final relief though the offence is registered beyond their territorial jurisdiction.

He submitted that the order in the nature of transit anticipatory bail can be termed as final order under Section 438 for a limited duration to enable the Applicant to approach the Court under whose jurisdiction the alleged offence is actually registered. He further maintained that the High Courts and the Sessions Court do have jurisdiction to decide such applications though the offence may be registered outside their territorial jurisdiction.

Learned counsel appearing for the respective parties were unanimous to contend that the issues involved in this matter can be more advantageously heard by Larger Bench. Learned A.S.G. left it to the discretion of the Court whether to refer it to a Larger Bench.

12. These, in short, are the submissions made by the parties. Of course, they have elaborately made their submissions by reading different judgments, which we shall refer to in the following discussion.

At the outset, we may mention that we are inclined to refer these issues to a Larger Bench and, therefore, we are refraining from making any conclusive observations.

13. After hearing the arguments, the first issue which we considered was, whether we can refer these issues to a Larger Bench and as to whether for such exercise it was necessary to record our disagreement with the view expressed by another Division Bench in **N.K Nayar's** case (supra). To consider this, it is necessary to reproduce Rule 8, Chapter I of the Bombay High Court Appellate Side Rules, 1960 (for short, 'Appellate Side Rules') which reads as follows :

“

CHAPTER I

JURISDICTION OF SINGLE JUDGES AND BENCHES OF THE HIGH COURT

8. Reference to two or more Judges.—If it shall appear to any Judge, either on the application of a party or otherwise, that an appeal or matter can be more advantageously heard by a Bench of two or more Judges, he may report to that effect to the Chief Justice who shall make such order thereon as he shall think fit.”

A bare reading of this Rule suggests that the power to make such a reference definitely lies with a Single Judge. But, the question whether it also lies with the Division Bench; if it was felt that the matter can be more advantageously heard by a Larger Bench; is answered by a Five Judges' Bench of this Court in the case of **State**

of Maharashtra Vs. Kusum Charudutt Bharna Upadhye⁵. The Bench was considering Rule 28 of Chapter I of the Bombay High Court Original Side Rules, 1980 (for short, 'Original Side Rules'), which was reproduced in paragraph-15 of that judgment. Said Rule 28 reads thus :

“

**CHAPTER I
ORIGINAL JURISDICTION**

- 28. Reference to two or more Judges:** - If it shall appear to any Judge, either on the application of a party or otherwise, that a suit or matter can be more advantageously heard by a bench of two or more Judges, he may report to that effect to the Chief Justice, who shall make such order thereon as he shall think fit.”

Learned Judges made a reference to Rule 28 of the Original Side Rules, which is worded similar to Rule 8 of Chapter I of the Appellate Side Rules; and after giving their reasons based on the General Clauses Act, they held that the words "any Judge" occurring in Rule 28 would include "any Judges, whether two or more, exercising original jurisdiction of the High Court.”

The same principles should apply to Rule 8 of Chapter I of the Appellate Side Rules. We agree with Shri Kumbhakoni in

5 1980 SCC OnLine Bom 309

that behalf and under that Rule a reference to a Larger Bench can be made even by a Division Bench if it appeared that the matter can be more advantageously heard by a Larger Bench.

14. Shri Kumbhakoni submitted that for reference to a Larger Bench, conflict with the coordinate Bench of equal strength is not necessary. To support this submission, he relied on the judgment of a Full Bench of this Court in the case of **Anant H. Ulahalkar and another Vs. Chief Election Commissioner and others**⁶. In paragraph-15, the Full Bench considered the submissions regarding incompetency of the reference to proceed upon the premise that the power of the Chief Justice to make such reference was confined only to cases where a conflict was noticed between decisions of two or more coordinate Benches. The Full Bench observed that such a premise was neither supported by any legal provisions nor by precedents. The Full Bench proceeded to answer the reference which was made by a Division Bench on forming the opinion that the matter, in that case, could be more advantageously heard by a Bench of more than two Judges.

⁶ 2017(1) Mh.L.J. 431 [Full Bench]

Thus, from these observations, it is clear that we do not have to disagree with the view expressed in **N.K. Nayar's** case (supra); and yet, we can refer the matter to a Larger Bench if we form an opinion that it can be more advantageously heard by a Larger Bench of more than two Judges. Such course of action was recently adopted by a Division Bench headed by Hon'ble the Chief Justice (Coram:Dipankar Datta, CJ & M.S.Karnik, J) vide order dated 25.11.2021 passed in (O.S.) Writ Petition No.2935/2018 in the case of **Jalgaon Janta Sahakari Bank Ltd. and another Vs. Joint Commissioner of Sales Tax and another** with other companion Petitions.

15. Based on the reasons mentioned in the following discussion, we are also inclined to adopt a similar approach.

16. To emphasize the complexity and the importance of the issue involved, it is now necessary to refer to the divergent views expressed by different High Courts. Most of these judgments have referred to a landmark judgment of the Hon'ble Supreme Court in the case of **Shri Gurbaksh Singh Sibbia and others Vs. State of Punjab**⁷.

⁷ (1980) 2 SCC 565

As is well known, the judgment discusses the scope of Section 438 of Cr.P.C. in the background of Article 21 of the Constitution of India. This judgment considered various facets of the powers under Section 438 of Cr.P.C. It was observed that there was no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because these are higher courts manned by experienced persons and their orders are not final but are open for appeal or revisional scrutiny and above all; because, discretion has always to be exercised by Courts judicially and not according to whims, caprice or fancy.

17. Shri Mihir Desai submitted that **Shri Gurbaksh Singh Sibbia's** case indicates that there is absolutely no restriction on exercise of the powers under Section 438 of Cr.P.C. and, therefore, this power can be exercised by the Sessions Court or the High Court in Maharashtra in respect of the offences registered outside the State of Maharashtra.

18. Shri Kumbhakoni, learned A.G., on the other hand, submitted that the exercise of such powers will have to be circumscribed by the territorial limits of the High Court and the

Sessions Court in that particular State. He submitted that the High Court cannot pass orders directing the authorities beyond the territorial limits of the High Court and similarly the Sessions Court cannot give directions to the authorities outside its territorial limits.

19. The term 'High Court' is defined under Section 2(e) of Cr.P.C. thus :

“2. Definitions.-- In this Code, unless the context otherwise requires,--

(e) “High Court” means, –

- (i) in relation to any State, the High Court for that State;
- (ii) in relation to a Union territory to which the jurisdiction of the High Court for a State has been extended by law, that High Court;
- (iii) in relation to any other Union territory, the highest Court of criminal appeal for that territory other than the Supreme Court of India;”

Article 214 of the Constitution of India refers to 'High Court' as follows :

“214. High Courts for States.--There shall be a High Court for each State.”

Territorial limits of the High Court can be related to these two provisions.

20. Various judgments taking different views were cited before us. We are referring only to a few prominent judgments in that behalf.

JUDGMENTS TAKING A VIEW THAT SUCH ORDERS CANNOT BE PASSED :

21. The prominent judgments taking a view that such power cannot be exercised outside the territories are as follows :

- (i) **Syed Zafrul Hassan** (supra);
- (ii) **Sailesh Jaiswal** (supra); and
- (iii) **Mathews Peter and others Vs. State of Maharashtra and others**⁸

22. The Full Bench of Patna High Court in **Syed Zafrul Hassan** (supra) was answering the question whether Section 438 of the Code of Criminal Procedure, 1973 envisages the grant of anticipatory bail by any High Court or any Court of Session within the country, irrespective of the locale of the commission of the offence. It was observed in that judgment that the law assumes in this context, that, the reference to the Court is in terms of the Court having territorial jurisdiction. In the said judgment, the phraseology “the High Court” or “the Court of Session” was considered emphasizing the fact that, it meant the Court having jurisdiction

8 1999 SCC OnLine AP 1180

over the area where a non-bailable offence was committed. After a detailed discussion, ultimately it was held that such power vests only in the Court of Session or the High Court having jurisdiction over the locale of the commission of offence of which a person is accused.

23. The same issue fell for consideration before a Five Judge Bench of Calcutta High Court in the case of **Sailesh Jaiswal** (supra). It was ultimately held that the reasoning of the Full Bench decision of the Patna High Court in the case of **Syed Zafrul Hassan** (supra) appeared to be more reasonable and convincing and, therefore, the said Bench of Calcutta High Court agreed with the views of the Full Bench decision in **Syed Zafrul Hassan** (supra). While agreeing with this view, the Five Judge Bench of Calcutta High Court disagreed with the view of a Single Bench of Karnataka High Court expressed in the case of **L.R. Naidu Vs. State of Karnataka**⁹, wherein it was held that the place of offence was not material while considering the prayer for bail and the Applicant could move before the Court where he ordinarily resides even though the offence was committed

9 1984 Cri.L.J. 757

outside the jurisdiction of that Court.

24. In the case of **Mathews Peter** (supra) a Division Bench of High Court of Andhra Pradesh held that it is the place of offence which determines the jurisdiction for anticipatory bail and not the place of residence of the accused.

25. It was contended by Shri Kumbhakoni that if final relief could not be granted for want of territorial jurisdiction, then even the interim relief for a short duration, which is described as 'transit anticipatory bail', cannot be granted.

26. Since the bench presided over by Justice A. S.Gadkari has relied extensively on the case of **Sandeep Lohariya** (supra) and since the issue under reference makes a reference to that Order, it would be appropriate to refer to the observations in the said Order. In the case of **Sandeep Lohariya** (supra), the offence had taken place within the jurisdiction of Vashi Police Station, Navi Mumbai, Maharashtra under Sections 302, 120B read with 34 of IPC and under Sections 3 and 25 of the Arms Act. The accused Sandeep in that case had applied for anticipatory bail before this High Court, which was

rejected vide order dated 25.2.2013. Thereafter, he had filed an application for anticipatory bail in the nature of transit bail before the High Court of Madhya Pradesh. In that background, the Hon'ble Supreme Court passed the order on 14th June 2013. We reproduce the said order in **Sandeep Lohariya's** case (supra) in its entirety, as under :

“These special leave petitions have come up before this Court challenging the order passed by the High Court of Madhya Pradesh Bench at Indore in which notice has already been issued by this Court and the impugned order has been stayed. The matter came up before us in the category of 'notice served' cases and on perusal of the impugned order and hearing the counsel for the parties; we are amazed and shocked to see the nature of the order passed by the High Court of Madhya Pradesh in M.Cr.C. No. 3807 of 2013 whereby the High Court has granted transit bail to the respondent no. 1 even without notice to the State of Maharashtra where the case against the respondent no.1/accused was registered; although admittedly he is an accused in a case under Sections 302, 120B, 34 of the Indian Penal Code, 1860 and under Section 3 and 25 of the Arms Act, which offence took place at Police Station Washi, Navi Mumbai, Maharashtra. The respondent no.1/ accused thereafter applied for anticipatory bail before the High Court of Bombay which was rejected vide order dated 25.02.2013.

Thereafter, the respondent no.1/accused appears to have filed an application for anticipatory bail in the nature of transit bail, which in our view has no provision under the Code of Criminal Procedure, 1973. The High Court of Madhya Pradesh, without considering as to whether the bail application was maintainable before it or not in regard to an incident which took place at Police Station Washi, Navi Mumbai, Maharashtra and the High Court of Bombay had already rejected the anticipatory bail application of the respondent no.1, ignoring the fact that the order of the High Court of Bombay was upheld by this Court in SLP(Crl) No.2790/2013 vide order dated 29.04.2013. Learned senior counsel for the respondent submitted that one of the matter was dismissed as withdrawn. However, the implication of this order is quite clear that the order of the High Court of Bombay was refused to be interfered with by this Court and the SLP against the same practically was dismissed and the order of the High Court of Bombay was upheld. Thereafter, the respondent no. 1 had also filed a second special leave petition SLP(Crl.) No.4297/2013 against the same order, which also was dismissed vide order dated 13.05.2013. In spite of the aforesaid orders, the High Court of Madhya Pradesh entertained anticipatory bail application termed as transit bail application.

It is difficult to comprehend under what provisions and under what authority of law such an application was even registered by the High Court of Madhya Pradesh. In our view it is an absolutely

shocking order which has been brought to the notice of this Court, hence we deem it appropriate to direct the Petitioner-State of Maharashtra as also the Petitioner-complainant/son of the deceased to implead the High Court of Madhya Pradesh in these petitions. Thereafter a notice be issued to the High Court of Madhya Pradesh through the Registrar indicating to file reply as to how the bail application of the respondent no.1/accused was even registered by the High Court before it was taken up by the Bench and also as to whether the Bench was apprised of the fact of rejection of his anticipatory bail application by the High Court of Bombay, which was upheld by the Supreme Court of India on two occasions.

List for further arguments on 12.07.2013.

In the meantime the respondent no.1/accused is directed to surrender forthwith before the concerned Trial Court in the State of Maharashtra.”

It was specifically observed in this order that there was no provision under Cr.P.C. for grant of anticipatory bail in the nature of transit bail. It was also observed that it was difficult to comprehend under what provisions and under what authority of law such application was even registered by the High Court of Madhya Pradesh.

27. However, learned Advocate General and learned counsel for various Applicants raised an issue which was also in fact was raised before the bench presided over by Justice Revati Mohite Dere

that the order passed **Sandeep Lohariya's** case (supra) was in the nature of interim order and it had not decided the question and, therefore, it was not a binding precedent. It was argued on behalf of these parties that the said matter was posted by the Supreme Court for further arguments on 12.7.2013 and, therefore, the issue was not concluded by said order dated 14.6.2013.

28. Learned A.S.G. however, supported the view taken by Gadkari, J.. He submitted that, as far as the issue of transit anticipatory bail is concerned, it was concluded on the date of this order i.e. on 14.6.2013 because the accused was directed to surrender forthwith before the concerned trial Court in the State of Maharashtra. Therefore, according to learned A.S.G., this issue was specifically referred to in the order and it was observed that there was no such provision for transit anticipatory bail. According to learned A.S.G., this concluded issue and the observations of the Hon'ble Supreme Court were binding.

29. The bench presided over by Justice A.S.Gadkari, in fact, had taken a similar view in respect of which the bench presided over by Justice Revati Mohite Dere had expressed a different

opinion. However, since we are proposing to refer all the issues to a Larger Bench, we are refraining from making any observations as to whether this order in **Sandeep Lohariya's** case (supra), is in the nature of interim order or final order and whether it, therefore, decides the issue involved. Various judgments were cited before us to canvass what is '*ratio decidendi*', what is '*obiter dicta*' and whether such observations can have binding effect. Since we are not expressing any opinion about the binding nature of this order and since we are leaving this issue to be decided by a Larger Bench, we are not expressing any opinion whether these observations are either *ratio decidendi* or *obiter dicta* and as to whether they are binding precedents.

JUDGMENTS TAKING VIEW THAT SUCH ORDERS CAN BE PASSED:

30. As mentioned earlier, there are various judgments which have taken a view that such orders can be passed protecting the citizens either for a limited period or by way of final relief in respect of an offence registered in a different state. A few prominent judgments are discussed in the following paragraphs.

31. The Madras High Court in the case of **S.P. Shanthi Swaroop Vs. State of Tamil Nadu**¹⁰ has considered the Patna High Court Full Bench judgment in **Syed Zaful Hassan** (supra) and disagreed with that view. It was observed in the concluding paragraph that, the view taken by the Full Bench of the Patna High Court was an extreme one and it was against the very concept of anticipatory bail as provided under Section 438 of Cr.P.C. and also was affecting the liberty of the person whose liberty is guaranteed under the Constitution of India providing necessary safeguards against arrest. The definition of 'High Court' provided under Section 2(e) of Cr.P.C. had no relevance in that context and it cannot be said that in view of the said definition, the High Court cannot exercise the power of granting anticipatory bail under Section 438 of Cr.P.C. in respect of persons who are sought to be arrested or who face threat of arrest within the jurisdiction of that particular High Court where the apprehension arises. In arriving at this conclusion, the Madras High Court relied on **Shri Gurbaksh Singh Sibbia's** case (supra). At the same time, in the same judgment, the Madras High Court clarified that while granting anticipatory bail the High Court had to

¹⁰ 1990 SCC OnLine Mad 914

restrict the relief for a limited period and had to direct the concerned persons to move the Court which was having jurisdiction over the matter in the meantime and also could impose such conditions so as to make the petitioners available for interrogation by the concerned police in the meantime.

Thus, though this judgment in **S.P. Shanthi Swaroop's** case (supra) granted limited relief, the last observations meant that ultimately the final relief had to be obtained from the Court having jurisdiction over the matter. To that extent, the view is different from **N.K. Nayar's** case (supra).

32. The Delhi High Court went a step further in the case of **Capt. Satish Kumar Sharma Vs. Delhi Administration and others**¹¹. This judgment considered the ratio in the cases of **Shri Gurbaksh Singh Sibbia** (supra), **N.K. Nayar** (supra) and **Syed Zafral Hassan** (supra). It was ultimately held that though the Petitioner before the Delhi High Court was apprehending arrest in respect of non-bailable warrant issued by C.J.M. Sultanpur, State of Uttar Pradesh, there was a threat of deprivation of liberty of the petitioner in Delhi in

11 ILR (1990) I Delhi 203

connection with an offence alleged to have been committed in the State of Uttar Pradesh; the cause of action in part arose in Delhi. Therefore, the Delhi High Court had jurisdiction in the matter irrespective of the seat of the Government or the High Court within whose jurisdiction the offence had allegedly been committed. It was further held that since the petitioner had reason to believe that he could be arrested in Delhi on an accusation of having committed a non-bailable offence, the Delhi High Court had the jurisdiction to enlarge the petitioner on anticipatory bail under Section 438 of Cr.P.C. as well as under Article 226 of the Constitution of India.

. This judgment suggests that even a final relief can be granted by a High Court though the offence was not committed within the jurisdiction of that Court.

33. The main judgment which this Court needs to discuss is a Division Bench judgment of this Court itself in the case of **N.K. Nayar** (supra). After that judgment, all the Courts in Maharashtra have been following this particular ratio expressed in this judgment. In that case, the FIR was filed at Rai Police Station, Sonapat District in the State of Haryana and the Applicants were

apprehending their arrest in Mumbai as they were permanent residents of Mumbai.

Again after referring to the observations in **Shri Gurbaksh Singh Sibbia's** case (supra) and other judgments, viz., the judgment of the Karnataka High Court in the case of **Dr. L.R. Naidu Vs. State of Karnataka**¹² and also the judgment of the Calcutta High Court in the case of **B.R. Sinha Vs. The State**¹³, in the concluding paragraph it was observed that an order of anticipatory bail would have a relevancy to the moment of arrest of the concerned person and, therefore, this Court would have the jurisdiction if a person was likely to be arrested at a place within the jurisdiction of this Court even if the offences were allegedly committed outside the State of Maharashtra. Having observed thus, the Court also considered a practical difficulty that the Public Prosecutor in Mumbai would not have details of the offence and other material in respect of the offence and it was ultimately observed that the Bench intended to exercise their powers under Section 438 of Cr.P.C. by granting anticipatory bail for a period of one month to enable the Applicants

12 1984 Cr.L.J. 757

13 1984 Cr.L.J.61

to move appropriate Courts for seeking appropriate orders. It was clarified that the anticipatory bail order was to stand automatically vacated at the end of that period if in the intervening period no orders about grant of anticipatory bail from the appropriate Court were obtained. The concluding lines of this judgment are also important which read thus :

“In the event of the arrest of the applicants in the territory of this State each of the applicants be released on bail upto 12th April, 1985 on each of them executing a personal recognizance bond of Rs.2000/- and a surety in the like amount.”

The analysis of this judgment shows that the Division Bench held that anticipatory bail under Section 438 of Cr.P.C. can be granted to a person apprehending arrest in this State though the offence is registered in a different State. The discussion indicates that the relief in the nature of final relief can be granted. However, considering the practical difficulties the relief actually granted by the Court was restricted to a period of one month. The important words in the operative portion were that “In the event of the arrest of the applicants in the territory of this State.....”. This operative part gives rise to a practical difficulty that for the period of one

month if the Applicants were not arrested at all then this order was practically ineffective as the applicants could not step out of this State without protection if they were not arrested in this State. This position needs to be clarified.

34. There is one more aspect which needs to be considered if it has to be held that **N.K. Nayar's** case (supra) is still good law. After this judgment was delivered in 1985, there was a subsequent Maharashtra amendment of 1993 to this particular Section 438 of Cr.P.C. The amended provision reads thus :

" Maharashtra:

For section 438, substitute the following section, namely:-

“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 that in the event of such arrest, he shall be released on bail; and that Court may, after taking into consideration, *inter alia*, the following factors:--

- (i) the nature and gravity or seriousness of accusation as apprehended by the applicant;
- (ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a

Court, previously undergone imprisonment for a term in respect of any cognizable offence;

- (iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested, and
- (iv) the possibility of the appellant, if granted anticipatory bail, fleeing from justice, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

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

- (2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of, anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit; and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:--
 - (i) that the applicant shall make himself available for interrogation by a police officer as and when required;
 - (ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the

- facts of the accusation against him so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (iii) that the applicant shall not leave India without the previous permission of the Court; and
 - (iv) such other conditions as may be imposed under sub-section (3) of section 437 as if the bail was granted under that section.
- (3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice, being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Commissioner of Police or, as the case may be, the concerned Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.
- (4) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.
- (5) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order made under sub-section (1).]

[*Vide* Maharashtra Act 24 of 1993, sec. 2 (w.e.f. 28-7-1993)]”

The amendment may impact the reasoning and effectiveness of this judgment. After the amendment, which is still in force today, two steps were contemplated. At the first stage, either interim relief could be granted or the application itself could be rejected. If interim relief is granted and the matter is posted for consideration at the final stage then the Court may either confirm, modify or cancel the interim order. Therefore, the question would arise if the interim order is granted by the Court in Maharashtra whether it can be confirmed, modified or cancelled by a Court outside the State. In this respect, Shri Amit Desai submitted that when the Court in Maharashtra grants relief under Section 438 of Cr.PC. it would be a final relief though it could be restricted for a limited period.

It is argued by the learned Advocate General that, in such a case, the applicants would have options of approaching four different Courts i.e. the Sessions Court and the High Court in this State as well as the Sessions Court and the High Court having jurisdiction where the offence is committed. This may give rise to

unhealthy practice of forum shopping. Therefore, this aspect also needs a serious consideration.

35. One more issue which needs to be considered is whether the High Court can exercise its power under Article 226 of the Constitution of India in respect of the offence registered outside the State of that High Court. In this context, reference can be made to the judgment of the Hon'ble Supreme Court in the case of **Navinchandra N. Majithia Vs. State of Maharashtra and others**¹⁴.

36. We have discussed different view points, practical difficulties and the arguments advanced before us. It is more than clear that there is a vertical rift in the views expressed by different High Courts. The importance of this question cannot be overstated. It involves liberty of citizens. At the same time, the Court will have to balance the difficulties of the investigating agency. The provision can be misused either by the accused or even by the complainant. In a given case, only with a view to harass somebody, the informant may choose to file his FIR at a far away place in India, by showing some part of cause of action there. In such a case, the accused

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would require some protection to approach that Court. On the other hand, as has happened in **Sandeep Lohariya's** case (supra), the accused may take wrong advantage of this provision by obtaining this type of order to buy time, which could be used to destroy the evidence. Both these mischiefs must be checked while considering this issue. Therefore, based on all this discussion, we are of the view that the matter involves larger interest of the citizens and, therefore, it can be more advantageously heard by a Larger Bench.

37. We have already discussed that Rule 8 of Chapter I of Appellate Side Rules does make such provision and the ratio of the judgments referred to hereinabove cited by learned A.G. does enable a Division Bench to refer such cases to a Larger Bench.

38. Considering the importance of the issue instead of answering the reference we are forwarding three issues framed in reference order mentioned in para-1 hereinabove, and additional issues to be decided by a Larger Bench. Hence, following additional issues are framed for reference to a Larger Bench :

- (4) Whether the Maharashtra Amendment of 1993 to Section 438 of Cr.P.C. affects the ratio of **N.K. Nayar's** case (supra).
- (5) Whether the final relief under Section 438 of Cr.P.C. can be granted for the offences registered or likely to be registered, outside the territorial jurisdiction of the Sessions Court or the High Court, as the case may be.
- (6) Whether a Sessions Court can grant any relief under Section 438 of Cr.P.C. in respect of the offences registered outside its jurisdiction.
- (7) If it is held that the powers of the High Courts under Section 438 of Cr.P.C. are restricted to passing of these orders only for the offences registered or likely to be registered within the territorial jurisdiction, whether the High Courts in exercise of their powers under Article 226 of the Constitution of India, can pass protective orders in the nature of relief under Section 438 of Cr.P.C. in respect of those offences.

It is made clear that whether the order dated 14.6.2013 of the Hon'ble Supreme Court in **Sandeep Lohariya's** case, referred to in Issue No.2, is interim or not, is also left open.

39. It is, of course, the prerogative of the Hon'ble the Chief Justice to decide whether these matters should be placed before a Larger Bench consisting of three or more Judges. Therefore, after

framing of these additional issues in addition to 3 issues in reference order of learned Single Judge mentioned in para-1 herein above, we direct the Registry to place these matters with this order before the Hon'ble the Chief Justice as per Rule 8 of Chapter I of the Appellate Side Rules.

(SARANG V. KOTWAL, J.)

(S.S. SHINDE, J.)

Deshmane (PS)