

**AFR**

Neutral Citation No.-2024:AHC-LKO:47649

**Reserved**

**Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION  
U/S 438 CR.P.C. No. - 1422 of 2024

**Applicant :-** Achchey Lal Jaiswal

**Opposite Party :-** State Of U.P. Thru. Prin. Secy. Home Deptt. Lko  
And Another

**Counsel for Applicant :-** Jitendra Saksena

**Counsel for Opposite Party :-** G.A.

**Hon'ble Pankaj Bhatia,J.**

1. Heard learned Counsel for the applicant as well as Sri V.K. Singh, learned Government Advocate assisted by Sri Shivendra Shivam Singh Rathore, learned brief holder and Sri Vivek Kumar Rai, learned Counsel appearing on behalf of the complainant and perused the record.
2. The present application has been filed by the applicant aged about 74 years under Section 438 of Cr.P.C. seeking anticipatory bail apprehending arrest in FIR No.298 of 2023, under Sections 120B, 420, 465, 466, 467, 468, 471 IPC, Police Station Kotwali Nagar, District Sultanpur.
3. It is stated that an FIR dated 10.04.2023 was lodged with the allegations that the mother of the informant was owner of the property and adjacent to the said property, there was a property of the son-in-law of the applicant and on account of bad intention, a registered Will was executed by the mother on 17.07.2019, in which, the son-in-law of the applicant and his wife and the applicant were shown as heirs of the said mother.

It was stated that the applicant was the attesting witness to the said Will.

4. The Counsel for the applicant argues that the Will was a registered Will and on account of the dispute in between the parties, a civil suit was filed being Original Suit No.1343 of 2016, in which, the informant had appeared and has filed his written statement taking a specific plea that the Will was a forged Will. Despite the said, an injunction order came to be passed in favour of the plaintiffs on 15.02.2023 after hearing the parties and after the injunction order was made final, the present FIR was registered on 10.04.2023 at the instance of defendants of civil suit.
5. The Counsel for the applicant also draws my attention to the proceedings pending in the court of Tehsildar, Sadar in between the parties in respect of the said land. He thus argues that essentially after the informant having failed in the civil suit for vacation of the injunction, the present FIR was lodged. Essentially a civil case is being converted into a criminal case.
6. The Counsel for the informant and the learned G.A. Sri V.K. Singh oppose the prayer for grant of anticipatory bail mainly on the ground that there was concealment of material facts.
7. It was stated by the Counsel for the State that the applicant had approached this Court by filing a petition under Article 226 of the Constitution of India for quashing of the FIR, in which, an interim order was obtained in favour of the applicant being Criminal Misc. Writ Petition No.3559 of 2023. In pursuance thereto, the applicant was not arrested. The said writ petition was dismissed on 18.08.2023 for want of prosecution. Thereafter, an application was filed for recall of the order dated

18.08.2023 and ultimately, the said order was recalled and also extended the interim order till the next date of listing, while issuing notice to the private opposite parties. It is argued that despite the restoration of the writ petition, the applicant filed an application under Section 482 of Cr.P.C. being Application No.9084 of 2023 challenging the charge-sheet, as the charge-sheet has already been filed on 09.08.2023 and the court had taken cognizance on 11.08.2023. He thus argues that the filing of an application under Section 482 of Cr.P.C. demonstrates that the applicant was aware of the charge-sheet and despite being aware, the Criminal Misc. Writ Petition No.3559 of 2023 was got restored and the interim order was got extended.

8. The Counsel for the State further argues that the Application U/S 482 Cr.P.C. No.10202 of 2023 filed by the applicant came to be dismissed on 17.01.2024 mainly noticing the conduct of the applicant in getting the writ petition restored despite the charge-sheet having been filed, however, the Court had made observations that as the applicant is an old person and suffering from various ailments, he may avail his remedy in the light of the provisions of Section 437 of Cr.P.C. and also may avail his remedy of filing discharge application, which has to be decided on merit.
9. It is argued by the Counsel for the State that these material facts have not been disclosed in the present application, as such, the Court should not exercise the jurisdiction under Section 438 of Cr.P.C. in favour of the applicant as the jurisdiction by virtue of Section 438 of Cr.P.C. is a discretionary jurisdiction and considering the conduct of the applicant, discretion cannot be exercised in his favour.

10. The Counsel for the State places reliance on the judgment of the Hon'ble Supreme Court in the case of State of *Madhya Pradesh vs Pradeep Sharma; (2014) 2 SCC 171*, which is to the effect that jurisdiction under Section 438 of Cr.P.C. should not be exercised if any one is declared as absconder/proclaimed offender. He argued that in the case of the applicant, non-bailable warrants have been issued. He further draws my attention to a similar judgment in the case of *Lavesh vs State (NCT of Delhi); (2012) 8 SCC 730*.
  
11. The learned G.A. further argues that it is well settled that equitable jurisdiction under Article 226 of the Constitution of India cannot be invoked unless of the material facts are disclosed. For the said proposition, reliance is placed in the case of *K. Jayaram and others vs Bangalore Development Authority and others; (2022) 12 SCC 815*. My attention has also been drawn to a co-ordinate Bench judgment of this Court in the case of *Shivam vs State of U.P. and another; 2021 (4) ALJ 132*, wherein, this court had laid down the conditions, in which, anticipatory bail cannot be granted to an accused after submission of the charge-sheet. Lastly my attention has been drawn to the judgment of the Hon'ble Supreme Court in the case of *Srikant Upadhyay and others vs State of Bihar and another; (2024) 3 SCR 421* laid emphasis of paragraphs 16 and 24, which are to the following effect:

*“16. For a proper consideration of the aforesaid contentions and allied questions, it is only appropriate to refer to certain provisions of law as also certain relevant decisions. From the chronology of events narrated hereinbefore, it is evident that for reasons best known to the appellants, subsequent to the filing of the final report in terms of the provisions under Section 173(2), Cr.P.C in FIR No.79/2020 and issuance of summons, issuance of bailable warrants*

*and issuance of non-bailable warrants; pursuant to the failure of the appellants to appear before the Court on the date fixed for their appearance based on bailable warrants, they did not care to take any action in accordance with law except moving applications for bail. Same was the position even after the issuance of the proclamation under Section 82, Cr.PC. As noted earlier, in the case of similarly situated co-accused of the appellants, they appeared and obtained regular bail pursuant to the issuance of bailable warrants. Thus, a scanning of the acts and omissions of the appellants, it can only be seen that virtually, the appellants were defying the authority of law and moving applications for bail when they apprehended arrest owing to their non-attendance and dis-obedience. It is in the context of the aforesaid facts revealed from the materials on record that the contention of the appellants that they were only pursuing their right to file application for anticipatory bail and, therefore, they were not either evading the arrest or absconding, has to be appreciated.*

*24. We have already held that the power to grant anticipatory bail is an extraordinary power. Though in many cases it was held that bail is said to be a rule, it cannot, by any stretch of imagination, be said that anticipatory bail is the rule. It cannot be the rule and the question of its grant should be left to the cautious and judicious discretion by the Court depending on the facts and circumstances of each case. While called upon to exercise the said power, the Court concerned has to be very cautious as the grant of interim protection or protection to the accused in serious cases may lead to miscarriage of justice and may hamper the investigation to a great extent as it may sometimes lead to tampering or distraction of the evidence. We shall not be understood to have held that the Court shall not pass an interim protection pending consideration of such application as the Section is destined to safeguard the freedom of an individual against unwarranted arrest and we say that such orders shall be passed in eminently fit cases. At any rate, when warrant of arrest or proclamation is issued, the applicant is not entitled to invoke the extraordinary power. Certainly, this will not*

*deprive the power of the Court to grant pre-arrest bail in extreme, exceptional cases in the interest of justice. But then, person(s) continuously, defying orders and keep absconding is not entitled to such grant.”*

12. In respect to the said preliminary objection, the Counsel for the applicant argues that the present application has been filed by the applicant apprehending his arrest in pursuance to the non-bailable warrant, which has already been issued, in a case, which is otherwise a civil case being given the colour of criminal case. He draws my attention to the order of the Hon'ble Supreme Court in the case of ***Kamlesh and another vs The State of Rajasthan and another***, decided on 09.07.2019 [Criminal Misc. Appeal No.1006 of 2019 (arising out of SLP (Crl.) No.1530 of 2018)], wherein, it was observed that even if a petition under Section 482 of Cr.P.C. is dismissed, the same could not be a reason for rejecting the anticipatory bail application. He also argues that on the basis of an order passed by the Hon'ble Supreme Court in the case of ***Sardool Singh and other vs Nasib Kaur (Smt.); 1987 Supp SCC 146***, wherein, a criminal prosecution was instituted on the allegation that the Will is a forged one, it was observed that the said issue is to be decided in the civil proceedings.
13. Considering the submissions made at the bar, the first question that arises is whether the non-disclosure of the fact of the applicant filing a writ petition and an application under Section 482 of Cr.P.C. would be fatal to be consideration of the anticipatory bail application or not?
14. Section 438 of Cr.P.C. was extensively discussed by the Hon'ble Supreme Court in the case of ***Sushila Aggarwal and***

*others vs State (NCT of Delhi) and another; (2020) 5 SCC 1*, the nature of the power of grant of anticipatory bail was discussed and the earlier view of the Hon'ble Supreme Court in the case of *Gurbaksh Singh Sibbia vs State of Punjab; (1980) 2 SCC 565* was affirmed. The Hon'ble Supreme Court had culled the conclusion drawn by the Hon'ble Supreme Court in the case of *Gurbaksh Singh Sibbia (Supra)* in paragraph 52, which is as under:

*52. In the light of the relevant extracts of Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , it would now be worthwhile to recount the relevant observations on the issue. The discussion and conclusions in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] are summarised as follows:*

*52.1. Grant of an order of unconditional anticipatory bail would be “plainly contrary to the very terms of Section 438”. Even though the terms of Section 438(1) confer discretion, Section 438(2) “confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section”.*

*52.2. Grant of an order under Section 438(1) does not per se hamper investigation of an offence; Sections 438(1)(i) and (ii) enjoin that an accused/applicant should cooperate with investigation. Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] also stated that courts can fashion appropriate conditions governing bail, as well. One condition can be that if the police makes out a case of likely recovery of objects or discovery of facts under Section 27 (of the Evidence Act, 1872), the accused may be taken into custody. Given that there is no formal method prescribed by Section 46 of the Code if*

*recovery is made during a statement (to the police) and pursuant to the accused volunteering the fact, it would be a case of recovery during “deemed arrest”. (Para 19 of Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.3.** *The accused is not obliged to make out a special case for grant of anticipatory bail; reading an otherwise wide power would fetter the court's discretion. Whenever an application (for relief under Section 438) is moved, discretion has to be always exercised judiciously, and with caution, having regard to the facts of every case. (Para 21, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.4.** *While the power of granting anticipatory bail is not ordinary, at the same time, its use is not confined to exceptional cases. (Para 22, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.5.** *It is not justified to require courts to only grant anticipatory bail in special cases made out by accused, since the power is extraordinary, or that several considerations — spelt out in Section 437—or other considerations, are to be kept in mind. (Paras 24-25, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.6.** *Overgenerous introduction (or reading into) of constraints on the power to grant anticipatory bail would render it constitutionally vulnerable. Since fair procedure is part of Article 21, the court should not throw the provision (i.e. Section 438) open to challenge “by reading words in it which are not to be found therein”. (Para 26)*

**52.7.** *There is no “inexorable rule” that anticipatory bail cannot be granted unless the applicant is the target of mala fides. There are several relevant*



*considerations to be factored in, by the court, while considering whether to grant or refuse anticipatory bail. Nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the accused's presence not being secured during trial; a reasonable apprehension that the witnesses might be tampered with, and “the larger interests of the public or the State” are some of the considerations. A person seeking relief (of anticipatory bail) continues to be a man presumed to be innocent. (Para 31, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.8.** *There can be no presumption that any class of accused i.e. those accused of particular crimes, or those belonging to the poorer sections, are likely to abscond. (Para 32, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.9.** *Courts should exercise their discretion while considering applications for anticipatory bail (as they do in the case of bail). It would be unwise to divest or limit their discretion by prescribing “inflexible rules of general application”. (Para 33, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.10.** *The apprehension of an applicant, who seeks anticipatory bail (about his imminent or possible arrest) should be based on reasonable grounds, and rooted on objective facts or materials, capable of examination and evaluation, by the court, and not based on vague unspelt apprehensions. (Para 35, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.11.** *The grounds for seeking anticipatory bail should be examined by the High Court or Court of Session, which should not leave the question for decision by the Magistrate concerned. (Para 36, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.12.** *Filing of FIR is not a condition precedent for exercising power under Section 438; it can be done*

*on a showing of reasonable belief of imminent arrest (of the applicant). (Para 37, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.13.** *Anticipatory bail can be granted even after filing of an FIR — as long as the applicant is not arrested. However, after arrest, an application for anticipatory bail is not maintainable. (Paras 38-39, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.14.** *A blanket order under Section 438, directing the police to not arrest the applicant, “wherever arrested and for whatever offence” should not be issued. An order based on reasonable apprehension relating to specific facts (though not spelt out with exactness) can be made. A blanket order would seriously interfere with the duties of the police to enforce the law and prevent commission of offences in the future. (Paras 40-41, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

**52.15.** *The Public Prosecutor should be issued notice, upon considering an application under Section 438; an ad interim order can be made. The application “should be re-examined in the light of the respective contentions of the parties”. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage:*

*“42.... Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.” (SCC p. 591, para 42, Sibbia [Gurbaksh Singh*

*Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465]*”

15. Explaining further in the case of *Sushila Aggarwal (Supra)*, the Court specifically held that there is no offence *per se*, which stands excluded from the purview of Section 438 of Cr.P.C with the following term:

*“75. For the above reasons, the answer to the first question in the reference made to this Bench is that there is no offence, per se, which stands excluded from the purview of Section 438, except the offences mentioned in Section 438(4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there are indications in any special law or statute, which exclude relief under Section 438(1) they would have to be duly considered. Also, whether anticipatory bail should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice), likelihood of cooperation or non-cooperation with the investigating agency or police, etc. There can be no inflexible time-frame for which an order of anticipatory bail can continue.*

16. In the case of *Sushila Aggarwal (Supra)*, the conclusions were recorded in paras 84 to 87, which reads as under:

*“84. This Court answers the reference in the following manner:*

*84.1. Regarding Question 1, it is held that the protection granted under Section 438 CrPC should not always or ordinarily be limited to a fixed period; it should enure in favour of the accused without any restriction as to time. Usual or standard conditions under Section 437(3) read with Section 438(2)*

*should be imposed; if there are peculiar features in regard to any crime or offence (such as seriousness or gravity, etc.), it is open to the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event or time-bound), etc.*

**84.2.** *The second question referred to this Court is answered, by holding that the life of an anticipatory bail does not end generally at the time and stage when the accused is summoned by the court, or after framing of charges, but can also continue till the end of the trial. However, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.*

**85.** *Having regard to the above discussion, it is clarified that the court should keep the following points as guiding principles, in dealing with applications under Section 438 CrPC:*

**85.1.** *As held in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , when a person apprehends arrest and approaches a court for anticipatory bail, his apprehension (of arrest), has to be based on concrete facts (and not vague or general allegations) relatable to a specific offence or particular offences. Applications for anticipatory bail should contain clear and essential facts relating to the offence, and why the applicant reasonably apprehends his or her arrest, as well as his version of the facts. These are important for the court which is considering the application, the extent and reasonableness of the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not a necessary condition that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.*

**85.2.** *The court, before which an application under Section 438 is filed, depending on the seriousness of the threat (of arrest) as a measure of caution, may issue notice to the Public Prosecutor and obtain*

*facts, even while granting limited interim anticipatory bail.*

**85.3.** *Section 438 CrPC does not compel or oblige courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While weighing and considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The necessity to impose other restrictive conditions, would have to be weighed on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.*

**85.4.** *Courts ought to be generally guided by the considerations such as nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while assessing whether to grant anticipatory bail, or refusing it. Whether to grant or not is a matter of discretion; equally whether, and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.*

**85.5.** *Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till end of trial. Also orders of anticipatory bail should not be “blanket” in the sense that it should not enable the accused to commit further offences and claim relief. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a*

*specific incident. It cannot operate in respect of a future incident that involves commission of an offence.*

**85.6.** *Orders of anticipatory bail do not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.*

**85.7.** *The observations in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] regarding “limited custody” or “deemed custody” to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] had observed that : (SCC p. 584, para 19)*

*“19. ... if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya [State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504].”*

**85.8.** *It is open to the police or the investigating agency to move the court concerned, which granted anticipatory bail, in the first instance, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc. The court, in this context, is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.*

**85.9.** *The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the State or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See Prakash Kadam v. Ramprasad Vishwanath Gupta [Prakash Kadam v. Ramprasad Vishwanath Gupta, (2011) 6 SCC 189 : (2011) 2 SCC (Cri) 848] , Jai Prakash Singh [Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379 : (2012) 2 SCC (Cri) 468] and State of U.P. v. Amarmani Tripathi [State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] .) This does not amount to “cancellation” in terms of Section 439(2) CrPC.*

**85.10.** *The judgment in Mhetre [Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] (and other similar decisions) that restrictive conditions cannot be imposed at all, at the time of granting anticipatory bail are hereby overruled. Likewise, the decision in Salauddin [Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] and subsequent decisions (including K.L. Verma [K.L. Verma v. State, (1998) 9 SCC 348 : 1998 SCC (Cri) 1031] , Nirmal Jeet Kaur [Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558 : 2004 SCC (Cri) 1989] ) which state that such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.*

**86.** *In conclusion, it would be useful to remind oneself that the rights which the citizens cherish deeply, are fundamental — it is not the restrictions that are fundamental. Joseph Story, the great jurist and US Supreme Court Judge, remarked that “personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice”.*

**87.** *The history of our Republic — and indeed, the Freedom Movement has shown how the likelihood of arbitrary arrest and indefinite detention and the lack of safeguards played an important role in rallying the people to demand Independence.*

*Witness the Rowlatt Act, the nationwide protests against it, the Jallianwala Bagh Massacre and several other incidents, where the general public were exercising their right to protest but were brutally suppressed and eventually jailed for long. The spectre of arbitrary and heavy-handed arrests : too often, to harass and humiliate citizens, and oftentimes, at the interest of powerful individuals (and not to further any meaningful investigation into offences) led to the enactment of Section 438. Despite several Law Commission Reports and recommendations of several committees and commissions, arbitrary and groundless arrests continue as a pervasive phenomenon. Parliament has not thought it appropriate to curtail the power or discretion of the courts, in granting pre-arrest or anticipatory bail, especially regarding the duration, or till charge-sheet is filed, or in serious crimes. Therefore, it would not be in the larger interests of society if the Court, by judicial interpretation, limits the exercise of that power : the danger of such an exercise would be that in fractions, little by little, the discretion, advisedly kept wide, would shrink to a very narrow and unrecognisably tiny portion, thus frustrating the objective behind the provision, which has stood the test of time, these 46 years.”*

17. In the light of the two Constitutional Bench judgments what flows out is that an anticipatory bail could be considered by a Sessions Court or by a High Court irrespective of the nature of the offences unless barred by a statute in the cases it deems fit without any restrictions.
18. In the light of the law as explained in the case of *Sushila Aggarwal (Supra)* following the earlier Constitutional Bench judgment in the case of *Gurbaksh Singh Sibbia (Supra)*, the judgment cited by the G.A. specifically in the case of *Shivam vs State of U.P. (Supra)* merits rejection as the restrictions of bail has culled out in paragraph 43 of the said judgment would



have to give way to the judgment of the Hon'ble Supreme Court in the case of *Sushila Aggarwal (Supra)*.

19. The other argument of the learned G.A. based upon the judgment rendered in the case of *Srikant Upadhyay (Supra)* and *State of Madhya Pradesh vs Pradeep Sharma (Supra)* also merits rejection as in the present case admittedly, no proceedings have been initiated and the applicant has not been declared to be proclaimed offender.
20. The other argument of the learned G.A. that as the applicant has not come with clean hand, the discretionary relief cannot be extended. On the foundation of the judgment in the case of *K. Jayaram vs Bangalore Development Authority (Supra)* merits rejection as it is fairly well settled that constitutional power under Article 226 are extraordinary discretionary power conferred upon the constitutional courts and the court can refuse to exercise the said power on various factors one of them being that the person not approaching clean hand and concealing the material facts whereas in the present case, the power invoked by the court is under Section 438 of Cr.P.C., which is a statutory power and does not confer extraordinary discretion and cannot be exercised on the same analogy, as is required for exercise of power under Article 226. Further more in terms of the provisions contained in Chapter XVIII Rule 18-A of the Allahabad High Court Rules, 1952, the application for bail under Section 438 of Cr.P.C. are required to disclose facts as specified from sub-rule 1 to sub-rule 8. In short, the requirements of exercise of powers under Article 226 are on different footing and the exercise of power under Section 438 of Cr.P.C. cannot be exercised on the same lines.

21. In the present case, admittedly civil litigations are going on in between the parties, the FIR has been lodged after almost 8 years of the alleged incident and after the injunction order was confirmed after hearing both the parties coupled with the fact that the applicant is aged about 74 years and only allegation against him is that he was an attesting witness. Further more there is no material to suggest that the applicant is either at a flight risk or in any way can adversely effect the trial, if enlarged on bail, thus, on these grounds the applicant is entitled for the benefit of anticipatory bail till conclusion of the trial. Accordingly, the anticipatory bail application is allowed.
22. In the event of arrest, let the applicant *Achchey Lal Jaiswal* be released on anticipatory bail in the abovesaid first information report number till conclusion of the trial on his furnishing personal bonds and two reliable sureties of Rs.20,000/- each to the satisfaction of the court concerned with the following conditions:
- (a) The applicant shall execute a bond to undertake to attend the hearings;
  - (b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and
  - (c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

(d) The applicant shall not leave India without the previous permission of the Court.

23. This Court appreciates its appreciation provided by Ms. Rajshree Lakshmi, Research Associate/ Law Clerk in deciding the case.

**Order Date:-15.07.2024**  
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**(Pankaj Bhatia,J)**