

*** THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**

+ CRIMINAL PETITION No.24624 OF 2017

% Dated 22.12.2016

Smt. P Kalpana

Occ Housewife R/o 63 Princeton Court Hill Fort

Basheerbagh Hyderabad

rep by her GPA holder

M Krishna Reddy S/o M Vittal Reddy

aged 55 years occ business

R/o H No 82609/23

Mithila Nagar Road No 10

Banjara Hills, Hyderabad

..... Petitioner

Vs.

\$

The State of Telangana

rep by its Public Prosecutor

1 High Court of Judicature at Hyderabad

for the State of Telangana and the State of AP Hyderabad

through SHO Police station Banjara Hills Hyderabad

Godi Pitchi Reddy

2 occ business R/o Plot No 1291

Road No 65 Jubilee Hills

Hyderabad500034

..... Respondents

! Counsel for the petitioner : Sri V. Ravi Kiran Rao

^ Counsel for the respondent :

1. R-1 Public Prosecutor for the State of Telangana

2. R-2 Sri K. Chenchu Rami Reddy

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? Cases referred

1. 2014 (2) ALT (CrI.) 457 (SC)

2. AIR 2011 SC 312

3. (2012) 4 Supreme Court Cases 379

4. (2012) 9 Supreme Court Cases 235

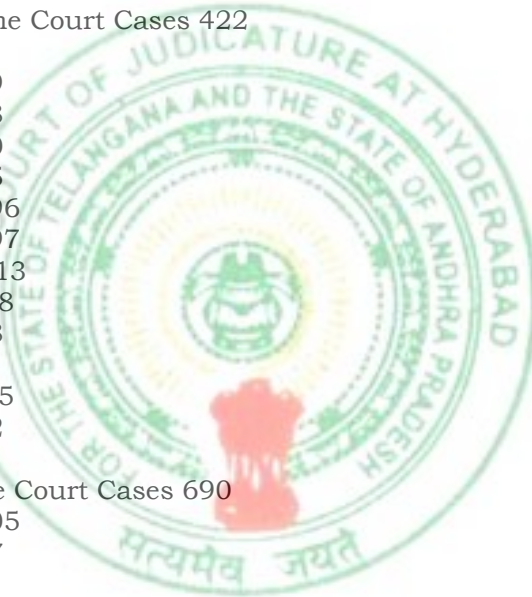
5. (2012) 12 Supreme Court Cases 180

6. (2014) 10 Supreme Court Cases 754

7. (2014) 16 Supreme Court Cases 501

8. (1995) 1 Supreme Court Cases 349

9. (2012) 13 Supreme Court Cases 720
10. 1952 CrL.L.J. 1425
11. AIR 1966 Guj. 146
12. 1976 (4) SCC 572
13. AIR 1995 SC 1198
14. 2003 Cri LJ 3519 at p. 3522 (Chhattis)
15. 1980(2)SCC 565
16. 2005 AIR 1057
17. 2016 (1) ALT (CRL.) 122 (S. C) AIR 2001 SC 2023
18. AIR 2009 SC 3173
19. 1981 Cri LJ 1808 at p. 1812 (Bom)
20. AIR 1993 SUPREME COURT 1
21. (2008) 13 Supreme Court Cases 584
22. 1978 AIR 961
23. (1984) 1 SCC 284
24. AIR 1990 SC 71
25. (2004) 7 SCC 528
26. AIR 2001 SC 2023
27. 1980 CriLJ 426
28. 1978 CriLJ 179
29. (2000) 1 SCR 718
30. AIR 2008 SC 3032
31. (2004) 2 SCC 362
32. (2016) 15 Supreme Court Cases 422
33. (2005) 8 SCC 21
34. (2011) 6 SCC 189
35. (2002) 3 SCC 598
36. (2001) 4 SCC 280
37. (2004) 7 SCC 525
38. (2010) 14 SCC 496
39. (2013) 16 SCC 797
40. 2001 SCC (Cri) 113
41. AIR 2017 SC 5398
42. (2017) 2 SCC 178
43. 2006 CriLJ 4435
44. AIR 2017 SC 1685
45. (2013) 7 SCC 452
46. (2008) 5 SCC 66
47. (2012) 5 Supreme Court Cases 690
48. (2008) 13 SCC 305
49. (1996) 1 SCC 667
50. (2003) 8 SCC 77
51. (2002) 3 SCC 598
52. (2006) 12 SCC 131
53. 1987 CrL.L.J. 242 (All)
54. (2006) (Supp.) (CrL.) 25 (SC)
55. (2003) 14 SCC 615
56. 2017 ALL MR (Cri) 49
57. AIR 1987 SC 1613
58. AIR 1989 SC 2292
59. AIR 2017 SC 3936
60. 49 CAL. 732; 71 Ind. Cas 81
61. (1995) 3 SCC 619
62. (1976) 2 SCC 291
63. AIR 1954 SC 557
64. IV (1999) CCR 89



THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**CRIMINAL PETITION No.24624 OF 2017****ORDER:**

The de-facto complainant in Crime No.1020 of 2016 on the file of Banjara Hills Police Station, Hyderabad, filed the present criminal petition under Section 439(2) Cr.P.C r/w Section 482 Cr.P.C, claiming multiple reliefs viz., to set-aside/quash/cancel the order passed by the IV Additional Metropolitan Sessions Judge, Hyderabad, In-Charge Additional Metropolitan Sessions Judge for Trial of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad dated 05.12.2017, granting anticipatory bail to Respondent No.2/Accused No.11 passed under Section 438 Crl.P.C in Crl.M.P.No.3726 of 2017 in the above crime, registered for the offences punishable under Sections 420, 468, 471 r/w Section 34 & 120B of IPC.

The petitioner/de-facto complainant lodged a complaint with the police on 16.11.2016 making serious allegations against the second respondent for committing fraud along with the other accused and creating documents or fabricating documents in pursuance of the conspiracy between the second respondent/A-11 and the other accused.

The main allegations made in the complaint are that the land in S.No. 129/30 (old) corresponds to R.S.No. 340 correlating to T.S.No. 22, Block K, Ward 12, Shaikpet village, Road No.12,Banjara Hills, Hyderabad, originally belongs to Abdullah Pasha, to whom the surfekhasse authorities allotted the said land on payment of money, who in turn gifted the above land to one Shaik Abdullah in the year 1342 F which was under Mohammadan law, the same was confirmed in writing and the said document of confirmation of oral gift was submitted to the

then Revenue authority for mutation in File No. 112/13 of 1342 F dated 12th Behman 1342 Fasli and his name has been recommended for mutation as per order in the said file. The said Shaik Abdullah in turn sold the above property by registered sale deed dt. 28-12-1964 vide document No. 2357 of 1964 to one Shaik Ahmed Amoodi, Shaik Ahmed Amoodi, being in possession sold the said property by registered sale deed, bearing document No. 420 of 1966 dt. 25-2-1966, to one V.V.Rao, E.Shankaramma, M.Bhujanga Rao and Smt. Kishori Bhujanga Rao. Out of them three of them sold their extents by executing registered sale deeds i.e. Sri Bhujanga Rao sold his share of 4,000 Sq. yds. vide document No. 1823 of 1967 dated 18-6-1967, Sri V.V.Rao the other Joint purchaser sold their share of 4,000 Sq. yards by registered sale deed bearing document No. 35 of 1968 dt. 5-1-1968 and Smt. E.Shankaramma the other joint purchaser have sold only an extent of 2000 Sq, yds. from out of her share of 4,000 Sq. yds., vide document No. 1140 of 1968 dated 15-10-1968 by retaining 2,000 Sq. yds. All the above three person have sold 10,000 Sq. yds., to M/s Women's Co-operative Housing Society under the above said three registered sale deeds and delivered possession to the society. The society in-turn having purchased 10,000 sq.yds., obtained layout, vide permit No. 25/layout/8/70 from the Municipal Corporation of Hyderabad, allotted plots to its members, executed registered sale deeds in favour of its members in the year 1981 and delivered possession to its members. All the members are in possession of their respective plots. Smt. Kishori Bhujanga Rao retained her total extent of 4,000/- Sq. yds like E.Shankaramma, who retained 2,000 Sq. yards and they are in possession of their respective extents of land.

While the matter stood thus, some of the disgruntled persons hatched a plan, as the land was vacant during the year 1989-90 and to in pursuance of their plan, projected D.Ramachandra Reddy and Sriramulu being alleged agreement of sale holder from D.Ramachandra Reddy, with active assistance of Advocate B.Dayakar Reddy have set up false title deed by fabricating a document, i.e a sale deed, as if Abdullah Pasha has sold the land under the alleged registered sale deed bearing document No. 252 of 1357 F and tried to get the name of D.Ramachandra Reddy enter in the revenue records and on the basis of such entry the said persons intended to occupy the land in occupation of above said owners. Members of Women's Cooperative Housing society, E.Shankaramma and Kishori Bhujanga Rao who filed a suit for declaration in OS No. 106 of 1991 on the file of the Court of the V Senior Civil Judge, City Civil Court, Hyderabad which was decreed on 14-6-2004 holding that the said D.Ramachandra Reddy and Sriramulu had no right over the said property and the document i.e., registered sale deed vide document No. 252 of 1357 Fasli projected by them held to be a fabricated document, fabricated for the purpose of occupying and grab the above land and the Court held that, they have no title and further observed that the document projected by D.Ramchandra Reddy was not registered with any of the office of Sub-Registrar during that time, more so there was no document of title with document No. 252 of 1357 Fasli, as per sub-registrar's record, it is related to some other property between some other parties, but not in favour of D.Ramchandra Reddy. While the suit is pending D.Ramchandra Reddy had set up one person by name K.Amarender Reddy claiming to be the agreement holder from D.Ramchandra Reddy and the said K.Amarender Reddy got impleaded himself as party wherein this court in the above said suit in its

Judgment, held that there is no agreement of sale in favour of K.Amarender Reddy that too as per Judgment, D.Ramchandra Reddy had no title, question of sale of the property to K.Amarender Reddy does not arise and his plea was also rejected by the V Senior Civil Judge. Immediately after such decree, K.Amarender Reddy having lost the case have set up Sahik Mansoor, Shaik Abdul Faffar, Shaik Jamal Wali, Syed Iftekar Hussain Jaidi, Shaik Anwar Basha and Syed Sarfaraj Hussain by fabricating certain papers in the office of B. Dayakar Reddy, Advocate and this is evident as per the contents of the FIR No. 277 of 2006 registered with PS, Sanathnagar, dated 18-8-2006 which was later on enquiry by the police, came to know that the documents of oral gifts (HIBA) in the names of the above persons are fabricated in the office of B. Dayakar Reddy, Advocate, the contents of FIR and the statements recorded by the police during the enquiry and investigations, the persons who fabricated the documents of oral gifts reduced into writing are fabricated by forging the signatures of Abdulla Pasha. The contents of Gifts (HIBA) reduced into writing in the names of above said person have been fabricated with a criminal intention to set up a claim of ownership as against the title of real owners. The persons who fabricated the above documents and the persons in whose favour such documents are created, they are the beneficiaries, the names and address of all the persons instrumental for fabrication and forgery of documents and the persons in whose favour the documents are fabricated are furnished to initiate action and to prosecute them for the offence. The fabricated documents purporting to be memorandum of oral gift (HIBA) reduced into writing alleged to have been made by Adullah Pasha the original owner to Syed Qasim and the said Syed Qasim in turn alleged to have converted the said land into plots and further alleged to have gifted

under oral gift (HIBA) Shaik Mansoor, Shaik Abdul Faffar, Shaik Jamal Wali, Syed Iftekar Hussain Haidi, Shaik Anwar Basha and Syed Sarfaraj Hussain. The said Sahik Mansoor, Shaik Abdul Gaffar, Shaik Jamal Wali, Syed Iftekar Hussain Jaidi, Shaik Anwar Basha and Syed Sarfaraj Hussain taking advantage of such fabricated documents filed suits O.S. Nos. 138, 139, 140, 141 and O.S.No. 8 of 2004 initially, against K. Amarender Reddy, as collusive suits, as if said K. Amarender Reddy alleged to have interfered with the alleged possession of above persons, though said K. Amarender Reddy who lost the case and tried to grab the land of all the original owners. The said suits are the collusive suits got filed by K. Amarender Reddy, by instigating Shaik Abdul Gaffar, Shaik Jamal Wali, Syed Iftekar Hussain Jaidi, Shaik Anwar Basha and Syed Sarfaraj Hussain, who lost the earlier suit. Having come to know about pending suits, some of owners i.e. some of the members of Women's Co-operative Society and Smt. Kishori Bhujanga Rao got impleaded as parties to the said suits and on contest, interim injunction petitions were dismissed and later even the suits were also dismissed as withdrawn, which itself is suffice to establish *prima facie* that Shaik Mansoor, Shaik Abdul Gaffar, Shaik Jamal Wali, Syed Iftekar Hussain Jaidi, Shaik Anwar Basha and Syed Sarfaraj Hussain along with the second respondent/A-11 and other accused have fabricated the documents and set up title without having any right whatsoever as against the real owners.

The de-facto complainant submitted that, said Sahik Mansoor, Shaik Abdul Gaffar, Shaik Jamal Wali, Syed Iftekar Hussain Jaidi, Shaik Anwar Basha and Syed Sarfaraj Hussain under the garb of fabricated document of oral gift (HIBA) and with an intention to set up a claim over the land, have made an application to the Joint Collector, Hyderabad

District for grant of **“No Objection Certificate (NOC)”** as required by MCH for according sanction of building permission. The Joint Collector issued NOC contending that the land is not classified as Government land according to records, at the same time in the said certificate categorically stated that the said endorsement does not constitute any title or right in favour of the applicants over the above land and it was directed that the M.C.H. shall verify the legal ownership and possession of the land before approving any plan, if anybody approaches for sanction. Under the garb of such NOC the said Sahik Mansoor, ShaikAbdul Gaffar, Shaik Jamal Wali, Syed Iftekar Hussain Jaidi, Shaik Anwar Basha and Syed Sarfaraj Hussain tried to set up a false claim and tried to alienate the property to third parties by exhibiting or with the aid of NOC, at that stage the owners having come to know that fraud has been played, sought for cancellation of NOC and the Joint Collector after enquiry cancelled the same by order dated 15-3-2005. It is also contended that, all the persons mentioned above conspired together criminally to grab and occupy the land of the members of Women's Cooperative Society and others, with a *malafide* intention gain wrongfully and cause loss to the original owners with a pre-mediated intention to cheat the owners knowing that they are no way concerned with the property mentioned above. They have created and fabricated documents by forging signatures and used to be genuine and obtained NOC from Joint Collector, Hyderabad. Till date they are trying to create third party interest which will cause irreparable loss to the genuine owners. The above said acts of the person mentioned constitute various offences punishable under various sections of Indian Penal Code.

Upon receipt of complaint, the Station House Officer, Banjara Hills Police Station, Hyderabad, registered the same as case in Crime No.1020 of 2016, issued F.I.R on 17.11.2016 and investigated the crime.

The second respondent who was arrayed as A-11 in the above crime filed CrI.P.No.5781 of 2017 under Section 482 Cr.P.C to quash the proceedings in Crime No.1020 of 2016 and the same was disposed of by this Court on 17.07.2017, with a specific observation that it is not a fit case to quash the criminal proceedings at the threshold and directed the Station House Officer, Banjara Hills Police Station, Hyderabad City, to follow the procedure as contemplated under Section 41-A Cr.P.C in Crime No.1020 of 2016, so far as the second respondent/A-11 is concerned.

Further, the second respondent/A-11 along with others filed W.P.No.25345 of 2017 to quash the proceedings in F.I.R.No.1020 of 2016. This Court, while ordering notice before admission and to carry out investigation, directed the police to follow strictly Section 41-A Cr.P.C and the guidelines of the Apex Court laid down in **Arnesh Kumar v. State of Bihar**¹. While the writ petition is pending, notice as per Section 41-A Cr.P.C was issued twice, but, the second respondent/A-11 did not respond to the notice. Further, the second respondent/A-11 filed CrI.M.P.No.2257 of 2017 before the VII Metropolitan Sessions Judge, City Criminal Court at Nampally, Hyderabad, which was dismissed as not pressed on 02.08.2017. Again, the very same second respondent/A-11 filed CrI.M.P.No.2622 of 2017 filed before the Additional Metropolitan Sessions Judge for Trial of Communal Offices Cases-cum-VII Additional

¹ 2014 (2) ALT (CrI.) 457 (SC)

Metropolitan Sessions Judge, Hyderabad, which was also dismissed as not pressed on 23.08.2017.

Suppressing the factum of filing bail application CrI.M.P.No.2622 of 2017 before the Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad, the second respondent/A-11 filed CrI.M.P.No.2994 of 2017 before the Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad. Furthermore, the second respondent/A-11 also filed CrI.P.No.7241 of 2017 before this Court, which was dismissed as withdrawn on 08.09.2017. The CrI.M.P.No.2994 of 2017 filed before the Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad, was dismissed on 04.10.2017, holding that the investigation is still pending and custodial investigation is necessary and some of the documents have to be seized. The second respondent/A-11 again filed CrI.P.No.3726 of 2017 for grant of pre-arrest bail, though there were no changed circumstances. The second respondent/A-11 suppressed the facts regarding filing of quash petition, writ petition and bail applications before the Sessions Court and this Court respectively and contrary to the principles laid down in **Siddharam Satlingappa Mhetre vs State Of Maharashtra**², the Sessions Judge, who was in-charge for a day or two, granted pre-arrest bail to the second respondent/A-11 by considering extraneous material. This order passed by the in-charge Metropolitan Sessions Judge is contrary to the principles laid down by the Apex Court in the judgment referred supra and thus the impugned order is sought to be set-aside.

² AIR 2011 SC 312

It is the case of the petitioner from the beginning that, major part of the investigation is completed and the statements recorded during investigation disclosed that this petitioner along with other accused committed serious offences and the other accused were remanded to judicial custody. The confessional statement of A-4, A-6 & A-12 were also recorded and even according to their confessional statement, the documents were fabricated by forging the signatures of the original landlords and produced the documents in prosecuting the proceedings and this petitioner is one of the members of the society and the owner of Plot No.10, admeasuring 910 sq.yds in S.No. 129/30 (old) corresponding to R.S.No. 340 (New) forming part of layout vide permit No. 25/layout/8/70 of, Shaikpet village, Road No.12,Banjara Hills, Hyderabad, which was purchased by her by means of sale deed bearing document No. 607 of 1982 dated 20-1-1982 and rectification deed bearing document No. 3207 of 1982 dated 3-5-1982 and sale deed bearing document No. 389/1982 dated 20-1-1982 and rectification deed bearing document No. 3211 of 1982 dated 3-5-1982. Thus, the petitioner is the owner whose property is attempted to be grabbed by the second respondent/A-11 in pursuance of the criminal conspiracy along with the other accused, created those documents and obtained No Objection Certificate (NOC) from the Joint Collector, Hyderabad District, which was cancelled later on the representation made by the petitioner.

It is also contended that the second respondent/A-11 is the brain behind fabrication of documents and forging the signatures of original landlords and basing on the said fabricated and forged documents, the second respondent has entered into an agreement of sale with M/s Ascot Constructions Private Limited for Rs.16 crores and received Rs.61 lakhs

as part of sale consideration from them in the capacity of GPA Holder of the other accused. Subsequently, M/s Ascot Constructions Private Limited filed a private complaint against the second respondent/A-11 for the offence punishable under Section 138 of Negotiable Instruments Act and also filed suit O.S.No.306 of 2013 on the file of Chief Judge, City Civil Court, Hyderabad, for recovery of the said amount and the said case is pending in the respective Court. The petitioner learnt that the second respondent/A-11 created a fake Cooperative society at Bangalore in respect of the land pertaining to Shantinagar Housing Society at Bangalore which was already existing and a news item was published in the Times of India stating that the second respondent/A-11 formed and created a fake housing society and intended to grab 66 acres of land near Koramangala, allotted to a housing society. Thus, the second respondent/A-11 is a man with criminal antecedents and obtained anticipatory bail by playing fraud on the Court, without disclosing the various proceedings which ended in dismissal, either on merits or on withdrawal and also filed petition for grant of pre-arrest bail when the original Officer was on leave, who dismissed the earlier bail application and filed the petition to grant pre-arrest bail, adopting the practice of bench haunting, without any changed circumstances. Thus, the order passed by the in-charge Sessions Judge is illegal and without considering the material on record, the criminal antecedents, including various proceedings, both civil and criminal, the in-charge Sessions Judge committed grave error in granting pre-arrest bail to the second respondent/A-11 and prayed to allow this petition and to set-aside/quash/cancel the order in CrI.M.P.no.3726 of 2017 dated 05.12.2017.

The second respondent/A-11 did not file any counter.

During hearing, learned Senior Counsel Sri V. Ravi Kiran Rao appearing for the petitioner reiterated the grounds raised in the grounds of petition, while relying on the judgment of the Supreme Court in **Jai Prakash Singh v. State of Bihar**³, **Maruti Nivrutti Navale v. State of Maharashtra**⁴ to contend that the Sessions Judge totally ignored the principles while granting pre-arrest bail. Learned Senior Counsel for the petitioner drawn attention of this Court to **Kanwar Singh Meena v. State of Rajasthan**⁵ where the Apex Court pointed out as to whether bail can be cancelled by exercising power under Section 439(2) Cr.P.C. Learned Senior Counsel for the petitioner also brought to the notice of this Court, judgment of the Apex Court in **Abdul Basit alias Raju and others v. Mohd. Abdul Kadir Chaudhary and another**⁶ where the Apex Court drew the distinction line between review/recall/quashment from cancellation of bail order. Finally, Learned Senior Counsel for the petitioner contended that filing of successive bail applications without any changed circumstances and obtaining pre-arrest bail from the in-charge officer would amount to bench haunting and placed reliance on the judgment of the Supreme Court in **Jagmohan Bahl and another v. State (NCT of Delhi) and another**⁷. On the strength of the principles laid down by the Supreme Court in the above judgments, learned Senior Counsel for the petitioner sought to set-aside/quash/cancel the impugned order.

Whereas, Sri Vedula Venkataramana, learned Senior Counsel appearing for the second respondent/A-11 mainly contended that, there

³ (2012) 4 Supreme Court Cases 379

⁴ (2012) 9 Supreme Court Cases 235

⁵ (2012) 12 Supreme Court Cases 180

⁶ (2014) 10 Supreme Court Cases 754

⁷ (2014) 16 Supreme Court Cases 501

were absolutely no reasons to cancel the pre-arrest bail granted to the second respondent/A-11, since none of the grounds are covered by the principles laid down by the Apex Court in **Dolatram and others v. State of Haryana**⁸, **Padmakar Tukaram Bhavnagare and another v. State of Maharashtra and another**⁹. Learned Senior Counsel for the second respondent/A-11 contended that, since the in-charge Sessions Judge granted pre-arrest bail to the second respondent/A-11, in the absence of any allegation regarding interference of investigation by the second respondent/A-11, as pointed out in **Dolat Ram** case (referred supra), the Court cannot exercise power under Section 439(2) Cr.P.C to cancel the bail or set-aside the order passed by the Court of Sessions in Crl.M.P.No.3726 of 2017 and prayed for dismissal of the criminal petition.

Considering rival contentions and perusing the material available on record, the sole point that arose for consideration is:

“Whether pre-arrest bail (anticipatory bail) or a direction given by the In-Charge Sessions Judge i.e. IV Additional Metropolitan Sessions Judge, Hyderabad, In-Charge Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad in Crl.M.P.No.3726 of 2017 to release the second respondent/A-11 is illegal and liable to be set-aside/quashed/cancelled?”

P O I N T:

The first and foremost contention of the learned Senior Counsel for the petitioner before this Court is that, the in-charge Sessions Judge had not even given a gloomy glance to the principles for granting pre-arrest bail, passed an illegal or perverse order and liable to be set-aside.

⁸ (1995) 1 Supreme Court Cases 349

⁹ (2012) 13 Supreme Court Cases 720

In view of specific contention, it is apposite to advert to the concept of anticipatory bail and principles guiding the Courts to grant such pre-arrest bail. In fact, Criminal Procedure Code is silent with regard to the concept of anticipatory bail, but, Section 438 Cr.P.C speaks about a direction to be issued to the Investigating Agency or police to release the accused on bail, in the event of arrest. Section 438 Cr.P.C deals with direction to the police for enlargement of accused on bail in the event of arrest, basing on the circumstances of the case. But, the concept of pre-arrest bail is developed by Judge made law and such direction is described as pre-arrest bail and sometimes as anticipatory bail. But, the basis for concept of anticipatory bail is only a direction covered by Section 438 Cr.P.C. Under the Code of Criminal Procedure, 1898, there was no provision corresponding to section 438 of the 1973 Code providing for bail in anticipation of arrest. Anticipatory bail was, however, granted in certain cases under the High Courts' inherent powers though the preponderant view negated the existence of any such jurisdiction. The Law Commission in its 41st Report, recommended the introduction of a provision in the Code enabling the High Court and the Court of Session to grant "anticipatory bail". The Commission viewed that "the necessity for granting anticipatory bail arises mainly because, sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then

apply for bail. (**Mangi Lal v. State**¹⁰, **State of Gujarat v. Govindlal Monilal Shah**¹¹).

The words 'anticipatory bail' is neither found in Section 438 nor in its marginal note. In fact, anticipatory bail is a misnomer as it is not bail presently granted, but in anticipation of arrest. When the court grants anticipatory bail, what it does, is to make an order that in the event of arrest, a person shall be released on bail, unless a person is arrested and, therefore, it is only upon arrest that an order granting 'anticipatory bail' becomes operational. The expression of anticipatory bail is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. (**Balchand Jain v. State of M.P**¹²)

Thus, at best, the Court can issue a direction to the police by exercising discretionary power under Section 438 Cr.P.C to release a particular person who allegedly committed a non-bailable offence, in the event of his arrest. It is profitable to extract Section 438 Cr.P.C to enable this Court as to what type of consideration is to be given and conditions to be imposed and the same is **extracted** for better appreciation of the facts.

Direction for Grant of Bail to Person Apprehending Arrest under Section 438 Cr. P.C.

(1) When any person has reason to believe that he maybe arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he be released on bail and that court may taking into consideration inter alia following factors namely:-

i)the nature and gravity of the accusation;

ii)the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii)the possibility of the applicant to free from justice, and

¹⁰ 1952 Cr.L.J. 1425

¹¹ AIR 1966 Guj. 146

¹² 1976 (4) SCC 572

iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

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

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

(1-B) 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, on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under

sub section (1) it may include such conditions in such directions in the light of the facts of the particular case as it may think fit, including :-

i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

ii) a condition that the person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

iii) a condition that the person shall not leave India without the previous permission of the Court;

iv) such other condition as may be imposed under sub section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation and is prepared either at the time of arrest or at any time in the custody of such officer to give bail, he shall be released on bail; and if a magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the court under sub section (1).

(Emphasis supplied)

In case of issuing such directions, the main challenge for the enforcement agencies is to elicit the truth during investigation. One of the challenges that the law enforcement agencies are facing from the Human Rights movement is that nobody should be confined in any way unless he is declared guilty. To meet such posers, the bail mechanism in India has been statutorily extended by induction into its fold a comparatively new concept commonly known as 'anticipatory bail'.

Section 438 of the Criminal Procedure Code 1973 has been shaped to incorporate this concept. It deals with a situation where a person having reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence, seeks to prevent his/her detention. The first part of the section sets out the conditions under which a person can make an application for anticipatory bail. The second part confers jurisdiction on the High Court or the Court of Session. Thus the second part can be viewed as strictly jurisdictional; that High Court and the Court of Session have concurrent jurisdiction. Once a Court is invested with jurisdiction, that jurisdiction subsists all along, unless taken away expressly or by implication. There are no express words in the section itself, indicating that the jurisdiction is taken away under any circumstances. It does not appear that by implication even the jurisdiction of either of the Courts is taken away or put an end to. It seems that the Legislators did not intend to exclude the one or the other of the two Courts the High Court or the Court of Session. Had it been so intended, the legislators would have taken care to express that clearly, as they have done in subsection (3) of section 397 or sub section (3) of Section 399. Anticipatory bail cannot be claimed as a matter of right, it is essentially a statutory right conferred long after the coming into force of the Constitution. It is not an essential ingredient of Art. 21 of the Constitution. (**State of M.P. v. R.K. Balothia**¹³)

To grant anticipatory bail/pre-arrest bail, the antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence, the possibility of the applicant to flee from justice; and where the accusation has been made with the object of injuring or

¹³ AIR 1995 SC 1198

humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order of the grant of anticipatory bail, shall be taken into consideration. This amendment in the section had come into force from the date of its notification. But, the grounds for granting regular bail or pre-arrest bail or anticipatory bail are almost identical. In both cases, the conduct of the person seeking bail is to be taken into consideration. Thus, the main object of anticipatory bail is to relieve a person from unnecessary apprehension or disgrace. The sine qua non of this provision is that when any person has a reason to believe that he may be arrested on an accusation of having committed a non-bailable offence.

Anticipatory bail cannot be granted as a matter of right nor should it be lightly granted. And, in offences like murder, dowry death, for example, which are punishable with death or imprisonment for life and for imprisonment which may extend to life, anticipatory bail ought not to be granted unless some very compelling circumstances are made out.

(Manoj Agarwal v. State of Chhattisgarh¹⁴)

In **Gurbaksh Singh Sibbia v. State of Punjab¹⁵**, the Constitution Bench was called upon to consider correctness or otherwise of principles laid down by the Full Bench of High Court of Punjab & Haryana. The Full Bench of the High Court summarized the law relating to anticipatory bail as reflected in Section 438 of the Code and laid down eight principles which are to be kept in view while exercising discretionary power to grant anticipatory bail. The Court felt that wide discretionary power conferred by the Legislature on the higher echelons in the criminal justice delivery system cannot be put in the form of straight-jacket rules for universal

¹⁴ 2003 Cri LJ 3519 at p. 3522 (Chhattis)

¹⁵ 1980(2) SCC 565

application as the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. A circumstance which, in a given case, turns out to be conclusive, may or may not have any significance in another case. While cautioning against imposition of unnecessary restrictions on the scope of the Section, because, in its opinion, over generous infusion of constraints and conditions, which were not to be found in Section 438 of the Code, could make the provision constitutionally vulnerable, since the right of personal freedom, as enshrined in Article 21 of the Constitution, cannot be made to depend on compliance with unreasonable restrictions, the Constitution Bench laid down the following guidelines, which the Courts are required to keep in mind while dealing with an application for grant of anticipatory bail:

i) Though the power conferred under Section 438 of the Code can be described as of an extraordinary character, but this does not justify the conclusion that the power must be exercised in exceptional cases only because it is of an extraordinary character. Nonetheless, the discretion under the Section has to be exercised with due care and circumspection depending on circumstances justifying its exercise.

ii) Before power under sub-section (1) of Section 438 of the Code is exercised, the Court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively. Specific events and facts must be disclosed by the applicant in order to enable the Court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the Section.

iii) The observations made in Balchand Jain's case (supra), regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot be treated as conclusive on the point. There is no warrant for reading into Section 438, the conditions subject to which bail can be granted under Section 437(1) of the Code and therefore, anticipatory bail cannot be refused in respect of offences like criminal breach of trust for the mere reason that the punishment provided for is

imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

iv) No blanket order of bail should be passed and the Court which grants anticipatory bail must take care to specify the offence or the offences in respect of which alone the order will be effective. While granting relief under Section 438(1) of the Code, appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One such condition can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the recovery. Otherwise, such an order can become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed.

v) The filing of First Information Report (FIR) is not a condition precedent to the exercise of power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.

vi) An anticipatory bail can be granted even after an FIR is filed so long as the applicant has not been arrested.

vii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government advocate forthwith and the question of bail should be re-examined in the light of 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.

ix) Though it is not necessary that the operation of an order passed under Section 438(1) of the Code be limited in point of time but 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 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 reasonable short period after the filing of the FIR.

(Emphasis supplied)

The power of the Court under Section 438 Cr.P.C is purely discretionary and this Court has to exercise its power judiciously based on settled principles. But, the circumstances to exercise such jurisdiction may vary from case to case. The law regarding grant of anticipatory bail is elaborately discussed by the Constitution Bench of

the Apex Court in **Gurbaksh Singh Sibbia v. State of Punjab** (referred supra), as the power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" such power is to be exercised. No hard and fast rule can be laid down in discretionary matters like grant or refusal of bail whether anticipatory or regular bail. The Apex Court further held that, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by *malafides*; that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The 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 applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the state" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. Therefore, anticipatory bail can be granted even in serious cases like economic offences and States should have no consideration for grant or refusal of anticipatory bail, as there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to

commit it. Therefore, while dealing with the application for grant of pre-arrest bail or anticipatory bail, the Court must take into consideration the guidelines issued in **Gurbaksh Singh Sibbia v. State of Punjab** (referred supra).

At this juncture, it would be appropriate to note that the view expressed by the Court in **Adri Dharan Das Vs. State of W.B**¹⁶ to the effect that while dealing with an application under Section 438 of the Code, the Court cannot pass an interim order restraining arrest as it will amount to interference in the investigation, does not appear to be in consonance with the opinion of the Constitution Bench in **Gurbaksh Singh Sibbia v. State of Punjab** (supra). Similarly, the observation that power under Section 438 is to be exercised only in exceptional cases seems to be based on the decision in **Balchand Jain v. State of Madhya Pradesh** (referred supra) which has not been fully approved by the Constitution Bench. On this aspect, the Constitution Bench stated thus:

"The observations made in Balchand Jain regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot therefore be treated as concluding the points which arise directly for our consideration. We agree, with respect, that the power conferred by Section 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection but beyond that, it is not possible to agree with the observations made in Balchand Jain in an altogether different context on an altogether different point".

(Emphasis Supplied)

For grant of pre-arrest bail under Section 438 Cr.P.C, certain principles have been laid down by the Apex Court and the Courts are bound to follow the guidelines laid down by the Apex Court in **Bhadresh**

¹⁶ 2005 AIR 1057

Bipinbhai Sheth v. State of Maharashtra¹⁷ case. The Apex Court only reiterated the 10 guidelines laid down in **Siddharam Satlingappa Mhetre v. State of Maharashtra** (referred supra) which are as follows:

- i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;*
- ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*
- iii. The possibility of the applicant to flee from justice;*
- iv. The possibility of the accused's likelihood to repeat similar or the other offences.*
- v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.*
- vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.*
- vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;*
- viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, **no** prejudice should be caused to the free, fair and full investigation and **there should be** prevention of harassment, humiliation and unjustified detention of the accused;*
- ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;*
- x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.*

(Emphasis supplied)

In **Savitri Agarwal v. State of Maharashtra**¹⁸, the Supreme Court reiterated the same principles referred supra.

In **Jagannath v. State of Maharashtra**¹⁹, the Supreme Court laid down the following four guidelines to be taken into consideration for refusing or granting an anticipatory bail.

¹⁷ 2016 (1) ALT (CRL.) 122 (S. C)

¹⁸ AIR 2009 SC 3173

¹⁹ 1981 Cri LJ 1808 at p. 1812 (Bom)

(a) *The court must be cautious and circumspect in exercising the power of grant of anticipatory bail because the said bail to some extent interferes with the investigation of the crime.*

(b) *If the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injuring and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made.*

(c) *The considerations which are relevant for the grant of bail after arrest are also relevant in regard to grant of anticipatory bail. Those considerations are, “ the court before granting bail in cases involving non-bailable offences particularly where the trial has not yet commenced should take into consideration various matters such as the nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State and similar other considerations.”*

(d) *There is no bar to grant of anticipatory bail in respect of economic offences.*

(Emphasis supplied)

Learned Senior Counsel for the petitioner contended that, in the absence of recording any finding, that there is no *prima facie* material to conclude that this petitioner did commit no offence, the Court cannot grant pre-arrest bail as a matter of course and placed reliance on the judgment in **Jai Prakash Singh v. State of Bihar** (referred supra), wherein, the Apex Court in paragraphs 13, 14 & 16 held as follows:

“13. There is no substantial difference between Sections 438 and 439 Code of Criminal Procedure so far as appreciation of the case as to whether or not a bail is to be granted, is concerned. However, neither anticipatory bail nor regular bail can be granted as a matter of rule. The anticipatory bail being an extraordinary privilege should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail.

14. In State of M.P. and Anr. v. Ram Kishna Balothia and Anr. AIR 1995 SC 1198, this Court considered the nature of the right of anticipatory bail and observed as under:

We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Code of Criminal Procedure

.....Also anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. and its non-application to a certain special category of offences cannot be considered as violative of Article 21.

16. Ms. Kavita Jha, Learned Counsel appearing for the accused/Respondents has vehemently advanced the arguments on the concept of life and liberty enshrined in Article 21 of the Constitution of India placing a very heavy reliance on the observations made by this Court in *Siddharam Satlingappa Mhetre v. State of Maharashtra* and Ors. AIR 2011 SC 312, and submitted that unless the custodial interrogation is warranted in the facts and circumstances of the case, not granting anticipatory bail amounts to denial of the rights conferred upon a citizen/person under Article 21 of the Constitution. We are afraid the law as referred to hereinabove does not support the case as canvassed by Learned Counsel for the accused-Respondents. More so, the Constitution Bench of this Court in *Kartar Singh v. State of Punjab*, 1994) 3 SCC 569, while summing up the law in para 368, inter-alia, held as under:

Section 20(7) of the TADA Act excluding the application of Section 438 of the Code of Criminal Procedure in relation to any case under the Act and the Rules made thereunder, cannot be said to have deprived the personal liberty of a person as enshrined in Article 21 of the Constitution.”

(Emphasis supplied)

In view of the long line of perspective judicial pronouncements of various Courts, the power under Section 438 Cr.P.C has to be exercised in exceptional circumstances, only after recording satisfaction of the Court that there is no *prima facie* material to conclude that the second respondent/A-11 has committed an offence, which is sine qua non to exercise discretionary jurisdiction that conferred either on the Sessions Court or High Court. Here, in the order under challenge, the in-charge Sessions Judge did not record any such finding that there was no *prima facie* material against the second respondent/A-11 to conclude that he committed any offence, muchless, offences punishable under Sections 420, 468, 471 r/w Section 34 & 120B of IPC. Thus, the Sessions Court in a most casual manner, passed the nonchalant order, which is under challenge in this present criminal petition.

There is a little controversy regarding cancellation of bail or setting-aside or annulment of anticipatory bail granted by the Sessions Court regarding entertainment of petition to set-aside or cancel such order.

Learned Senior Counsel for the petitioner mainly contended that, in a regular bail or anticipatory bail, a direction can be given to surrender before concerned police after setting aside or cancelling the order of regular bail or anticipatory bail in few circumstances. But, Section 439(2) Cr.P.C is silent as to under what circumstances such direction can be given. But, there are divergent views expressed by different Courts. One view is that, when, either regular or anticipatory bail is granted, a petition for cancellation can be filed before the Court which granted the bail, either regular or anticipatory. The other view is that, such application has to be filed only before the higher Court, challenging the order of bail, either regular or anticipatory, granted by the Subordinate Court. (vide **Abdul Basit alias Raju and others v. Mohd. Abdul Kadir Chaudhary and another** (referred supra)).

Learned Senior Counsel for the petitioner strenuously demonstrated that the petitioner did not violate any conditions imposed by the Sessions Court while granting bail and in such case, the Court cannot exercise power under Section 439(2) Cr.P.C and placed reliance on the judgment of the Supreme Court in **Dolatram and others v. State of Haryana** (referred supra), wherein, it is held that, rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally

speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the Court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

The same principle is reiterated by the Supreme Court in **Padmakar Tukaram Bhavnagare and another v. State of Maharashtra and another** (referred supra).

In view of the principles laid down in the above judgments, the possibility for cancellation of a bail may be due to supervening circumstances, i.e. circumstances intervening between the date of granting bail and before termination of criminal proceedings. But, in this case, the order passed by the in-charge Sessions Judge in CrI.M.P.No.3726 of 2017 under Section 438 Cr.P.C granting anticipatory bail to the second respondent/A-11 is under challenge in a higher forum. Request of the petitioner is in consonance with the principle laid down by the Apex Court in **Abdul Basit alias Raju and others v. Mohd. Abdul Kadir Chaudhary and another** (referred supra). Therefore, this Court can exercise power under Section 482 Cr.P.C or under Section 439(2) Cr.P.C to quash or set-aside or annul the order passed by the in-charge

Sessions Judge in Crl.M.P.No.3726 of 2017, subject to availability of grounds to exercise such power.

The Full Bench of the Apex Court in **Aslam Babalal Desai v. State of Maharashtra**²⁰ and **Narendra K. Amin (Dr.) v. State of Gujarat and another**²¹ laid down certain parameters for cancellation of bail, by relying on the judgment in **State Through Delhi v. Sanjay Gandhi**²², wherein, it was succinctly held that, rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. The Apex Court further stated that, Section 439(2) of the Code of Criminal Procedure confers jurisdiction on the High Court or Court of Sessions to direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power to take back in custody, an accused who has been enlarged on bail has to be exercised with care and circumspection. But the power, though of an extra-ordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with witnesses. Refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the courts to be silent spectators to the subversion of the judicial process.

²⁰ AIR 1993 SUPREME COURT 1

²¹ (2008) 13 Supreme Court Cases 584

²² 1978 AIR 961

Similarly in **Bhagirathsinh Judeja Vs. State of Gujarat**²³ the Apex Court has held that, very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail and the trend today is towards granting bail because it is now well-settled by a catena of decisions of this Court that the power to grant bail is not to be exercised as if the punishment before trial is being imposed. The only material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with evidence.

Finally, the Full Bench of the Apex Court in **Aslam Babalal Desai v. State of Maharashtra** (referred supra), summed up the principle stating that, once the accused has been released on bail his liberty cannot be interfered with lightly i.e. on the ground that the prosecution has subsequently submitted a charge-sheet. Such a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Sections 57 and 167(2) of the Code. We are, therefore, of the view that once an accused is released on bail under Section 167(2) he cannot be taken back in custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals the commission of a non-bailable crime, and over-ruled the ratio of **Rajnikant Jivanlal and Anr. v. Intelligence Officer, Narcotic Control Bureau, New Delhi**²⁴ to the extent it is inconsistent herewith does not, with respect, state the law correctly.

Moreover, in **Narendra K. Amin (Dr.) v. State of Gujarat and another** (referred supra), while reiterating the judgments of various High

²³ (1984) 1 SCC 284

²⁴ AIR 1990 SC 71

Courts including **Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav**²⁵, the Apex Court concluded that, once it is found that bail was granted on untenable grounds, same can be cancelled. The stand that there was no supervening circumstance has no relevance in such case.

This view is fortified by the judgment in **Puran v. Rambilas & Anr**²⁶, wherein, the Division Bench of the Apex Court after reviewing the entire law laid down by the Supreme Court in **Niranjan Singh & another v. Prabhakar Rajaram Kharote**²⁷, **Dolatram and others v. State of Haryana** (referred supra) and **Gurcharan Singh v. State (Delhi Administration)**²⁸ was of the view that, if, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under S. 439 (2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court. In **R. Rathinam v. State of DSP, District Crime Branch, Madurai District and Anr**²⁹, the Supreme Court reiterated the same principles.

²⁵ (2004) 7 SCC 528

²⁶ AIR 2001 SC 2023

²⁷ 1980 CriLJ 426

²⁸ 1978 CriLJ 179

²⁹ (2000) 1 SCR 718

In the later judgment of the Supreme Court in **Manjit Prakash & ors. V. Shobha Devi & anr**³⁰, the Apex Court discussed about the parameters for grant of bail and cancellation of bail that stand on different footings by relying on the majority judgment in **Aslam Babalal Desai v. State of Maharashtra** (referred supra), **Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav** (referred supra). But, in **Puran v. Rambilas & Anr** (referred supra), the Apex Court succinctly observed as follows.

"11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in Gurcharan Singh v. State (Delhi Admn.). In that case the Court observed as under: (SCC p. 124, para 16) "If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-à-vis the High Court."

(Emphasis supplied)

Thus, if the order suffers from any perversity or on consideration of any extraneous material, the Higher Court can set-aside or annul or quash the order of regular bail or pre-arrest bail by exercising power under Section 439(2) Cr.P.C, only in extraordinary and overwhelming circumstances.

Similarly in **Bhagirathsinh Judeja Vs. State of Gujarat** (referred supra) the Apex Court has held that, very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail and the trend today is towards granting bail because it is now well-settled by a catena of decisions of this Court that the power to grant bail

³⁰ AIR 2008 SC 3032

is not to be exercised as if the punishment before trial is being imposed. The only material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with evidence. Similar view was expressed by the Apex Court in **Mehboob Dawood Shaikh v. State of Maharashtra**³¹.

In **Neeru Yadav v. State of U.P.**³², the Full Bench of the Apex Court again reviewed the law declared by the Apex Court for cancellation of bail by referring the earlier judgments in **State of U.P v. Amarmani Tripathi**³³, **Puran v. Rambilas** (referred supra), **Narendra K. Amin v. State of Gujarat** (referred supra), and **Prakash Kadam v. Ramprasad Vishwanah Gupta**³⁴ and held as follows:

“At the outset we are obliged to clarify that it is not an appeal seeking cancellation of bail in the strictest sense. It actually calls in question the legal pregnability of the order passed by the High Court. The prayer for cancellation of bail is not sought on the foundation of any kind of supervening circumstances or breach of any condition imposed by the High Court. The basic assail is to the manner in which the High Court has exercised its jurisdiction under Section 439 CrPC while admitting the accused to bail. To clarify, if it has failed to take into consideration the relevant material factors, it would make the order absolutely perverse and totally indefensible. That is why there is a difference between cancellation of an order of bail and legal sustainability of an order granting bail.”

(Emphasis supplied)

In **Neeru Yadav v. State of U.P** (referred supra), a reference was made to the earlier judgment of the Supreme Court in, **Ram Govind Upadhyay v. Sudarshan Singh**³⁵, wherein, it has been clearly laid down that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. The heinous nature of crimes warrants more caution as there is a greater chance of rejection of bail

³¹ (2004) 2 SCC 362

³² (2016) 15 Supreme Court Cases 422

³³ (2005) 8 SCC 21

³⁴ (2011) 6 SCC 189

³⁵ (2002) 3 SCC 598

though, however, dependent on the factual matrix of the matter. In the said case, reference was made to **Prahlad Singh bhati v. NCT of Delhi**³⁶, and thereafter the court proceeded to state the following principles:-

“(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

“(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

“(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

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

It is a well-settled principle of law that, while dealing with an application for grant of bail, it is the duty of the Court to take into consideration certain factors and they basically are, (i) the nature of accusation and the severity of punishment in cases of conviction and the nature of supporting evidence, (ii) reasonable apprehension of tampering with the witnesses for apprehension of threat to the complainant, and (iii) Prima facie satisfaction of the court in support of the charge. [vide **Chaman Lal v. State of U.P**³⁷]

In **Prasanta Kumar Sarkar v. Ashis Chatterjee**³⁸, while dealing with the Court's role to interfere with the power of the High Court to grant bail to the accused, the Court observed that it is to be seen that the High Court has exercised this discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in catena of judgments on that point. The Court proceeded to enumerate the factors:-

³⁶ (2001) 4 SCC 280

³⁷ (2004) 7 SCC 525

³⁸ (2010) 14 SCC 496

“9. ... among other circumstances, the factors [which are] to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

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

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.”

(Emphasis supplied)

Finally, the Supreme Court in **Neeru Yadav v. State of U.P** (referred supra) concluded that, this being the position of law, it is clear as cloudless sky that the High Court has totally ignored the criminal antecedents of the accused. What has weighed with the High Court is the doctrine of parity. A history- sheeter involved in the nature of crimes which we have reproduced hereinabove, are not minor offences so that he is not to be retained in custody, but the crimes are of heinous nature and such crimes, by no stretch of imagination, can be regarded as jejune. Such cases do create a thunder and lightening having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be alert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner.

The Division Bench of the Apex Court in **Abdul Basit alias Raju and others v. Mohd. Abdul Kadir Chaudhary and another** (referred supra) again referred the judgments of **Gurcharan Singh v. State (Delhi Administration)** (referred supra), **Puran v. Rambilas & Anr** (referred

supra), **Narendra K. Amin (Dr.) v. State of Gujarat and another** (referred supra), **Ranjit Singh v. State of Madhya Pradesh**³⁹ and **Hari Singh Mann v. Harbhajan Singh Bajwa**⁴⁰ held that, although the court granting bail can cancel the bail on ground of accused's misconduct or new adverse facts having surfaced after the grant of bail, however, in view of express bar contained in Section 362 Cr.P.C, it cannot review its order as to grant of bail on ground of it being unjustified, illegal or perverse. Such challenge to bail order on ground of it being illegal or contrary to law can be determined only by the court superior to the court which granted bail. Thus, from the law declared by the Apex Court in the judgments referred supra, including the judgment in **Abdul Basit alias Raju and others v. Mohd. Abdul Kadir Chaudhary and another** (referred supra) and other judgments of the Supreme Court, when the order of anticipatory bail granted in favour of the second respondent/A-11 is challenged on the ground that it is unjustified or illegal or perverse, the only course open to the petitioner herein is to file a petition before the Superior Court i.e. the High Court and if the petition is filed for cancellation on the ground of supervening circumstances, the bail liable to be cancelled, the petitioner can approach the Sessions Court which granted the bail, and need not approach the Superior Court to claim such relief.

Similar view was taken by the Apex Court in **Anil Kumar Yadav v. State (NCT) of Delhi & another**⁴¹, wherein, the Apex Court again reviewed the law and based on the judgment in **State of Bihar v. Rajballav Prasad**⁴², concluded that the Court while granting bail should

³⁹ (2013) 16 SCC 797

⁴⁰ 2001 SCC (Cri) 113

⁴¹ AIR 2017 SC 5398

⁴² (2017) 2 SCC 178

exercise its discretion in a judicious manner. Of course, once discretion is exercised by the Sessions Court to grant bail on consideration of relevant materials, the High Court would not normally interfere with such discretion, unless the same suffers from serious infirmities or perversity. While considering the correctness of the order granting bail, the approach should be whether the order granting bail to the Accused was vitiated by any serious infirmity, in which case, the High Court could certainly interfere with the exercise of discretion. The materials available on record prima facie indicating the involvement of the Accused, possibility of Accused tampering with witnesses and the gravity of the crime were not kept in view by the Sessions Court. Since the Sessions Court granted bail to the Appellants on irrelevant considerations and the same suffered from serious infirmity, the High Court rightly set aside the order of grant of bail to the Accused. Even, the judgment of the Apex Court in Apex Court in **Anil Kumar Yadav v. State (NCT) of Delhi & another** (referred supra), supports the view taken in **Abdul Basit alias Raju and others v. Mohd. Abdul Kadir Chaudhary and another** (referred supra). Thus, it is clear from the long line of perspective pronouncements that a bail can be cancelled, set-aside or annulled or quashed by the Superior Court when the Court found that it is impregnable or perverse, unjustified and contrary to the principles of law and the bar under Section 362 Cr.P.C has no application to such petition filed before Superior Courts filed challenging order passed by Subordinate Court, i.e. Sessions Court in the present case.

The grounds for cancellation of bail or setting-aside the bail are laid down by the Apex Court in **Usha Devi v. The State of Bihar**⁴³ which reads as follows:

“17. It is well settled that the grounds for cancellation of bail under Section 437(5) and 439(2) of the Code are identical, namely, bail granted under Section 437(1) or 439(1) of the Code can be cancelled broadly when one or more of the following conditions are fulfilled:

- (i) The accused misuses his liberty by indulging in similar activity,***
- (ii) Interferes with the Course of investigation,***
- (iii) Attempts to tamper with the evidence,***
- (iv) Threaten witnesses or indulges in similar activities which would hamper smooth investigation,***
- (v) There is likelihood of the accused fleeing away to another country.***
- (vi) Attempts to make himself scarce by going underground or becoming unavailable to the Investigating Agency,***
- (vii) Attempts to place himself beyond the reach of the surety,***
- (viii) Bail has been granted by an inferior Court in a case involving serious offence shocking to the conscience of the superior Courts***
- (ix) After investigation the facts disclose commission of graver offence.”***

(Emphasis supplied)

The above guidelines mostly relates to intervening circumstances

But, in **Kanwar Singh Meena v. State of Rajasthan** (referred supra), the Apex Court observed that, Cancellation of bail is a serious matter. Bail once granted can be cancelled only in the circumstances and for the reasons which have been clearly stated by this Court in a catena of judgments.

In **Virupakshappa Gouda and another v. The State of Karnataka**⁴⁴, the Apex Court reiterated the principles, including the judgment of **Central Bureau of Investigation v. V. Vijay Sai Reddy**⁴⁵ by observing thus:- While granting bail, the court has to keep in mind the nature of accusation, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of

⁴³ 2006 CriLJ 4435

⁴⁴ AIR 2017 SC 1685

⁴⁵ (2013) 7 SCC 452

the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the Accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words reasonable grounds for believing instead of the evidence which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the Accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the Accused beyond reasonable doubt.

In **Dinesh M.N. (S.P) v. State of Gujarat**⁴⁶, the three Judge bench of the Apex Court held that where the Court admits the Accused to bail by taking into consideration irrelevant materials and keeping out of consideration the relevant materials the order becomes vulnerable and such vulnerability warrants annulment of the order.

In **Rashmi Rekha Thatoi and another v. State of Orissa and others**⁴⁷, the Apex Court laid down certain guidelines for grant of pre-arrest bail, by referring to guidelines laid down by the Apex Court in **Gurbaksh Singh Sibbia** case (referred supra), **Balchand Jain v. State of M.P** (referred supra), **Savitri Agarwal v. State of Maharashtra** (referred supra), **Union of India v. Padam Narain Aggarwal**⁴⁸, **Narendra K. Amin (Dr.) v. State of Gujarat and another** (referred supra), **Adri Dharan Das**

⁴⁶ (2008) 5 SCC 66

⁴⁷ (2012) 5 Supreme Court Cases 690

⁴⁸ (2008) 13 SCC 305

Vs. State of W.B (referred supra), **Salauddin Abdulsamad Shaikh v.**

State of Maharashtra⁴⁹, held in paragraphs 7, 18 & 25 as follows:

"7. Keeping the cherished idea of liberty in mind, the fathers of our Constitution engrafted in its Preamble: "Liberty of thought, expression, belief, faith and worship." After a lot of debate in the Constituent Assembly, Article 21 of the Constitution came into existence in the present form laying down in categorical terms that no person shall be deprived of his life and personal liberty except according to the procedure established by law.

16. The pivotal issue that emanates for consideration is whether the orders passed by the High Court are legitimately acceptable and legally sustainable within the ambit and sweep of Section 438 of the Code. To appreciate the defensibility of the order it is condign to refer to Section 438 of the Code which reads as follows.

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

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

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

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

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

⁴⁹ (1996) 1 SCC 667

(2) When the High Court or the Court of Session makes a direction under Sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the court;

(iv) such other condition as may be imposed under Sub-section (3) of Section 437, as if the bail were granted -under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the court under Sub-section (1).

In Savitri Agarwal v. State of Maharashtra and Anr., the Bench culled out the principles laid down in Gurbaksh Singh (supra). Some principles which are necessary to be reproduced are as follows:

(i) Before power under Sub-section (1) of Section 438 of the Code is exercised, the Court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively. Specific events and facts must be disclosed by the applicant in order to enable the Court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the Section.

ii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government advocate forthwith and the question of bail should be re-examined in the light of 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."

(Emphasis supplied)

In **Ranjit Singh v. State of M.P** (referred supra), the Supreme Court took a serious view about listing of a matter before another Judge, when the other regular Judge was available and held that, when the earlier bail application was dismissed and the later application cannot be listed before another judge, it must be listed before the same Judge. Granting bail by the Judge without considering the order of dismissal passed by the other Judge is an impropriety and it is liable to be set-aside. Keeping in view the law declared by the Apex Court in catena of judgments referred supra, it would like to advert to the grounds urged in the present criminal petition.

The **first ground** is that CrI.M.P.No.2994 of 2017 was dismissed on 04.10.2017 by the regular Presiding Officer i.e. Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad. But, when the regular Presiding Officer was on leave, suddenly, a petition was filed and an order was obtained by the second respondent/A-11 in CrI.M.P.No.3726 of 2017 before IV Additional Metropolitan Sessions Judge, Hyderabad, In-charge Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad, who is the in-charge officer of the original Court for a day or two.

The Regular Officer i.e the Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad dismissed the petition in CrI.M.P.No.2994 of 2017 making the following observations:

“Heard both sides. In this matter, the allegations against the petitioner are serious in nature. It appears that the petitioner did not comply section 41(a) Cr.P.C as directed by the Hon’ble

High Court to the police in Crl.P.No.5781/2017 and the Hon'ble High Court also observed in the said petition that the material placed before the court is prima facie sufficient to investigate into the matter in order to ascertain the truthfulness or otherwise of the allegations made in the complaint. It also appears that investigation is still pending and custodial investigation is necessary as some of the documents have to be seized. Hence, this is not a fit case to grant anticipatory bail to the petitioner, as such the petition is liable to be dismissed. In the result, the petition is dismissed."

Thereupon, the second respondent/A-11 filed Crl.M.P.No.3726 of 2017 before IV Additional Metropolitan Sessions Judge, Hyderabad, while Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad, was placed as In-Charge for grant of anticipatory bail even without any changed circumstances and also by suppressing the dismissal of quash petition by the High Court and dismissal of bail application Crl.M.P.No.2994 of 2017 by the regular Presiding Officer i.e. Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad.

As discussed above, a bail application is filed before a Sessions Judge and invited an order of dismissal. The application should be listed before the same Court. If, the Regular Officer who dealt with the application is on leave, then it must be listed before the Judge holding Additional Charge or Full Additional Charge during the leave period of the Regular Officer. The second respondent/A-11 after obtaining an adverse order on 04.10.2017 from the Regular Officer, filed Crl.M.P.No.3726 of 2017 and obtained an order in his favour on 05.12.2017 from the In-Charge Officer i.e. IV Additional Metropolitan Sessions Judge, Hyderabad, In-Charge Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad. Moreover, it is an undisputed

fact that the IV Additional Metropolitan Sessions Judge, Hyderabad, In-Charge Additional Metropolitan Sessions Judge for Trial of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad passed an order in CrI.M.P.No.3726 of 2017 which is now under challenge. The order passed by the Regular Officer is clear that the second respondent/A-11 does not deserve any anticipatory bail, as the investigation is still going on and custodial interrogation is necessary to collect real evidence from the possession of the second respondent/A-11. Though a reference was made in the criminal petition about dismissal of the CrI.P.No.3726 of 2017, the second respondent/A-11 did not disclose anything about the date of the order or the effect of order. It appears from the record that the bail application was listed before the Regular Judge on 29.11.2017 and on that day, the second respondent/A-11 reported not ready. Then the matter was heard by the In-Charge Officer and pronounced the order impugned in this criminal petition. Though, the second respondent/A-11 allegedly committed an offence long prior to filing of this petition and approached both High Court and Sessions Court for grant of bail and got dismissed, the petition under Section 438 Cr.P.C once by the High Court and other before the Sessions Court as withdrawn, but suddenly, obtained the order without any changed circumstances in the investigation.

It is relevant to refer the law laid down by the Apex Court in **Bharat Chaudhary and another v State of Bihar and another⁵⁰, Ram Govind Upadhyay v Sudarshan Singh and others⁵¹ and Gajanand Agarwal v State of Orissa and others⁵².**

⁵⁰ (2003) 8 SCC 77

⁵¹ (2002) 3 SCC 598

⁵² (2006) 12 SCC 131

In **Bharat Chaudhary and another v State of Bihar and another** (referred supra), the Apex Court reiterated the object behind grant of pre-arrest bail and held that the power under Section 438 Cr.P.C. can be exercised either by Court of Session or High Court or the Apex Court even when cognizance is taken or a charge sheet is filed. The object of Section 438 Cr.P.C is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The Court has either taken cognizance of the complaint or the investigating agency has filed a charge sheet, would not by itself, in the opinion of the Apex Court, prevent the Courts concerned from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the Courts concerned while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of a charge sheet cannot by itself be construed as a prohibition against the grant of anticipatory bail.

In **Ram Govind Upadhyay v Sudarshan Singh and others** (referred supra), the Apex Court held that for grant of pre-arrest bail, considerations for cancellation of such an order of bail are independent and do not overlap each other, but in the event of non consideration of considerations relevant for the purpose of grant of bail and in the event an earlier order of rejection available on the records, it is a duty incumbent on the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago. The subsequent FIR is on record and incorporated therein are the charges under Sections 323 and 504 IPC in which the charge

sheet have already been issued. Thus, it is clear from the principle laid down therein, the Court is required to record reasons giving departure to the earlier order, which was passed about a month ago rejecting the bail to the petitioner. In such a case, the Court can set aside the order in the absence of reasons recorded by the Court while granting pre-arrest bail. This principle is suffice to conclude that the order of In-Charge Sessions Judge is contrary to law.

In **Gajanand Agarwal v State of Orissa and others** (referred supra), the Apex Court adverted to the order passed by the High Court and when no reason has been indicated by the High Court for granting bail except stating that in the peculiar facts and circumstances of the case the bail was being granted because the accused is in custody for ten months, is illegal. The principle laid down in the above judgment is directly applicable to the present facts of the case, since, In-Charge Sessions Judge did not record his satisfaction as to the innocence of second respondent/A-11, *prima facie*.

The petition filed under Section 438 Cr.P.C in CrI.P.No.3726 of 2017 is bereft of any changed circumstances in the investigation, except virtually reiterating the grounds urged in the earlier bail application in CrI.M.P.No.2994 of 2017. It appears from the allegations made in the petition that the bail was claimed not due to any changed circumstances, but, based on the same allegations made in the earlier bail application in CrI.M.P.No.2994 of 2017. When the bail application was dismissed having found that there are no grounds to grant pre-arrest bail to this petitioner by issuing a direction to the police to release the second respondent/A-11, on bail in the event of his arrest, the In-Charge Officer would have atleast referred the changed circumstances in the investigation. But, obviously, for different reasons, the In-Charge Officer

who passed the order under challenge did not point out any changed circumstances after dismissal of the earlier bail application in CrI.M.P.No.2994 of 2017 till filing of CrI.M.P.No.3726 of 2017, enabling the Court to grant pre-arrest bail to the second respondent/A-11. Therefore, granting a pre-arrest bail to the second respondent/A-11 without any changed circumstances in investigation, is a serious illegality, the Court cannot grant a pre-arrest bail as a matter of routine, more particularly, when the earlier bail application was dismissed by the Regular Officer, assigning his own reasons and the order passed by the Regular Officer became final. In such case, the In-Charge Officer ought not to have granted a pre-arrest bail without any changed circumstances in the investigation.

Though the principles of *res judicata* and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a co-ordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the Courts must give due weight to the grounds which weighed with the former or higher Court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same it would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting. (vide In **Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav** (referred supra))

When a bail application is rejected there is no bar to entertain

another application afresh, since principle of *res judicata* has no application, however there must be some new ground to be made out to apply for bail again after rejection of earlier bail application (vide: “**Gama v. State of U.P.**”⁵³) as such, any number of bail applications can be filed, if some new ground is made out or by proceeding new material or due to changed circumstances in investigation.

In “**State of Tamil Nadu v. S.A.Raja**”⁵⁴ the Apex Court held in paragraphs 8 & 9 when a learned Single Judge of the same Court had denied bail to the respondent for certain reasons and that order was unsuccessfully challenged before the appellate forum, without there being any major change of circumstances, another fresh application should not have been dealt with within a short span of time unless there were valid grounds giving rise to a tenable case for bail. Of course, the principles of *res judicata* are not applicable to bail applications, but the repeated filing of the bail applications without there being any change of circumstances would lead to bad precedents. Similarly in “**Parvinder Singh v. State of Punjab**”⁵⁵ the Apex Court is of the view that dismissal of earlier bail application would not render fresh bail application, legally not maintainable and Court can always consider fresh circumstances and subsequent events.

Thus, the law consistently laid down by the Apex Court and other Courts is that if there are major changed circumstances in investigation, subsequent to dismissal of earlier bail application, the Court can entertain application for bail, consider the same and decide afresh. Merely, on the ground that the earlier application was dismissed, the

⁵³ 1987 Cr.L.J. 242 (All)

⁵⁴ (2006) (Supp.) (Cr.L.) 25 (SC)

⁵⁵ (2003) 14 SCC 615

Court cannot straightaway dismiss the fresh bail application and if major changed circumstances are shown to the satisfaction of the Court, the Court can grant bail.

In view of the law declared by the Apex Court in various judgments referred supra, granting pre-arrest bail to the second respondent/A-11 after dismissal of the earlier anticipatory bail application in Crl.M.P.No.2994 of 2017 without major changed circumstances in the investigation is a grave illegality. On this ground alone, the order is liable to be set-aside.

The **second ground** raised by the learned Senior Counsel for the petitioner is that, filing of an application immediately without any changed circumstances after dismissal of earlier bail application and taking advantage of the situation that the Regular Officer was on leave and listing the matter before the In-Charge Officer is a matter of serious concern and it is nothing but bench haunting. Learned Senior Counsel for the petitioner placed reliance on the judgment in **Jagmohan Bahl and another v. State (NCT of Delhi) and another** (referred supra), wherein, the Supreme Court in paragraphs 7, 8,9 & 10 held as follows:

“7. On a perusal of the order passed by the High Court, we find that it has felt disturbed that the second application Under Section 438 Code of Criminal Procedure was allowed by another Additional Sessions Judge who had not dealt with the first application. It has opined that the Second Judge could not have entertained the bail application especially when the earlier Judge was available. To elaborate, the Additional Sessions Judge who has dealt with the matter on the first occasion, had neither been transferred from the said court, nor had he become incapacitated to come to court nor was he absent for a considerable length of time. As it appears, the High Court has taken exception to the fact that the application was moved when the 2nd Judge was allotted the roster to deal with the application Under Section 438 Code of Criminal Procedure.

8. To appreciate the analysis made by the High Court we have bestowed our anxious consideration and perused the order impugned. As far as the distinction drawn by the High Court between the categories of situations, namely, a bail order passed

in a perverse manner excluding the relevant matters and considering the extraneous matters which deserves to be lanced in exercise of supervisory jurisdiction to nullify the same and the other, which is fundamentally and absolutely situation based for cancelling the order of bail because of violation of the terms and conditions of the order granting bail and other supervening circumstances, the distinction gets support from the recent decisions rendered in Ash Mohammad v. Shiv Raj Singh @ Lalla Babu and Anr. (2012) 9 SCC 446 and Neeru Yadav v. State of U.P. and Anr.1 which have taken note of number of earlier authorities. However, the said situation or circumstance does not arise in the case at hand.

9. *In this context, we may refer with profit to the decision in Shahzad Hasan Khan v. Ishtiaq Hasan Khan and Anr. (1987) 2 SCC 684 wherein this Court took note of the fact that three successive bail applications made on behalf of the accused had been rejected and disposed of finally by one Judge of the High Court. However, another learned Judge, despite being aware of the situation, granted bail to the Respondent. In that context, this Court held that long standing convention and judicial discipline requires bail application to be placed before the learned Judge who had passed earlier orders. Proceeding further this Court observed:*

... The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of court inasmuch as an impression is not created that a litigant is shunning or selecting a court depending on whether the court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the court and the confidence of the other side being put in issue and there would be wastage of courts' time. Judicial discipline requires that such matters must be placed before the same Judge, if he is available for orders. Since Justice Kamleshwar Nath was sitting in court on June 23, 1986 the Respondent's bail application should have been placed before him for orders.

10. *In State of Maharashtra v. Captain Buddhikota Subha Rao (1989) Supp(2) SCC 605, the Court, placing reliance on Shahzad Hasan Khan (supra), opined that:*

... In such a situation the proper course, we think, is to direct that the matter be placed before the same learned Judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conducive to judicial discipline and would also save the court's time as a judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency."

(Emphasis supplied)

An identical question came up before the Full Bench of the Kerala High Court in **Firos Ali v. State of Kerala**⁵⁶, by placing reliance on the judgments in **Shahzad Hasan Khan v. Ishtiaq Hasan Khan**⁵⁷, **State of Maharashtra v. Captain Buddhikota Subha Rao**⁵⁸ and **Jagmohan Bahl and another v. State (NCT of Delhi) and another** (referred supra) issued the following guidelines to the Registry for listing the bail applications in paragraph 22 and they are extracted as follows:

"a) The subsequent bail application by the same accused will be entertained only if there is change of circumstance for filing such application.

b) Subsequent bail application filed by the same accused shall be heard by the learned Judge who has considered and passed orders on the earlier bail application/applications in the same crime.

c) The application filed by the co-accused may be considered and ordered by any other learned Judge having roster during the relevant point of time and such application need not be placed before the Judge who passed orders earlier on the application filed by another accused.

) The subsequent bail application filed by the same accused in the same crime during Onam and Christmas holidays may wait for orders till the end of the said holidays, in case, if the learned Judge who has passed orders on the earlier application is not available for orders during those holidays or if he is not designated as a Vacation Judge.

e) In case if the subsequent bail application is filed by the same accused during summer vacation and if the learned Judge who passed earlier order is not available for orders or if he is not a designated Vacation Judge, the memo filed under section 8 of the High Court Act on behalf of the accused-applicant be listed before the learned Judge nominated to hear the bail applications during the summer vacation. However, the fact that an earlier bail application in the same crime is dismissed is to be brought to the notice of that Vacation Judge. The factor of listing the matter during summer vacation or refusing to do so can be decided by the learned Vacation Judge sitting in summer vacation.

f) If the learned Judge who passed order on the earlier bail application filed by the same accused in the same crime is sitting in the Division Bench, the subsequent application for bail may be brought to the notice of the Hon'ble the Chief Justice by the Registry so as to enable the Hon'ble the Chief Justice to make necessary arrangement to have a special sitting of the said learned Judge.

⁵⁶ 2017ALL MR (Cri) 49

⁵⁷ AIR 1987 SC 1613

⁵⁸ AIR 1989 SC 2292

g) The counsel for the accused who is filing the subsequent application for bail in the same crime shall mention in the application seeking bail about the disposal of earlier bail application filed by this very accused. A copy of the order passed on such application earlier in respect of the same accused shall also be produced along with the second or successive bail applications.

h) It is the duty of the Public Prosecutor concerned to bring to the notice of the court, as far as possible, about the earlier bail application filed by the same accused as well as about any application filed by the co-accused in the same crime and the result thereof, either by filing the statement of objections or at least at the time of arguments on the bail application."

(Emphasis supplied)

In **Ranjit Singh v. State of M.P** (referred supra), the Supreme Court took a serious view about listing of a matter before another Judge, when the other regular Judge was available and held that, when the earlier bail application was dismissed and the later application cannot be listed before another judge, it must be listed before the same Judge. Granting bail by the Judge without considering the order of dismissal passed by the other Judge is an impropriety and it is liable to be set-aside. Thus, keeping in view the law declared by the Apex Court in catena of judgments referred supra, it would like to advert to the grounds urged in the present criminal petition.

In **Re: Mohit Chaudhary**⁵⁹, the Supreme Court while dealing with application for bail, highlighted the duty of an Advocate and observed that the practice of law is not akin to any other business or profession as it involves a dual duty - nay a primary duty to the Court and then a duty to the litigant with the privilege to address the Court for the client is best enunciated in the words of Justice **Mookerjee in Emperor v. Rajanikantha Bose**⁶⁰. The Practice of Law is not a business open to all who wish to engage in it. It is a personal right or privilege. It is in the nature of a Franchise from the State - That you are a member of the legal

⁵⁹ AIR 2017 SC 3936

⁶⁰ 49 CAL. 732; 71 Ind. Cas 81

profession is your privilege; That you can represent your client is your privilege; that you can in that capacity claim audience in Court is your privilege. Yours is an exalted profession in which your privilege is your duty and your duty is your privilege. They both coincide.

Warvelle's Legal Ethics, 2nd Edition at page 182 sets out the obligation of a lawyer; that a lawyer is under obligation to do nothing that shall detract from the dignity of the court, of which he is himself a sworn officer and assistant. He should at all times pay deferential respect to the Judge, and scrupulously observe the decorum of the courtroom that, the contempt jurisdiction is not only to protect the reputation of the concerned Judge so that he can administer Justice fearlessly and fairly, but also to protect "the fair name of the judiciary". The protection in a manner of speaking, extends even to the Registry in the performance of its task and false and unfair allegations which seek to impede the working of the Registry and thus the administration of Justice, made with oblique motives cannot be tolerated. In such a situation in order to uphold the honor and dignity of the institution, the Court has to perform the painful duties which we are faced with in the present proceedings. (vide **Dy. Secy., Ministry of Information & Broadcasting, In re**⁶¹).

Now turning to the "Standards of Professional Conduct and Etiquette" of the Bar Council of India Rules contained in Section I of Chapter II, Part VI, the duties of an advocate towards the Court have been specified that, an advocate shall use his best efforts to restrain and prevent his client from resorting to sharp or unfair practices or from doing anything in relation to the Court, opposing counsel or parties which the advocate himself ought not to do. An advocate shall refuse to

⁶¹ (1995) 3 SCC 619

represent the client who persists in such improper conduct. He shall not consider himself a mere mouthpiece of the client, and shall exercise his own judgment in the use of restrained language in correspondence, avoiding scurrilous attacks in pleadings, and using intemperate language during arguments in Court. The advocate is a representative but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law, he will not willfully misstate the facts, though it be to gain the case for his client. He will ever bear in mind that if he be an advocate of an individual and retained and remunerated often inadequately, for valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice and there is no Crown or other license which in any case or for any party or purpose can discharge him from that primary and paramount retainer. (vide **R. v. O'Connell** (7 Irish Law Reports 313))

The fundamentals of the profession thus require an advocate not to be immersed in a blind quest of relief for his client. The dignity of the institution cannot be violated in this quest as "law is no trade, briefs no merchandise (vide Bar Council of **Maharashtra v. M.V. Dabholkar**⁶²)

It is also pertinent to note at this point, the illuminating words of Vivian Bose, J. in 'G' a Senior Advocate of the Supreme Court, In **re G. A Sr. Advocate of SC, In re**⁶³, who elucidated that, to use the language of the Army, an Advocate of this Court is expected at all times to comport himself in a manner befitting his status as an "officer and a gentleman".

⁶² (1976) 2 SCC 291

⁶³ AIR 1954 SC 557

It is as far back as in 1925 that an Article titled 'The Lawyer as an Officer of the Court' published in the Virginia Law Review, lucidly set down what is expected from the lawyer which is best set out in its own words that, the duties of the lawyer to the Court spring directly from the relation that he sustains to the Court as an officer in the administration of justice. The law is not a mere private calling, but is a profession which has the distinction of being an integral part of the State's judicial system. As an officer of the Court the lawyer is, therefore, bound to uphold the dignity and integrity of the Court; to exercise at all times respect for the Court in both words and actions; to present all matters relating to his client's case openly, being careful to avoid any attempt to exert private influence upon either the judge or the jury; and to be frank and candid in all dealings with the Court, "using no deceit, imposition or evasion," as by misreciting witnesses or misquoting precedents. "It must always be understood," says Mr. Christian Doerfler, in an address before the Milwaukee County Bar Association, in December, 1911, "that the profession of law is instituted among men for the purpose of aiding the administration of justice. A proper administration of justice does not mean that a lawyer should succeed in winning a lawsuit. It means that he should properly bring to the attention of the Court everything by way of fact and law that is available and legitimate for the purpose of properly presenting his client's case. His duty as far as his client is concerned is simply to legitimately present his side of the case. His duty as far as the public is concerned and as far as he is an officer of the Court is to aid and assist in the administration of justice.

When the Advocate failed to bring to the notice of the Court certain facts in obtaining an order, such order is liable to be set-aside, since the

lawyer owes high degree of duty and responsibility to his profession and to his fellow members of the Bar is an obvious truth. His profession should be his pride, and to preserve its honor pure and unsullied should be among his chief concerns. "Nothing should be higher in the estimation of the advocate," declares Mr. Alexander H. Robbins, "next after those sacred relations of home and country than his profession. She should be to him the 'fairest of ten thousand' among the institutions of the earth. He must stand for her in all places and resent any attack on her honor - as he would if the same attack were to be made against his own fair name and reputation. He should enthrone her in the sacred places of his heart, and to her he should offer the incense of constant devotion. For, she is a jealous mistress.

Making such misrepresentation or failure to bring to the notice of the Court about certain facts, it was not an innocent act, an innocuous endeavor but a well thought out decision to tread an unfortunate path which the existing Advocate-on-Record was un-willing to do. The objective was only to assist the client by somehow seeking shifting of the Bench.

In view of the law declared by the Courts, the act of the second respondent/A-11 in making misstatements or incomplete statements to the Court regarding dismissal of the earlier bail application by the Court and dismissal of a petition filed under Section 482 Cr.P.C in CrI.P.No.5781 of 2017 before this Court having found sufficient material to proceed against the second respondent/A-11, dismissal of CrI.P.No.7241 of 2017 on 08.09.2017 as withdrawn and the interim order passed by this Court in W.P.No.25345 of 2017 on 02.08.2017 and

the finding recorded by the In-Charge Officer is nothing but bench haunting for the advantage of his client, the learned Counsel for the second respondent/A-11 and the learned Public Prosecutor before the Sessions Court disowned their duty towards Court and responsible for passing order impugned, indirectly, in the bail petition.

Yet, a serious fallacy in the order is the failure to refer anything about the order in the CrI.P.No.5781 of 2017 filed under Section 482 Cr.P.C. When the second respondent/A-11 filed a petition to quash the proceedings in Crime No.1020 of 2016 on the file of Banjara Hills Police Station, through a counsel before this Court, this Court upon consideration of the material observed in paragraphs 4 & 6 as follows:

“4. While exercising the inherent power under Section 482 Cr.P.C., the Court has to take into consideration the allegations made in the complaint only. The Court is not justified in embarking upon an enquiry as to probability, reliability or genuineness of the allegations made in the complaint at the initial stage of investigation. Whether the petitioner has committed the alleged offence or not will come to light during the course of investigation. The material placed before the Court is prima facie sufficient to investigate into the matter in order to ascertain the truthfulness or otherwise of the allegations made in the complaint.

6. Taking into consideration the facts and circumstances of the case and also the principle enunciated by the Supreme Court in Arnesh Kumar v State of Bihar, the Station House Officer, Banjara Hills Police Station, Hyderabad City, is hereby directed to follow the procedure as contemplated under Section 41-A Cr.P.C. in Crime No.1020 of 2016, so far as the petitioner/A11 is concerned.”

(emphasis supplied)

The order passed by this Court in CrI.P.No.5781 of 2017 attained finality. But, there was no reference either in the bail application or in the order passed by the Sessions Judge. Of course, there is a reference about the interim order passed in W.P.No.25345 of 2017. When the Court concluded that there is a *prima facie* material to investigate against this petitioner for various offences, more particularly, non-bailable

offences, the Court while exercising power under Section 438 Cr.P.C unless concludes that there is no *prima facie* material that the petitioner did commit no offence, cannot grant pre-arrest bail and recording such finding is sine qua non for exercising discretionary jurisdiction under Section 438 Cr.P.C. In the present case, Sessions Judge, though, adverted to the judgment of **Mulkhraj Arora v. State of Punjab**⁶⁴ delivered by Punjab and Haryana High Court which held as follows:

“The investigation of the case hinges on the documentary evidence which must be with the Punjab State Electricity Board. I think anticipatory bail should be allowed to Mulkh Raj Arora and Prem Nath. It is, therefore, ordered that in the event of arrest, the Investigating Officers shall call upon them to furnish bail. They shall join the investigation. They shall keep the investigation. If during the investigation, the Investigating Officer feels that without custodial interrogation of Mulkh Raj Arora and Prem Nath or both, as the case may be, the investigation will remain stultified, he may apply to the learned Sessions Judge, Amritsar for the cancellation of bail allowed either to Mulkh Raj Arora or Prem Nath or both. The learned Sessions Judge will not cancel bail till he hears the petitioners and the State.”

The principle laid down in the above judgment has nothing to do with the present facts of the case. However, when this Court already concluded that there is a *prima facie* material to proceed against this petitioner, the In-Charge Sessions Judge cannot substitute his opinion that there is no *prima facie* material to conclude that the second respondent/A-11 has committed any non-bailable offence. It amounts to reviewing the order of the High Court by the Sessions Judge. In any view of the matter, when the order is silent as to the satisfaction of the Presiding Officer of the Court, that there is no *prima facie* material that the second respondent/A-11 committed any non-bailable offence, the order is illegal and perverse and liable to be set-aside.

⁶⁴ IV (1999) CCR 89

Thus, the Sessions Judge passed the impugned order without following the guidelines issued by the Apex Court in **Gurbaksh Singh Sibbia** case (referred supra) and **Siddharam Satlingappa Mhetre vs State Of Maharashtra** (referred supra), and by totalling ignoring the guidelines, passed the present impregnable order, which is sought to be annulled by exercising power under Section 439(2) Cr.P.C, directing the second respondent/A-11 to surrender before the police.

Section 439(2) Cr.P.C did not specify the circumstances under which the Court can issue such direction. In the absence of any such circumstances for exercising such power under Section 439(2) Cr.P.C, this Court has no option except to fall back on the law declared by various Courts. Hence, this order is only a deductive or order *a priori*, but not inferential.

The **third ground** raised before this Court is that the second respondent/A-11 suppressed few orders passed by this Court and the Sessions Court. In view of the serious allegation made by the learned Senior Counsel for the petitioner, I adverted to the allegations made in the petition in CrI.M.P.No.3726 of 2017, which is bereft of such details. Filing an application, suppressing certain orders passed by the Court having invited the orders by the second respondent/A-11 himself would amount to playing fraud on the Court, which is a matter of serious concern. When the order was obtained by playing fraud on the Court, it vitiates the entire order and it is liable to be set-aside. (vide **Buddhi Kota Subbarao v/s State of Andhra Pradesh Rep. by its Public Prosecutor & Others** (referred supra).

In view of the law declared by various Courts, I find that the second respondent/A-11 suppressed various orders passed by this Court and Sessions Court, more particularly, in the order passed in CrI.P.No.5781 of 2017 dated 17.07.2017 where this Court recorded a specific finding that there is *prima facie* material to proceed against this petitioner, disagreeing with the contention of the second respondent/A-11 that he did commit no offence *prima facie*.

Though, learned Senior Counsel Sri Vedula Venkataramana appearing for the second respondent/A-11 contended that, bail can be cancelled only due to intervening circumstances, but, the contention of the Senior Counsel is without any substance, in view of the law declared by Apex Court referred supra. Hence, the said contention is rejected.

The learned Senior Counsel for the petitioner contended that, when the Regular Officer observed that custodial investigation is necessary, the In-Charge Officer ought not to have granted pre-arrest or anticipatory bail to the second respondent/A-11. The In-Charge Sessions Judge, basing on the principle laid down by Punjab & Haryana High Court (referred above), concluded that the case is totally based on documentary evidence on the ground that, there is a necessity of custodial investigation and the Court cannot reject pre-arrest bail. This conclusion is assailed in this petition, as there is no justification in the conclusion arrived by the In-Charge Officer. This contention cannot be sustained in this petition, since, the de-facto complainant/the petitioner herein is incompetent to decide whether custodial investigation is necessary or not. It is for the Investigating Agency to decide the same. Therefore, on that ground, the order cannot be over-turned.

In view of the aforementioned discussion, the order passed by the In-Charge Officer is perverse, illegal and the order is liable to be set-aside and the reasons are summed up hereunder:

- a) *The In-Charge officer did not advert to the requirement to record satisfaction that there is no material prima facie to conclude that the second respondent/A-11 committed any of the non-bailable offences, which is sine qua non for granting pre-arrest bail.*
- b) *The In-Charge officer without finding any changed circumstances after dismissal of earlier bail application by the Regular Officer in Crl.M.P.No.2994 of 2017, passed the impugned order, which is contrary to the law declared by the Supreme Court in the catena of decisions referred supra.*
- c) *The second respondent/A-11 did not disclose various orders passed by this Court, more particularly, the order passed in Crl.P.5781 of 2017 where this Court recorded its finding that there are no grounds to quash the proceedings at this stage, having concluded that there is prima facie material to proceed against the second respondent/A-11.*
- d) *In passing an order by the In-Charge Officer when the Regular Officer is on leave, for a day or two, without any imminent urgency, would amount to bench haunting, without taking into consideration the date of registration of crime, date of filing successive applications and their dismissal either as withdrawn or on merits.*
- e) *The In-Charge Officer passed an order based on extraneous material by quoting an irrelevant law laid down by Punjab & Haryana High Court, and committed a grave error without considering the gravity, conduct and antecedents of the second respondent/A-11.*

This Court cannot exercise power under Section 439(2) Cr.P.C, directing second respondent/A-11 to surrender before the police concerned, due to quashment or setting-aside the order passed by the In-Charge Officer of the Court, as the In-Charge Officer passed by the order ignoring the general principles for granting anticipatory bail, as referred in the preceding paragraphs

In view of my foregoing discussion, I find that the order passed by the Court below is perverse, illegal and irregular, based on extraneous material and the same is liable to be set-aside.

It is not out of place that the Registry may take note of the guidelines issued by the Full Bench of the Kerala High Court for listing the bail applications before appropriate Courts, in case of any contingency or dispute in listing of subsequent bail applications after dismissal of earlier bail applications with slight modification in Guideline No.(d) which reads as follows:

“d) The subsequent bail application filed by the same accused in the same crime during vacation(s) (Sankranti & Dussera) may wait for orders till the end of the said holidays, in case, if the learned Judge who has passed orders on the earlier application is not available for orders during those holidays or if he is not designated as a Vacation Judge.”

Though, it is not necessary to issue any directions to the Subordinate Courts to make over the bail applications, it is the practice of the Courts i.e. Sessions Courts that the bail applications once dismissed, the subsequent application shall be made over to the same Court which dismissed the earlier bail application, to avoid bench haunting. Therefore, the Principal Sessions Court (Sessions Division)

may follow the following guidelines; (which are illustrative, but not exhaustive).

"a) The subsequent bail application by the same accused will be entertained only if there is change of circumstance for filing such application.

b) Subsequent bail application filed by the same accused shall be heard by the learned Judge who has considered and passed orders on the earlier bail application/applications in the same crime, subject to availability of the Officer in the same Court

c) The application filed by the co-accused may be considered and ordered by any other learned Judge and such application need not be placed before the Judge who passed orders earlier on the application filed by another accused.

d) The subsequent bail application filed by the same accused in the same crime during vacation(s) may wait for orders till the end of the vacation, in case, if the learned Judge who has passed orders on the earlier application is not available for orders during the vacation or if he/she is not designated as a Vacation Judge."

*e) In case, if the subsequent bail application is filed by the same accused during summer vacation and if the learned Judge who passed earlier order is not available for passing orders or if he/she is not a **designated** as a Vacation Judge, bail application shall be listed before the learned Judge nominated to hear the bail applications during the summer vacation. **However, the fact that an earlier bail application in the same crime is dismissed is to be brought to the notice of that Vacation Judge.** The factor of listing the matter during summer vacation or refusing to do so can be decided by the learned Vacation Judge sitting in summer vacation.*

f) The counsel for the accused who is filing the subsequent application for bail in the same crime shall mention in the application seeking bail about the disposal of earlier bail application filed by this very accused. A copy of the order passed on such application earlier in respect of the same accused shall also be produced along with the second or successive bail applications.

g) It is the duty of the Public Prosecutor concerned to bring to the notice of the court, as far as possible, about the earlier bail application filed by the same accused as well as about any application filed by the co-accused in the same crime and the result thereof, either by filing the statement of objections or at least at the time of arguments on the bail application."

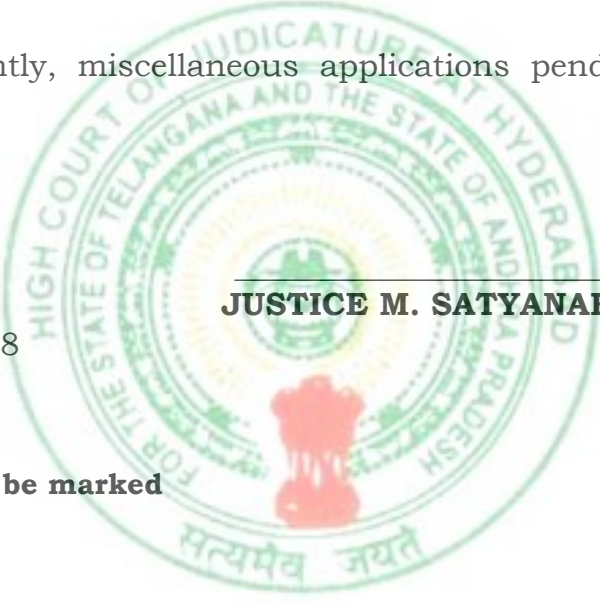
With the above guidelines, the criminal petition is allowed, setting-aside the order passed by the IV Additional Metropolitan Sessions Judge, Hyderabad, In-Charge Additional Metropolitan Sessions Judge for Trail of Communal Offices Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad dated 05.12.2017, in CrI.M.P.No.3726 of 2017. However, liberty is given to renew the request of the second respondent/A-11 before the Competent Court having jurisdiction and if, any application is filed, the Presiding Officer of the Court is directed to follow the principles referred in the earlier paragraphs and decide in accordance with law.

Consequently, miscellaneous applications pending, if any, shall stand closed.

Dated:04.06.2018

SP

**Note: LR copy to be marked
b/o
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JUSTICE M. SATYANARAYANA MURTHY