

UNION OF INDIA

v.

PADAM NARAIN AGGARWAL ETC.
(Criminal Appeal No. 1575 of 2008)

OCTOBER 3, 2008

[C.K. THAKKER AND D.K. JAIN, JJ.]

Code of Criminal Procedure, 1973 – s. 438

Anticipatory bail – Grant of by Courts of Law – Explained – Departmental proceedings by Customs Authorities – Summons issued to accused to participate in investigation – Non-cooperation by the accused – Initiation of criminal proceedings at the instance of Customs Authorities – Accused seeking anticipatory bail – High Court holding the application as pre-mature and ordering the accused to appear before the Authority – However, it directed the Customs Authorities not to arrest the accused without ten days prior notice if accused found to have committed non-bailable offence – Held: High Court rightly held that the application for anticipatory bail was premature – The statements recorded u/s 108 of Customs Act cannot be used against the accused – However, directions issued to Customs Authorities are illegal and invalid in as much it grants blanket protection to the accused and curtails the statutory power of the Authority – Exercise of power to grant anticipatory bail is unusual and discretionary – Courts to exercise such power only when it has reason to believe that the accused is likely to be arrested for a non-cognizable offence – Order granting anticipatory bail comes into operation only after the accused is arrested – Customs Act, 1962 – ss. 104 and 108.

Words and Phrases:

'Anticipatory bail' and 'arrest' – Meaning of.

- A Customs department initiated proceedings under Customs Act, against the respondent. Summons were issued to the respondent so as to enable the Department to investigate the case. Since the respondent did not co-operate, Customs Authorities filed complaints for commission of offences u/ss. 174 and 175 IPC.
- B Respondents filed applications seeking anticipatory bail and the same were dismissed. Respondent approached High Court, and it held that since the respondents were merely summoned u/s. 108 of Customs Act, applications for anticipatory bail were pre-mature. High Court ordered the respondents to appear before the Customs Authorities. However, it directed that if Customs Authorities found that any non-bailable offence had been committed by respondents, they shall not arrest the respondents without ten days prior notice. Hence the present appeal.
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Partly allowing the appeal, the Court

- E HELD: 1.1 The respondents were only summoned under Section 108 of Customs Act, 1962 for recording of their statements. The High Court was conscious and mindful of that fact. It, therefore, held that applications for anticipatory bail, in the circumstances, were pre-mature. [Para 63] [205, B]

- F 1.2 Statements recorded u/s. 108 of Customs Act are distinct and different from statements recorded by Police Officers during the course of investigation under Cr.P.C.. Section 108 does not contemplate magisterial intervention. The power is exercised by a Gazetted Officer of the Department. It obliges the person summoned to state truth upon any subject respecting which he is examined. He is not absolved from speaking truth on the ground that such statement is admissible in evidence and could be used against him. The provision thus enables the officer to elicit truth from the person examined. The underlying object of Section 108 is to ensure that the
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officer questioning the person gets all the truth concerning the incident. [Paras 56 and 59] [204,B; 203,B-C] A

Ramesh Chandra Mehta v. State of West Bengal, (1969) 2 SCR 461– followed

Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd., (2000) 7 SCC 53– relied on B

2.1 The order passed by the High Court to the extent of directions issued to the Custom Authorities is liable to be set aside. On the facts and in the circumstances of the present case, the directions cannot be said to be legal, valid or in consonance with law. Firstly, because the order passed by the High Court is a blanket one and seeks to grant protection to respondents in respect of any non-bailable offence. Secondly, because it illegally obstructs, interferes and curtails the authority of Custom Officers from exercising statutory power to arrest a person said to have committed a non-bailable offence by imposing a condition of giving ten days prior notice, a condition not warranted by law. [Paras 63 and 64] [205,F; 205,D-E] C D

2.2 Anticipatory bail means a bail in anticipation of arrest. The expression ‘anticipatory bail’ is a misnomer inasmuch as it is not as if bail presently granted in anticipation of arrest. Where a competent court grants ‘anticipatory bail’, it makes an order that in the event of arrest, a person shall be released on bail. There is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting anticipatory bail becomes operative. [Para 26] [190,G-H; 191,A] E F

2.3 The power of granting ‘anticipatory bail’ is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is 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 H

A his liberty while on bail” that such power may be exercised. Thus, the power is ‘unusual in nature’ and is entrusted only to the higher echelons of judicial service, i.e. a Court of Session and a High Court. [Para 27] [191,B-C]

B 2.4 Discretionary power conferred by the Legislature on higher judiciary cannot be put in a straight-jacket formula. Such power must be exercised by the Court keeping in view facts and circumstances of an individual case. Before power under sub-section (1) of Section 438 Cr.P.C. is exercised, the Court must be satisfied that the
C applicant invoking the provision of anticipatory bail has ‘reason to believe’ that he is likely to be arrested for a non-cognizable offence. High Court or the Court of Session must apply its own mind to the question and decide whether a case has been made out for grant of such relief.
D If condition precedent laid down in sub-section (1) of Section 438 Cr.P.C. is not satisfied and there is no reason to believe that the applicant is likely to be arrested for commission of a non-bailable offence, the Court has no power to grant anticipatory bail. No blanket order of bail can be passed by a Court while exercising power under
E Section 438 Cr.P.C. [Paras 37, 41, 43 and 48] [195,F; 197,B; 198,A-B; 200,B]

F 2.5 An order under Section 438 Cr.P.C. is a device to secure the individual’s liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. ‘Blanket’ order of bail may amount to or result in an invitation to commit an offence or a passport to carry on criminal activities or to afford a shield against any and all types of illegal operations, which can never be allowed in a society governed by Rule of Law.
G [Paras 49 and 53] [200,D; 201,H; 202,A]

Gurbaksh Singh Sibbia and Ors. v. State of Punjab, (1980) 2 SCC 565– followed

H *Balchand Jain v. State of M.P.* (1976) 4 SCC 572; *State of Maharashtra v. Mohd. Rashid and Anr.* (2005) 7 SCC 56;

Adri Dharan Das v. State of West Bengal, (2005) 4 SCC 303–
relied on

Law Commission of India, Forty-first Report, Vol. 1, p.32, para 39.9.; Law Commission of India, Forty-eighth Report, para 31; Report of 'Malimath Committee on Reforms of Criminal Justice System'– referred to

2.6 The term “arrest” has neither been defined in the Cr.P.C. nor in IPC nor in any other enactment dealing with offences. The word “arrest” is derived from the French word “*arrater*” meaning “to stop or stay”. It signifies a restraint of a person. “Arrest” is thus a restraint of a man’s person, obliging him to be obedient to law. “Arrest” then may be defined as “the execution of the command of a Court of Law or of a duly authorized officer”. [Para 22] [189,C-D]

2.7 The power to arrest a person by a Custom Officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Custom Officer has ‘reason to believe’ that a person has been guilty of an offence punishable under Sections 132, 133, 135, 135A or 136 of the Act. Thus, the power must be exercised on objective facts of commission of an offence enumerated and the Custom Officer has reason to believe that a person sought to be arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer. [Para 51] [201,C-E]

2.8 The law, on the one hand, allows a Custom Officer to exercise power to arrest a person who has committed certain offences, and on the other hand, takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards so that the power of arrest is not abused or misused by the Authorities. [Para 53] [201,F-G]

A CASE LAW REFERENCE

(1976) 4 SCC 572 Relied on Para 26

(1980) 2 SCC 565 Followed Para 34

(2005) 4 SCC 303 Relied on Para 49

B (1969) 2 SCR 461 Followed Para 57

(2000) 7 SCC 53 Relied on Para 58

(2005) 7 SCC 56 Relied on Para 61

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1575 of 2008

From the final Judgment and Order dated 30.11.2006 of the High Court of Rajasthan, at Jaipur Bench, Jaipur in S.Ba. Cr. Misc. Bail Application Nos. 7572 and 7573 of 2006

D Gopal Subramaniam, ASG., Alka Sharma and B. Krishna Prasad for the Appellant.

Rupesh Kumar for the Respondent.

The Judgment of the Court was delivered by

E C.K. THAKKER, J. 1. Leave granted.

2. The present appeal is filed by the Union of India against the judgment and order dated November 30, 2006 passed by the High Court of Judicature for Rajasthan (Jaipur Bench) in S.B. Criminal Misc. Bail Application Nos. 7572 and 7573 of 2006 whereby certain directions have been issued by a Single Judge to the Customs Authorities. The High Court held that since the respondents herein were merely summoned under Section 108 of the Customs Act, 1962 to give their statements in the inquiry, anticipatory bail applications filed by them were premature and were required to be disposed of. The learned Single Judge, therefore, ordered the respondents to appear before the Customs Authorities in response to the summons. He, however, directed that in case the Customs Authorities find that any non-bailable offence has been committed by the respondents,

H they shall not be arrested without ten days prior notice.

Facts

3. It is the case of the appellant (Union of India) that Director of Revenue Intelligence ('DRI' for short) was investigating the matter in respect of export of readymade garments by M/s B.A. International valued at Rs.4.75 crores through various ports during December, 2000 to March, 2003. According to the allegation of the appellant, on the basis of information received from the Income Tax Department on September 15, 2006, investigation was conducted and search operation was carried out at two office premises of M/s B.A. International which revealed that the so-called suppliers of raw material i.e. fabrics and job workers of garments, were bogus and non-existent entities and at the declared address, no such firms or business entities were found. The accused thereby fraudulently availed drawback amounting to Rs.75 lakhs approximately.

4. M/s B.A. International is a partnership firm and is controlled by Padam Narain Aggarwal-respondent No. 1. Asha Rani Aggarwal, respondent No. 2 is the wife of Padam Narain Aggarwal. Other partners of the said firm are family members of Padam Narain Aggarwal. The overseas inquiry conducted through Central Board of Direct Taxes (CBDT) and Director of Revenue Intelligence (DRI) disclosed export of readymade garments under two shipping bills and receipt of foreign exchange. But in fact, no such export had been made either by Padam Narain Aggarwal or by M/s B.A. International.

5. Investigation also revealed that false and fabricated bills were prepared in order to mislead Investigating Agencies. Income Tax Department, hence, disallowed the benefit of exports said to have been earned by M/s B.A. International against the shipping bills as claimed by the partnership firm under Section 80 HHC of the Income Tax Act, 1961 by treating the remittance as bogus export proceeds.

Departmental proceedings

6. Proceedings were initiated by the Customs Department

- A under the Customs Act, 1962 (hereinafter referred to as 'the Act). The respondents were issued summons to appear on September 15, 16, 22, 25, 29 and on October 6, 11, 17 and 26, 2006, so as to enable the Department to investigate the case. The respondents, however, did not join the investigation and there was total non-co-operation by them.
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Criminal proceedings

7. In view of non-co-operation by the respondents, complaints were filed by the Custom Authorities in a competent Court on September 16, 2006 and November 17, 2006 for commission of offences punishable under Sections 174 and 175, Indian Penal Code, 1860.
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Application for anticipatory bail

8. The accused came to know about the filing of complaints. They, therefore, made applications for anticipatory bail before the District and Sessions Court, Jaipur. The learned Judge, however, dismissed the applications by an order dated November 22, 2006. The accused approached the High Court of Rajasthan (Jaipur Bench) and as stated above, the applications were disposed of by the High Court directing the Customs Authorities not to arrest the respondents of any non-bailable offence without ten days prior notice to them.
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9. The High Court stated;

- F "Having considered the rival submissions, since the accused petitioners have only been summoned under S. 108 of the Customs Act, 1962 to give their evidence in the inquiry, these anticipatory bail applications are pre-mature and are disposed of with the direction that they shall appear before the concerned custom authorities on 4-12-2006 at 11 AM in response to the summons issued to them and in case the customs authorities found any non bailable offence against the accused petitioners, they shall not be arrested without ten days prior notice to them."
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(emphasis supplied)

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10. The said order is challenged by the Union of India in this Court. A

Earlier orders

11. On April 23, 2007, the matter was placed for admission hearing. Notice was issued by this Court and respondents were granted time to file affidavit in reply. Affidavits were, thereafter, filed. Considering the nature of directions issued by the High Court, the Registry was asked to place the matter for final hearing and that is how the matter has been placed before us. B

Submissions of counsel C

12. We have heard learned counsel for the parties.

13. The learned Addl. Solicitor General, appearing for Union of India contended that the order passed by the High Court is illegal and erroneous. The counsel submitted that once the High Court held that the respondents were merely summoned under Section 108 of the Act to give statements in the inquiry and anticipatory bail applications were premature, no further direction could have been issued. The High Court rightly directed the respondents to appear before the Customs Authorities on December 4, 2006 at 11.00 a.m. To that extent the Union is not aggrieved. D E

14. The learned counsel, however, vehemently contended that the direction to the Customs Authorities not to arrest the respondents even if they had committed *any non-bailable offence* without *ten days prior notice* to them is totally illegal and unlawful. No such order could have been passed by the Court. It was submitted that on two counts the order is illegal; (i) it is a *blanket order* of anticipatory bail in respect of '*any non-bailable offence*'; and (ii) a direction to issue *ten days prior notice* before arrest is unknown to law. It was, therefore, submitted that the order deserves to be set aside by allowing the Customs Authorities to take appropriate proceedings in accordance with law. F G H

- A 15. The learned counsel for the respondents, on the other hand, supported the order passed by the High Court. It was submitted that the High Court felt that since only summons was issued to the respondents for recording statements in inquiry, anticipatory bail applications were premature and High Court rightly disposed them of on that ground. A direction was also issued to the respondents herein to appear before the Customs Authorities on a particular day. However, with a view to protect interest of the respondents, the High Court directed the authorities not to arrest them before issuing prior notice of ten days. In exercise of discretionary power, the High Court issued the above direction which may not be interfered with in exercise of discretionary jurisdiction under Article 136 of the Constitution.
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High Court's directions not in accordance with law

- D 16. Having heard the learned counsel for the parties and having given anxious consideration to the controversy raised and the proceedings initiated against the respondents, we are of the view that no such order could have been passed nor a direction as to prior notice before effecting arrest could have been issued by the High Court.
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Statutory provisions

- F 17. To understand the issues raised by the Union of India in the appeal, let us examine the relevant provisions of the Customs Act, 1962.

- G 18. The Act consolidates and amends the law relating to customs. Chapter IV empowers the Central Government to prohibit import or export of goods of specified description. Chapters IVA to IVC relate to detection of illegally imported goods, prevention of disposal thereof, etc.

- H 19. Chapter XIII (Sections 100-110) is an important Chapter and deals with search, seizure and arrest. Sections 100-03 authorise Custom Officers to search suspected persons. Section 104 enables Custom Officers to arrest a person. Similarly, power to search premises and conveyances is found in Sec-

tions 105 to 106A. Sections 107-09 empower Custom Officers to examine persons and summon them to give evidence and produce documents. Seizure of goods, documents and things can be effected under Section 110.

20. Chapter XIV provides for confiscation of goods and conveyances as also imposition of penalties. Chapter XVI (Sections 132-140A) deals with offences and prosecutions.

Power to arrest

21. Having noticed the relevant provisions of the Act, let us now consider ambit and scope of power of arrest.

22. The term "arrest" has neither been defined in the Code of Criminal Procedure, 1973 nor in the Indian Penal Code, 1860 nor in any other enactment dealing with offences. The word "arrest" is derived from the French word "*arrater*" meaning "to stop or stay". It signifies a restraint of a person. "Arrest" is thus a restraint of a man's person, obliging him to be obedient to law. "Arrest" then may be defined as "the execution of the command of a Court of Law or of a duly authorized officer".

23. Sections 41-44 and 46 of the Code of Criminal Procedure, 1973 deal with arrest of a person. Section 41 empowers a Police Officer to arrest any person without warrant. Section 42 deals with the power of a Police Officer to arrest any person who in the presence of such Police Officer has committed or has been accused of committing a non-cognizable offence and refuses to give his name and residence or gives a name or residence which such officer has reason to believe to be false. Section 43 enables a private person to arrest any person who in his presence commits a non-cognizable offence, or is a proclaimed offender. Section 44 deals with cases of arrest by a Magistrate. Section 46 lays down manner of arrest.

24. So far as the Customs Act, 1962 is concerned, the power to arrest is contained in Section 104 thereof. It reads thus;

A *Power to arrest.*—(1) If an officer of customs empowered
in this behalf by general or special order of the
Commissioner of Customs has reason to believe that any
person in India or within the Indian customs waters has
committed an offence punishable under section 132 or
B section 133 or section 135 or section 135A or section
136, he may arrest such person and shall, as soon as may
be, inform him of the grounds for such arrest.

(2) Every person arrested under sub-section (1) shall,
without unnecessary delay, be taken to a magistrate.

C (3) Where an officer of customs has arrested any person
under sub-section (1), he shall, for the purpose of releasing
such person on bail or otherwise, have the same powers
and be subject to the same provisions as the officer-in-
D charge of a police station has and is subject to under
the²Code of Criminal Procedure, 1898 (5 of 1898).

(4) Notwithstanding anything contained in the Code of
Criminal Procedure, 1898 (5 of 1898), an offence under
this Act shall not be cognizable.

E 25. Section 104 thus empowers a Custom Officer to ar-
rest a person if he has 'reason to believe' that such person has
committed any offence mentioned therein. It also enjoins the
officer to take the arrested person to a Magistrate 'without un-
F necessary delay'. The section also provides for release of such
person on bail.

Anticipatory bail

26. Section 438 of the Code makes special provision for
granting 'anticipatory bail' which was introduced in the present
G Code of 1973. The expression ('anticipatory bail') has not been
defined in the Code. But as observed in *Balchand Jain v. State*
of M.P., (1976) 4 SCC 572, anticipatory bail means a bail in
anticipation of arrest. The expression 'anticipatory bail' is a
misnomer inasmuch as it is not as if bail presently granted in
H anticipation of arrest. Where a competent court grants 'antici-

patory bail', it makes an order that in the event of arrest, a person shall be released on bail. There is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting anticipatory bail becomes operative.

27. It was also observed that the power of granting 'anticipatory bail' is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is 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" that such power may be exercised. Thus, the power is 'unusual in nature' and is entrusted only to the higher echelons of judicial service, i.e. a Court of Session and a High Court.

28. The Code of Criminal Procedure, 1898 (old Code) did not contain specific provision corresponding to Section 438 of the present Code of 1973. Under the old Code, there was a sharp difference of opinion amongst various High Courts on the question whether a Court had inherent power to make an order of bail in anticipation of arrest. The preponderance of view, however, was that it did not have such power. The Law Commission of India considered and question and recommended to introduce express provision by observing as under;

"The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. 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

A 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
B some days and then apply for bail.

We recommend the acceptance of this suggestion. We
are further of the view that this special power should be
conferred only on the High Court and the Court of Session,
and that the order should take effect at the time of arrest
C or thereafter.

In order to settle the details of this suggestion, the following
draft of a new section is placed for consideration:

D 497A. (1) When any person has a reasonable
apprehension that he would be arrested on an
accusation of having committed a non-bailable
offence, he may apply to the High Court or the Court
of Session for a direction under this section. That
Court may, in its discretion, direct that in the event of
E his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence
against that person shall, while taking steps Under
Section 204(1), either issue summons or a bailable
warrant as indicated in the direction of the Court
F under Sub-section (1).

(3) if any person in respect of whom such a direction
is made is arrested without warrant by an officer in
charge of a police station on an accusation of having
committed that offence, and is prepared either at
G the time of arrest or at any time while in the custody
of such officer to give bail, such person shall be
released on bail.

H We considered carefully the question of laying down in the
statute certain conditions under which alone anticipatory

bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion, of the court and prefer not to fetter such discretion in the statutory provision itself. Superior Courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused".

[Law Commission of India, Forty-first Report, Vol. 1, p.32, para 39.9.]

29. The suggestion of the Law Commission was accepted by the Central Government and in the Draft Bill of the Code of Criminal Procedure, 1970, Clause 447 conferred an express power on the High Court and the Court of Session to grant anticipatory bail.

30. The Law Commission again considered the issue and stated;

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim

A order as well as of the final orders will be given to the Superintendent of Police forthwith".

[Law Commission of India, Forty-eighth Report, para 31]

31. Keeping in view the reports of the Law Commission,
B Section 438 was inserted in the present Code. Sub-section (1) of
Section 438 enacts that when any person has reason to believe
that he may be arrested on an accusation of having committed a
non-bailable offence, he may apply to the High Court or to the Court
C of Session for a direction that in the event of his arrest he shall be
released on bail, and the Court may, if it thinks fit, direct that in the
event of such arrest he shall be released on bail.

32. Sub-section (2) empowers the High Court or the Court
of Session to impose conditions enumerated therein.

D 33. Sub-section (3) states that if such person is thereafter
arrested without warrant by an officer in charge of a police station
on such accusation, he shall be released on bail.

34. In the leading case of *Gurbaksh Singh Sibbia & Ors.*
v. *State of Punjab*, (1980) 2 SCC 565, the Constitution Bench
E of this Court was called upon to consider correctness or otherwise
of principles laid down by the Full Bench of High Court of
Punjab & Haryana in *Gurbaksh Singh Sibbia v. State of Punjab*,
AIR 1978 P & H 1 : 1978 CrL LJ 20 (FB). The Full Bench of the
High Court summarized the law relating to anticipatory bail as
F reflected in Section 438 of the Code and laid down certain principles
as to when discretionary power to grant anticipatory bail may be
exercised by a Court.

35. This Court partly disagreeing with the judgment of the
High Court held that the Legislature conferred a wide discretion
G on the High Court and the Court of Session to grant anticipatory
bail since it felt, *firstly*, that it would be difficult to enumerate
the conditions under which anticipatory bail should or should not
be granted and *secondly*, because the intention was to allow the
higher courts in the echelon a somewhat free hand in
H the grant of relief in the nature of anticipatory bail.

36. The Court stated;

"Generalizations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher Courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by Courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. *Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges*".

(emphasis supplied)

37. According to this Court, therefore, discretionary power conferred by the Legislature on higher judiciary cannot be put in a straight-jacket formula. Such power must be exercised by the Court keeping in view facts and circumstances of an individual case.

38. Speaking for the Court, Chandrachud, C.J. stated;

"Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter

A like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises.

B Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the Legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the Courts generally is to preserve their discretion without meaning to abuse it. *It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law*.

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(emphasis supplied)

E 39. We may also refer to at this stage 'Malimath Committee on Reforms of Criminal Justice System'. Considering the exercise of power by Courts under Section 438 and grant of anticipatory bail in favour of applicants, the Committee observed that the provision as to anticipatory bail has often been

F 'misused by rich and influential people'. The Committee, however, opined to retain the provision subject to two conditions;

- (i) Public Prosecutor should be heard by the court before granting an application for anticipatory bail; and
- (ii) Petition for anticipatory bail should be heard only by the court of competent jurisdiction.

G 40. It may be stated that Section 438 has been amended by the Code of Criminal Procedure (Amendment) Act, 2005 which now provides for hearing of Public Prosecutor before

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granting an application for anticipatory bail. Sub-sections (1A) and (1B) also provide for notice and presence of applicant in the Court seeking anticipatory bail. The said provisions, however, have not been brought into force so far. A

41. In *Gurbaksh Singh*, this Court also held that before power under sub-section (1) of Section 438 is exercised, the Court must be satisfied that the applicant invoking the provision of anticipatory bail has '*reason to believe*' that he is likely to be arrested for a non-cognizable offence. B

42. The Court stated; C

"Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested 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 a 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, because it is then alone that the Court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. *Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely*". D E F G

(emphasis supplied) H

A 43. The Court proceeded to state that the High Court or
the Court of Session must apply its own mind to the question
and decide whether a case has been made out for grant of such
relief. If condition precedent laid down in sub-section (1) of Sec-
tion 438 is not satisfied and there is no reason to believe that
B the applicant is likely to be arrested for commission of a non-
bailable offence, the Court has no power to grant anticipatory
bail.

44. This Court, however, held that the High Court was wholly
right so far as proposition (2) was concerned. The High Court
C in proposition (2) said;

“Neither Section 438 nor any other provision of the Code
authorizes the grant of blanket anticipatory bail for offences
not yet committed or with regard to accusations not so far
D levelled”.

45. Agreeing with the said proposition, this Court stated;
“We agree that a ‘blanket order’ of anticipatory bail should
not generally be passed. This flows from the very language
of the section which, as discussed above, requires the
E applicant to show that he has “reason to believe” that he
may be arrested. A belief can be said to be founded on
reasonable grounds only if there is something tangible to
go by on the basis of which it can be said that the
applicant’s apprehension that he may be arrested is
F genuine. That is why, normally, a direction should not issue
under Section 438(1) to the effect that the applicant shall
be released on bail “whenever arrested for whichever
offence whatsoever.” That is what is meant by a ‘blanket
order’ of anticipatory bail, an order which serves as a
blanket to cover or protect any and every kind of allegedly
unlawful activity, in fact any eventuality, likely or unlikely
G regarding which, no concrete information can possibly be
had. The rationale of a direction under Section 438(1) is
the belief of the applicant founded on reasonable grounds
H that he may be arrested for a non-bailable offence. It is

unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But *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*".

(emphasis supplied)

46. The Court also stated that apart from the language of the statute, there is an important principle involved in the insistence of the fact that the direction under Section 438(1) must be clear and specific and not vague and general.

47. The Court stated;

"Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction Under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. *A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public.* Such an order can then 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. Therefore, *the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone*

A *the order will be effective. The power should not be exercised in a vacuum*".

(emphasis supplied)

B 48. *Gurbaksh Singh*, thus clearly laid down that no blanket order of bail can be passed by a Court while exercising power under Section 438 of the Code.

C 49. In *Adri Dharan Das v. State of West Bengal*, (2005) 4 SCC 303, referring to *Gurbaksh Singh*, this Court observed that normally, no direction should be issued to the effect that the applicant should be released on bail "whenever arrested for whichever offence whatsoever". Such order should not be passed as it would serve as a blanket to cover or protect any and every kind allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty, it is neither
D a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.

50. The Court proceeded to state;

E "Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused
F may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance to maintain law and order in the locality. For these or other
G reasons, arrest may become inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the
H

process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. *An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code*".

(emphasis supplied)

Safeguards against abuse of power

51. From the above discussion, it is amply clear that power to arrest a person by a Custom Officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Custom Officer has 'reason to believe' that a person has been guilty of an offence punishable under Sections 132, 133, 135, 135A or 136 of the Act. Thus, the power must be exercised on *objective facts of commission of an offence* enumerated and the custom officer has *reason to believe* that a person sought to be arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer.

52. The section also obliges the Custom Officer to inform the person arrested of the grounds of arrest *as soon as may be*. The law requires such person to be produced before a Magistrate '*without unnecessary delay*'.

53. The law thus, on the one hand, allows a Custom Officer to exercise power to arrest a person who has committed certain offences, and on the other hand, takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards so that the power of arrest is not abused or misused by the authorities. It is keeping in view these considerations that we have to decide correctness or otherwise of the directions issued by a single Judge of the High Court. 'Blanket' order of bail may amount to or result in an invitation to com-

A mit an offence or a passport to carry on criminal activities or to afford a shield against any and all types of illegal operations, which, in our judgment, can never be allowed in a society governed by Rule of Law.

B *Statements under Section 108, Customs Act : Evidentiary value*

C 54. As already noted in the earlier part of the judgment, Sections 107-09 confer power on Custom Officers to examine persons, to summon them to give evidence and to produce documents.

D 55. Section 108 which is a material provision, reads thus;
Power to summon persons to give evidence and produce documents.—(1) Any gazetted officer of customs duly empowered by the Central Government in this behalf, shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.

E (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under control of the person summoned.

F (3) All persons so summoned shall be bound to attend either in person or by an authorized agent as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject, respecting which they are examined or make statements and produce such documents and other things as may be required;

G Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

H

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860) A

56. This section does not contemplate magisterial intervention. The power is exercised by a Gazetted Officer of the Department. It obliges the person summoned to state truth upon any subject respecting which he is examined. He is not absolved from speaking truth on the ground that such statement is admissible in evidence and could be used against him. The provision thus enables the officer to elicit truth from the person examined. The underlying object of Section 108 is to ensure that the officer questioning the person gets all the truth concerning the incident. B C

57. As held by Constitution Bench of this Court in *Ramesh Chandra Mehta v. State of West Bengal*, (1969) 2 SCR 461, a person called upon to make a statement before the Custom Authorities cannot be said to be an *accused* of an offence. It is, therefore, clear that if a person is called upon to make a statement under Section 108 of the Act and summon is issued for the said purpose, he is bound to comply with such direction. This view has been reiterated in several cases thereafter. D E

58. In *Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd.*, (2000) 7 SCC 53, this Court stated;

"Section 108 of the Customs Act does not contemplate any magisterial intervention. The power under the said section is intended to be exercised by a gazetted officer of the Customs Department. Sub-section (3) enjoins on the person summoned by the officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the gazetted officer to elicit the truth from the person interrogated. There is no involvement of the magistrate at F G H

A that stage. *The entire idea behind the provision is that the gazetted officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue its utility for the officer gets lost*.

(emphasis supplied)

B 59. It is thus clear that statements recorded under Section 108 of the Act are distinct and different from statements recorded by Police Officers during the course of investigation under the Code.

C *Imposition of condition before effecting arrest*

D 60. The counsel for the Union of India submitted that in spite of settled law on the point, the directions issued by the High Court have made the statutory provisions ineffective, nugatory and meaningless. Even if on the basis of statements of the respondents, the Custom Authorities are satisfied that the respondents had committed non-bailable offence and in exercise of statutory power, they could be arrested, the directions of the High Court will come in the way of the Authorities and will prevent them from exercising the power of arrest without complying the conditions imposed by the Court. No such condition on the exercise of statutory power could have been imposed by the High Court and since they are not in consonance with law, they are liable to be set aside.

F 61. The counsel, in this connection, invited our attention to a decision of this Court in *State of Maharashtra v. Mohd. Rashid & Anr.*, (2005) 7 SCC 56. In that case, the High Court had issued a direction to the effect that if *any crime* is registered against *M* in future with a particular Police Station within three years, he shall not be arrested in connection therewith, except after service of four working days' *advance notice* in writing to him.

H 62. Describing the order as 'blanket', this Court held that, no such direction could have been issued by the High Court. The order was, therefore, set aside. The Court, however, ob-

served that if a false case is registered against *M*, he can challenge it in an appropriate forum.

Conditions not lawful

63. In the case on hand, the respondents were only summoned under Section 108 of the Act for recording of their statements. The High Court was conscious and mindful of that fact. It, therefore, held that applications for anticipatory bail, in the circumstances, were pre-mature. They were, accordingly, disposed of by directing the respondents to appear before the Custom Authorities. The Court, however, did not stop there. It stated that even if the Custom Authorities find *any non-bailable offence* against the applicants (respondents herein), they shall not be arrested "*without ten days prior notice to them*."

64. In our judgment, on the facts and in the circumstances of the present case, neither of the above directions can be said to be legal, valid or in consonance with law. *Firstly*, the order passed by the High Court is a *blanket* one as held by the Constitution Bench of this Court in *Gurbaksh Singh* and seeks to grant protection to respondents in respect of *any non-bailable offence*. *Secondly*, it illegally obstructs, interferes and curtails the authority of Custom Officers from exercising statutory power of arrest a person said to have committed a non-bailable offence by imposing a condition of giving *ten days prior notice*, a condition not warranted by law. The order passed by the High Court to the extent of directions issued to the Custom Authorities is, therefore, liable to be set aside and is hereby set aside.

Final order

65. For the foregoing reasons, the appeal filed by the Union of India is partly allowed and the directions issued and conditions imposed by the High Court on the Custom Authorities are hereby set aside.

66. Ordered accordingly.

K.K.T.

Appeal partly allowed.