NEUTRAL CITATION NO. 2025:MPHC-JBP:4526

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SURESH KUMAR KAIT,

CHIEF JUSTICE

&

HON'BLE SHRI JUSTICE VIVEK JAIN

MISCELLANEOUS CRIMINAL CASE No. 25252 of 2022

DEEPANKAR VISHWAS

Versus

STATE OF MADHYA PRADESH THROUGH P.S. OMTI, DISTRICT JABALPUR

Appearance:

Shri Vishal Daniel – Amicus Curiae with Shri Akshay Jha, Advocate.

Shri Alok Vagrecha – Amicus Curiae with Shri Ishan Tignath and Shri Abhinesh Soni – Advocates.

Shri Anubhav Jain – Government Advocate for respondent/State.

Reserved on	-	28.01.2025
Pronounced on	-	27.02.2025

ORDER

Per*: *Hon'ble Shri Justice Suresh Kumar Kait, Chief Justice:

1. By order dated 09.09.2022, the learned Single Judge referred following questions to be considered by this Court:-

> *"(i) Whether the anticipatory bail petition filed under Section 438 of CrPC is maintainable, in case proceedings under*

Sections 82 & 83 or Section 299 of CrPC have been initiated against the accused ?

(ii) Whether the anticipatory bail petition filed under Section 438 of CrPC is maintainable, when the accused has been declared as 'absconder/ proclaimed offender' under Sections 82 and 83 or Section 299 of CrPC by the authority competent ?"

2. The facts in brief relatable to the present petitioner are that he is an accused in connection with Crime No.276/2019 registered at Police Station Omti, District Jabalpur for offences punishable under Sections 420, 406 and 409/34 of the IPC. After the investigation, on 15.12.2020, a charge-sheet was filed before the concerned Court showing him absconding. The proceedings under Sections 82 and 83 of the Cr.P.C. were initiated against him.The petitioner was declared proclaimed offender and a perpetual warrant of arrest was issued against him. The bail application filed by the petitioner before the trial Court seeking anticipatory bail under Section 438 of the Cr.P.C. was rejected vide order dated 25.04.2022. Thereafter, the petitioner approached this Court seeking anticipatory bail.

3. During the hearing before the learned Single Judge, a question of maintainability of the application for anticipatory bail was raised by the State. The learned Single Judge was of the view that on this issue, there is a conflict of opinion as earlier in the case of **Gaurav Malviya Vs. State of M.P.** M.Cr.C.No.32950/2020 decided on 09.09.2020 as well as in **Bhupendra Singh Vs. State of M.P.** M.Cr.C.No.24897/2017 decided on 21.12.2017, it was held that the application for anticipatory bail is not maintainable whereas in the case of **Balveer Singh Bundela**

vs State of M.P.: MCrC No.5621 of 2020 decided on 12.05.2020, the coordinate Bench held that so far as maintainability of anticipatory bail is concerned, it is maintainable even the person is declared absconder under Section 82 of Cr.P.C.

4. Before referring the questions for consideration by this Court, the learned Single Judge noted the diversant views expressed by the different Benches on the issue in question. In the case of **Bhupendra Singh** (supra), the learned Single Bench of Gwalior Bench has held as follows:

> *"In the present case, the charge-sheet has already been filed. The Supreme Court in the case of Pradeep Sharma (supra) i.e. [State of M.P. Vs. Pradeep Sharma (2014) 2 SCC 171] has held that once a person is declared as absconding, then the application for grant of anticipatory bail is not maintainable."*

5. In the case of **Gaurav Malviya (supra),** the learned Single Bench of Gwalior Bench held as under:-

> *"This Court in the case of Bhupendra Singh v. State of Madhya Pradesh by order dated 21/12/2017 passed in MCRC No.24897/2017 had held that after filing of the charge-sheet showing the applicant absconding, the application under Section 438 of CrPC is not maintainable. The said order of this Court has been affirmed by the Supreme Court by order dated 27/3/2018 passed in the case of Bhupendra Singh v. The State of Madhya Pradesh in SLP (Cri) No.2569/2018. Similarly, this Court in the case of Ku. Aditi Tyagi @ Gudia @ Rani v. State of Madhya Pradesh by order dated 12/1/2018 in MCRC No. 28068/2017 has held that where the charge-sheet has been filed against the applicant showing her/him absconding and the trial Court has issued the warrant of*

arrest, then the application for grant of anticipatory bail would not be maintainable. The said order of this Court has also been affirmed by the Supreme Court by order dated 19/3/2018 passed in the case of Ku. Aditi Tyagi @ Gudia @ Rani v. State of Madhya Pradesh in SLP (Cri) No. 2132/2018.

Since the charge-sheet against the applicant has been filed under Section 299 of Cr.P.C. by showing that he is absconding and perpetual warrant of arrest must have been issued by the Trial Court, this application is dismissed as not maintainable."

6. On the other hand, the learned Single Judge is of the view that anticipatory bail application is maintainable even after filing of charge-sheet till the person is arrested but on merit case would be governed by the judgment of the Apex Court rendered in the case of ***Lavesh Vs. State (NCT of Delhi)*** (2012) 8 SCC 730. The learned Single Judge placed reliance on the decision of the Co-ordinate Bench at Gwalior in the case of **Balveer Singh Bundela vs State of M.P.**: MCrC No.5621 of 2020 decided on 12.05.2020 wherein, discussing the several judgments of the Apex Court, the Bench laid down the law in following terms :

"1- Anticipatory bail application is maintainable even after filing of charge-sheet, till the person is arrested as per the mandate of Apex Court in the cases of Gurbaksh Singh Sibbia etc. Vs. The State of Punjab, AIR 1980 SC 1632, Sushila Aggarwal and others Vs. State (NCT of Delhi) and another in SLP (Criminal) Nos.7281-7282/2017 passed on 29-01-2020, Bharat Chaudhary and another Vs. State of Bihar and another, (2003) 8 SCC 77 and Ravindra Saxena Vs. State of Rajasthan, (2010) 1 SCC 684.

2- So far as maintainability of anticipatory bail is concerned, it is maintainable even the person is declared absconder under Section 82 of Cr.P.C. but on merits case would be governed by the judgment of Apex Court rendered in the case of Lavesh Vs. State (NCT Of Delhi), (2012) 8 SCC 73.

3- Section 82/83 Cr.P.C. is transient provision subject to finality of proceedings as provided under Sections, 84, 85 and 86 of Cr.P.C."

7. The learned Single Judge noticing the different views thought it appropriate to refer the matter to be considered by this Court on the aforesaid questions of law, giving interim protection to the applicant till further orders of the Court.

8. To consider and arrive at a conclusion on the questions of law referred by the learned Single Bench, we have heard the learned amicus curiae on one side and the Government Advocate on the other side on the issue in question.

9. Shri Vishal Daniel, learned amicus-curiae vehemently argued that in the light of various decisions of the Apex Court as well as this Court, it is implicitly clear that an application for grant of anticipatory bail would be absolutely and unequivocally maintainable for it to be considered on its own merits, even if a person is declared as a proclaimed offender within the meaning of section 82 or 299 of the Cr.P.C. To fortify his contentions, he took the Court for perusing the decisions of the learned Single Bench of this Court in the case of **Balveer Singh Bundela vs State of M.P. -** MCrC No.5621 of 2020 decided on 12.05.2020 and **Rajni Puruswani and anr. Vs. State of**

M.P. reported in ILR 2020 MP 1477, which reflect the correct proposition of law inasmuch as they refrain from impinging upon the personal liberty guaranteed to a person. He further contended that in the aforesaid judgments, the learned Single Bench explained the true import and precedential value of the judgments of the Apex Court in ***Lavesh Vs. State (NCT of Delhi)*** (2012) 8 SCC 73 and ***State of M.P. Vs. Pradeep Sharma*** (2014) 2 SCC 730, he contended that the application for anticipatory bail is maintainable even after filing of the charge-sheet till the person has been arrested as per the mandate of the Constitution Bench of the Apex Court in the case of ***Gurbaksh Singh Sibbia Vs. State of Punjab*** reported in AIR 1980 SC 1632, ***Sushila Aggarwal and others Vs. State (NCT of Delhi) and another*** in SLP (Criminal) Nos.7281-7282/2017 passed on 29-01-2020, ***Bharat Chaudhary and another Vs. State of Bihar and another*** (2003) 8 SCC 77 and ***Ravindra Saxena Vs. State of Rajasthan*** (2010) 1 SCC 684.

10. The learned Amicus Curiae, Shri Vishal Daniel further argued that if the applicant is successful in satisfying the discretionary jurisdiction of a Court of law, insofar as the provisions of Section 438(1)(i)(ii) and (iv) of Cr.P.C. are concerned, then the Court ought to weigh the effect of the non-availability of sub-clause (iii) in the facts and circumstances of the case and may take a decision accordingly. The Court would also be well within its rights and jurisdiction to consider the bonafide of a person, if so contended that he was unaware of the proceedings initiated under Section 82 and 299 of the Cr.P.C.

11, The learned Amicus Curiae further contended that the legislature makes no abridgment between the provisions of Section 438, 82 and 299 of the Cr.P.C. The Court will be well within its jurisdiction to consider the anticipatory bail application as per the terms of the law laid down by the Constitution Bench in the case of ***Gurbaksh Singh Sibbia*** (supra).

12. Referring to Section 82 of Cr.P.C, learned amicus curiae submitted that it is a complete procedural code within itself, a perusal whereof shows that the legislative intent of granting time to the accused not less than 30 days from the date of publication in respect of declaring him a proclaimed offender is to provide him an opportunity to seek protection of the law, particularly under Section 438 of the Cr.P.C.

13. Referring to judgments in the case of ***Lavesh*** (supra) and ***Pradeep Sharma*** (supra), he contended that the Apex Court in the aforesaid judgments nowhere bars the maintainability of the anticipatory bail application. He further relied upon the judgment of the learned Single Judge in the case of ***Rajni Puruswani and another Vs. State of Madhya Pradesh*** reported in ILR (2020) MP 1477.

14. Relying on the various judgments of the Apex Court, learned amicus curiae contended that anticipatory bail application is maintainable at any time so long the person has not been arrested.

15. Shri Alok Vagrecha, learned amicus curiae also addressed his argument to the effect that the application for anticipatory bail would be maintainable even if the charge-sheet has been filed and a person has been declared as proclaimed offender. He has pointed out that the Code of Criminal Procedure has been amended and the Bharatiya Nagrik Suraksha Sanhita, 2023 has taken its place since 2023. He further argued that Section 82 and 83 of the Cr.P.C. (Now Sections 84 and 85 of the BNSS) come before section 438 of Cr.P.C. (now Section 482 of the BNSS) in the statute book. The legislative intention is also clear to the effect that the same has not been enacted as a condition or proviso to Section 482 of the BNSS so as to put a bar or rider on the applicability or maintainability of the anticipatory bail application, in case of declaration of proclaimed offender. Hence, the Parliament in its own wisdom has not placed any such rider on the exercise of the powers under Section 482 of the BNSS. Relying on the judgment of the Apex Court in ***Gurbaksh Singh Sibbia*** (supra), he contended that the Apex Court has specifically laid down that the conditions which are not mentioned in Section 438 of Cr.P.C. should not be read into said section because Section 438 of Cr.P.C. is a provision which deals with the liberty of a citizen and any condition which is not there in said section should not be read in it to curtail down the effect of Section 438 of Cr.P.C.

16. The contention of Shri Vagrecha, learned Amicus Curiae is that one of the fundamental principles of interpretation of criminal statute is that the Section which is dealing with criminal matters or which is directly related with the liberty of a citizen should be read as it is and

an interpretation which restricts or curtails the liberty of the citizen should be avoided unless there is a clear intention in express language of the statue, therefore, Section 438 of Cr.P.C/482 of BNSS will prevail over Section 82 and 83 of Cr.P.C/84 and 85 of the BNSS.

17. Shri Vagrecha drawing attention of this Court to the judgment of the ***House of Lords in Polanski Vs. Conde Nast Publications Limited*** reported in (2005) UKHL 10 contends that we are here basically compelling a person to surrender. In that decision, the concept of fugitives from justice has been dealt with in detail.

18. Shri Vagrecha further took the Court to the judgment of the Full Bench in **Nirbhay Singh and anr. Vs. State of M.P.** reported in 1994 ILR 294 wherein it was held that the apprehension of the arrest on accusation of commission of non-bailable offence, that will continue even if the Magistrate issued process under Section 204 Cr.P.C. or at the committal stage or even at a subsequent stage, application for grant of anticipatory bail is maintainable. This judgment specifically considered the judgment of the Apex Court in ***Gurbaksh Singh Sibbia's*** case. Para 11 and 15 are relevant, which are reproduced as under:-

> *"11. Section 438 speaks of a person having reason to believe that he may be arrested on an 'accusation'. There may be an accusation even before a case is registered by police. After the registration of the case, filing of the charge-sheet or filing of the complaint or taking cognizance or issuance of warrant, the accusation will not cease to be an accusation. At the later stage, there may be stronger accusation or more evidence. Nevertheless, the accusation*

survives or continues. Section 438 speaks of apprehension and belief that he may be "arrested'. There is no limitation in the language employed by the legislature indicating that the arrest contemplated is an arrest by the police of their own accord or that arrest by the police on a warrant issued by the Court will not attract Section 438. The language used is clear and unambiguous, namely, apprehension of "arrest on an accusation". Considering the legislative purpose underlying the provision and the clariry of the language used in the section, we do not find any justification to import anything extraneous into the interpretation so as to restrict the scope or vitality of the provision. It is not as if circumstances justifying an application under Section 438 would disappear once a Magistrate takes cognizance of the offence or even after he passes an order committing the case to the Sessions Court. Even at such stages, there may be circumstances warranting invocation of the special jurisdiction under Section 438. A person may file a private complaint and produce before the Magistrate a few witnesses who will provide a consistent version of an imaginary occurrence. At that stage, the Magistrate will not be in a position to appreciate the evidence or go behind the same. If the material is such that he is satisfied that there is sufficient ground for proceeding he is bound to take cognizance and issue process. This may happen even if the story put forth by the complainant is more imaginary than real or may be hopelessly exaggerated. Such a situation may arise at the stage of committal where the Magistrate is concerned only with one aspect, namely, whether the material disclosed commission of the offence exclusively triable by the Court of Sessions. At neither stage is he required to go into the truth or otherwise of the material before him. It cannot, therefore, be said that at such stages the justification for invocation of Section 438, Cr.P.C. no longer exists. In this view, the scope of Section 438 should not be restricted by reading into it words to the effect - "when any person has reason to believe that he may be arrested solely at the instance of the police and not as per warrant issued by a competent Magistrate." The clear purpose underlying the language employed by the

> *legislature precludes any justification for reading such words into be statute.*
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> *** *** ***
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> *15. In view of what we have indicated above, we are in respectful agreement with the view taken by the High Court of Punjab and Haryana that an application under Section 438, Cr.P.C. would be maintainable even after the Magistrate issued process under Section 204 or at the stage of committal of the case to the Sessions Court or even at a subsequent stage, if circumstances justify the invocation of the provision. This is not to say that the jurisdiction under Section 438 of the Code is to be freely exercised without reference to the nature and gravity of the offence alleged, the possible sentence which may be ultimately imposed, the possibility of interference with the investigation or the witnesses and public interest. With great respect, we are unable to agree with the view taken by the High Court of Rajasthan."*

19. He further contended that in the case of ***Lavesh*** and **Pradeep Sharma** (supra), the law as laid down in ***Gurbaksh Singh Sibbia's*** case by the Constitution Bench of the Apex Court has not been considered.

20. Shri Anubhav Jain, learned Government Advocate placing reliance upon the decision of the Apex Court in the case of ***Srikant Upadhyay and ors. Vs State of Bihar and Anr.*** in Special Leave Petition (Criminal) No.7940 of 2023 decided on 14.03.2024 vehemently argued that once the person has been declared proclaimed offender or absconder, in view of Section 82 and 83 of the Cr.P.C., his bail application is not maintainable at the threshold. Relying on para 12 of the judgment in the case of ***Lavesh*** (supra) case, he contends that the Apex Court in this case has specifically held that when a person against whom a warrant has been issued and is

absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of section 82 of the Code, he is not entitled to the relief of anticipatory bail. Entitlement has been discussed in these two judgments in respect of grant of anticipatory bail.

21. To consider the questions referred by the learned Single Bench, it may be necessary to look into Section 82 and 83 of the Code of Criminal Procedure, 1973 (now section 84 and 85 of the BNSS), which are reproduced as below:-

> ***"82. Proclamation for person absconding -****(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.*
> *(2) The proclamation shall be published as follows:—*
> *(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;*
> *(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;*
> *(c) a copy thereof shall be affixed to some conspicuous part of the Court House;*
>
> *(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.*
> *(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly*

published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under Sections 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1)

***83. Attachment of property of person absconding**.—(1) The Court issuing a proclamation under Section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable or both, belonging to the proclaimed person:*

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court, it may order the attachment simultaneously with the issue of the proclamation.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of

any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(a) by taking possession; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908).”

Corresponding sections 84 and 85 of the BNSS are reproduced for ready reference, which are as follows:-

*“**84. Proclamation for person absconding**.—(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been*

issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:—

(i)(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence which is made punishable with imprisonment of ten years or more, or imprisonment for life or with death under the Bharatiya Nyaya Sanhita, 2023 or under any other law for the time being in force, and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1).

***85. Attachment of property of person absconding**.—(1) The Court issuing a proclamation under Section 84 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person:*

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued,—

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court,

it may order the attachment of property simultaneously with the issue of the proclamation.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(a) by taking possession; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or
(d) by all or any two of such methods, as the Court thinks fit.
(5) If the property ordered to be attached consists of livestock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.
(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908).”

22. Section 438 of the Code of Criminal Procedure, 1973 and the corresponding section 482 of the BNSS provides for direction for grant of bail to person apprehending arrest. For ready reference Section 438 of Cr.P.C. is reproduced as under:-

*“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.

(1-A) 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.

(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, if 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 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).
(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860).”

Corresponding section 482 of the BNSS is as under:-

*“482**. Direction for grant of bail to person apprehending arrest**.—(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.”*
(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 480, 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 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).
(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under Section 65 and sub-section (2) of Section 70 of the Bharatiya Nyaya Sanhita, 2023."

23. The core questions before us are that whether the anticipatory bail application filed under Section 438 of the Cr.P.C/482 of the BNSS is maintainable in case proceedings under Section 82 and 83 or section 299 of the Cr.P.C. have been initiated against the accused and in a situation where accused has been declared as absconder/proclaimed offender under Section 82/83 and 299 of the Cr.P.C.(84/85 and 335 of BNSS.

24. Before considering the above questions, we may consider the application of the doctrine of merger. On the question of doctrine of merger, Shri Vishal Daniel argued that doctrine of merger would not apply in this case as the SLP was dismissed by the Apex Court simplicitor.

25. On considering above, merely dismissal of SLP does not attract the doctrine of merger. The SLP was dismissed without commenting on the merit. It would not become the order of the Court and it cannot be said to be a binding law under Article 141 of the Constitution of

India, When the SLP was dismissed at the admission stage, the doctrine of merger would not apply in that case.

26. The three-judge Bench of the Apex Court in the case of ***Kunhayammed and others Vs. State of Kerala and another*** (2000) 6 SCC 359 has held as follows:-

> *"27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the Apex Court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The*

Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

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44. To sum up, our conclusions are:

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the

Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC."

27. On reading of the above enunciation of law, in the case of ***Bhupendra Singh*** (supra), the SLP was dismissed without commenting on the merit of the case. The same was dismissed at admission stage. The order would not merge with the order of the Apex Court. Thus, we are of the considered view that the order passed by the High Court does not attract the doctrine of merger. Only the decision and law which is declared by the Apex Court under Article 141 of the Constitution of India would be binding upon all the courts.

28. Now we may consider the questions referred by the learned Single Judge. In the case of ***Bhupendra Singh*** (supra), the learned Single Judge was of the view that when the charge-sheet is filed showing the applicant absconding, the application under Section 438 of the Cr.P.C. is not maintainable. The learned Single Judge relied on the judgment passed by the Apex Court in the case of ***Pradeep Sharma Vs. State of M.P.*** (supra) and observed that in that case it was held that once a person is declared as absconding, then application for grant of anticipatory bail is not maintainable. After careful reading of the

judgment passed by the Apex Court in ***Pradeep Sharma*** (supra), therein the Apex Court is of the view that looking to the seriousness of the offence and the accused has not cooperated with the investigation and being proclaimed offender, he should not be granted anticipatory bail. In that judgment, the Apex Court did not consider about maintainability of the anticipatory bail. The relevant para is as follows:-

> *"17. In the case on hand, a perusal of the materials i.e. confessional statements of Sanjay Namdev, Pawan Kumar alias Ravi and Vijay alias Monu Brahambhatt reveals that the respondents administered poisonous substance to the deceased. Further, the statements of the witnesses that were recorded and the report of the Department of Forensic Medicine and Toxicology, Government Medical College and Hospital, Nagpur dated 21-3-2012 have confirmed the existence of poison in milk rabri. Further, it is brought to our notice that warrants were issued on 21-11-2012 for the arrest of the respondents herein. Since they were not available/traceable, a proclamation under Section 82 of the Code was issued on 29-11-2012. The documents (Annexure P-13) produced by the State clearly show that the CJM, Chhindwara, M.P. issued a proclamation requiring the appearance of both the respondent-accused under Section 82 of the Code to answer the complaint on 29-12-2012. All these materials were neither adverted to nor considered by the High Court while granting anticipatory bail and the High Court, without indicating any reason except stating "facts and circumstances of the case", granted an order of anticipatory bail to both the accused. It is relevant to point out that both the accused are facing prosecution for offences punishable under Sections 302 and 120-B read with Section 34 IPC. In such serious offences, particularly, the respondent-accused being proclaimed offenders, we are unable to sustain the impugned orders [Sudhir Sharma v. State of M.P., Misc. Criminal Case No. 9996 of 2012, order dated 10-1-2013 (MP)] , [Gudda v. State of M.P.,*

Misc. Criminal Case No. 15283 of 2012, order dated 17-1-2013 (MP)] of granting anticipatory bail. The High Court failed to appreciate that it is a settled position of law that where the accused has been declared as an absconder and has not cooperated with the investigation, he should not be granted anticipatory bail."

The Apex Court in the above judgment observed that looking to the seriousness of the offence and being the proclaimed offender, the accused should not be granted anticipatory bail.

29. On the other hand, the learned Single Judge in ***Balveer Singh Bundela*** (supra) is of the view that anticipatory bail application is maintainable even after filing of charge-sheet till the person is arrested, but on merit, the case would be governed by the judgment of Apex Court in the case of ***Lavesh*** (supra). The Apex Court in the case of ***Lavesh*** (supra) has held that normally when the accused is absconding and declared as proclaimed offender, there is no question of grant of anticipatory bail and he is not entitled to relief of anticipatory bail.

30. The learned Single Judge in the case of ***Rajni Puruswani and another Vs. State of Madhya Pradesh*** reported in ILR (2020) MP 1477 has rightly considered that the word "entitlement" was used in the case of ***Lavesh*** and ***Pradeep Sharma*** (supra). Both are different i.e. "maintainability of the application" and "entitlement to get the bail". If the application is not tenable then the Court cannot consider the facts of the case and bound to reject the application outright upon the ground of tenability. If the application is tenable, then court will have to consider the merits, facts and other circumstances of the case. In that

situation, the court may grant or refuse the anticipatory bail. The relevant para 18 is as follows:-

> "*18. The word 'Entitled' used in the case of Lavesh and Pradeep Sharma (supra). Therefore, it is clear from the aforesaid discussion of laws that "Tenability of application" and "Entitlement to get the bail" are different. If an application is "not-tenable' then the Court cannot considered the facts of the case and bound to reject the application outright upon the ground of tenability. If the application is tenable, then the Court will consider the merits, facts and other circumstances of the case. In the aforesaid situation, the Court may grant or refuse the anticipatory bail."*

31. The Apex Court in the case of ***Bharat Chaudhary and another Vs. State of Bihar and another*** reported in (2003) 8 SCC 77, had an occasion to consider the power under Section 438 Cr.P.C. The Apex Court has held that there is no restriction in regard to exercise of power in a suitable case either by the Court of Session, High Court or the Apex Court even when cognizance is taken or charge-sheet is filed. The Apex Court further held that even if the cognizance is taken or the charge-sheet has been filed would not by itself prevent the Court from granting anticipatory bail in appropriate cases. The only important factor is to be taken into consideration while granting anticipatory bail is gravity of offence and also need for custodial interrogation. The relevant para is as follows:-

> *"7. From the perusal of this part of Section 438 of CrPC, we find no restriction in regard to exercise of this power in a suitable case either by the Court of Session, High Court or this Court even when cognizance is taken or a charge-sheet is filed. The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a court has either*

> *taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, 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 our opinion, the courts i.e. the Court of Session, High Court or this Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under Section 438 of CrPC even when cognizance is taken or a charge-sheet is filed provided the facts of the case require the court to do so".*

32. The earlier view taken by the Apex Court in the case of ***Pradeep Sharma*** (supra) considering the judgment passed by the Apex Court in the case of ***Lavesh*** (supra), was to the effect that where the accused has been declared as an absconder and has not cooperated with the investigation, he should not be entitled for grant of anticipatory bail but in the recent case of ***Asha Dubey Vs. State of M.P.*** in Criminal Appeal No.4564 of 2024, the Apex Court vide order 12.11.2024 considering the earlier judgment passed by the Apex Court in the case of ***Pradeep Sharma*** has held that in the event of the declaration under Section 82 of the Cr.P.C., it is not as if in all cases that there will be a total embargo on considering the application for grant of anticipatory bail. When the liberty of the appellant pitted against, the Court will have to see the circumstances of the case, nature of the offence and the background based on which such a proclamation was issued. The relevant paras are as follows:-

> *"8. Coming to the consideration of anticipatory bail, in the event of the declaration under Section 82 of the Cr.P.C., it is not as if in all cases that there will be a total embargo on considering the application for the grant of anticipatory bail.*
>
> *9. When the liberty of the appellant is pitted against, this Court will have to see the circumstances of the case, nature of the offence and the background based on which such a proclamation was issued. Suffice it is to state that it is a fit case for grant of anticipatory bail, on the condition that the appellant shall cooperate with the further investigation. However, liberty is also given to the respondents to seek cancellation of bail that has been granted, in the event of a violation of the conditions which are to be imposed by the Trial Court or if there are any perceived threats against the witnesses."*

33. In the above judgment, the Apex Court granted the anticipatory bail by saying that it is fit case for grant of anticipatory bail in the event of declaration under Section 82 of the Cr.P.C. on the condition that the appellant shall cooperate with the further investigation.

34. The Apex Court in the case of ***Srikant Upadhyay and others Vs. State of Bihar and another***, SLP No.7940/2023 decided on 14.03.2024, has held as follows:-

> *"8. It is thus obvious from the catena of decisions dealing with bail that even while clarifying that arrest should be the last option and it should be restricted to cases where arrest is imperative in the facts and circumstances of a case, the consistent view is that the grant of anticipatory bail shall be restricted to exceptional circumstances. In other words, the position is that the power to grant anticipatory bail under Section 438, Cr. PC is an exceptional power and should be exercised only in exceptional cases and not as a matter of course. Its object*

is to ensure that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. (See the decision of this Court in HDFC Bank Ltd. v. J.J.Mannan & Anr. (2010) 1 SCC 670.

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

35. Thus, it is clear like a noon-day that the power under Section 438 of the Cr.P.C. is an extraordinary power and therefore, it cannot be curtailed. If a view is taken that in all cases application for anticipatory bail is not maintainable, it would curtail the power conferred upon the Courts under Section 438 of the Cr.P.C./482 of the BNSS. However,

there shall be restrictions with regard to grant of anticipatory bail to the accused which will depend upon the nature of the offences which are alleged against the accused coupled with the fact that such grant of anticipatory bail to the accused does not in any manner hamper and affect the ongoing investigation of the case.

36 In view of the above discussion and taking note of the legal aspects on the question and the judgments passed by the Hon'ble Apex Court, we are inclined to hold that in both the scenarios, where the proceedings under Section 82/83 and 299 of Cr.P.C.(84/85 and 335 of the BNSS) have been initiated against the accused and/or he has been declared proclaimed offender, the application for anticipatory bail would be maintainable. However, such consideration and grant of anticipatory bail to the accused would depend upon the gravity and seriousness of the offence involved therein. It is needless to mention here that such power should be exercised in a very cautious manner and in extreme and exceptional cases only in the interest of justice. In this view of the matter, the judgments rendered by the learned Single Judge in the case of ***Bhupender Singh*** and ***Gaurav Malviya*** (supra) and other allied cases holding that anticipatory bail application is not maintainable in cases where the charge sheet has been filed, are not the correct enunciation of law and the same are hereby overruled to that extent. We, therefore, hold that the application for anticipatory bail is maintainable even if the charge-sheet has been filed showing the accused as declared absconder.

37. The reference is thus answered accordingly. The Registry is directed to list the case as per roster.

38. We record our appreciation for the able assistance rendered to the Court by both the learned amicus curiaes.

(SURESH KUMAR KAIT)
CHIEF JUSTICE

(VIVEK JAIN)
JUDGE

C.