* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 28th May, 2025
Pronounced on: 1st July, 2025

\+ **BAIL APPLN. 1375/2025 & CRL.M.A. 10692/2025**

SHANKESH MUTHA ….Petitioner

Through: Mr. Gautam Khazanchi, Mr. Vaibhav Dubey, Mr. Anuj Aggarwal and Mr. Vinayak Chawla, Advocates.

versus

UNION OF INDIA & ANR …Respondents

Through: Mr. Amit Tiwari, CGSC with Mr. Chetanya Puri, Mr. Abhigyan Siddhant, Ms. Ayushi Srivastava and Mr. Ayush Tanwar, Advocates for UOI.
Mr. N.K. Matta, SPP with Mr. Siddharth Kaushik and Mohd. Faizan Khan, Advocates for UOI.
Ms. Anubha Bhardwaj, SPP with Ms. Muskan Narang, Advocate for CBI.
Mr. Rudresh Kumar and Mr. Karan Shankla, Advocates for Complainant.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

1. The Petitioner invokes Section 482 read with Section 528 of Bhartiya Nagarik Suraksha Sanhita, 2023[1] (corresponding to Section 438 and 482 of the Code of Criminal Procedure, 1973[2], respectively) to assail the order dated 3rd April, 2025, passed by the Additional Chief Judicial Magistrate-01, Patiala House Court, Delhi in Complaint Case 41367/2024

[1] "BNSS"
[2] "Cr.P.C./Code"

titled *Union of India v. Shankesh Mutha* and proceedings emanating therefrom. By the said order, the Petitioner's application seeking anticipatory bail under Section 482 of the BNSS read with Section 25 of the Extradition Act, 1962[3] was dismissed and the Petitioner was directed to immediately surrender before the Court or before CBI. The present petition therefore seeks (i) setting-aside of the impugned order dated 3rd April, 2025 and all proceedings emanating therefrom, and (ii) pre-arrest protection pending the extradition proceedings in the said complaint case.

2. Briefly, the facts giving rise to the present petition are summarised as follows:

2.1 The Petitioner, an Indian citizen, joined Flawless Co. Ltd.[4], an entity based out of Bangkok, Thailand, in 2013 in Administration of Foreign Affairs. After completing his tenure of around 8 years, he returned to India. The Petitioner contends that the officials of the company were fully aware that he would return to India after his tenure.

2.2 In June 2021, Flawless Co. Ltd. filed a complaint against the Petitioner in Thailand, alleging that he stole 8 diamonds worth around 15.16 million baht (≈ ₹3.89 crore) and fled to India. The officials of the company contend that the Petitioner misappropriated the diamonds and upon being confronted, he admitted his guilt to the company on 25th May, 2021, but apprehending arrest, he fled to India on 27th May, 2021.

2.3 Pursuant to a criminal complaint against him, the Southern Bangkok Criminal Court Thailand issued a warrant for his arrest, and Thai prosecutors commenced the extradition efforts that underpin the ongoing proceedings before the Patiala House Courts, Delhi.

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[3] "Extradition Act"
[4] "the Company"

2.4 On 25.09.2024, the Ministry of External Affairs, Government of India passed an order informing that the Kingdom of Thailand had made a request for the extradition of the Petitioner and thus, as per the provisions of the Extradition Act, the Additional Chief Judicial Magistrate-01, Patiala House Court, Delhi[5] was notified as the Magistrate Court to conduct an inquiry into the extradition request and determine whether a *prima facie* case was made out against the Petitioner.

2.5 Pursuant thereto, Respondent No. 1 filed an application under Section 5 of the Act seeking issuance of warrants against the Petitioner and enclosing therewith, the order passed by the Government of India, Thai extradition request along with Thai arrest warrant, complaint, and supporting dossier.

2.6 By order dated 3rd October, 2024, the Magistrate issued Non-Bailable Warrants against the Petitioner, through CBI Interpol and listed the matter on 12th December, 2024 for further proceedings. On the said date, the Petitioner appeared voluntarily before the Magistrate and filed an application for cancellation of Non-Bailable Warrants and grant of anticipatory bail. He urged that, although Section 6 of the Extradition Act permits the court to compel attendance by warrant, the objective of ensuring his presence during the inquiry could be achieved without resorting to issuance of fresh coercive process against him. *Prima facie*, finding merit in his submission, the Magistrate withheld re-issuance of the warrants and directed the applicant to remain personally present on the next date of hearing.

2.7 The applicant complied with that direction and appeared on each subsequent date of listing.

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[5] "Magistrate"

2.8 Subsequently, on 3rd April, 2025, the Magistrate dismissed the anticipatory bail application of the Petitioner, leading to filing of the present application before this Court, along with an interim application seeking restraint against coercive action.

3. On 7th April, 2025, taking note of the Petitioner's participation in the extradition inquiry and his undertaking to cooperate with the proceedings, this Court directed that no coercive steps be taken against him, subject to the condition that he deposit his passport with the Registry. The Petitioner was further directed to remain present before the inquiry Court on all scheduled dates and to abstain from adopting any dilatory tactics. The record reflects that these directions have been duly complied with by the Petitioner.

4. Although the impugned denial of pre-arrest bail proceeds on merits rather than on maintainability, the Respondents have nonetheless raised a threshold objection to the very maintainability of the present petition. Their contention is that the scheme of the Extradition Act, read with the provisions of the Cr.P.C (now BNSS), contemplates grant of bail only after the fugitive has been formally arrested. According to them, once the designated Magistrate initiates inquiry under the Extradition Act, the grant of any pre-arrest protection falls outside the contours of the statutory framework. In addition to this objection, the Respondents also seek to defend the impugned order on merits and urge dismissal of the present petition.

SUBMISSIONS OF THE PARTIES

Petitioner's Submissions

5. Mr. Gautam Khazanchi, counsel for the Petitioner, contests the preliminary objection on maintainability and advances the following submissions:

5.1 The objection of Respondent No. 1, that the scheme of the Extradition Act does not envisage grant of anticipatory bail, is misconceived. Section 438 of the Code embodies a crucial safeguard for the preservation of personal liberty under Article 21 of the Constitution of India. The provision is rooted in the constitutional presumption of innocence and is designed to ensure that individuals are not unjustly deprived of liberty at the pre-trial stage. There is nothing in the text or scheme of the Extradition Act that expressly or by necessary implication excludes the applicability of this protection. In this regard, reliance is placed on the decision of the Constitution Bench of the Supreme Court in ***Sushila Aggarwal v State of (NCT of Delhi) & Anr.,***[6] which reaffirms the well-settled proposition that anticipatory bail constitutes an integral part of the constitutional guarantee of personal liberty.

5.2 Any restriction or curtailment on the application of Section 438 must rest on an express, unambiguous statutory prohibition. In the absence of any such express bar, the power to grant anticipatory bail, being an essential safeguard flowing from the fundamental right to personal liberty under Article 21 of the Constitution, cannot be read down or restricted by implication. Consequently, the protections under Section 438 extend to extradition proceedings as well. In support of this proposition, reliance is

[6] (2020) 5 SCC 1

placed on the judgements of ***Sushila Aggarwal*** and ***Balchand Jain v. State of M.P.***[7]

5.3 Section 25 of the Extradition Act enables a Magistrate dealing with a fugitive criminal to grant bail in accordance with the provisions of Cr.P.C 1973, as if the individual were accused of an offence committed within India. It also vests the Magistrate with the same powers and jurisdiction as a Court of Session. While the provision refers to persons "arrested or detained," it does not expressly limit the applicability of other bail-related provisions of the Cr.P.C., including Section 438. There is no textual prohibition, express or implied, against anticipatory bail in extradition matters.

5.4 The Respondent's contention that the expression "*arrested*" or "*detained*" in Section 25 of the Extradition Act, excludes the right to anticipatory bail, is misconceived. Section 438 of the Cr.P.C. allows a person to seek the remedy of a bail order when they are apprehending arrest, at the same time, the Section contemplates the 'release' of such a person on bail only in the *event of arrest*. The grant of such an order, however, is prospective and pre-emptive in nature, triggered by apprehension of arrest.

5.5 The Supreme Court in ***Balchand Jain***, while dealing with a similar objection relating to maintainability of anticipatory bail under Rule 18 of the Defence & Internal Security of India Rules, 1971, held that there can be no question of a person being released on bail *until* he has been arrested or detained in custody. Section 438 of Cr.P.C., the Court explained, exists precisely so that, the instant an arrest is effected, the individual is enlarged on bail.

[7] (1976) 4 SCC 572

5.6 Furthermore, as per Section 4(2) of the Cr.P.C., the procedure enshrined in the Cr.P.C. shall also apply to special statutes, unless its applicability is expressly barred by the said special statute. Reliance is placed on the judgements of ***Ashok Munnilal Jain & Anr. v. ED***[8], ***ED v. Deepak Mahajan***[9] and ***Asmita Agrawal v. ED & Ors.***[10]

5.7 Section 7 of the Extradition Act which opens with the words "*appears or brought before*", mirrors Section 436 and 437 of the Cr.P.C. Under the Code, an accused who has not been arrested during investigation may appear voluntarily before the court concerned, apply for bail, and be deemed to be in the court's custody without first being remanded to judicial custody. The identical phrasing in Section 7 of the Extradition Act, which provides for the procedure to be followed by the Magistrate, reveals that the Act contemplates a situation where a person may not be required to be arrested. The Act provides that upon conclusion of the inquiry, if the Magistrate arrives at a *prima facie* decision in support of extradition to a foreign state, only then such a person would be committed to custody under Section 7(4) of the Act, to await the orders of the Central Government.

5.8 On receipt of a request from the Central Government under Section 5 of the Act, it is not necessary that Non-Bailable Warrants must be issued by the Magistrate under Section 6. Judicial discretion must be exercised after examining the material placed on record to decide whether such a coercive process is required to secure the fugitive's attendance. Reliance is placed on ***Tribhuvan Kumar Prakash v. Union of India***[11] to contend that

[8] (2018) 16 SCC 158
[9] (1994) 3 SCC 440
[10] ILR (2001) II Delhi 643
[11] Bail Appln. No. 2844/2021 decided on 12th November, 2021

issuance of Non-Bailable Warrants can neither be automatic nor mechanical.

5.9 The overall scheme of the Extradition Act does not implicitly or explicitly bar the applicability of Section 438 of the Cr.P.C. The judicial power to grant anticipatory bail therefore remains intact, and an application under that provision is maintainable during the inquiry.

5.10 The Respondent's reliance on the decision of the Kerala High Court in ***In Re: Rajan Pillai***[12] is misconceived. The facts and legal context of that case differ materially from the present proceedings and do not negate the availability of anticipatory bail under the Act.

Respondent's Submissions

6. Mr. Amit Tiwari, CGSC for Respondent No. 1, strongly opposes the maintainability of the present application on the principal ground that the scheme and provisions of the Extradition Act do not permit the grant of anticipatory bail to a fugitive criminal. He raises the following grounds in this regard:

6.1 The statutory purpose of the Extradition Act is to secure the custody of the fugitive criminal and extradite him to the Requesting State expeditiously, in accordance with the procedure established by law. Pre-arrest protection would undermine this objective.

6.2 Although Section 25 of the Extradition Act does incorporate the bail-related provisions of the Cr.P.C., its operation is expressly limited to persons who have already been "arrested or detained" under the Act. This, indicates a deliberate legislative design to exclude anticipatory bail from the statutory scheme. Since Section 438 of the Cr.P.C. contemplates pre-arrest protection, its invocation in the context of extradition would run

[12] 1995 SCC OnLine Ker 118

contrary to the express language and purpose of the Act, and hence, must be deemed to be impliedly excluded.

6.3 The Extradition Act is a self-contained special statute, enacted to honour India's treaty obligations, and as such its provisions override the general criminal procedure under Indian law. It lays down a distinct legal framework for the apprehension, inquiry, and eventual surrender of fugitives to the Requesting State. In light of its special character and overriding purpose, the general provisions of the Cr.P.C., particularly those enabling anticipatory bail, cannot be applied in a manner that dilutes or circumvents the objectives of the Extradition Act.

6.4 The custody of a fugitive criminal under the Act, who has evaded the process of the law in the Requesting State, serves a dual purpose: it is both preventative and facilitative in nature. It is intended to prevent further evasion of law as well as to ensure compliance of India's international treaty obligations. Reliance is placed on the decision of the Supreme Court in ***Bhavesh Jayanthi Lakhani v State of Maharashtra***[13]***,*** wherein it was held that arrest under Extradition Act must strictly conform to the statutory procedure, primarily through a warrant issued by a Magistrate under Sections 6, 16 or 34B of the Act or an arrest warrant issued by a foreign country and endorsed by the Central Government under Section 15 of the Act. It was further observed that upon such arrest, the fugitive is to be produced before the Magistrate, who may then consider granting bail. This judgment supports the view that bail is contemplated only post-arrest, and not as a measure of pre-arrest protection.

6.5 The legislative drafting history of the statute itself sheds light on the objective of the Act. When the Extradition Act was enacted in 1962, bail

[13] (2009) 9 SCC 551

procedure was governed by the Code of Criminal Procedure, 1898, which did not contain a provision for anticipatory bail. Although, the enactment of the new Code of Criminal Procedure in 1973 introduced Section 438, the corresponding amendment to Section 25 of the Extradition Act, merely updated the reference to the new Code, without incorporating any language that would import the provision for anticipatory bail into the Act. This deliberate omission reflects a conscious legislative intent to exclude pre-arrest relief from the extradition framework.

6.6 In support of the above construction, reliance is placed on the decision of the Kerala High Court in ***In Re: Rajan Pillai***, wherein it was held that Section 25 operates only in two limited circumstances: first, where a fugitive is arrested on a Magistrate's warrant and produced before the Court; and second, where the person is otherwise detained under the Act. In either event, custody is a necessary precondition to the consideration of bail under the statute.

6.7 The Petitioner's invocation of Article 21 of the Constitution is misplaced. While personal liberty is indeed a fundamental right, it is circumscribed by the phrase "procedure established by law". Once the Parliament has provided a specific procedure, as under the Extradition Act, for securing custody and processing extradition, the courts are not at liberty to introduce a remedy that the statute consciously excludes.

6.8 Even though the constitutional courts have broadened the reach and scope of rights under Article 21, that expansion cannot override an express or implied legislative restriction. Judicial interpretation must operate within the four corners of the statute unless the provision itself is struck down as unconstitutional which is not a plea advanced in the present case.

6.9 Entertaining applications for anticipatory bail in extradition matters would effectively defeat the very object of the Extradition Act. It would impair the country's ability to honour its treaty obligations, compromise the credibility of its legal process, and open avenues for fugitives to evade justice under the guise of pre-arrest protection. Such a reading would be incompatible with the scheme and object of the Act, and with the constitutional principle that reasonable restrictions may be placed on the exercise of fundamental rights through duly enacted legislation.

ANALYSIS

7. The central question which falls for determination in the present case is whether the protective armor of anticipatory bail, available to an individual apprehending arrest in domestic criminal proceedings, can be invoked by a 'fugitive criminal' facing proceedings under the Extradition Act, 1962. Resolving this issue necessitates a careful and harmonious reading of the Extradition Act, the Code of Criminal Procedure, 1973, and the constitutional jurisprudence that places personal liberty at the heart of our legal system. The Court must also navigate the delicate balance between Union of India's international obligations to surrender fugitives to a Requesting State, and the individual's right to seek protection under Section 438 of the Cr.P.C., especially when viewed through the prism of Article 21 of the Constitution and the jurisprudence on the presumption of innocence and the sanctity of pre-arrest liberty.

Procedural framework and judicial discretion under the Extradition Act

8. The procedural framework of Extradition Act, gets triggered when the Central Government receives a requisition request from a foreign state. Upon satisfaction, it may, under Section 5, direct a competent Magistrate

to conduct an inquiry. Section 6 mandates the Magistrate to "issue a warrant for the arrest" of the fugitive criminal. Once the fugitive "appears or is brought" before the Magistrate, Section 7 empowers the Magistrate to conduct the inquiry with all the powers and jurisdiction, as nearly as may be, of a Court of Session under the Cr.P.C. If, on the conclusion of the inquiry, the Magistrate forms the opinion that a *prima facie* case exists in support of the requisition, the fugitive may be committed to prison to await the orders of the Central Government, as contemplated under Section 8. Conversely, if the Magistrate finds that no *prima facie* case is made out, the fugitive is to be discharged.

9. Section 6 empowers the concerned Magistrate to secure the fugitive criminal's presence in the inquiry proceedings under the Extradition Act by issuing a warrant. However, the statute is silent as to the nature of such warrant – whether it must be bailable or non-bailable. In the absence of an express stipulation, the general provisions of the prevalent criminal law, i.e., that of the Cr.P.C., fill the gap. Sections 70 to 72 of the Cr.P.C. permit the Magistrate to endorse bail terms on a warrant or to issue a Bailable warrant, depending on the circumstances of the case. Section 73 further reinforces the discretion vested in the Court to calibrate the "degree of coercion" necessary to compel appearance. Thus, the decision to issue a Bailable or Non-Bailable warrant remains a matter of judicial discretion, to be exercised with due regard to (a) whether the fugitive criminal is a flight-risk, (b) India's treaty obligations, and (c) the principle of proportionality that underpins both Cr.P.C. and constitutionally mandated due process of law. This interpretation finds support in the decision in ***Tribhuvan Kumar Prakash v. Union of India***, wherein a co-ordinate

Bench of this Court held that it is clear from the reading of Section 6 that the warrant to be issued does not necessarily have to be non-bailable.

10. The Supreme Court in ***Bhavesh Jayanti Lakhani,*** highlighted two key principles relevant to proceedings under the Extradition Act: first, that the arrest of a fugitive must strictly track the procedure laid down by Parliament; and second, that any curtailment of liberty must be commensurate with the object sought to be achieved – namely, securing the fugitive's presence before the Magistrate for the inquiry under Section 7, rather than imposing unnecessary or punitive detention[14]. In this framework, Section 25 of the Extradition Act assumes significance. It empowers the Magistrate to release a fugitive on bail, and expressly applies the bail provisions of the Cr.P.C., "in the same manner" as if the person were accused of having committed the offence in India. For ease of reference, Section 25 is reproduced below:

> *"**25. Release of persons arrested on bail**.—In the case of a person **who is a fugitive criminal arrested or detained under this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to bail shall apply in the same manner** as they would apply if such person were accused of committing in India the offence of which he is accused or has been convicted, **and in relation to such bail, the magistrate before whom the fugitive criminal is brought shall have, as far as may be, the same powers and jurisdiction as a court of session under that Code."***
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> [Emphasis supplied]

11. The opening words of the Section 25 – "*in case of a person who is a fugitive criminal* ***arrested*** *or* ***detained*** *under this Act,* ***the provisions of the Code of Criminal Procedure, 1973, relating to bail shall apply***", merely describe the stage at which question of grant of bail ordinarily arises. Crucially, the provision does not contain any express bar on the grant of

[14] Paragraphs 54, 59-61, Supra Note 14

pre-arrest bail, nor does its language support an implied exclusion of Section 438 of Cr.P.C. If Parliament had intended to carve out an exception to a substantive remedy safeguarding personal liberty, it could have done so in clear terms. Restrictions on the scope of pre-arrest bail must rest on a clear statutory mandate, not on inference. In the present statutory scheme, no such prohibition exists. Accordingly, Section 25 of the Extradition Act, cannot be construed as precluding the application of anticipatory bail to extradition proceedings.

Section 438 of Cr.P.C. as a safeguard of personal liberty

12. Moreover, Section 438 of Cr.P.C. embodies a vital procedural safeguard rooted in the constitutional guarantee of personal liberty, the applicability of which cannot be excluded except by an express and unmistakable legislative mandate. It reads as follows:

> *"Section 438 – Direction for grant of bail to person apprehending arrest –*
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> *(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****:*
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> *(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****:*
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> *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.

...xx… …xx… …xx…

(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 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 sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860).”

[Emphasis Supplied]

13. The provision allows a person, apprehending arrest for any non-bailable offence, to seek a direction from the Court of Session or the High Court that, in the event of such an arrest, they shall be released on bail. A plain reading of the text of Section 438 reveals that it is prospective in operation and protects against arrest by ensuring automatic release upon arrest, subject to conditions imposed by the Court. The only statutory

exclusions appear in sub-section (4), which expressly bars anticipatory bail in a narrow class of aggravated sexual offences. Sub-section (3) of Section 438 clarifies that the relief becomes operative only upon actual arrest, reinforcing that the remedy is prospective and conditional. The purpose of pre-arrest bail is not to immunize a person from investigation or inquiry, but to prevent the abuse of process through arbitrary or motivated detention. In this respect, Section 438 harmonizes the coercive powers of the State with the individual's right to dignity and personal liberty guaranteed under Article 21 of the Constitution. The legislature, through this provision, has empowered the judiciary to intervene at the threshold where *mala fides*, political vendetta, or frivolous accusations may be reasonably suspected. The provision must be interpreted liberally to uphold personal freedom and to ensure that the power of arrest does not become a tool of oppression rather than a means of securing justice.

14. Furthermore, read literally, Section 25 of the Extradition Act imports the entirety of the bail jurisprudence under the Cr.P.C., "*in the same manner*" as it would apply if the offence had been committed in India. Section 438, being an integral part of the bail framework under the Cr.P.C., is included by necessary implication. The Respondent's emphasis on the prefatory phrase "*in the case of a person…. arrested or detained*" does not, in itself, amount to a legislative exclusion of pre-arrest relief. That phrase merely identifies the stage at which bail most commonly arises, and does not exhaust the universe of circumstances where bail provisions may be invoked. Statutory construction cannot rest on semantic literalism; it must account for (i) the legislative objective of ensuring presence of the fugitive criminal, (ii) the overarching imperative of preserving liberty, and (iii) the

constitutional bar against implied curtailments of personal freedom in absence of a clear legislative mandate.

15. In ***Balchand Jain,*** the Supreme Court traced the genesis of Section 438 of Cr.P.C. and observed that the expression "anticipatory bail" is, strictly speaking, a misnomer. What the Court grants is not bail in advance, but a conditional direction that, *should arrest occur*, the applicant be released forthwith. The power is "somewhat extraordinary" and is to be exercised sparingly, where false implication is suspected, the accusation appears frivolous, or the applicant is demonstrably unlikely to abscond or abuse the liberty if so granted. Recognizing its exceptional character, the legislature confined the jurisdiction to the Court of Session and the High Court. The relevant portion of the judgement is as follows:

> *".....We do not find in this section the words "anticipatory bail", but that is clearly the subject with which the section deals.* ***In fact "anticipatory bail" is a misnomer. It is not as if bail is presently granted by the court in anticipation of arrest. When the court grants "anticipatory bail", what it does is to make an order that in the event of arrest, a person shall be released on bail. Manifestly 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.*** ***Now, this power of granting "anticipatory bail" is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" that such power is to be exercised****. And this power being rather of an unusual nature, it is entrusted only to the higher echelons of judicial service, namely, a Court of Session and the High Court. It is a power exercisable in case of an anticipated accusation of non-bailable offence and there is no limitation as to the category of non-bailable offence in respect of which the power can be exercised by the appropriate court."*
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> [Emphasis Supplied]

16. The liberty-centric character of Section 438 received emphatic endorsement in the decision of the Constitution bench in ***Gurbaksh Singh Sibbia v. State of Punjab***[15]**.** The Court held that, because denial of bail curtails personal liberty, courts must "lean against the imposition of unnecessary restrictions", especially where the legislature itself has imposed none. The Bench cautioned that overly stringent judicial constraints could render the provision "constitutionally vulnerable." Rooted in Article 21 of the Constitution, which mandates that any procedure curtailing liberty must be fair, just, and reasonable, Section 438 was described as a beneficial procedural safeguard that must not be judicially stifled. The Court noted as follows:

> *26. We find a great deal of substance in Mr Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty,* ***the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned****. No doubt can linger after the decision in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] , that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."*
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> [Emphasis Supplied]

[15] (1980) 2 SCC 565

17. It is instructive to note that Section 438 falls within Chapter XXXIII of the Cr.P.C., which is titled as "*Provisions as to Bail and Bonds*." Section 25 of the Extradition Act explicitly incorporates "*the provisions of the Code of Criminal Procedure, 1973, relating to bail.*" This textual phrase is broad and unfettered; it would include the entire architecture of Chapter XXXIII of Cr.P.C., including anticipatory bail, unless a contrary legislative intent is expressed. Neither does Section 25 have any limiting words excluding Section 438 of Cr.P.C., nor does Section 438 contain any clause excluding its application to extradition matters. In the absence of such express exclusion, the two provisions must be read harmoniously. The bail jurisdiction conferred on the Magistrate under Section 25 must be understood to include the power to grant anticipatory bail, in the same manner as it would ordinarily operate in respect of offences triable in India.

18. In this light, the Respondent's submission that the phrase "*arrested or detained*" in Section 25 implicitly excludes anticipatory bail cannot be sustained. Such a reading finds no support in the statutory text and would run afoul of the guiding principle laid down in ***Sibbia***, that legislatively conferred liberties are not to be curtailed by inference. On the contrary, the Petitioner's construction, which views Section 25 as importing the entire bail framework of the Cr.P.C., including anticipatory bail, aligns with both the statutory language of the Extradition Act and the constitutional imperative to preserve personal liberty, unless the Legislature has expressly stated otherwise.

19. Even assuming, *arguendo*, that the Respondents' interpretation is correct and the phrase "*arrested or detained*" in Section 25 of the Extradition Act refers only to the post-custody stage, such a reading does not *ipso facto* negate the availability of anticipatory bail under Section 438

Cr.P.C. A mere temporal reference cannot operate as a legislative bar to a remedy protecting personal liberty, unless the statute articulates such exclusion in express terms, which the Extradition Act does not. This precise question was addressed in ***Balchand Jain***, where the Supreme Court considered Rule 184 of the Defence and Internal Security of India Rules, 1971, a provision that opened with a *non-obstante* clause and imposed explicit limitations on the power to grant bail to persons accused or convicted of contravention of those Rules.

20. Despite this stronger statutory restriction, the Supreme Court observed that Rule 184 was not a self-contained code but rather it merely placed conditional fetters on the bail jurisdiction under the Cr.P.C., without entirely ousting its operation. Pertinently, Section 438 Cr.P.C. was held to remain fully operative in such cases because it functioned at a distinct procedural stage, i.e., prior to arrest, whereas Rule 184 governed release after custody. The Court observed that the two provisions "operate at different stages" and "stand side by side without conflict." The relevant portion of the Supreme Court's reasoning in ***Balchand*** is as follows:

> *"3....*
>
> *...This rule commences on a non obstante clause and in its operative part imposes a ban on release on bail of a person accused or convicted of a contravention of the Rules or orders made thereunder,* ***if in custody, unless two conditions are satisfied****. The first contention is that the prosecution must be given an opportunity to oppose the application for such release and the second condition is that when the contravention is of any such provision of the Rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such contravention.* ***If either of these two conditions is not satisfied, the ban operates and the person concerned cannot be released on bail.*** *The rule, on its plain terms, does not confer any power on the court to release a person accused or convicted of contravention of any rule or order made under the Rules, on bail.* ***It postulates the existence of power in the court***

under the Code of Criminal Procedure and seeks to place a curb on its exercise by providing that a person accused or convicted of contravention of any rule or order made under the Rules, if in custody, shall not be released on bail unless the aforesaid two conditions are satisfied. It imposed fetters on the exercise of the power of granting bail in certain kinds of cases and removes such fetters on fulfilment of the aforesaid two conditions*. When these two conditions are satisfied, the fetters are removed and the power of granting bail possessed by the court under the Code of Criminal Procedure revives and becomes exercisable.*** *The non obstante clause at the commencement of the rule also emphasises that the provision in the rule is intended to restrict the power of granting bail under the Code of Criminal Procedure and not to confer a new power exercisable only on certain conditions.* ***It is not possible to read Rule 184 as laying down a self-contained code for grant of bail in case of a person accused or convicted of contravention of any rule or order made under the Rules so that the power to grant bail in such case must be found only in Rule 184 and not in the Code of Criminal Procedure. Rule 184 cannot be construed as displacing altogether the provisions of the Code of Criminal Procedure in regard to bail in case of a person accused or convicted of contravention of any rule or order made under the Rules. These provisions of the Code of Criminal Procedure must be read along with Rule 184 and full effect must be given to them except insofar as are, by reason of the non-obstante clause overridden by Rule 184.***

4. We must, therefore, proceed to consider whether on a true and harmonious construction, Section 438 of the Code of Criminal Procedure, which provides for grant of "anticipatory bail" can stand side by side with Rule 184 or there is any inconsistency between them so that to the extent of *inconsistency****, it must be regarded as overridden by that rule.*** *Now Section 438 contemplates an application to be made by a person who apprehends that he may be arrested on an accusation of having committed a non-bailable offence. It is an application on an apprehension of arrest that invites the exercise of the power under Section 438. And on such an application, the direction that may be given under Section 438 is that in the event of his arrest, the applicant shall be released on bail. Rule 184, on the other hand, deals with a different situation and operates at a subsequent stage when a person is accused or convicted of contravention of any rule or order made under the Rules and is in custody. It is only the release of such a person on bail that is conditionally prohibited by Rule 184.* ***If a person is not in custody but is merely under an apprehension of arrest and he applies for grant of "anticipatory bail" under Section 438, his case would clearly be outside the mischief of Rule 184, because when the court makes an order for grant of "anticipatory bail", it would not be***

> ***directing release of a person who is in custody. <u>It is an application for release of a person in custody that</u> <u>is contemplated by Rule 184 and not an application for grant of "anticipatory bail" by a person apprehending arrest. Section 438 and Rule 184 thus operate at different stages, one prior to arrest and the other, after arrest and there is no overlapping between these two provisions so as to give rise to a conflict between them. And consequently, it must follow as a necessary corollary that Rule 184 does not stand in the way of a Court of Session or a High Court granting "anticipatory bail" under Section 438 to a person apprehending arrest on an accusation of having committed contravention of any rule or order made under the Rules."***
>
> [Emphasis Supplied]

21. Applying the same rationale to the present case, the contention advanced by Respondents that the words "*arrested or detained*" in Section 25 of the Extradition Act necessarily exclude anticipatory bail, is untenable. If anticipatory bail can co-exist with a provision armed with an overriding clause and explicit prohibitions, it must all the more co-exist with Section 25 of the Extradition Act, which contains neither. To read an implied bar into Section 25 would not only stretch its language beyond permissible limits but also disregard the interpretive restraint highlighted by the Supreme Court in ***Balchand Jain***.

22. Thus, even if Section 25 were to be strictly construed as applying only after arrest or detention, such a reading cannot displace the availability of anticipatory bail under Section 438 Cr.P.C., which operates at a prior stage. As clarified in ***Balchand Jain***, a provision that regulates post-custody bail cannot impliedly override a statutory remedy that functions at the pre-arrest threshold. Both provisions can, and must, be read harmoniously. Section 25 governs the grant of bail once arrest has occurred; Section 438 safeguards liberty by intervening *before* arrest. Their co-existence presents no doctrinal conflict. Accordingly, in light of the above,

Section 25 of the Extradition Act cannot be interpreted to curtail the application of anticipatory bail under Section 438.

Extradition Act, though lex specialis, does not completely override the Cr.P.C.

23. The second limb of the Respondents' opposition is that anticipatory bail is incompatible with the Extradition Act, which being a special legislation, comprehensively governs the regime for dealing with fugitive criminals, and must therefore override the general framework of criminal procedure. Respondents place reliance on the Supreme Court's decision in ***Bhavesh Jayanti Lakhani v. State of Maharashtra*** to support this proposition.

24. However, in the opinion of the Court, this submission is unsustainable. The legal position is well settled: under Section 4(2) read with Section 5 of the Cr.P.C., the procedural framework of the Code applies to special laws unless such application is expressly or necessarily excluded. This principle was affirmed in ***Ashok Munnilal Jain v. Enforcement Directorate,*** where the Supreme Court held as follows:

> *"3. We have gone through the orders passed by the trial court as well as by the High Court. We may state at the outset that insofar as the High Court is concerned, it has not given any reasons in support of its aforesaid view except endorsing the view of the trial court to the effect that the provisions of Section 167(2) CrPC are not applicable to the cases under the PMLA Act. This position in law stated by the trial court does not appear to be correct and even the learned Attorney General appearing for the respondent could not dispute the same.* ***We may record that as per the provisions of Section 4(2) CrPC, the procedure contained therein applies in respect of special statutes as well unless the applicability of the provisions is expressly barred.*** *Moreover, Sections 44 to 46 of the PMLA Act specifically incorporate the provisions of CrPC to the trials under the PMLA Act. Thus, not only that there is no provision in the PMLA Act excluding the applicability of CrPC, on the contrary, provisions of CrPC are incorporated by specific inclusion…"*

[Emphasis Supplied]

25. Similar view has been taken in the recent case of ***Radhika Agarwal v. Union of India,***[16] where the Supreme Court reiterated that Cr.P.C. provisions apply to offences under special statutes, including the Customs Act and CGST Act, unless such application is expressly excluded. Referring to Sections 4 and 5 of the Cr.P.C., the Court observed:

> *"13. Section 4(1) stipulates that offences under the Penal Code, 1860, shall be investigated, inquired into, tried, and otherwise dealt with in accordance with the Code. For offences under any other local law, section 4(2) stipulates that they shall be investigated, inquired, tried, or otherwise dealt with in accordance with the Code, subject to any other enactment governing the manner or place of investigation, inquiry, trying or otherwise dealing. Section 5, the savings clause, clarifies that the Code shall not affect any special or local law, or any special jurisdiction or power conferred, or any special procedure prescribed, unless there is a specific provision to the contrary.* ***Thus, the provisions of the Code would be applicable to the extent that there is no contrary provision in the special act or any special provision excluding the jurisdiction and applicability of the Code****. [See paragraph 128 of the Directorate of Enforcement v. Deepak Mahajan, (1995) 82 Comp Cas 103 (SC); (1994) 3 SCC 440; 1994 SCC (Cri) 785; 1994 SCC OnLine SC 17.] In A.R. Antulay v. Ramdas Sriniwas Nayak [(1984) 2 SCC 500; 1984 SCC (Cri) 277; 1984 SCC OnLine SC 44.] , a Constitution Bench of this court has clarified this position while discussing the applicability of the Code to offences under the Prevention of Corruption Act, 1988. The relevant portion reads [Page 517 in SCC.] :*
>
> > *"16… In the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Code of Criminal Procedure. In other words, Code of Criminal is the parent statute which provides for investigation, inquiring into and trial of cases by criminal courts of various designations."*
>
> [Emphasis Supplied]

[16] 2025 SCC OnLine SC 449

26. Thus, while it cannot be disputed that the Extradition Act is a special legislation designed to give effect to India's international obligations in criminal justice cooperation, however, its specialized purpose cannot be invoked to eclipse the general law's foundational safeguards, especially those that are constitutionally rooted, in absence of an express legislative exclusion. The Extradition Act contains no express bar excluding the applicability of the Cr.P.C. On the contrary, Section 25 of the Extradition Act expressly incorporates the bail provisions under Cr.P.C., declaring that they shall apply "*in the same manner*" as if the offence were committed in India, with the Magistrate exercising powers akin to those of a Court of Session. A purposive construction, faithful to the constitutional presumption in favor of personal liberty, leaves no scope to infer an unstated exception for anticipatory bail. Such a significant curtailment of liberty cannot be read into the statute by implication; it must be stated in express terms.

Reconciling grant of anticipatory bail with the legislative intent of the Extradition Act

27. Respondents further contend that the legislature, when replacing the Code of Criminal Procedure, 1898 with the Cr.P.C. of 1973, consciously omitted to incorporate Section 438 into the Extradition Act, thereby indicating an intent to exclude anticipatory bail from its scheme. In the Court's view, this argument rests on tenuous footing. The substitution of references to the repealed Code through the Extradition (Amendment) Act, 1993[17], after nearly two decades of operation of 1973 Code was a legislative housekeeping exercise, intended to align the Extradition Act

[17] Act No. 66 of 1993

with the prevailing procedural statute. This amendment substituted references to the outdated 1898 Code with those of the 1973 Code, *in toto*, without excluding any provision, including the newly introduced Chapter XXXIII on bail. No part of the amended text suggests a legislative decision to exclude Section 438 of Cr.P.C. To infer such exclusion from mere silence would subvert the object of the amendment, which was to preserve procedural continuity and legal coherence, not to curtail personal liberty by implication.

28. The further submission that anticipatory bail would frustrate India's sovereign obligation to honour extradition treaties proceeds on an overstated assumption. The Extradition Act is indeed a tool of international cooperation, but its procedural design incorporates judicial scrutiny. In ***Brij Bhushan Bansal & Ors. v. Union of India***[18], this Court underscored that the Magistrate's powers under Sections 5 to 8 of the Act are judicial in nature, embedded between two executive actions: the Central Government's decision to initiate an inquiry and its subsequent determination on surrender. The Court held as follows:

> *"33.* ***It was noticed in the above decision that extradition proceedings are by their very nature partly judicial and partly administrative. The judicial part, that is, the inquiry by the Magistrate is sandwiched between the two administrative actions****. The first being the entertainment of the request received by the foreign state and the consideration thereof as to whether to issue an order to a Magistrate to inquire into the offence is the administrative decision of the Government of India. Thereafter, the judicial part is taken care of by the Magisterial Inquiry. After the inquiry, the Central Government again considers the matter. It has been noticed in this decision that the fugitive criminal is entitled to a proper judicial inquiry and that is provided for in Section 7 of the Act.*
>
> ***34. It appears that the whole purpose of the extradition proceedings seems to give an opportunity to the fugitive criminal to be considered impartially by a Magistrate before the Central***

[18] 2012 SCC OnLine Del 6354

> ***Government is required to consider whether to surrender the fugitive criminal or not. It is also clear that if the Magistrate is of the view that a prima facie case for extradition is not made out, the matter ends there and then and the fugitive criminal is discharged. Even if the Central Government wants to surrender the fugitive criminal, it cannot do so. On the other hand, even if the Magistrate is of the view that a prima facie case for extradition has been made out, it is still open to the Central Government to take a decision not to surrender the fugitive criminal."***
>
> [Emphasis Supplied]

29. This procedural bifurcation reinforces that the Magistrate's role is not merely formal but substantial. Moreover, the wording of Section 7 of the Act, "*when the fugitive criminal appears or is brought*" contemplates voluntary appearance, not just compelled production through arrest. The statute thus acknowledges that the fugitive may present himself before the Magistrate, upon receiving notice, without being taken into custody. In such circumstances, pre-arrest bail under Section 438 merely regularizes this voluntary participation and allows the Court to set conditions ensuring the applicant's continued submission to jurisdiction. Far from obstructing the extradition process, it allows the Court control over the proceedings from the outset.

30. Further, an Indian citizen who apprehends arrest in India for an alleged offence committed abroad is not stripped of the protection guaranteed under Article 21 of the Constitution. Section 438 of the Cr.P.C. is not merely a statutory remedy, it is a procedural safeguard flowing directly from the constitutional command that no person shall be deprived of liberty except by just, fair, and reasonable procedure established by law. On this aspect, in ***Radhika Agarwal***, the Supreme Court reaffirmed that:

> *"70.* ***We also wish to clarify that the power to grant anticipatory bail arises when there is apprehension of arrest. This power, vested in the courts under the Code, affirms the right to life and liberty under article 21 of the Constitution to protect persons from being arrested. Thus, in Gurbaksh Singh Sibbia [Gurbaksh Singh***

> ***Sibbia v. State of Punjab, (1980) 2 SCC 565; 1980 SCC (Cri) 465; 1980 SCC OnLine SC 125.] , this court had held that when a person complains of apprehension of arrest and approaches for an order of protection, such application when based upon facts which are not vague or general allegations, should be considered by the court to evaluate the threat of apprehension and its gravity or seriousness. In appropriate cases, application for anticipatory bail can be allowed, which may also be conditional.*** *It is not essential that the application for anticipatory bail should be moved only after an FIR is filed, as long as facts are clear and there is a reasonable basis for apprehending arrest. This principle was confirmed recently by a Constitution Bench of five-Judges of this court in Sushila Aggarwal v. State (NCT of Delhi) [(2020) 5 SCC 1; (2020) 2 SCC (Cri) 721; 2020 SCC OnLine SC 98.] . Some decisions [State of Gujarat v. Choodamani Parmeshwaran Iyer, (2023) 115 GSTR 297 (SC); 2023 SCC OnLine SC 1043, Bharat Bhushan v. Director General of GST Intelligence, Nagpur Zonal Unit Through Its Investigating officer(2024) 129 GSTR 297 (SC); 2024 SCC OnLine SC 2586, SLP (Crl.) No. 8525 of 2024.] of this court in the context of GST Acts which are contrary to the aforesaid ratio should not be treated as binding."*
>
> [Emphasis Supplied]

The decision also reaffirmed the Constitution Bench ruling in ***Sushila Aggarwal*** which clarified that anticipatory bail may be granted even before registration of an FIR, where the apprehension is real and grounded in facts. The constitutional foundation of such a remedy is thus, beyond question.

31. The two authorities cited by the Respondents – ***In re: Rajan Pillai*** and ***Bhavesh Jayanti Lakhani v. State of Maharashtra***, do not support the proposition that anticipatory bail is impermissible in extradition matters. The decision in ***Rajan Pillai*** concerned the forum for entertaining a post-arrest bail application under Sections 9 and 25 of the Extradition Act. The Court's reference to the phrase "*arrested and brought*" must be understood in that factual context; it was not engaged with the question of pre-arrest liberty at all. Similarly, in ***Bhavesh Jayanti Lakhani***, the Supreme Court was primarily concerned with procedural safeguards surrounding the

issuance and execution of warrants under the Extradition Act, and the scope of the Central Government's discretion following a Magistrate's inquiry. In the said case, the question of anticipatory bail was neither raised nor addressed. Thus, neither decision forecloses the applicability of pre-arrest bail under Section 438 of Cr.P.C.

32. If anything, the judgment in ***Bhavesh Jayanti Lakhani*** affirms the importance of adherence to due process under the Extradition Act. The Supreme Court held that arrests in extradition-related matters must strictly comply with the procedures laid down in the Act, and must be based on valid warrants issued or endorsed under its framework. It was further emphasized that personal liberty cannot be curtailed without following "the procedure established by law." Nowhere did the Court suggest that Cr.P.C. provisions, including those relating to pre-arrest bail, stood excluded. On the contrary, the Court's reasoning supports the continued applicability of procedural safeguards in the absence of express exclusion. The relevant portion reads:

> *"**41. The legal position that a person cannot be arrested without any authority of law again is not denied or disputed. Thus, the arrest of a person must be effected in terms of the provisions of the Act**. **A person wanted for an offence in a foreign jurisdiction may be arrested on fulfilment of the following conditions:***
>
> ***(i) that the offence should be counted as one by Indian law as well, and***
>
> ***(ii) the person must be liable to be arrested in India—either under any law relating to extradition, or otherwise.***
>
> ***Such an arrest can be effected only pursuant to a warrant issued by a Magistrate in view of Sections 6, 16 and 34-B of the Act or an arrest warrant issued by a foreign country and endorsed by the Central Government under Section 15 of the Act**. It is also not in doubt or dispute that in a case where there is no treaty, it is only the Magistrate who issues the warrant for arrest, subject of course to the condition that the Central Government had ordered a magisterial inquiry in terms of Section 5 of the Act. Such an order of arrest, emanating from a treaty State, is also permissible under a*

> *"provisional warrant" issued by a Magistrate in exercise of its power under Section 16 of the Act, upon information that the fugitive should be apprehended subject to the condition that the detention thereunder may continue only for the time requisite for obtaining an endorsed warrant from the Central Government.*
>
> *42. All arrested persons are required to be immediately produced before a Magistrate whereupon it would have power to grant bail. Section 34-B provides that the person so arrested would have to be released on bail after a period of 60 days. If actual request for extradition is required within the said period having regard to Section 41(g) of the Code of Criminal Procedure, the Central Government cannot direct or effect an urgent arrest in anticipation of an extradition request without obtaining a warrant issued by a Magistrate. Article 12 provides that provisions of provisional arrest according to which in a case of urgency, the contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. It also provides that the facilities of the International Criminal Police Organisation (Interpol) may be used to transmit such a request. However, when a request for provisional arrest in terms of Article 12 is communicated, it must satisfy the requirement of Section 34-B of the Act. Such request from a foreign country must be accompanied by the requisite documents and not a communication from Interpol alone.*
>
> ***43. It will bear repetition to state that an arrest can be effected at the instance of the Central Government only when such a request is made by the foreign country and not otherwise.*** *Respondent 6 herself accepts that she had pursued only civil remedies and the order of the custody court was passed under civil remedies. Section 29 of the Act as indicated hereinbefore provides for power of the Central Government to discharge any fugitive criminal if it has arrived at a conclusion that it is unjust or inexpedient to surrender or return the fugitive criminal."*
>
> [Emphasis Supplied]

Conclusion on Maintainability

33. Liberty and extradition are not mutually exclusive; the two can and must coexist within constitutional bounds. To suggest that anticipatory bail would undermine the statutory purpose is to exaggerate its effect and overlook the court's power to impose adequate safeguards while granting such relief. Reasonable restrictions on the fundamental rights under Article 21 of the Constitution can be imposed only by clear statutory provisions.

The Extradition Act contains no prohibition on grant of pre-arrest bail. To read such a prohibition into the statute would amount to judicially engrafting a limitation that the Legislature, in its wisdom, has chosen not to impose. When Section 25 of the Extradition Act is construed in its proper statutory context, and read purposively alongside Section 438 of the Cr.P.C., it does not impose any bar, express or implied, on the grant of pre-arrest bail. The two provisions operate in distinct procedural spheres and can co-exist without conflict. The Extradition Act, despite being a special law, does not oust the constitutional safeguards embedded in the Cr.P.C., particularly in the absence of a specific legislative exclusion. Therefore, an application for anticipatory bail filed before the Magistrate exercising the powers of a Court of Session under Section 7 & 25 of the Extradition Act is maintainable.

34. With the jurisdictional question resolved, the Court turns to consider the Petitioner's application.

On merits

35. In the impugned order, the Magistrate has not rejected the Petitioner's application on the ground of lack of jurisdiction. Rather, the Magistrate declined to exercise the discretion vested in him under Section 438 of the Cr.P.C., citing factual considerations. The operative portion of the impugned order is as follows:

> *"8.* ***It has not been disputed by the FC that he left the Requesting State after the alleged incident and came to India. In what circumstances the FC came to India have not been disclosed by the FC. The allegations against the FC are serious as the FC has been alleged to have misappropriated/stolen diamonds worth around Rs.3.7 Cr. and has immediately fled the Requesting State. The allegations against the FC attract punishment of more than 07 years imprisonment u/s 316(5) BNS****. The reliance has been placed by the FC on Tribhuvan Kumar Prakash (supra).* ***Even though, it is accepted that this court can grant the relief of prearrest bail, the***

> ***grant of such power would be discretionary and would depend upon facts and circumstances of each case.*** *The facts of Tribhuvan Kumar Prakash (supra) are distinguishable from the present case. In the said case, the FC had joined the proceedings in the Requesting State and had come to India only on account of medical condition of his mother. Further, the allegations against the FC were bailable in the Requesting State.* ***In the present case, the FC did not join the criminal proceedings in the Requesting State and immediately after the complaint was made to the police, he has alleged to have fled the Requesting State. The fate of the stolen property is still unknown. Since, the FC has avoided the criminal prosecution in the Requesting State, the possibility of the FC fleeing from the present proceedings also cannot be ruled out.*** *In a similar case, Hon'ble Delhi High Court in George Kutty Kuncheria Vs. State & Anr., 1990 18 DRJ 108, has declined the relief of bail to the FC on account of the allegations of embezzlement during the course of the employment against the FC.* ***It is settled law that even when custody of an accused is not required, anticipatory bail application can still be dismissed by the court.*** *Reference can be made to the judgment of Hon'ble Supreme Court in Sumitha Pradeep Vs. Arun Kumar C.K., Crl. Appeal No. 1834/2022 dated 21.10.2022.*
>
> *9. It was also submitted by Ld. Counsel for the FC that the custodial detention of the FC, in the event of his arrest, should not be counted after his extradition and therefore, the FC should not be unnecessarily put under detention during the period of inquiry by this court. There is no absolute rule of law in this regard which prevents the custody of the FC being counted in the Requesting State after his extradition and the same is a matter of arrangement between the treaty States.*
>
> ***10. Having regard to the seriousness of the allegations and facts and circumstances of the case, this court is not inclined to grant the anticipatory bail to the FC Shankesh Mutha."***
>
> [Emphasis supplied]

36. The Magistrate's reasoning rests on the factual matrix of the case. It has been observed that the Petitioner, unlike the fugitive criminal in ***Tribhuvan Kumar Prakash***, had not participated in proceedings in the Requesting State and allegedly departed from Thailand shortly after the complaint was lodged. This, according to the Magistrate, raised concerns of the Petitioner being a flight risk. Further, it was observed that since the stolen property remains untraced, the possibility of the Petitioner fleeing the jurisdiction cannot be ruled out. The Magistrate further held that even

if custodial interrogation is not required, the discretionary nature of anticipatory bail entitles the Court to decline the relief having regard to the Petitioner being a flight risk and seriousness of the allegations.

37. The nature of offence alleged against the Petitioner is of theft of property belonging to or in the possession of his employer, which is punishable under Section 335 of the Thailand Penal Code with imprisonment of one to five years. *Prima facie* in light of the allegations made against the Petitioner in the compliant, the corresponding penal provision in India is Section 316(5) of the Bharatiya Nyaya Sanhita, relating to the offence of criminal breach of trust, which is punishable with imprisonment for life or imprisonment upto 10 years, along with a fine. The extradition proceedings against the Petitioner were initiated after his return to India. The Petitioner claims that he did not know about any criminal proceedings initiated against him in Thailand, when he came back to India. As per the Requisition documents supplied by Thailand, while the arrest warrant against the Petitioner was issued by the Bangkok South Criminal Court on 11th June 2021, his date of departure from the country has been recorded as 27th May, 2021. Therefore, in the opinion of the Court, there is *prima facie* merit in the Petitioner's submission that he was not aware of any criminal proceedings initiated against him in the foreign country, when he came back to India. Be that as it may, till now, he has not been taken into custody and has continued to appear voluntarily before the Magistrate, conducting the inquiry under the Extradition Act.

38. In the opinion of this Court, there is no convincing material to suggest that the Petitioner poses a flight risk, or that he is likely to tamper with evidence or impede the judicial process. On the contrary, his conduct reflects a readiness to cooperate. In such circumstances, the grant of

anticipatory bail under Section 438 Cr.P.C. does not subvert the purpose of the Extradition Act. The pending extradition request can be processed effectively within the statutory framework, without forfeiting the Petitioner's right to personal liberty.

39. The Petitioner has joined the inquiry proceedings before the Magistrate and there is no allegation of non-compliance or obstruction on his part. Thus, in the *prima facie* opinion of this Court, the Petitioner has demonstrated *bona fide* intent to co-operate in the inquiry proceedings.

40. Since the alleged offence occurred in Thailand, there is hardly any possibility of the Petitioner tampering with the evidence or intimidating any witness. As regards the Petitioner being a flight risk, it must be noted that pursuant to the directions of this Court, he has submitted his passport in the custody of the Registrar of this Court, thereby reducing his likelihood to abscond. Besides, the Court can always frame a conditional order under Section 438 to minimize the flight risk, rather than committing him to a custodial interlude that serves no compelling public purpose.

41. Moreover, the Petitioner, having clean antecedents, has remained accessible and has consistently demonstrated his willingness to cooperate with the inquiry; there is, therefore, no compelling reason to suggest that his arrest or custodial detention is necessary.

42. In light of the foregoing, the present application is allowed. The impugned order denying bail is set-aside. It is directed that in the event of his arrest, the Petitioner shall be released on bail, on furnishing a bail bond for a sum of 10,00,000/- with two sureties of the like amount subject to the satisfaction of the concerned Magistrate, on the following conditions:

a. The Petitioner shall continue to participate and cooperate with the inquiry as and when directed by the Magistrate. Further, the Petitioner shall

make himself available for any interrogation by the investigating authorities, as and when required;

b. The Petitioner shall not leave the territorial boundaries of India, and the passport already surrendered to the Registry of this Court shall remain deposited, subject to the outcome of the proceedings before the concerned Magistrate;

c. The Petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case;

d. The Petitioner shall give his mobile number to the concerned investigating authority and shall keep his mobile phone switched on and remain accessible at all times, subject to just exceptions;

43. In the event of there being any FIR/DD entry/complaint lodged against the Petitioner or any violation of the aforementioned conditions, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

44. It is clarified that any observations made in the present order relating to the merits of the case are only for the purpose of deciding the present bail application and shall not influence the outcome of the inquiry, and should also not be taken as an expression of opinion on the merits of the case.

45. The application is allowed in the afore-mentioned terms.

SANJEEV NARULA, J

JULY 01, 2025
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