

2. The facts of the case are that one Ghanashyam Senapati, working as security guard of the Railway track in Dhamra port, lodged FIR before the Bansada Police Station in the district of Bhadrak alleging that the petitioners were found stealing keys from the railway tracks and fled away from the spot being detected thus. Basing on such FIR, Bansada P.S. Case No. 311 of 2022 was registered under Sections 379/34 of IPC followed by investigation.

3. The petitioners being CCLs, filed an application in the court of Sessions Judge, Bhadrak under Section 438 of Cr.P.C. for grant of anticipatory bail. Learned court below entertained doubts as regards maintainability of such application whereupon the prosecution as well as the petitioners put forth their respective arguments supported by judgments of the Supreme Court and different High Courts. Learned court below noted that there are conflicting views of different High Courts in this regard and held that since a juvenile cannot be arrested, the provision under Section 438 of Cr.P.C. would not apply to him since there cannot be

apprehension of arrest in his case. As such, the bail application was rejected.

4. Having regard to the importance of the question of law involved, this Court requested Mr. Dharanidhar Nayak, learned Senior Counsel to assist the Court as amicus curiae.

5. Heard Mr. Dharanidhar Nayak, learned Senior Counsel and amicus curiae, Mr. Pratik Nayak, learned Counsel for the petitioner and Mr. P. Tripathy, learned Addl. Standing Counsel.

6. Learned Senior Counsel Mr. Nayak submits that Section 438 of Cr.P.C. applies to a 'person' who is apprehending arrest. The word 'person' is not defined in Cr.P.C. but Section 2(y) thereof provides that words and expressions used therein and not defined but defined in the Indian Penal Code shall be assigned with the meaning assigned in IPC. Section 11 of IPC defines "Person" as – the word 'person' includes any Company or Association or body of persons, whether incorporated or not. Mr. Nayak therefore, argues that the word 'person' being an inclusive one, use of the same in Section 438 of Cr.P.C. would take

in its sweep even a child in conflict with law. Mr. Nayak further argues that Section 10 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short the “JJ Act”) refers to ‘apprehension by the police’, which is the same as ‘arrest’. He also argues that Section 12 of the said Act grants the remedy of bail to a CCL if he is apprehended. Since there is no distinction between apprehension and arrest and bail is also permissible to be granted after apprehension, there is no reason why the benefit of anticipatory bail shall be denied to a CCL apprehending such apprehension, which is nothing but arrest.

Summing up his arguments Mr. Nayak submits that even otherwise, unlike other statutes like, SC & ST (POA) Act, the JJ Act does not specifically exclude the power of the court/Board to grant anticipatory bail to a CCL. To buttress his arguments as narrated above, Mr. Nayak has relied upon an unreported decision of a Division Bench of the Bombay High Court (Aurangabad Bench) in the case of **Raman v. State of**

Maharashtra (in Anticipatory Bail Application No. 227 of 2022, decided on 15.07.2022).

7. Mr. P. Tripathy, learned Additional Standing Counsel argues that anticipatory bail can be granted only when there is apprehension of arrest. In view of the scheme of the JJ Act, arrest of a CCL is not permissible. Special procedures have been laid down under Sections 10 and 12 of the JJ Act in this regard. Therefore, according to Mr. Tripathy, learned Court below is right in holding that in the absence of any provision to arrest a CCL, the benefit of Section 438 cannot be extended.

8. Before proceeding to examine the issue in detail it would be apt to mention that there have been conflicting views of different High Courts on this point. Some of the cases in which the anticipatory bail applications have been held to be not maintainable are as follows:

(a) **Suhana Khatun and Ors vs. State of West Bengal**, decided on 20th January, 2022 in CRM No. 2739 of 2021. (Calcutta High Court)

(b) **Satendra Sharma Vs. The State of M.P.**, decided on 8th July, 2014, in MCRC No. 4183 of 2014, by a Single Bench of the High Court of Madhya Pradesh (Gwalior Bench).

(c) **Piyus (minor) though his natural mother Nirmala Devi Vs. State of Haryana** reported in (2021) SCC Online PH 3076. (Punjab and Haryana High Court)

(d) **K. Vigenesh vs. State represented by the Sub-Inspector of Police, C-3 Seven Welss Police Station, Chennai** reported in 2017 SCC Online MAD-28442. (Madras High Court)

(e) **Mr. Mohammad Bin Zyad, a minor represented through his mother Smt. Moon vs. State of Telengana** (WP(C) No. 12422 of 2021 decided on 21.06.2021). (Telengana High Court).

On the other hand, the judgments in which the petition for anticipatory bail application was held to be maintainable are as follows:

(a) **Miss Surabhi Jain (Minor) & Ors. Vs. The State of West Bengal**, decided on 23rd August, 2021 in

C.R.M. 405 of 2021 with CRAN 1 of 2021, by a Division Bench of the Calcutta High Court.

(b) **Kureshi Irfan Hasambhai vs. State of Gujarat**, decided on 9th June, 2021, in Criminal Misc. Application No. 6978 of 2021, by a Single Judge Bench of the High Court of Gujarat.

(c) **Amndeeep Singh though his father vs. State of Punjab** reported in 2020 SCC Online PH 2308. (Punjab and Haryana High Court)

(d) **Mr. X, S/o Baby V.M. vs. State of Kerala** reported in LAWS (KER) 2021-11-65. (Kerala High Court)

(e) **Saheb Alli (minor) & another vs. State of U.P.** reported in 2020 SCC Online All-45. (Allahabad High Court).

9. It is seen that different High Courts have relied upon the provisions of the JJ Act to arrive at their respective conclusions. It is not necessary to refer to each of the judgments in detail as it is deemed fit and proper to make an independent assessment basing on the statutory

provisions. It would be proper to refer to some of the relevant provisions at the outset.

10. Section 438 of Cr.P.C. reads as under;

438. 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 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).”

It is evident that the fundamental requirement for application of the provision is a legitimate apprehension of a person of being arrested in a non-bailable offence. It has been argued by learned Senior Counsel that there is no dispute that the offence under Section 379 is a non-bailable one and that petitioners being juveniles are covered under the word 'person'.

11. Undoubtedly, 'person' is a general word and inclusive in nature. In the context of the provision it must be held to include all such persons who are apprehending arrest in a non-bailable offence as otherwise, giving a restricted meaning to the word would run contrary to the legislative intent behind enacting the provision.

12. In the case of **Shri Gurbaksh Singh Sibbia and others Vs. State of Punjab**, reported in (1980) 2 SCC 565 it was held that a beneficent construction has to be imparted to the provisions relating to personal liberty. It would therefore, be an extremely unreasonable proposition that a person would be entitled to the benefit

under Section 438 of Cr.P.C. only after he completes the age of 18 years and not before.

13. Coming to the provisions of JJ Act, Section 10 and 12 are relevant in the present context and are quoted hereinbelow:

10. (1) *As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:*

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail.

(2) *The State Government shall make rules consistent with this Act,—*

(i) *to provide for persons through whom (including registered voluntary or nongovernmental organisations) any child alleged to be in conflict with law may be produced before the Board;*

(ii) *to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.*

12. (1) *When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or

expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.

Both the provisions are included under Chapter-IV which deals with procedure in relation to children in conflict with law after they are apprehended in connection with a case.

14. Section 10, as is evident, refers to apprehension of child and procedure to be followed thereafter. Section 12 refers to grant of bail to such child who has been apprehended as per the provision under Section 10. Learned Court below has rejected the application of the petitioners on the ground that there is no provision for arrest of a juvenile under the JJ Act and

consequentially, Section 438 of Cr.P.C. which deals with “apprehension of arrest”, has no application. It therefore, becomes necessary to understand the meaning of the words, ‘arrest’ and ‘apprehension’. Both these terms have not been defined in the Cr.P.C., IPC or the JJ Act and therefore, we have to refer to their ordinary dictionary meanings. The **Oxford Advanced Learner’s Dictionary (9th Edition)** inter alia defines ‘arrest’ as – an act of stopping or being interrupted. It defines ‘apprehension’ as the act of capturing or arresting, usually by the police. **Black’s Law Dictionary** defines ‘arrest’ as (1) a seizure or forcible restrain. (2) the taking or keeping of a person in custody by legal authority, especially in response to a criminal charge. It also defines ‘apprehension’ (1) seizure in the name of the law; arrest <apprehension of a criminal>. Plainly understood, the word ‘arrest’ as well as ‘apprehension’ refers to an act of confining a person and/or his liberty. The word ‘apprehension’ also has a different connotation such as worry or fear that something unpleasant may happen (**Oxford Advanced Learner’s Dictionary**). Therefore, the expression “apprehending

arrest” occurring in the heading of Section 438 Cr.P.C. obviously refers to the latter meaning of the word ‘apprehension’ i.e., worry that something unpleasant is expected to happen. This has been referred to in the provision itself as ‘reason to believe’. Thus, the meaning of apprehending occurring in the heading of Section 438 of Cr.P.C. means that the person concerned has reason to believe that he may be arrested.

15. Coming to the provisions of the JJ Act, it may be noted at the outset that the word ‘arrest’ has not been used anywhere in the statute. Section 10 refers to apprehension of child alleged to be in conflict with law. Obviously the word ‘apprehension’ here would refer to the former meaning i.e., the act of capturing or arresting (Oxford Advanced Learner’s Dictionary) and seizure in the name of law (Black’s Law Dictionary). There can be no manner of doubt that both the words are intended to convey the same meaning i.e., confinement of the person by the authority of law. In other words, the words signify curtailment of liberty of the person concerned.

16. In the case decided by the Division Bench of the Bombay High Court as relied upon by learned Senior Counsel, it was held as follows:

“In this connection, it has to be noted that Section 3 (viii) of the JJ Act provides that adversarial or accusatory words are not to be used in the processes pertaining to a child. Keeping in mind the spirit of this principle, the word “arrest” is not used in connection with a child. The Cr.P.C., in fact, uses the words “arrest” and “apprehension” interchangeably. Section 46 of the Cr.P.C. mentions how an arrest is to be effected. Sections 58 and 59 of the Cr.P.C. read thus:

“58. Police to report apprehensions.–

Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-Divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

59. Discharge of person apprehended.–*No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.”*

In both these sections, the titles use the words “apprehensions” and “apprehended” whereas in the body of the sections, the word used is “arrested”. Thus, the Cr.P.C. uses these words synonymously. The effect of arrest or apprehension is to curtail liberty of a person. When a child in conflict with law is apprehended, his liberty is curtailed. Section 438 of the Cr.P.C. affords a valuable right to a person, who is likely to be arrested or in other words, whose liberty is likely to be curtailed. Section 438 of the Cr.P.C. does not make any distinction between different persons as rightly submitted by Shri Kulkarni, learned counsel for the applicants. The definition of the word “person” mentioned in Section 11 of the IPC, is an inclusive definition. It does not exclude a child.

Section 438 of the Cr.P.C. does not exclude a child from the word “person”. Therefore, there is no reason to deny the benefit of the provisions of Section 438 of the Cr.P.C. to a child, who is likely to be apprehended.”

This Court is in respectful agreement with the above reasoning of the Bombay High Court and holds that merely because the word ‘arrest’ has not been used in the JJ Act, cannot operate to the detriment of a child in conflict with law, who has reason to believe that he may be apprehended in a non-bailable offence. This would tantamount to placing undue restrictions on a Person’s right to liberty guaranteed under Article 21 of the Constitution of India.

17. In the case of **Gurbaksh Singh Sibbia** (supra), it was observed as follows:

“..... a person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail is generally sought brings about its striking dissimilarity with the situation in which a person, who is arrested for the commission of non-bailable offences asks for bail.

..... the beneficent provision contained in Section 438 must be saved, not jettisoned.

..... in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from

some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made.”

18. Another important aspect that needs to be considered is the effect of Section 5 of Cr.P.C., which reads as under;

“5. Saving.—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

19. Thus, unless the applicability of the provisions of Cr.P.C. are specifically excluded by any special or local law they would continue to apply even to cases under such laws. As has been argued by learned Senior Counsel, Section 18 of the SC & ST (POA) Act specifically excludes the operation of the provision under Section 438 of Cr.P.C. Such a provision is not found in the JJ Act. This Court has already held that Section 10 and 12 of the JJ Act lay down procedure only after the child is apprehended but not before it. Therefore, Section 438 of Cr.P.C. would continue to be applicable as there would be no conflict with the provisions of the JJ Act. Had there been a specific provision akin to Section 18 in the SC and

ST (POA) Act excluding the power to grant anticipatory bail, the matter would have been different but not so in the absence of any such provision, as was held by the Bombay High Court in the aforementioned case. This Court also holds that the inconsistency between Cr.P.C. and Sections 10 & 12 of the JJ Act are in respect of Sections 167 and 437 of Cr.P.C. only and not otherwise. Section 438 of Cr.P.C. is enacted for a different purpose and there is no inconsistency.

20. From a conspectus of the analysis and discussion made hereinbefore, this Court is of the considered view that an application under Section 438 of Cr.P.C. filed by a child in conflict with law for grant of anticipatory bail is maintainable in the eye of law.

21. Coming to the merits of the case, this Court finds that there is no allegation in the FIR that the petitioners had actually stolen the Railway articles and there is also nothing in the FIR to show as to how the informant could ascertain their identities to refer to them by their respective names in the FIR.

22. Considering the same, this Court directs that in the event of apprehension of the petitioners in connection with G.R. Case No. 700 of 2022 corresponding to Bansada P.S. Case No. 311 of 2022 pending before the learned J.M.F.C., Chandbali, they shall be released by the apprehending officer on furnishing of personal bond by their fathers/guardians and undertaking to appear before the Juvenile Justice Board as and when required.

23. The CRLREV is disposed of accordingly.

*Orissa High Court, Cuttack,
The 5th January, 2023/ A.K. Rana, P.A.*

.....
Sashikanta Mishra,
Judge

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