REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2271 2010.
(Arising out of SLP (Crl.) No.7615 of 2009)

Siddharam Satlingappa Mhetre .....Appellant

Versus

State of Maharashtra and Others .....Respondents

J U D G M E N T

Dalveer Bhandari, J.

1. Leave granted.

2. This appeal involves issues of great public importance pertaining to the importance of individual's personal liberty and the society's interest.

3. The society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails

two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.

4. Brief facts which are necessary to dispose of this appeal are recapitulated as under:

The appellant, who belongs to the Indian National Congress party (for short 'Congress party') is the alleged accused in this case. The case of the prosecution, as disclosed in the First Information Report (for short 'FIR'), is that Sidramappa Patil was contesting election of the State assembly on behalf of the Bhartiya Janata Party (for short 'BJP'). In the FIR, it is incorporated that Baburao Patil, Prakash Patil, Mahadev Patil, Mallikarjun Patil, Apparao Patil, Yeshwant Patil were supporters of the Congress and so also the supporters of the appellant Siddharam Mhetre and opposed to the BJP candidate.

5. On 26.9.2009, around 6.00 p.m. in the evening, Sidramappa Patil of BJP came to the village to meet his party workers. At that juncture, Shrimant Ishwarappa Kore, Bhimashankar Ishwarappa Kore, Kallapa Gaddi, Sangappa Gaddi, Gafur Patil, Layappa Gaddi, Mahadev Kore, Suresh Gaddi, Suresh Zhalaki, Ankalgi, Sarpanch of village Shivmurti Vijapure met Sidramappa Patil and thereafter went to worship and pray at Layavva Devi's temple. After worshipping the Goddess when they came out to the assembly hall of the temple, these aforementioned political opponents namely, Baburao Patil, Prakash Patil, Gurunath Patil, Shrishail Patil, Mahadev Patil, Mallikarjun Patil, Annarao @ Pintu Patil, Hanumant Patil, Tammarao Bassappa Patil, Apparao Patil, Mallaya Swami, Sidhappa Patil, Shankar Mhetre, Usman Sheikh, Jagdev Patil, Omsiddha Pujari, Panchappa Patil, Mahesh Hattargi, Siddhappa Birajdar, Santosh Arwat, Sangayya Swami, Anandappa Birajdar, Sharanappa Birajdar, Shailesh Chougule, Ravi Patil, Amrutling Koshti, Ramesh Patil and Chandrakant Hattargi suddenly came rushing in their direction and loudly shouted, "why have you come to our village? Have you come here to oppose our Mhetre

Saheb? They asked them to go away and shouted Mhetre Saheb Ki Jai."

6. Baburao Patil and Prakash Patil from the aforementioned group fired from their pistols in order to kill Sidramappa Patil and the other workers of the BJP. Bhima Shankar Kore was hit by the bullet on his head and died on the spot. Sangappa Gaddi, Shivmurti Vjapure, Jagdev Patil, Layappa Patil, Tammaro Patil were also assaulted. It is further mentioned in the FIR that about eight days ago, the appellant Siddharam Mhetre and his brother Shankar Mhetre had gone to the village and talked to the abovementioned party workers and told them that, "if anybody says anything to you, then you tell me. I will send my men within five minutes. You beat anybody. Do whatever."

7. According to the prosecution, the appellant along with his brother instigated their party workers which led to killing of Bhima Shanker Kora. It may be relevant to mention that the alleged incident took place after eight days of the alleged incident of instigation.

8. The law relating to bail is contained in sections 436 to 450 of chapter XXXIII of the Code of Criminal Procedure, 1973.

Section 436 deals with situation, in what kind of cases bail should be granted. Section 436 deals with the situation when bail may be granted in case of a bailable offence. Section 439 deals with the special powers of the High Court or the Court of Sessions regarding grant of bail. Under sections 437 and 439 bail is granted when the accused or the detenu is in jail or under detention.

9. The provision of anticipatory bail was introduced for the first time in the Code of Criminal Procedure in 1973.

10. Section 438 of the Code of Criminal Procedure, 1973 reads 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:-
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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:

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 thinks 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)."

Why was the provision of anticipatory bail introduced? – Historical perspective

11. The Code of Criminal Procedure, 1898 did not contain any specific provision of anticipatory bail. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether the courts had an inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power.

12. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code of Criminal Procedure enabling the High Court and the Court of Sessions to grant "anticipatory bail". It observed in para 39.9 of its report (Volume I) and the same is set out as under:

> "The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

The Law commission recommended acceptance of the suggestion.

13. The Law Commission in para 31 of its 48th Report (July, 1972) made the following comments on the aforesaid clause:

> "The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.
>
> We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.
>
> It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

14. Police custody is an inevitable concomitant of arrest for non-bailable offences. The concept of anticipatory bail is that a person who apprehends his arrest in a non-bailable case can apply for grant of bail to the Court of Sessions or to the High Court before the arrest.

Scope and ambit of Section 438 Cr.P.C.

15. It is apparent from the Statement of Objects and Reasons for introducing section 438 in the Code of Criminal Procedure, 1973 that it was felt imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace

at the instance of influential people who try to implicate their rivals in false cases.

16. The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present section 438 Cr.P.C. The only two clear provisions of law by which bail could be granted were sections 437 and 439 of the Code. Section 438 was incorporated in the Code of Criminal Procedure, 1973 for the first time.

17. It is clear from the Statement of Objects and Reasons that the purpose of incorporating Section 438 in the Cr.P.C. was to recognize the importance of personal liberty and freedom in a free and democratic country. When we carefully analyze this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court.

18. The High Court in the impugned judgment has declined to grant anticipatory bail to the appellant and aggrieved by the said

order, the appellant has approached this Court by filing this appeal.

19. Mr. Shanti Bhushan, learned senior counsel appearing for the appellant submitted that the High Court has gravely erred in declining the anticipatory bail to the appellant. He submitted that section 438 Cr.P.C. was incorporated because sometime influential people try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. He pointed out that in recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase.

20. Mr. Bhushan submitted that the appellant has been implicated in a false case and apart from that he has already joined the investigation and he is not likely to abscond, or otherwise misuse the liberty while on bail, therefore, there was no justification to decline anticipatory bail to the appellant.

21. Mr. Bhushan also submitted that the FIR in this case refers to an incident which had taken place on the instigation of the appellant about eight days ago. According to him, proper analysis of the averments in the FIR leads to irresistible

conclusion that the entire prosecution story seems to be a cock and bull story and no reliance can be placed on such a concocted version.

22. Mr. Bhushan contended that the personal liberty is the most important fundamental right guaranteed by the Constitution. He also submitted that it is the fundamental principle of criminal jurisprudence that every individual is presumed to be innocent till he or she is found guilty. He further submitted that on proper analysis of section 438 Cr.P.C. the legislative wisdom becomes quite evident that the legislature wanted to preserve and protect personal liberty and give impetus to the age-old principle that every person is presumed to be innocent till he is found guilty by the court.

23. Mr. Bhushan also submitted that an order of anticipatory bail does not in any way, directly or indirectly, take away from the police their power and right to fully investigate into charges made against the appellant. He further submitted that when the case is under investigation, the usual anxiety of the investigating agency is to ensure that the alleged accused should fully cooperate with them and should be available as and when they require him. In the instant case, when the appellant has already

joined the investigation and is fully cooperating with the investigating agency then it is difficult to comprehend why the respondent is insistent for custodial interrogation of the appellant? According to the appellant, in the instant case, the investigating agency should not have a slightest doubt that the appellant would not be available to the investigating agency for further investigation particularly when he has already joined investigation and is fully cooperating with the investigating agency.

24. Mr. Bhushan also submitted that according to the General Clauses Act, 1897 the court which grants the bail also has the power to cancel it. The grant of bail is an interim order. The court can always review its decision according to the subsequent facts, circumstances and new material. Mr. Bhushan also submitted that the exercise of grant, refusal and cancellation of bail can be undertaken by the court either at the instance of the accused or a public prosecutor or a complainant on finding fresh material and new circumstances at any point of time. Even the appellant's reluctance in not fully cooperating with the investigation could be a ground for cancellation of bail.

25. Mr. Bhushan submitted that a plain reading of the section 438 Cr.P.C. clearly reveals that the legislature has not placed any fetters on the court. In other words, the legislature has not circumscribed court's discretion in any manner while granting anticipatory bail, therefore, the court should not limit the order only for a specified period till the charge-sheet is filed and thereafter compel the accused to surrender and ask for regular bail under section 439 Cr.P.C., meaning thereby the legislature has not envisaged that the life of the anticipatory bail would only last till the charge-sheet is filed. Mr. Bhushan submitted that when no embargo has been placed by the legislature then this court in some of its orders was not justified in placing this embargo.

26. Mr. Bhushan submitted that the discretion which has been granted by the legislature cannot and should not be curtailed by interpreting the provisions contrary to the legislative intention. The courts' discretion in grant or refusal of the anticipatory bail cannot be diluted by interpreting the provisions against the legislative intention. He submitted that the life is never static and every situation has to be assessed and evaluated in the context of emerging concerns as and when it arises. It is

difficult to visualize or anticipate all kinds of problems and situations which may arise in future.

Law has been settled by an authoritative pronouncement of the Supreme Court

27. The Constitution Bench of this Court in ***Gurbaksh Singh Sibbia and Others*** v. ***State of Punjab*** (1980) 2 SCC 565 had an occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail. Section 438 Cr.P.C. is an extraordinary provision where the accused who apprehends his/her arrest on accusation of having committed a non-bailable offence can be granted bail in anticipation of arrest. The Constitution Bench's relevant observations are set out as under:

> ".....A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail".

28. Mr. Bhushan referred to a Constitution Bench judgment in ***Sibbia's case*** (supra) to strengthen his argument that no such

embargo has been placed by the said judgment of the Constitution Bench. He placed heavy reliance on para 15 of ***Sibbia's case*** (supra), which reads as under:

> **"15.** Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

29. Mr. Bhushan submitted that the Constitution Bench in ***Sibbia's case*** (supra) also mentioned that "we see no valid reason for rewriting Section 438 with a view, not to expanding

the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal".

30. Mr. Bhushan submitted that the court's orders in some cases that anticipatory bail is granted till the charge-sheet is filed and thereafter the accused has to surrender and seek bail application under section 439 Cr.P.C. is neither envisaged by the provisions of the Act nor is in consonance with the law declared by a Constitution Bench in ***Sibbia's case*** (supra) nor it is in conformity with the fundamental principles of criminal jurisprudence that accused is considered to be innocent till he is found guilty nor in consonance with the provisions of the Constitution where individual's liberty in a democratic society is considered sacrosanct.

31. Mr. Mahesh Jethmalani, learned senior counsel appearing for respondent no. 2, submitted that looking to the facts and circumstances of this case, the High Court was justified in declining the anticipatory bail to the appellant. He submitted that the anticipatory bail ought to be granted in rarest of rare cases where the nature of offence is not very serious. He placed reliance on the case of ***Pokar Ram*** *v.* ***State of Rajasthan and Others*** (1985) 2 SCC 597 and submitted that in murder cases custodial interrogation is of paramount importance particularly when no eye witness account is available.

32. Mr. Jethmalani fairly submitted that the practice of passing orders of anticipatory bail operative for a few days and directing the accused to surrender before the Magistrate and apply for regular bail are contrary to the law laid down in ***Sibbia's case*** (supra). The decisions of this Court in ***Salauddin Abdulsamad Shaikh*** v. ***State of Maharashtra*** (1996) 1 SCC 667, ***K. L. Verma*** *v.* ***State and Another*** (1998) 9 SCC 348, ***Adri Dharan Das*** v. ***State of West Bengal*** (2005) 4 SCC 303 and ***Sunita Devi*** v. ***State of Bihar and Another*** (2005) 1 SCC 608 are in conflict with the above decision of the Constitution Bench in ***Sibbia's case*** (supra). He submitted that all these orders which

are contrary to the clear legislative intention of law laid down in ***Sibbia's case*** (supra) are *per incuriam.* He also submitted that in case the conflict between the two views is irreconcilable, the court is bound to follow the judgment of the Constitution Bench over the subsequent decisions of Benches of lesser strength.

33. He placed reliance on ***N. Meera Rani*** v. ***Government of Tamil Nadu and Another*** (1989) 4 SCC 418 wherein it was perceived that there was a clear conflict between the judgment of the Constitution Bench and subsequent decisions of Benches of lesser strength. The Court ruled that the dictum in the judgment of the Constitution Bench has to be preferred over the subsequent decisions of the Bench of lesser strength. The Court observed thus:

> ".....All subsequent decisions which are cited have to be read in the light of the Constitution Bench decision since they are decisions by Benches comprising of lesser number of judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution bench in *Rameshwar Shaw's case (1964) 4 SCR 921*"

34. He placed reliance on another judgment of this Court in ***Vijayalaxmi Cashew Company and Others*** *v.* ***Dy.***

Commercial Tax Officer and Another (1996) 1 SCC 468. This Court held as under:

> ".....It is not possible to uphold the contention that perception of the Supreme Court, as will appear from the later judgments, has changed in this regard. A judgment of a Five Judge Bench, which has not been doubted by any later judgment of the Supreme Court cannot be treated as overruled by implication."

35. He also placed reliance on ***Union of India and Others*** v. ***K. S. Subramanian*** (1976) 3 SCC 677 and ***State of U.P.*** v. ***Ram Chandra Trivedi*** (1976) 4 SCC 52 and submitted that in case of conflict, the High Court has to prefer the decision of a larger Bench to that of a smaller Bench.

36. Mr. Jethmalani submitted that not only the decision in ***Sibbia's case*** (supra) must be followed on account of the larger strength of the Bench that delivered it but the subsequent decisions must be held to be *per incuriam* and hence not binding since they have not taken into account the ratio of the judgment of the Constitution Bench.

37. He further submitted that as per the doctrine of *'per incuriam'*, any judgment which has been passed in ignorance of or without considering a statutory provision or a binding precedent is not good law and the same ought to be ignored. A

perusal of the judgments in ***Salauddin Abdulsamad Shaikh*** *v.* ***State of Maharashtra,*** ***K. L. Verma*** v. ***State and Another,*** ***Adri Dharan Das*** v. ***State of West Bengal*** and ***Sunita Devi*** v. ***State of Bihar and Another*** (supra) indicates that none of these judgments have considered para 42 of ***Sibbia's case*** (supra) in proper perspective. According to Mr. Jethmalani, all subsequent decisions which have been cited above have to be read in the light of the Constitution Bench's decision in ***Sibbia's case*** (supra) since they are decisions of Benches comprised of lesser number of judges. According to him, none of these subsequent decisions could be intended taking a view contrary to that of the Constitution Bench in ***Sibbia's case*** (supra).

38. Thus, the law laid down in para 42 by the Constitution Bench that the normal rule is not to limit operation of the order of anticipatory bail, was not taken into account by the courts passing the subsequent judgments. The observations made by the courts in the subsequent judgments have been made in ignorance of and without considering the law laid down in para 42 which was binding on them. In these circumstances, the observations made in the subsequent judgments to the effect that anticipatory bail should be for a limited period of time, must

be construed to be *per incuriam* and the decision of the Constitution Bench preferred.

39. He further submitted that the said issue came up for consideration before the Madras High Court reported in ***Palanikumar and Another*** *v.* ***State*** 2007 (4) CTC 1 wherein after discussing all the judgments of this court on the issue, the court held that the subsequent judgments were in conflict with the decision of the Constitution Bench in ***Sibbia's case*** (supra) and in accordance with the law of precedents, the judgment of the Constitution Bench is biding on all courts and the ratio of that judgment has to be applicable for all judgments decided by the Benches of same or smaller combinations. In the said judgment of ***Sibbia's case*** (supra) it was directed that the anticipatory bail should not be limited in period of time.

40. We have heard the learned counsel for the parties at great length and perused the written submissions filed by the learned counsel for the parties.

Relevance and importance of personal liberty

41. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of

these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty.

42. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilized existence.

43. Origin of "liberty"' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realization of the people.

44. Chambers' Twentieth Century Dictionary defines "liberty" as "Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges are enjoyed, freedom of speech and action beyond ordinary civility".

45. It is very difficult to define the "liberty". It has many facets and meanings. The philosophers and moralists have praised freedom and liberty but this term is difficult to define because it does not resist any interpretation. The term "liberty" may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three factors, firstly, harmonious balance of personality, secondly, the absence of restraint upon the exercise of that affirmation and thirdly, organization of opportunities for the exercise of a continuous initiative.

46. "Liberty" may be defined as a power of acting according to the determinations of the will. According to Harold Laski, liberty was essentially an absence of restraints and John Stuard Mill

viewed that "all restraint", qua restraint is an evil". In the words of Jonathon Edwards, the meaning of "liberty" and freedom is:

> "Power, opportunity or advantage that any one has to do as he pleases, or, in other words, his being free from hindrance or impediment in the way of doing, or conducting in any respect, as he wills."

47. It can be found that "liberty" generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Restraints on man's liberty are laid down by power used through absolute discretion, which when used in this manner brings an end to "liberty" and freedom is lost. At the same time "liberty" without restraints would mean liberty won by one and lost by another. So "liberty" means doing of anything one desires but subject to the desire of others.

48. As John E.E.D. in his monograph Action on "Essays on Freedom and Power" wrote that Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization.

49. A distinguished former Attorney General for India, M.C. Setalvad in his treatise "War and Civil Liberties" observed that

the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty.

50. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the state. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the state can reach their goal of perfection. In brief, according to this doctrine, the state exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The state exists for the benefit of the individual.

51. Mr. Setalvad in the same treatise further observed that it is also true that the individual cannot attain the highest in him

unless he is in possession of certain essential liberties which leave him free as it were to breathe and expand. According to Justice Holmes, these liberties are the indispensable conditions of a free society. The justification of the existence of such a state can only be the advancement of the interests of the individuals who compose it and who are its members. Therefore, in a properly constituted democratic state, there cannot be a conflict between the interests of the citizens and those of the state. The harmony, if not the identity, of the interests of the state and the individual, is the fundamental basis of the modern Democratic National State. And, yet the existence of the state and all government and even all law must mean in a measure the curtailment of the liberty of the individual. But such a surrender and curtailment of his liberty is essential in the interests of the citizens of the State. The individuals composing the state must, in their own interests and in order that they may be assured the existence of conditions in which they can, with a reasonable amount of freedom, carry on their other activities, endow those in authority over them to make laws and regulations and adopt measures which impose certain restrictions on the activities of the individuals.

52. Harold J. Laski in his monumental work in “Liberty in the Modern State” observed that liberty always demands a limitation on political authority. Power as such when uncontrolled is always the natural enemy of freedom.

53. Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book “The Development of Constitutional Guarantee of Liberty” that whatever, ‘liberty’ may mean today, the liberty is guaranteed by our bills of rights, “is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust that society to individuals.”

54. Blackstone in “Commentaries on the Laws of England”, Vol.I, p.134 aptly observed that “Personal liberty consists in the power of locomotion, of changing situation or moving one’s person to whatsoever place one’s own inclination may direct, without imprisonment or restraint unless by due process of law”.

55. According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, "Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." [Dicey on Constitutional Law, 9th Edn., pp.207-08]. According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

56. Eminent English Judge Lord Alfred Denning observed:

> "By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person.... It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live."

57. Eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol.18 (1978), p.133 observed that "liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body".

Right to life and personal liberty under the Constitution

58. We deem it appropriate to deal with the concept of personal liberty under the Indian and other Constitutions.

59. The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes.

60. The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India. American Constitution provides that no person shall be deprived of his life, liberty, or property without due process of law. The due process clause not only protects the property but also life and liberty, similarly Article 21 of the Indian Constitution asserts the importance of life and liberty. The said Article reads as under:-

> "no person shall be deprived for his life or personal liberty except according to procedure established by law"

the right secured by Article 21 is available to every citizen or non-citizen, according to this article, two rights are secured.

1. Right to life
2 Right to personal liberty.

61. Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

62. This court defined the term "personal liberty" immediately after the Constitution came in force in India in the case of ***A. K.***

Gopalan *v.* ***The State of Madras***, AIR 1950 SC 27. The expression 'personal liberty' has wider as well narrow meaning. In the wider sense it includes not only immunity from arrest and detention but also freedom of speech, association etc. In the narrow sense, it means immunity from arrest and detention. The juristic conception of 'personal liberty', when used the latter sense, is that it consists freedom of movement and locomotion.

63. Mukherjea, J. in the said judgment observed that 'Personal Liberty' means liberty relating to or concerning the person or body of the individual and it is, in this sense, antithesis of physical restraint or coercion. 'Personal Liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right constitutes the essence of personal liberty. Patanjali Shastri, J. however, said that whatever may be the generally accepted connotation of the expression 'personal liberty', it was used in Article 21 in a sense which excludes the freedom dealt with in Article 19. Thus, the Court gave a narrow interpretation to 'personal liberty'. This court excluded certain varieties of rights, as separately mentioned in

Article 19, from the purview of 'personal liberty' guaranteed by Art. 21.

64. In ***Kharak Singh*** v. ***State of U.P. and Others*** AIR 1963 SC 1295, Subba Rao, J. defined 'personal liberty, as a right of an individual to be free from restrictions or encroachment on his person whether these are directly imposed or indirectly brought about by calculated measure. The court held that 'personal liberty' in Article 21 includes all varieties of freedoms except those included in Article 19.

65. In ***Maneka Gandhi*** v. ***Union of India and Another*** (1978) 1 SCC 248, this court expanded the scope of the expression 'personal liberty' as used in Article 21 of the Constitution of India. The court rejected the argument that the expression 'personal liberty' must be so interpreted as to avoid overlapping between Article 21 and Article 19(1). It was observed: "The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19." So, the phrase 'personal liberty' is

very wide and includes all possible rights which go to constitute personal liberty, including those which are mentioned in Article 19.

66. Right to life is one of the basic human right and not even the State has the authority to violate that right. [***State of A.P. v. Challa Ramakrishna Reddy and Others*** (2000) 5 SCC 712]**.**

67. Article 21 is a declaration of deep faith and belief in human rights. In this pattern of guarantee woven in Chapter III of this Constitution, personal liberty of man is at root of Article 21 and each expression used in this Article enhances human dignity and values. It lays foundation for a society where rule of law has primary and not arbitrary or capricious exercise of power. [***Kartar Singh v. State of Punjab and Others*** (1994) 3 SCC 569].

68. While examining the ambit, scope and content of the expression "personal liberty" in the said case, it was held that the term is used in this Article as a compendious term to include within itself all varieties of rights which goes to make up the "personal liberties" or man other than those dealt within several clauses of Article 19(1). While Article 19(1) deals with particular

species or attributes of that freedom, "personal liberty" in Article 21 takes on and comprises the residue.

69. The early approach to Article 21 which guarantees right to life and personal liberty was circumscribed by literal interpretation in ***A.K. Gopalan*** *(*supra*)*. But in course of time, the scope of this application of the Article against arbitrary encroachment by the executives has been expanded by liberal interpretation of the components of the Article in tune with the relevant international understanding. Thus protection against arbitrary privation of "life" no longer means mere protection of death, or physical injury, but also an invasion of the right to "live" with human dignity and would include all these aspects of life which would go to make a man's life meaningful and worth living, such as his tradition, culture and heritage. [***Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others*** (1981) 1 SCC 608]

70. Article 21 has received very liberal interpretation by this court. It was held: "The right to live with human dignity and same does not connote continued drudging. It takes within its fold some process of civilization which makes life worth living

and expanded concept of life would mean the tradition, culture, and heritage of the person concerned." [***P. Rathinam/Nagbhusan Patnaik*** *v.* ***Union of India and Another*** (1994) 3 SCC 394.]

71. The object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen. A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible to non-citizens. While invoking the provisions of Article 21, and by referring to the oft-quoted statement of Joseph Addision, "Better to die ten thousand deaths than wound my honour", the Apex court in ***Khedat Mazdoor Chetana Sangath*** *v.* ***State of M.P. and Others*** (1994) 6 SCC 260 posed to itself a question "If dignity or honour vanishes what remains of life"? This is the significance of the Right to Life and Personal Liberty guaranteed under the Constitution of India in its third part.

72. This court in ***Central Inland Water Transport Corporation Ltd. and Another*** *v.* ***Brojo Nath Ganguly and***

Another (1986) 3 SCC 156 observed that the law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and justice, and unless there is anything to the contrary in the statute, Court must take cognizance of that fact and act accordingly.

73. This court remarked that an undertrial prisoner should not be put in fetters while he is being taken from prison to Court or back to prison from Court. Steps other than putting him in fetters will have to be taken to prevent his escape.

74. In ***Prem Shankar Shukla v. Delhi Administration*** (1980) 3 SCC 526, this court has made following observations:

> "……. The Punjab Police Manual, in so far as it puts the ordinary Indian beneath the better class breed (para 26.21A and 26.22 of Chapter XXVI) is untenable and arbitrary. Indian humans shall not be dichotomised and the common run discriminated against regarding handcuffs. The provisions in para 26.22 that every under-trial who is accused of a non-bailable offence punishable with more than 3 years prison term shall be routinely handcuffed is violative of Articles 14, 19 and 21. The nature of the accusation is not the criterion. The clear and present danger of escape breaking out of the police control is the determinant. And for this there must be clear material, not glib assumption, record of reasons and judicial oversight and summary hearing and direction by the court where the victim is produced. … Handcuffs are not summary punishment vicariously imposed at police level, at

once obnoxious and irreversible. Armed escorts, worth the salt, can overpower any unarmed under-trial and extra guards can make up exceptional needs. In very special situations, the application of irons is not ruled out. The same reasoning applies to (e) and (f). Why torture the prisoner because others will demonstrate or attempt his rescue? The plain law of under-trial custody is thus contrary to the unedifying escort practice. (Para 31)

Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reason for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law. The minions of the police establishment must make good their security recipes by getting judicial approval. And, once the court directs that handcuffs shall be off, no escorting authority can overrule judicial direction. This is implicit in Article 21 which insists upon fairness, reasonableness and justice in the very procedure which authorities stringent deprivation of life and liberty. (Para 30)

It is implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable so to do unless the State is able to make out that no other practical way of forbidding escape is available, the prisoner being so dangerous and desperate and the circumstances so hostile to safekeeping. (Para 23)

Whether handcuffs or other restraint should be imposed on a prisoner is a matter for the decision of the authority responsible for his custody. But there is room for imposing supervisory regime over the

> exercise of that power. One sector of supervisory jurisdiction could appropriately lie with the court trying the accused, and it would be desirable for the custodial authority to inform that court of the circumstances in which, and the justification for, imposing a restraint on the body of the accused. It should be for the court concerned to work out the modalities of the procedure requisite for the purpose of enforcing such control."

75. After dealing with the concept of life and liberty under the Indian Constitution, we would like to have the brief survey of other countries to ascertain how life and liberty has been protected in other countries.

UNITED KINGDOM

76. Life and personal liberty has been given prime importance in the United Kingdom. It was in 1215 that the people of England revolted against King John and enforced their rights, first time the King had acknowledged that there were certain rights of the subject could be called Magna Carta 1215. In 1628 the petition of rights was presented to King Charles-I which was the 1st step in the transfer of Sovereignty from the King to Parliament. It was passed as the Bill of Rights 1689.

77. In the Magna Carta, it is stated "no free man shall be taken, or imprisoned or disseised or outlawed or banished or any ways

destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land".

78. Right to life is the most fundamental of all human rights and any decision affecting human right or which may put an individual's life at risk must call for the most anxious scrutiny. *See:* ***Bugdaycay v. Secretary of State for the Home Department*** (1987) 1 All ER 940. The sanctity of human life is probably the most fundamental of the human social values. It is recognized in all civilized societies and their legal system and by the internationally recognized statements of human rights. *See:* ***R on the application of Pretty*** *v.* ***Director of Public Prosecutions*** (2002) 1 All ER 1.

U.S.A.

79. The importance of personal liberty is reflected in the Fifth Amendment to the Constitution of U.S.A. (1791) which declares as under :-

> "No person shall be.....deprived of his life, liberty or property, without due process of law." (The 'due process' clause was adopted in s.1(a) of the Canadian Bill of Rights Act, 1960. In the Canada Act, 1982, this expression has been substituted by 'the principles of fundamental justice' [s.7].

80. The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the 'due process clauses'. Under the above clauses the American Judiciary claims to declare a law as bad, if it is not in accordance with 'due process', even though the legislation may be within the competence of the Legislature concerned. Due process is conveniently understood means procedural regularity and fairness. (Constitutional Interpretation by Craig R. Ducat, 8th Edn. 2002 p.475.).

WEST GERMANY

81. Article 2(2) of the West German Constitution (1948) declares:

> "Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of the legal order."

Though the freedom of life and liberty guaranteed by the above Article may be restricted, such restriction will be valid only if it is in conformity with the 'legal order' (or 'pursuant to a law, according to official translation). Being a basic right, the freedom guaranteed by Article 2(2) is binding on the legislative, administrative and judicial organs of the State [Article 1(3)]. This

gives the individual the rights to challenge the validity of a law or an executive act violative the freedom of the person by a constitutional complaint to the Federal Constitutional Court, under Article 93. Procedural guarantee is given by Articles 103(1) and 104. Article 104(1)-2(2) provides:

> "(1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein…….
>
> (2) Only the Judge shall decide on the admissibility and continued deprivation of liberty."

82. These provisions correspond to Article 21 of our Constitution and the court is empowered to set a man to liberty if it appears that he has been imprisoned without the authority of a formal law or in contravention of the procedure prescribed there.

JAPAN

83. Article XXXI of the Japanese Constitution of 1946 says :

> "No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law."

This article is similar to Article 21 of our Constitution save that it includes other criminal penalties, such as fine or forfeiture within its ambit.

CANADA

84. S. 1(1) of the Canadian Bill of Rights Act, 1960, adopted the 'Due Process' Clause from the American Constitution. But the difference in the Canadian set-up was due to the fact that this Act was not a constitutional instrument to impose a direct limitation on the Legislature but only a statute for interpretation of Canadian status, which, again, could be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian Parliament itself (s.2). The result was obvious : The Canadian Supreme Court in ***R***. v. ***Curr*** (1972) S.C.R. 889 held that the Canadian Court would not import 'substantive reasonableness' into s.1(a), because of the unsalutary experience of substantive due process in the U.S.A.; and that as to 'procedural reasonableness', s.1(a) of the Bill of Rights Act only referred to 'the legal processes recognized by Parliament and the Courts in Canada'. The result was that in Canada, the 'due process clause' lost its utility as an instrument of judicial review of legislation and it came to mean practically the same thing as whatever the Legislature prescribes, - much the same as 'procedure established by law' in Article 21 of the Constitution of India, as interpreted in ***A.K. Gopalan*** *(*supra*).*

BANGADESH

85. Article 32 of the Constitution of Bangladesh, 1972 [3 SCW 385] reads as under:

> "No person shall be deprived of life or personal liberty save in accordance with law."

This provision is similar to Article 21 of the Indian Constitution. Consequently, unless controlled by some other provision, it should be interpreted as in India.

PAKISTAN

86. Article 9 Right to life and Liberty. – "Security of Person : No person shall be deprived of life and liberty save in accordance with law."

NEPAL

87. In the 1962 – Constitution of Nepal, there is Article 11(1) which deals with right to life and liberty which is identical with Article 21 of the Indian Constitution.

INTERNATIONAL CHARTERS

88. **Universal Declaration, 1948.** – Article 3 of the Universal Declaration says:

> "Everyone has the right to life, liberty and security of person."

Article 9 provides:

> "No one shall be subjected to arbitrary arrest, detention or exile."

Cl.10 says:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." [As to its legal effect, see M. v. Organisation Belge, (1972) 45 Inter, LR 446 (447, 451, et. Sq.)]

89. **Covenant on Civil and Political Rights** - Article 9(1) of the U.N. 1966, 1966 says:

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

90. **European Convention on Human Rights, 1950.** – This Convention contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion.

91. In every civilized democratic country, liberty is considered to be the most precious human right of every person. The Law Commission of India in its 177th Report under the heading 'Introduction to the doctrine of "arrest" has described as follows:

> "Liberty is the most precious of all the human rights". It has been the founding faith of the human race for more than 200 years. Both the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and the Citizen, 1789, spoke of liberty being one of the natural and inalienable rights of man. The universal declaration of human rights adopted by the general assembly on United Nations on December 10, 1948 contains several articles designed to protect and promote the liberty of individual. So does the international covenant on civil and political rights, 1996. Above all, Article 21 of the Constitution of India proclaims that no one shall be deprived of his right to personal liberty except in accordance with the procedure prescribed by law. Even Article 20(1) & (2) and Article 22 are born out of a concern for human liberty. As it is often said, "one realizes the value of liberty only when he is deprived of it." Liberty, along with equality is the most fundamental of human rights and the fundamental freedoms guaranteed by the Constitution. Of equal importance is the maintenance of peace, law and order in the society. Unless, there is peace, no real progress is possible. Societal peace lends stability and security to the polity. It provides the necessary conditions for growth, whether it is in the economic sphere or in the scientific and technological spheres."

92. Just as the Liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important.

93. It is a matter of common knowledge that a large number of undertrials are languishing in jail for a long time even for allegedly committing very minor offences. This is because section 438 Cr.P.C. has not been allowed its full play. The

Constitution Bench in ***Sibbia's case*** (supra) clearly mentioned that section 438 Cr.P.C. is extraordinary because it was incorporated in the Code of Criminal Procedure, 1973 and before that other provisions for grant of bail were sections 437 and 439 Cr.P.C. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. Some courts of smaller strength have erroneously observed that section 438 Cr.P.C. should be invoked only in exceptional or rare cases. Those orders are contrary to the law laid down by the judgment of the Constitution Bench in ***Sibbia's case*** (supra). According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain fine balance between the societal interest *vis-à-vis* personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused that the accused is presumed to be innocent till he is found guilty by the competent court.

94. The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

95. The gravity of charge and exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

96. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

97. A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

Whether the powers under section 438 Cr.P.C. are subject to limitation of section 437 Cr.P.C.?

98. The question which arises for consideration is whether the powers under section 438 Cr.P.C. are unguided or uncanalised or are subject to all the limitations of section 437 Cr.P.C.? The Constitution Bench in ***Sibbia's case*** (supra) has clearly observed that there is no justification for reading into section 438 Cr.P.C. and the limitations mentioned in section 437 Cr.P.C. The Court

further observed that the plentitude of the section must be given its full play. The Constitution Bench has also observed that the High Court is not right in observing that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by section 438 Cr.P.C. to a dead letter. The Court observed that "We do not see why the provisions of Section 438 Cr.P.C. should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable."

99. As aptly observed in ***Sibbia's case*** (supra) that a wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

100. The Constitution Bench in the same judgment also observed that a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall enlarged on bail.

101. The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the public prosecutor. After hearing the public prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The public prosecutor or complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.

102. The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in ***Sibbia's case*** (supra).

103. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the public prosecutor or the complainant on finding new material or circumstances at any point of time.

104. The intention of the legislature is quite clear that the power of grant or refusal of bail is entirely discretionary. The Constitution Bench in ***Sibbia's case*** (supra) has clearly stated that grant and refusal is discretionary and it should depend on the facts and circumstances of each case. The Constitution Bench in the said case has aptly observed that we must respect the wisdom of the Legislature entrusting this power to the superior courts namely, the High Court and the Court of Session. The Constitution Bench observed as under:

> "We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognized over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the grounds that, after all "the legislature in, its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."

GRANT OF BAIL FOR LIMITED PERIOD IS CONTRARY TO THE LEGISLATIVE INTENTION AND LAW DECLARED BY THE CONSTITUTION BENCH:

105. The court which grants the bail has the right to cancel the bail according to the provisions of the General Clauses Act but ordinarily after hearing the public prosecutor when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case.

106. The judgment in ***Salauddin Abdulsamad Shaikh*** (supra) is contrary to legislative intent and the spirit of the very provisions of the anticipatory bail itself and has resulted in an

artificial and unreasonable restriction on the scope of enactment contrary to the legislative intention.

107. The restriction on the provision of anticipatory bail under section 438 Cr.P.C. limits the personal liberty of the accused granted under Article 21 of the constitution. The added observation is nowhere found in the enactment and bringing in restrictions which are not found in the enactment is again an unreasonable restriction. It would not stand the test of fairness and reasonableness which is implicit in Article 21 of the Constitution after the decision in ***Maneka Gandhi's*** case (supra) in which the court observed 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.

108. Section 438 Cr.P.C. does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the

concerned court would be fully justified in imposing conditions including direction of joining investigation.

109. The court does not use the expression 'anticipatory bail' but it provides for issuance of direction for the release on bail by the High Court or the Court of Sessions in the event of arrest. According to the aforesaid judgment of ***Salauddin's case***, the accused has to surrender before the trial court and only thereafter he/she can make prayer for grant of bail by the trial court. The trial court would release the accused only after he has surrendered.

110. In pursuance to the order of the Court of Sessions or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

111. The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an

application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. This finding of the said judgment (supra) is contrary to the legislative intention and law which has been declared by a Constitution Bench of this court in ***Sibbia's case*** (supra).

112. The validity of the restrictions imposed by the Apex Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail. This is contrary to the basic intention and spirit of section 438 Cr.P.C. It is also contrary to Article 21 of the

Constitution. The test of fairness and reasonableness is implicit under Article 21 of the Constitution of India. Directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty.

113. It is a settled legal position crystallized by the Constitution Bench of this court in ***Sibbia's case*** (supra) that the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it.

114. It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this section could be granted. We deem it appropriate to reproduce some observations of the judgment of the Constitution Bench of this court in the ***Sibbia's*** **case** (supra).

> "The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. Therefore, while determining the scope of Section 438, the court should not impose any unfair or

unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned Counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision.

xxx xxx xxx

Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence."

xxx xxx xxx

"I desire in the first instance to point out that the discretion given by the section is very wide. . . Now it seems to me that when the Act is so expressed to provide a wide discretion, ... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place

> conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."
>
> xxx xxx xxx
>
> "The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

115. The Apex Court in ***Salauddin's case*** (supra) held that anticipatory bail should be granted only for a limited period and on the expiry of that duration it should be left to the regular court to deal with the matter is not the correct view. The reasons quoted in the said judgment is that anticipatory bail is granted at a stage when an investigation is incomplete and the court is not informed about the nature of evidence against the alleged offender.

116. The said reason would not be right as the restriction is not seen in the enactment and bail orders by the High Court and Sessions Court are granted under sections 437 and 439 also at such stages and they are granted till the trial.

117. The view expressed by this Court in all the above referred judgments have to be reviewed and once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused.

SCOPE AND AMBIT OF ANTICIPATORY BAIL:

118. A good deal of misunderstanding with regard to the ambit and scope of section 438 Cr.P.C. could have been avoided in case the Constitution Bench decision of this court in ***Sibbia's case*** (supra) was correctly understood, appreciated and applied.

119. This Court in the ***Sibbia's case*** (*supra*) laid down the following principles with regard to anticipatory bail:

a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.

b) Filing of FIR is not a condition precedent to exercise of power under section 438.

c) Order under section 438 would not affect the right of police to conduct investigation.

d) Conditions mentioned in section 437 cannot be read into section 438.

e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such *ad interim order* must conform to requirements of the section and suitable conditions should be imposed on the applicant.

120. The Law Commission in July 2002 has severely criticized the police of our country for the arbitrary use of power of arrest which, the Commission said, is the result of the vast discretionary powers conferred upon them by this Code. The Commission expressed concern that there is no internal mechanism within the police department to prevent misuse of law in this manner and the stark reality that complaint lodged in this regard does not bring any result. The Commission intends to suggest amendments in the Criminal Procedure Code and has invited suggestions from various quarters. Reference is made in this Article to the 41st Report of the Law Commission wherein the Commission saw 'no justification' to require a person to submit to custody, remain in prison for some days and then apply for

bail even when there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty. Discretionary power to order anticipatory bail is required to be exercised keeping in mind these sentiments and spirit of the judgments of this court in ***Sibbia's case*** (supra) and ***Joginder Kumar*** *v.* ***State of U.P. and Others*** (1994) 4 SCC 260.

Relevant consideration for exercise of the power

121. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in ***Sibbia's case*** (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is

the legislative mandate which we are bound to respect and honour.

122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

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

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be

caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

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

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

125. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for

anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

126. Irrational and Indiscriminate arrest are gross violation of human rights. In ***Joginder Kumar's case*** (supra), a three Judge Bench of this Court has referred to the 3rd report of the National Police Commission, in which it is mentioned that the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

127. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

128 In case, the State consider the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive.

1) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.

3) Direct the accused to execute bonds;

4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.

5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

6) Bank accounts be frozen for small duration during investigation.

129) In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.

130. Exercise of jurisdiction under section 438 of Cr.P.C. is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications.

131. It is imperative for the High Courts through its judicial academies to periodically organize workshops, symposiums, seminars and lectures by the experts to sensitize judicial officers, police officers and investigating officers so that they can properly comprehend the importance of personal liberty vis-à-vis social

interests. They must learn to maintain fine balance between the personal liberty and the social interests.

132. The performance of the judicial officers must be periodically evaluated on the basis of the cases decided by them. In case, they have not been able to maintain balance between personal liberty and societal interests, the lacunae must be pointed out to them and they may be asked to take corrective measures in future. Ultimately, the entire discretion of grant or refusal of bail has to be left to the judicial officers and all concerned must ensure that grant or refusal of bail is considered basically on the facts and circumstances of each case.

133. In our considered view, the Constitution Bench in ***Sibbia's case*** (supra) has comprehensively dealt with almost all aspects of the concept of anticipatory bail under section 438 Cr.P.C. A number of judgments have been referred to by the learned counsel for the parties consisting of Benches of smaller strength where the courts have observed that the anticipatory bail should be of limited duration only and ordinarily on expiry of that duration or standard duration, the court granting the anticipatory bail should leave it to the regular court to deal with

the matter. This view is clearly contrary to the view taken by the Constitution Bench in ***Sibbia's case*** (supra). In the preceding paragraphs, it is clearly spelt out that no limitation has been envisaged by the Legislature under section 438 Cr.P.C. The Constitution Bench has aptly observed that "we see no valid reason for rewriting section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court or the Court of Session but, for the purpose of limiting it".

134. In view of the clear declaration of law laid down by the Constitution Bench in ***Sibbia's case*** *(*supra*)*, it would not be proper to limit the life of anticipatory bail. When the court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of section 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in ***Sibbia's case*** (supra) clearly observed that it is not necessary to re-write section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under section 438 Cr.P.C. granting bail cannot be curtailed.

135. The ratio of the judgment of the Constitution Bench in ***Sibbia's case*** (supra) perhaps was not brought to the notice of their Lordships who had decided the cases of ***Salauddin Abdulsamad Shaikh*** v. ***State of Maharashtra***, ***K. L. Verma*** v. ***State and Another, Adri Dharan Das*** v. ***State of West Bengal*** and ***Sunita Devi*** v. ***State of Bihar and Another*** (supra).

136. In ***Naresh Kumar Yadav*** *v.* ***Ravindra Kumar*** (2008) 1 SCC 632, a two-Judge Bench of this Court observed "the power exercisable under section 438 Cr.P.C. is somewhat extraordinary in character and it should be exercised only in exceptional cases. This approach is contrary to the legislative intention and the Constitution Bench's decision in ***Sibbia's case*** (supra).

137. We deem it appropriate to reiterate and assert that discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under section 438 Cr.P.C. should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject to the wide power

and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

138. The judgments and orders mentioned in paras 135 and 136 are clearly contrary to the law declared by the Constitution Bench of this Court in ***Sibbia's case*** (supra). These judgments and orders are also contrary to the legislative intention. The Court would not be justified in re-writing section 438 Cr.P.C.

139. Now we deem it imperative to examine the issue of *per incuriam* raised by the learned counsel for the parties. In ***Young*** *v.* ***Bristol Aeroplane Company Limited*** (1994) All ER 293 the House of Lords observed that 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean *per ignoratium*. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, '*in ignoratium* of a statute or other binding authority. The same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

> "..... In *Halsbury's Laws of England* (4th Edn.) Vol. 26: *Judgment and Orders*: *Judicial Decisions as Authorities* (pp. 297-98, para 578) per incuriam has been elucidated as under:
>
> > "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (Young v. Bristol Aeroplane Co. Ltd., 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300.
> >
> > In Huddersfield Police Authority v. Watson, 1947 KB 842 : (1947) 2 All ER 193.); or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

140. Lord Godard, C.J. in ***Huddersfield Police Authority*** *v.* ***Watson*** (1947) 2 All ER 193 observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in *per incuriam.*

141. This court in ***Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others*** (2000) 4 SCC 262 observed as under:

> "The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

142. In a Constitution Bench judgment of this Court in ***Union of India*** *v.* ***Raghubir Singh*** (1989) 2 SCC 754, Chief Justice Pathak observed as under:

> "The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

143. In ***Thota Sesharathamma and another*** *v.* ***Thota Manikyamma (Dead) by LRs. and others*** *(1991) 4 SCC 312* a two Judge Bench of this Court held that the three Judge Bench decision in the case of ***Mst. Karmi*** *v.* ***Amru*** (1972) 4 SCC 86 was per incuriam and observed as under:

> "…It is a short judgment without adverting to any provisions of Section 14 (1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in *Badri Pershad v. Smt. Kanso Devi.* The decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Section 14(1) and (2) of the Act."

144. In ***R. Thiruvirkolam v. Presiding Officer and Another*** (1997) 1 SCC 9 a two Judge Bench of this Court observed that the question is whether it was bound to accept the decision rendered in ***Gujarat Steel Tubes Ltd.*** *v.* ***Mazdoor Sabha*** (1980) 2 SCC 593, which was not in conformity with the decision of a Constitution Bench in ***P.H. Kalyani v. Air France*** (1964) 2 SCR 104. J.S. Verma, J. speaking for the court observed as under:

> "With great respect, we must say that the above-quoted observations in *Gujarat Steel at P. 215* are not in line with the decision in *Kalyani* which was binding or with *D.C. Roy* to which the learned Judge, Krishna Iyer, J. was a party. It also does not match with the underlying juristic principle discussed in Wade. For the reasons, we are bound to follow the Constitution Bench decision in *Kalyani,* which is the binding authority on the point."

145. In ***Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangra and others*** (2001) 4 SCC 448 a Constitution Bench of this Court ruled that a decision of a Constitution Bench of this Court binds a Bench of two learned Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness.

146. A Constitution Bench of this Court in ***Central Board of Dawoodi Bohra Community*** *v.* ***State of Maharashtra*** (2005) 2 SCC 673 has observed that the law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

147. A three-Judge Bench of this court in ***Official Liquidator*** *v.* ***Dayanand and Others*** (2008) 10 SCC 1 again reiterated the clear position of law that by virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in ***State of Karnataka and Others*** v. ***Umadevi (3) and Others*** (2006) 4 SCC 1 is binding on all courts including this court till the same is overruled by a larger Bench. The ratio of the Constitution Bench has to be followed by Benches of lesser strength. In para 90, the court observed as under:-

> "We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the

> credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed."

148. In ***Subhash Chandra and Another*** *v.* ***Delhi Subordinate Services Selection Board and Others*** (2009) 15 SCC 458, this court again reiterated the settled legal position that Benches of lesser strength are bound by the judgments of the Constitution Bench and any Bench of smaller strength taking contrary view is *per incuriam.* The court in para 110 observed as under:-

> "Should we consider ***S. Pushpa*** *v.* ***Sivachanmugavelu*** (2005) 3 SCC 1 *t*o be an obiter following the said decision is the question which arises herein. We think we should. The decisions referred to hereinbefore clearly suggest that we are bound by a Constitution Bench decision. We have referred to two Constitution Bench decisions, namely, **Marri Chandra Shekhar Rao** *v.* **Seth G.S. Medical College** (1990) 3 SCC 139 and ***E.V. Chinnaiah*** *v.* ***State of A.P.*** (2005) 1 SCC 394. ***Marri Chandra Shekhar Rao*** (supra) had been followed by this Court in a large number of decisions including the three-Judge Bench decisions. ***S. Pushpa*** (supra) therefore, could not have ignored either ***Marri Chandra Shekhar Rao***

> (supra) or other decisions following the same only on the basis of an administrative circular issued or otherwise and more so when the constitutional scheme as contained in clause (1) of Articles 341 and 342 of the Constitution of India putting the State and Union Territory in the same bracket. Following ***Official Liquidator v. Dayanand and Others*** (2008) 10 SCC 1 therefore, we are of the opinion that the dicta in ***S. Pushpa*** (supra) is an obiter and does not lay down any binding ratio."

149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and 136 are by two or three judges of this court. These judgments have clearly ignored a Constitution Bench judgment of this court in ***Sibbia's case*** (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under section 438 of Cr.P.C.. Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are *per incuriam.*

150. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the

proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength.

151. In the instant case there is a direct judgment of the Constitution Bench of this court in ***Sibbia's case*** (supra) dealing with exactly the same issue regarding ambit, scope and object of the concept of anticipatory bail enumerated under section 438 Cr.P.C. The controversy is no longer *res integra.* We are clearly bound to follow the said judgment of the Constitution Bench. The judicial discipline obliges us to follow the said judgment in letter and spirit.

152. In our considered view the impugned judgment and order of the High Court declining anticipatory bail to the appellant cannot be sustained and is consequently set aside.

153. We direct the appellant to join the investigation and fully cooperate with the investigating agency. In the event of arrest the appellant shall be released on bail on his furnishing a personal bond in the sum of Rs.50,000/- with two sureties in the like amount to the satisfaction of the arresting officer.

154. Consequently, this appeal is allowed and disposed of in terms of the aforementioned observations.

……..……..J.
(Dalveer Bhandari)

……..……..J.
(K.S. Panicker Radhakrishnan)

New Delhi;
December 2, 2010