IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION (FOR CHALLENGING VIRES/ULTRA VIRES) NO. 14040 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL

and
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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BHAVESH BALDEVBHAI DESAI / RABARI
Versus
STATE OF GUJARAT

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Appearance:
MR ASIM PANDYA, SR.ADVOCATE with GAURAV VYAS and MR SHYAM M SHAH,ADVOCATES for the Applicant(s) No. 1
MR KM ANTANI, ADDL.PUBLIC PROSECUTOR for the Respondent(s) No. 1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**
and
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE

Date : 12/02/2024

CAV JUDGMENT

(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

1. This petition filed under Article 226 of the Constitution of India raises an important issue pertaining to the procedure being adopted by this Court as a long practice in issuance of “Rule” in bail matters, the applications filed under Sections 438 and 439 of the Code of Criminal Procedure, 1973 (in short as “ Cr.P.C.). The petitioner herein is aggrieved by the pendency of the bail application, namely Criminal Miscellaneous Application No. 20917 of 2022, wherein order dated 16.11.2022 was passed issuing Rule returnable on 28.11.2022 when the learned Additional Public Prosecutor already waived service of notice of Rule for and on behalf of the respondent-State.

2. It is stated in the writ petition presented on 25.08.2023, that the bail application had not been decided even after 27 adjournments without the fault of the petitioner.

3. The issues as agitated by Mr. Asim Pandya, learned Senior Advocate assisted by learned advocates Mr. Gaurav Vyas and Mr. Shyam Shah appearing for the petitioner are:-

(i) Practice of issuance of “Rule” or “Rule Nisi” and posting bail matters after two or three weeks for final hearing is contrary to the provisions of the Gujarat High Court Rules, 1993 (“the Rules’1993) and the Rules governing the procedure of this Court.

(ii) The practice of relegating accused to the (trial Court) Sessions Court for bail when his bail application at the pre-chargesheet stage is pending in the High Court, where the chargesheet is filed during the pendency of the bail application, is to be stopped.

4. It is submitted by Mr. Asim Pandya, learned Senior Advocate appearing for the petitioner that the practice of issuing "Rule" or "Rule Nisi" on the presentation of the bail application is causing prejudice to the right of the applicants to seek release on bail at the earliest. It is contended that the bail application filed during the course of investigation or trial has to be proceeded with keeping in mind the principles of criminal jurisprudence of presumption of innocence of a person accused of an offence, placing the onus on the prosecution to prove the guilt before the Court. It is for the investigating agency to satisfy the Court that the arrest made was warranted and enlargement on bail is to be denied. The principle that "the bail is the rule and jail is the exception", has been well recognized by the Apex Court in a catena of decisions, the latest being ***Satender Kumar Antil vs. Central Bureau of Investigation and another***, **(2022) 10 SCC 51**, wherein the Apex Court has held therein that the word "bail" has not been defined in the Cr.P.C, but the Code, despite being a procedural law, is enacted on an inviolable

right enshrined under Articles 21 and 22 of the Constitution of India. The Apex Court, having extensively, gone through the provisions of Cr.P.C. pertaining to the investigation, arrest of a person named as accused and the power and method to be adopted by the Court, has issued a slew of directions to be followed by the investigating agencies as also for the Courts. It is directed therein that the bail applications ought to be disposed of within the period of two weeks, except if the provisions mandate otherwise, with the exception being an intervening application. The applications for anticipatory bail are expected to be disposed of within the period of six weeks with the exception of any intervening application.

5. The contention, thus, is that the practice of issuing “Rule” or “Rule Nisi” in the bail applications and postponing the bail applications on its presentation without adverting to the merits is contrary to the decision of the Apex Court in ***Satender Kumar Antil***(supra). This practice is to be curbed immediately, as it is also contrary to the procedure prescribed in the Gujarat High Court Rules, 1993 (in short as “Rules’1993”). Rule 335 contained in Chapter XXVI of the Rules’1993 provides for advance notice of the bail application upon the learned Government Pleader. It provides that in cases arising from the Ahmedabad City, advance notice is to

be given at least 24 hours before the application is heard by the Court and in cases from mofussil, 48 hours before the such hearing is to be given. No bail application can be filed in the Registry without giving advance notice to the Office of the Government Pleader as per Rule 335 of the Rules'1993. Further, the bail applications are listed before the Court by the auto-listing mode on the 3rd day of the registration if without objection. The office of the Government Pleader/ Public Prosecutor, thus, gets sufficient time to seek instructions from the concerned police station or the Court, as the case may be, to ascertain as to the relevant aspects of the matter. In any case, no casual adjournment can be granted in a bail matter, as it would be in direct conflict with the decisions of the Apex Court, the recent one being ***Satender Kumar Antil*** (supra).

6. It was further argued that the Rules framed by the High Court of Gujarat in exercise of the power conferred under Article 227 of the Constitution of India for making amendments in Criminal Manual, 1977 provides a timeline for deciding regular/anticipatory bail by the trial Courts. Rule 25A of the Rules'1993 notified by the Notification dated 24.05.2022 states that the application for bail and non-bailable cases must ordinarily be disposed of within a period of three to seven days from the date of first hearing. In case

the application is not disposed of within such period, the Presiding Officer shall have to furnish reasons thereof in the order itself.

7. It was further argued that Sections 438 and Section 439 of the Cr.P.C confer concurrent jurisdiction on the Court of Sessions and the High Court in the matter of grant of bail to a person apprehending arrest or any person accused of an offence and in custody. However, a practice has been developed in this Court over the period of years that most of the bail applications filed prior to filing at the pre-chargesheet stage are adjourned for three to four weeks for final hearing or by giving time to the Public Prosecutor to seek instructions in the matter from the investigating officer concerned or for some other reasons. By the time, the bail matter is taken up for hearing by the Court after three to four weeks, the chargesheet is filed and on intimation given to the Court that the chargesheet is filed, the accused is relegated to approach the trial Court to seek bail. The submission is that this practice has no statutory sanction. No advocate or litigant can be compelled to withdraw the bail application, merely because the chargesheet has been filed in the matter. It was argued that this practice violates Article 21 of the Constitution, as it prolongs the period of custody of the person made accused further for at least two to three weeks.

In many of the matters, this practice has resulted in a futile exercise, as the applicants have to again approach the High Court on rejection of the bail application by the trial Court in a casual manner.

8. Learned Senior Counsel has, thus, prayed that some guidelines may be issued for expeditious disposal of the bail matters in consonance with the provisions of Sections 438 and 439 of the Cr.P.C and in the spirit of Article 21 of the Constitution. It is contended that the cause espoused by the petitioner in the instant petition is for the benefit of all, as it is crucial to see that the outcome of the legal procedure aligns with the broader concept of justice under the Constitution of India, the provisions incorporated in the Cr.P.C. and reiterated by the Apex Court in ***Satender Kumar Antil*** (supra).

9. Having noted the controversy raised herein, we proceed to treat the present petition as Public Interest Litigation for the cause of such persons who have been made accused and waiting for disposal of their bail applications in different Courts in the State of Gujarat.

10. Further, considering the contentions of learned Senior Counsel for the petitioner, we may note at the outset, that there cannot be any doubt or dispute to the proposition that the pendency of a bail application beyond a reasonable time

period is contrary to the constitutional scheme incorporated in the procedure laid down under the Cr.P.C. The liberty of an individual made accused of an offence is paramount consideration while striking a balance between the freedom of an individual and concerns of the investigating Agency or the Courts to curtail the same. The Apex Court has issued directions from time to time so as to curb the tendency of the police officers arresting the accused unnecessarily and the Magistrate authorizing detention casually and mechanically.

11. In ***Arnesh Kumar vs. State of Bihar and another*, (2014) 8 SC 273**, the Apex Court emphasized the need to maintain the balance between individual liberty and societal order while exercising the power of arrest. It was noted that the arrest curtails freedom, bring humiliation and casts scars forever; no arrest can be made in a routine manner on a mere allegation of commission of offence made against the person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. In order to curb the tendency of making casual arrest, Section 41 of the Cr.P.C. in the present form came to be enacted in view of the recommendation of the 177th Report of the Law Commission submitted in the year 2001. The law brought into force vide Act No.5 of 2009 with effect from

01.11.2010, mandates the police officer to state the facts and record the reasons in writing, which lead him to come to the conclusion governed by any of the law as enforced with the substitution of Section 41 and insertion of Section 41A, mandatory provisions therein, while making such arrest. The provision further requires the police officers to record reasons in writing even for not making the arrest. In pith and substance, the police officer is answerable as to why the arrest has been made, for what purpose and with what object. The police officer may have reasons to believe on the basis of information and material that the accused has committed the offence, but it reach at the satisfaction further that the arrest is necessary for one or more purposes envisaged in the aforesaid provision.

12. In ***Siddharth vs. State of Uttar Pradesh and another,*** **(2022) 1 SCC 676** a question came up before the Apex Court as to whether it is mandatory for the trial Court to take a person made accused into custody at the time of taking a chargesheet on record, in view of Section 170 the Cr.P.C. In the said case, the appellant had already joined the investigation. The reason to approach the Apex Court was on account of an arrest memo issued by the police officer on the premise that Section 170 of the Cr.P.C prevents the trial Court from taking the chargesheet on record unless the

accused is taken into custody. It was held therein that Section 170 of the Cr.P.C does not impose an obligation on the officer in-charge to arrest each and every accused at the time of filing of the chargesheet. Noticing in the facts of that case that the accused had co-operated with the investigation throughout and yet on the chargesheet being filed act of issuance of non-bailable warrants for his production premised on the requirement that there is an obligation to arrest the accused and produce him before the Court, was based on misconception. It was observed that if the investigating officer does not believe that the accused will postpone, abscond or disobey summons, he/she is not required to be produced in custody. The word “custody” appearing in Section 170 of the Cr.P.C does not contemplate either police or judicial custody, but it merely connotes the presentation of the accused by the Investigating Officer before the Court while filing the chargesheet.

13. It was observed that personal liberty is an important aspect of our constitutional mandate and merely, because an arrest can be made because it is lawful, does not mandate that the arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a

person.

14. In ***Satender Kumar Antil***(supra), the Apex Court has taken the issue of arrest of a person made accused in the current scenario of the under trial prisoners and the arrest being made on registration of a cognizable offence being charged with offence punishable for seven years or less. It was noted that the term “bail” though has not been defined in the Cr.P.C. and is used very often, is nothing but a surety inclusive of a personal bond from the accused. It means release of an accused person either by the orders of the Court or by the police or by the investigating agency. It is a set of pre-trial restrictions imposed on a suspect while enabling any interference in the judicial process. Thus, it is a conditional release on the solemn undertaking by the suspect that he would cooperate both with the investigation and the trial. It was noted that the principle that “bail is the rule and jail is the exception” has been well recognized through the repetitive pronouncements of the Apex Court, which again is on the touchstone of Article 21 of the Constitution of India.

15. It was noted that the object of bail is neither punitive nor preventive. Deprivation of liberty must be considered a punishment, unless it is required to ensure that the accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that the punishment

begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty (Reference was made to ***Sanjay Chandra vs. Central Bureau of Investigation***, (**2012) 1 SCC 40**).

16. It was further noted that the innocence of a person accused of an offence is presumed through a legal fiction, placing the onus on the prosecution to prove the guilt before the Court. It is for the agency to satisfy the Court that the arrest made was warranted and enlargement on bail is to be denied. It has been the consistent stand of the Courts in India that presumption of innocence, being a facet of Article 21, shall inure to the benefit of the accused. Resultantly, burden is placed on the prosecution to prove the charges to the Court of law. The weightage of the evidence has to be assessed on the principle of beyond reasonable doubt. The Cr.P.C., despite being a procedural law is enacted in the inviolable right enshrined under Articles 21 and 22 of the Constitution of India. The provisions governing clearly exhibited the aforesaid intendment of Parliament.

17. The Apex Court in ***Satender Kumar Antil***(supra) having elaborately discussed the provisions contained in Sections 41, 41-A, 60-A contained in Chapter-V of the Cr.P.C pertaining to arrest of persons; Sections 87 and 88 of the Cr.P.C providing procedure for issuance of warrant and power to take bond for

appearance; Section 167(2) of the Cr.P.C. pertaining to the power of the Magistrate authorizing the detention of the accused in custody on the request of the Investigating Officer; Sections 204, 209, 309, 389, 436-A, 437, 439 and section 440 of the Cr.P.C, has proceeded to issue the following directions meant for the investigating agencies and also for the Courts, in the matter of arrest or grant of bail :-

> " *100. In conclusion, we would like to issue certain directions. These directions are meant for the investigating agencies and also for the courts. Accordingly, we deem it appropriate to issue the following directions, which may be subject to State amendments.:*
>
> *100.1 The Government of India may consider the introduction of a separate enactment in the nature of a Bail Act so as to streamline the grant of bails.*
> *100.2. The investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in Arnesh Kumar (supra). Any dereliction on their part has to be brought to the notice of the higher authorities by the court followed by appropriate action.*
> *100.3. The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non-compliance would entitle the accused for grant of bail.*
> *100.4. All the State Governments and the Union Territories are directed to facilitate standing orders for the procedure to be followed under Section 41 and 41A of the Code while taking note of the order of the High Court of Delhi dated 07.02.2018 in Writ Petition (C) No. 7608 of 2018 and the standing order issued by the Delhi Police i.e. Standing Order No. 109 of 2020, to comply with the mandate of Section 41A of the Code.*
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> *100.5. There need not be any insistence of a bail application while considering the application under Section 88, 170, 204 and 209 of the Code.*
> *100.6. There needs to be a strict compliance of the mandate laid down in the judgment of this court in Siddharth (supra).*

100.7. The State and Central Governments will have to comply with the directions issued by this Court from time to time with respect to constitution of special courts. The High Court in consultation with the State Governments will have to undertake an exercise on the need for the special courts. The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.

100.8. The High Courts are directed to undertake the exercise of finding out the undertrial prisoners who are not able to comply with the bail conditions. After doing so, appropriate action will have to be taken in light of Section 440 of the Code, facilitating the release.

100.9. While insisting upon sureties the mandate of Section 440 of the Code has to be kept in mind.

100.10. An exercise will have to be done in a similar manner to comply with the mandate of Section 436A of the Code both at the district judiciary level and the High Court as earlier directed by this Court in Bhim Singh (supra), followed by appropriate orders.

100.11. Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application."

18. It was observed that Section 436-A of the Cr.P.C. has been inserted by Act No.25 of 2005, and has got a laudable object behind it, particularly from the point of view of granting bail. The provision draws the maximum period for which an undertrial can be detained. The period has to be reckoned with the custody of the accused during the investigation, inquiry and trial. Under this provision, when a person has undergone detention for the period extending to one half of

the maximum period of imprisonment specified for that offence, he shall be released by the Court on his personal bond with or without sureties. The word "shall" clearly denotes the mandatory compliance of this provision.

19. Further Section 439 confers a power upon the High Court or the Court of Sessions regarding the bail. This power has to be exercised against the order of the Judicial Magistrate exercising the power under Section 437 of the Cr.P.C. or in a case triable by the Court of Sessions exclusively. It may be relevant, at this juncture, to note Sections 438 and 439 of the Cr.P.C. for ready reference.

> *"438. **Direction for grant of bail to person apprehending arrest** . —(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.*
> *(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—*
> *(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;*
> *(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;*
> *(iii) a condition that the person shall not leave India without the previous permission of the Court;*
> *(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.*

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in confirmity with the direction of the Court under sub-section (1).
(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860).]"

***439. Special powers of High Court or Court of Session regarding bail.**—(1) A High Court or Court of Session may direct,—*
(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;
(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.
Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860), give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.
(1A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section DB of the Indian Penal Code (45 of 1860).

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

20. Having noted the first and second proviso to sub-section (1) of Section 439 of the Cr.P.C, it has been noted by the Apex Court therein that the proviso makes it obligatory to give notice of the application for bail to the Public Prosecutor, on the set of offence mentioned thereunder, and to the informant or any other person authorised by him, as stated in sub-section (A) of Section 139, at the time of hearing the application for bail. It is observed that this being the mandate of the legislation, the High Court and the Court of Sessions shall see to it that it is being complied with.

21. Interpreting provisions of Section 449 of the Cr.P.C., it was further observed that the amount of every bond executed under Chapter XXXIII is to be fixed with regard to the circumstances of the case and shall not be excessive. The conditions imposed shall not be mechanical and uniform in all cases. It is a mandatory duty of the Court to take into consideration the circumstances of the case and satisfy itself that it is not excessive. Imposing a condition which is impossible of compliance would be defeating the very object of the release. This is a salutary provision, which has to be kept in mind. Reasonableness of the bond and surety is something which the Court has to keep in mind whenever the

same is necessitated. Sections 436, 437, 438 and 439 of the Cr.P.C. are to be read in consonance. While exercising the power under Section 88 of the Cr.P.C also, the said factum has to be kept in mind.

22. Having exhaustively gone through the decisions of the Apex Court and the provisions of Sections 438 and 439 of the Cr.P.C., we find that the Rules framed by the High Court of Gujarat in the matter of presentation of bail applications are in consonance with and in the spirit of the legislative mandate of early disposal of the bail application. Rule 335, as contained in Chapter XXVI of the Gujarat High Court Rules'1993 reads as under:-

> *"335. Application for bail to be served on Government Pleader.—In every application for grant of bail, a copy of application shall be served upon the Government Pleader in cases arising from the Ahmedabad City area at least 24 hours before the application is heard by the Court and in cases from the mofussil 48 hours before such hearing."*

23. It provides that every application for grant of bail shall be served upon the Government Pleader, within the time period provided therein, before the application is heard by the Court. This provision is scrupulously being followed and no application for bail is received by the Registry without the proof of the advance notice of the application in the Office of the Public Prosecutor. Once the advance notice is being given to the Office of the Public Prosecutor, it is under obligation to

obtain instructions from the concerned police station about the stage of investigation, inquiry or from the Court about the stage of the trial. The proviso to sub-section (1) of Section 439 of the Code, which prescribes for the notice of an application for bail to be served to the Public Prosecutor, thus, stands complied with.

24. Sub-Section (1A) of Section 438 of the Code, where the provision is to give the notice of seven days, together with the copy of such order is to be served on the Public Prosecutor and the Superintendent of Police, with a view to give Public Prosecutor a reasonable opportunity of being heard when the application is finally heard by the Court, also stands complied with the requirement of advance notice to the Office of the Public Prosecutor under Rule 335 of the High Court Rules, which is scrupulously being followed in the High Court.

25. We, thus, find that once the advance notice of the bail applications of all categories is served in the office of the learned Public Prosecutor before filing of the same in the Registry, there is no reason to issue Rule to the Public Prosecutor. Moreover, the Office of the Public Prosecutor gets sufficient time to seek instructions as the bail applications are listed in the High Court by the auto-listing mode on the 3rd day of the date of registration, which is made

in a day or two of the date of filing, if there is no office objection.

26. The order dated 16.11.2022 for issuance of Rule in the bail application filed by the petitioner herein even after recording of the factum of waiver of service of notice by the learned Additional Public Prosecutor, in a routine manner, is found to be contrary to both the legislative mandate as also the law laid down by the Apex Court in the case of ***Satender Kumar Antil*** (supra). This practice of issuance of Rule and posting the bail applications after a period of one week, two weeks or three weeks for final hearing without adverting to the merits of the same on the date of its presentation, is to be curbed forthwith.

27. While hearing this matter, we have been informed that in a meeting on the administrative side of the Hon'ble the Chief Justice, learned Advocate General and learned Public Prosecutor, it has been decided that the Office of the Public Prosecutor will not insist on issuance of "Rule" or "Rule Nisi" in bail matters. We have also been informed that this practice of issuance of Rule, continued in this Court for a long time has been done away with. The Courts hearing bail applications have now stopped issuing Rules in bail matters. We, therefore, do not find any reason to issue any directions or guidelines in the matter and only deem it fit and proper to

record that the bail applications are to be dealt with by every Court as per the law of land, in the spirit of the Constitutional and legislative mandate, strictly in compliance of the decision of the Apex Court in the case of ***Satender Kumar Antil*** (supra), through-out the State including the High Court. The Procedure in the matter of disposal of the bail applications shall be followed scrupulously in accordance with the law laid down by the Apex Court in the case of ***Satender Kumar Antil*** (supra) and the mandate therein that bail applications ought to be disposed of within the period of two weeks and applications for anticipatory bail are to be disposed of within the period of six weeks, subject to the exceptions of there being an intervening application or if the special provisions mandate otherwise.

28. The Magistrate's Court and the Court of Sessions, i.e. the trial Courts are mandated to strictly adhere to the law laid down by the Apex Court in the case of ***Satender Kumar Antil*** (supra) and Rule 25A of the Criminal Manual, 1977, inserted by way of Notification No.C.2001/93 dated 24.05.2022.

29. Coming to the second point of submission, where it was argued that during the pendency of the bail application filed by the person made accused, if chargesheet is filed by the Investigating Officer, the applicant accused is relegated to

approach the trial Court and this Court refuses to proceed with the bail applications on merits, we may note that no data of any such instance has been produced before us. However, taking note of the provisions of Sections 438 and 439 of the Code, we deem it proper to note that indisputedly the jurisdiction as conferred on the High Court and the Court of Sessions by Sections 438 and 439 of the Cr.P.C., is concurrent. It is only a matter of practice that the applicant is required to approach the Court of Sessions in the first instance and if relief is denied, he approaches the High Court under Sections 438 or 439, as the case may be. The High Court does not act as a superior Court sitting in appeal or revisional jurisdiction over the order of the Court of Sessions, but because the Superior Court can still exercise its own jurisdiction independently. (Reference the opinion of the High Court of Orissa in the case of ***Preeti Bhatia vs. Republic of India***,**(2015) 1 OLR 662**, relied upon by the counsel for the petitioner).

30. It was noted by the High Court of Orissa therein that the fact that the application seeking bail before the High Court is accompanied by an order of the Court of Sessions rejecting a similar prayer, it does not mean that the High Court is required to look into the correctness of the decision of the Court of Sessions, rather the idea is to provide the Superior

Court with an advantage of apprising itself with the grounds of considerations, which prevailed with the Court of Sessions in taking the view which it did. It was noted therein that where the bail application under Section 439 of the Cr.P.C. is rejected by the Court of Sessions during the course of investigation and the applicant applies for bail to the High Court and by the time of consideration of the bail application, chargesheet is filed, the applicant, if he/she so likes, has an option to withdraw the bail application from the High Court to move the Court of Sessions again, but if he/she chooses not to do the same and to pursue the bail application pending before the High Court, it is to be decided on its own merits as the High Court can take note of the factum of submission of the chargesheet and the materials which have come against the applicant in the charge-sheet. It was further noted that there cannot be any rational to show the door of the Court of Sessions again to the applicant, in such a case and the bail application would be maintainable before the High Court.

31. A five Judges Bench of the Allahabad High Court in ***Ankit Bharti vs. State of Uttar Pradesh and others***, **[Criminal Misc. Application No.1094 of 2020], 2020 ILR 3-5 ALL 1281**, was dealing with the question as to whether the anticipatory bail applications shall be entertained by the High Court directly. It was noted therein that the jurisdiction as

conferred on the High Court and the Court of Sessions by Section 438 is concurrent and the discretion and the power of the High Court to entertain an application directly is one, which is liable to be exercised according to the facts and circumstances of each case. It was noted that there may be cases in which it may be considered by the High Court to be proper to entertain an application without the applicant having moved the Court of Sessions initially. Similarly, there may be cases in which the Court may feel justified in asking the applicant to move the Court of Sessions or to refer the matter to that Court. In any case, all depends upon the discretion of the Judge hearing the case, it must be left to the Judge to exercise the discretion vested in him by the Statute depending upon the facts obtained in a particular case. It is open for the learned Judge to assess the facts of each case to form an opinion whether special circumstances existed for not entitling the applicant to approach the High Court directly. There can be no exhaustive detail of general exposition of circumstances in which the applicant may be held entitled to approach the High Court, directly.

32. Noticing the above, we may record that there cannot be any dictum that may guide the exercise of discretion vested in the High Court under Sections 438 or 439 of the Cr.P.C. The discretion left unfettered by the legislature must be

recognized as being available to be exercised depending upon the facts and circumstances of the particular case. It is neither permissible nor advisable to us to lay down any strict procedure or issue a mandate to the learned Judge dealing with the bail applications under Sections 438 or 439 of the Cr.P.C to adopt a fixed approach in the matter of pending bail applications where chargesheets have been filed. In a given case, the Court may feel justified in asking the applicant to move the Sessions Court or refer the matter to that Court and it would depend upon the discretion of the Judge hearing the case. However, we find it just and proper to add a word of caution that any routine practice of relegating the applicant to approach the Court of Sessions where the chargesheet is filed during the pendency of the bail application before the High Court, has not got our seal of approval with what we have stated above.

33. We may further clarify that, however, it would not be open for the Public Prosecutor to argue before the High Court that since the chargesheet is filed during the pendency of the bail application, the applicant has no option but to approach the Sessions Court. It is the choice of the applicant to loose a chance to approach the trial Court, because otherwise, the applicant will have two chances, first to approach the Sessions Court and then to the High Court. No mandate in

this regard, as such, can be issued in the matter of exercise of discretionary power of the Courts dealing with the bail applications under Sections 438 and 439 of the Cr.P.C.

34. In the end, we dispose of the present petition with the observation that all Courts in the State of Gujarat including the High Court are obliged to scrupulously follow the directions of the Apex Court in the case of ***Satender Kumar Antil*** (supra), while dealing with the bail applications under Sections 437, 438 or 439 of the Cr.P.C., as the case may be. This order be circulated by the Registrar General, High Court of Gujarat to all concerned Courts in the State of Gujarat.

35. The petition stands disposed of accordingly.

(SUNITA AGARWAL, CJ)

(ANIRUDDHA P. MAYEE, J.)

SUDHIR