



**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Jay Sengupta

The Hon'ble Justice Tirthankar Ghosh

The Hon'ble Justice Bivas Pattanayak

**CRM 2739 of 2021
Suhana Khatun and Others
Vs.
The State of West Bengal**

For the petitioners : Mr. Ayan Bhattacharjee,
Mr. Indrajit Adhikari,
Mr. Bitasok Banerjee,
Mr. Niladri Sekhar Bose,
Mr. Sharequl Haque,
Ms. Priyanka Agarwal,
Mr. Prattay Khan,
Mr. Zohaib Rauf,
Mr. Aditya Ratan Tiwari,
Mr. Amitabrata Hait,



Mr. Subjait Manna,
Ms. Ritu Das,
Mr. Debarka Guha,
Ms. Ayesha Sultana,
Mr. Shaunat Mondal,
Mr. Arpit Choudhury,
Mr. Pronab Halder.

.....Advocates

For the State

: Mr. Debasish Roy Ld. PP,
Mr. Suman De

.....Advocates

For the UOI

: Mr. Himanshu De Sr. Adv.,
Mr. Arun Kumar Maiti (Mohanty).

.....Advocates

Heard lastly on

: 08.08.2025

Judgment on

: 14.11.2025

Jay Sengupta, J:

1. This application for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 filed at the instance of four minor/juvenile persons in connection with the Raghunathganj Police Station Case No. 12 of 2021 dated 07.01.2021 under Sections 341, 325, 326, 307, 302, 34 of the Indian Penal



Code was assigned before the Bench by the Hon'ble Chief Justice with the following observations –

‘ The matter was listed for judgment on 20th January, 2022 before the Hon'ble Division Bench comprising Hon'ble Justice Arijit Banerjee and Hon'ble Justice Bivas Pattanayak wherein the Hon'ble Division Bench observed that the principal question pertaining to the instant petition is whether an application for anticipatory bail under Section 438 of the Code at the behest of a juvenile minor is maintainable. Therefore, before delving into any other points involved in the case, the Hon'ble Division Bench dealt with the question of maintainability of the present application for anticipatory bail preferred at the instance of juveniles/minors under Section 438 of the Code.

The Hon'ble Division Bench, after dismissing the application, has made the following observation: -

“ 21. However, although neither of the sides drew our attention to the Judgment of a Division Bench of this Court, the Judgement in the case of Miss Surabhi Jain (Minor) & Ors. In CRM 405 of 2021 has come to our notice. In that Judgment, a Coordinate Bench has come in the conclusion that an application for anticipatory bail at the instance of a minor juvenile is maintainable That Bench has differed from the conclusion reached by an earlier Division Bench of this Court in the Case of Krishna Garai v. The State of West Bengal, 2016(5)CHN(Cal) 157 wherein it was held that such an application is not maintainable. The Division Bench in the case of Miss Surabhi Jain (Minor) &



Ors. In CRM 405 of 2021. referred the issue to the Chief Justice to constitute a larger Bench to decide the point. However the Division Bench, being of the view that such an application is maintainable, allowed the application on merit.

We respectfully disagree with the conclusion reached by the coordinate Bench in the case of Miss Surabhi Jain (Minor) & Ors. In CRM 405 of 2021. We have recorded our detailed reasons hereinabove as to why in our opinion, an application for anticipatory bail at the instance of a minor juvenile is not maintainable. Accordingly we have dismissed the application. However, we also request the Hon'ble Chief Justice to constitute a larger Bench to decide as to whether or not an application for anticipatory bail under section 438 of the Cr.P.C. at the instance of a minor juvenile is maintainable, in view of the fact that there is divergence of opinion between coordinate benches of this Court in that regard.”

It is to be mentioned herein that the Hon'ble Division Bench comprising Hon'ble Justice Harish Tandon and Hon'ble Justice Bibek Chaudhuri passed the judgment on 23th August, 2021 in Miss Surabhi Jain (Minor) & Ors. –Vs– The State of West Bengal while sitting at Circuit Bench.’

2. Therefore, the question of law to be answered by this Bench is whether an application for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 is maintainable when filed by a juvenile or a child in conflict with law.



3. Mr. Bhattacharjee, learned senior counsel appearing on behalf of the petitioners has submitted and has relied on the written notes as follows. Juvenile Justice (Care and Protection of Children) Act, 2015 ('Act of 2015') was enacted by the Legislature in furtherance to the obligations and duties imposed under the provisions of Articles 15(3), 39(e)/(f), 45 and 47 of the Constitution on India. The Act of 2015 was enacted for the protection of children and to ensure that the basic human rights of children are fully protected. The Act of 2015 conceptualizes an inquiry by the Juvenile Justice Board (Board) constituted under Section 4 of the Act of 2015 in respect of a child in conflict with law. Any person who has not completed 18 years of age and is apprehended for committing an offence will be treated as a child during the process of inquiry as envisaged under Section 6(1) of the Act of 2015. According to Section 10 of the Act of 2015, as soon as a child alleged to be in conflict in law is "apprehended" by police, such child shall be placed under the charge of the Special Juvenile Police Unit or the Designated Child Welfare Police Officer, who shall produce the child before the Board. According to the proviso appended to Section 10, such a child shall not be placed in a police lock up or lodged in a jail under any circumstances. According to Section 12 of the Act of 2015, when such a child is apprehended or detained by the police or appears or is brought before a Board, such child would ordinarily be released on bail. However, bail will not be granted in cases where there are reasonable apprehensions that the release would expose the child to the danger of getting associated with any criminal etc. In such cases, the child shall be lodged in an observation home (Section 2(40))



in terms of Section 12(2) of the Act of 2015. According to Section 14 of the Act, when a 'child in conflict with law' is produced before the Board, the same is obligated to hold an inquiry as per Chapter XXI of the Code of Criminal Procedure, 1973 ('CrPC') in case of petty offences (vide Section 14(5)(d)); or an inquiry as per Chapter XX of CrPC in case of serious offence (vide Section 14(5)(e)), or an inquiry as per Chapter XX of CrPC in case of heinous offence for a child below the age of sixteen years as on the date of commission of the offence (vide Section 14(5)(f)(i)). At the conclusion of such inquiry, the Board may pass either an order of exoneration under Section 17 or an order of (victual) conviction under Section 18 of the Act of 2015. In case an order is passed under Section 18 of the Act, the Board is required to follow the provisions mentioned under Section 18(1) and/or 18(2) of the Act of 2015. However, in case of 'a child in conflict with law' above the age of sixteen years as on the date of commission of the offence being an accused of a 'heinous offence', a preliminary assessment inquiry has to be conducted in terms of Section 15 of the Act of 2015 (vide Section 14(3)/14(5)(f)(ii)). From the aforesaid provisions of law, it would therefore, be evident that the provisions of the Act of 2015 don't get activated until a child is apprehended or detained by police or appears or is brought before a Board. The mechanism of the Act of 2015 fall in place once the stage of appearance is reached but not before. In this regard, it is noteworthy that Section 10 of the Act of 2015 provides for the mechanism of apprehension of a child/juvenile. The non-obstante clause as it occurs in Section 12 of the Act of 2015 carves out an exception from the general provisions of bails and bonds



as enumerated under the provision of Cr PC. The said non-obstante clause, however, does not abrogate the provision of anticipatory bail/pre-arrest bail as envisaged under Section 438 of Cr PC which remains untrammelled by such non-obstante clause in view of the provisions under Sections 4 & 5 of Cr P C. According to Section 4(2) Cr P C, the special provision prescribed is for grant of bail and that would prevail upon the provisions of Cr PC. However, it cannot be said that the rest of the provisions of CrPC are also excluded. [vide *Moti Lal vs CBI*, (2002) 4 SCC 713 [Para 14]. Section 438 CrPC vis a vis liberty: The provision under Section 438 of CrPC creates a different niche, and therefore, the same cannot be construed to be excluded by way of necessary implication. In this regard, it is most pertinent to mention that the provision under Section 438 of Cr PC traces its origin back in the ark of fundamental liberty as enshrined under Article 21 of the Constitution of India. Every pre-arrest bail petition involves a lurking question as to how much personal liberty of an individual is required to be curtailed. In other words, every pre-arrest bail petition seeks reinforcement and reinstatement of the personal liberty of an individual which is enjoyed by such individual as a natural right by virtue of his birth and as a fundamental right by virtue of Chapter III of the Constitution of India. In a pre-arrest bail petition, the moot question therefore remains, is to the justification of the executive to infringe upon such personal liberty of a citizen. Therefore, the larger ark of freedom of individual should be the backdrop on which this interpretative exercise has to be undertaken regard being had to contextual ambience in which the authorities are functioning. It is not out of place to



mention herein that a person has a right not to be hounded by police. Therefore, the mechanism provided under the Act of 2015, which are a-posteriori to apprehension/production of a child/juvenile cannot exclude the provision of Section 438 of Cr PC, especially when such a provision of law envisages a situation a priori to arrest/apprehension. Ouster clause of liberty: The liberty of a person is as important as his life and limb. Liberty cannot therefore, be lightly interfered with. An ouster clause of liberty has to receive strict interpretation. It is to be strictly construed. (vide Bhut Nath Mete vs. State of W B, (1974) 1 SCC 645 (Para 11)). Regard being had to the principle of interpretation and in particular the provision of Section 3 of the Act of 2015 as mentioned hereinabove, it can safely be concluded that the inner engineering of the Act of 2015 does not exclude the provision of anticipatory bail/pre-arrest bail under Section 438 of CrPC by necessary implication. Noticeably, no statutory law in India, however draconian that might be, has been interpreted to exclude the beneficial provision of pre-arrest bail as envisaged under Section 438 of Cr PC. In this regard it is profitable to refer to the provisions of the Prevention of Money Laundering Act, 2002 (PMLA) which have been interpreted to not to exclude the provision of anticipatory bail (vide Vijay Madanlal Choudhary & Ors. vs. Union of India & Ors., 2022 SCC Online 929 [Para 407]). No express exclusion: It is also to be mentioned that the Act of 2015 being a beneficial legislation cannot be construed to exclude another beneficial provision which is a necessary component of Article 21 of the Constitution of India, that too by way of necessary implication. It is noteworthy that when the



Legislature in its wisdom has excluded the provisions of Section 438 of CrPC in some special acts like Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Act, the same exclusion is not found within the four corners of the Act of 2015. No such legislative prescription has found place in the Act of 2015. Therefore, in absence of a clear legislative interdict, same cannot be implanted by way of judicial interpretation. Apprehension vis a vis arrest: In the Act of 2015, the Legislature might have consciously used the term "apprehension" in place of "arrest". Linguistically, both the terms may have different connotations but the consequence of both are same i.e., deprivation of personal liberty. Therefore, employment of the word 'apprehension' will not make any significant change in the texture of the statute regarding applicability of the provision under Section 438 of the Cr PC. The word arrest has been given a different connotation altogether by the Hon'ble Supreme Court of India. The stereotype liberal interpretation of the words 'arrest' and 'custody' was done away with by the Apex Court. The issue of remand under Section 167(2) of Cr PC was also interpreted in a liberal way in order to cope up with liberty clause qua the Foreign Exchange Regulation Act, 1973 and the Customs Act, 1962. (vide Directorate of Enforcement v. Deepak Mahajan and Anr. (1994) 3 SCC 440 [Para 14/22/31-34/38/45/46-48/54]). The issue of arrest, police custody, judicial custody received a completely different dimension by the Apex Court wherein 'house arrest' has been read into the provision under Section 167(2) of Cr PC. (vide Gautam Navlakha v. National Investigation Agency, 2021 (7) SCALE 379 [Para 43-46]). Liberal Interpretation of Section 438 Cr PC: That apart, the



application of Section 438 of CrPC cannot be denied in absence of any Legislative mandate to that effect as the same would violate the provision of Article 21 of the Constitution of India. It is trite law that beneficent provision contained in Section 438 of Cr PC must be saved and not abrogated. Section 438 of the Cr PC, in the form in which it is codified by the Legislature, is open to no exception unless the same is otherwise provided. Any other interpretation may throw it to a constitutional challenge by reading words into it. [Gurbaksh Singh Sibba and Ors. Vs State of Punjab, (1980) 2 SCC 565, [Para 26]. It will be disastrous to interpret the term 'apprehension' in contradistinction with arrest as in such situation the concept of statutory bail envisaged under Section 167(2) of CrPC will no longer remain available with a juvenile. Section 167(1) of CrPC opens up with phrase "wherever any person is arrested and detained in custody...". Sub-section (2) of Section 167 which embraces the provision of statutory bail starts with the expression "The Magistrate to whom the accused is forwarded ...". If in case the word 'apprehension' is understood differently with 'arrest', then Section 167(2) Cr PC will be inapplicable to a juvenile/ child in conflict with law. In this regard it is not out of place to mention that Apex Court in context of provisions of PMLA has approved the applicability of Section 167(2) Cr PC. (vide Vijay Madanlal Choudhary (supra) [Para 421]). In Case of Two views: As mentioned herein above, while interpreting the Act of 2015, it has to be kept in mind that the purpose of the Act of 2015 is to ensure that the children should be protected. In such backdrop, when two views are possible, one should prefer to take a view which is in favor of the children. [vide Shilpa



Mittal vs State (NCT of Delhi), (2020) 2 SCC 787 [Para 31/35]. In the aforesaid guiding principle, the beneficent provision of anticipatory bail should not be assumed to be excluded in the Act of 2015. It can be safely concluded that in legal parlance there is hardly any difference in connotations of both the terms, even though linguistically both may be different. The aforesaid argument may be emboldened by the observation of the Hon'ble Supreme Court of India in Bhavesh Jayanti Lakhani vs. State of Maharashtra and Ors., (2009) 9 SCC 551 [para 78]. If apprehension is construed to be something different from arrest, then there will be no bar in arresting a child inasmuch as the Act of 2015 is silent about word. Regard being had to be provisions of Section 4(2) of CrPC read with Section 1(4) of the Act of 2015, the police will have the right to arrest carte blanche. Arrest/apprehension is not excluded qua a child, what is excluded is subsequent formalities of arrest as envisaged under Section 46(4) of CrPC. So far this argument is concerned, it can be said that Section 1(4) of the Act of 2015 is akin to Sections 4(2)/5 of CrPC. The exclusion is only to the extent of inconsistency and not overall. However, as we see it, there is no conflict between the provisions of Section 438 of the CrPC and Section 10 or 12 of the Act of 2015 as both operate in different fields. It is well settled that the non-obstante clause has overriding effect only in case of inconsistency. [vide Chief Information Commissioner Vs. High Court of Gujarat and another, (2020) 4 SCC 702(Para)]. Another pivotal argument is the consequence of rejection of anticipatory bail. The consequence is arrest and subsequent custody. But as per Section 10 read with Section 12 of the Act of 2015, an arrest in a misnomer



when it comes to a child. Hence, by necessary implication the provision under Section 438 of CrPC is excluded. In this regard, it is not out of place to mention that the conception of bail is not alien to the Act of 2015 and therefore in a given case High Court of Sessions can pass necessary directions for appearance or production before board even in case of rejection of such application. Tersely saying, relief may be tailored according to need of the case.

4. Mr. Roy, learned Public Prosecutor representing the State has submitted and has relied on the written notes as follows. Constitutional framework: a) Article 21 – Right to Personal Liberty – i) Encompasses right to seek anticipatory bail, ii) Applies to all persons including juveniles, iii) Cannot be restricted by procedural technicalities. Reference – Gurubaksh Singh Sibba v. State of Punjab, b) Article 14 - Right to Equality – i) Equal protection under bail provisions, ii) Reasonable classification permitted, iii) Cannot deny statutory remedy completely. Statutory provisions and their interpretation – a) Section 438 CrPC – i) No explicit bar on applications by juveniles, ii) General provision for protection against arrest, iii) Discretionary power of courts, b) JJ Act provisions – i) Section 12 – Bail provisions, ii) Section 10 – Apprehension procedure, iii) Section 41 – Registration of FIR. Significant observations of all the Courts and arguments - It is to be remembered that while the JJ Act provides the primary mechanism, situations may arise where Section 438 becomes the only effective remedy. Courts cannot be blind to such exigencies. The situation which arises is that a child in conflict with law cannot be left to be remedy-less till the time of his apprehension by the concerned authority or



arrest whatever the case may be. Although Section 1(4) of the Act 2015 starts with a non-obstante clause excluding the operation of any act and specifically providing that the provisions of this Act shall apply to all matters concerning the child in need, care and protection and child in conflict with law, but does not, in any manner, bar the power of the Court to grant anticipatory bail under Section 438 CrPC. Non-obstante clause although operates in the areas covered in sub-section (i) and (ii) of Section 1 of Act 2015, under sub-section (i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social integration of child in conflict with law is provided. In so far as in a stage prior to the apprehension or arrest by a child in conflict with law is concerned, the Act is silent. The Parliament has not overridden the provision of Section 438 CrPC. There is no provision in Section 1 and Section 4 or elsewhere in the Act 2015 making Section 438 CrPC. inapplicable for offences punishable under the Act 2015. The liberty of a citizen has to be regulated by law. It has to be procedural, substantial, just and reasonable under Article 21 of the Constitution of India. There is no bar for grant of anticipatory bail to a child in conflict with law or a juvenile, although Section 1(4) of the Act 2015 begins with a non-obstante clause which operates in relation to Code of Criminal Procedure, but the same does not, in any manner, is inconsistent with regard to the provisions of anticipatory bail under Section 438 CrPC. for a juvenile or a child in conflict with law although it is a discretion of the court concerned either to grant anticipatory bail or not, but the remedy of an anticipatory bail cannot be taken away for a juvenile or a child in conflict with law, if there is no specific



bar to it. The Legislature has not expressly barred the application under Section 438 CrPC. with regard to a juvenile or a child in conflict with law. If the Legislature had an intention to override the provision of Section 438 CrPC. then the same should have been expressly stated that Section 438 CrPC. shall not apply to a juvenile or a child in conflict with law. There is, however, no such provision in the Code. In these circumstances, therefore, the Legislature in its wisdom left it to the Court to bring about a harmonious construction of the two statutes, so that the two may work and stand together. This is also fully inconsonance with the principles laid down in construing the non-obstante clause in the statute. It would be relevant to point out that there are certain statutes which expressly excluded the provisions of Section 438 CrPC. The exclusion of access to anticipatory bail as a remedy impinges upon human liberty. A child enjoys equal rights with other persons. Therefore, it would be in violation of all the principles and provisions to deny an opportunity to exercise right of preferring an application under Section 438 CrPC. If the legislature wanted not to extend the benefit of anticipatory bail to a child in conflict with law, the same would have been specifically barred to be in operation for such person. In Section 18 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, an absolute bar on the application of Section 438 CrPC has been created. Section 14 of the Act of 2015 provides for inquiry by Board regarding child in conflict with law and the procedure to be followed depending on the category of offences. Section 15 provides for preliminary assessment into heinous offences by Board to decide whether there



is a need for trial of the said child as an adult and then, transfer the case for trial to the Children's Court having jurisdiction to try such offences. Chapter III of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 provides for procedure in relation to children in conflict with law. From the proviso, it is clear that such child has been given full protection and care, so as to see that he is not unnecessarily arrested and if he has been such, then safeguards are provided to take care of such a situation. The importance of enacting Section 438 CrPC is explained by the Apex Court in the case of *Gurbaksh Singh Sibbia v. The State of Punjab* supra. That since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. The reason for enactment of Section 438 in the Code was parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for



personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the legislature. The issue is not whether Section 438 is an intrinsic element of Article 21: it is rather whether that provision is part of fair procedure. As to that, there can be no doubt that the provision for anticipatory bail is pro-liberty and enables one anticipating arrest, a facility of approaching the court for a direction that he or she not be arrested; it was specifically enacted as a measure of protection against arbitrary arrests and humiliation by the police, which Parliament itself recognised as a widespread malaise on the part of the police. The argument that the Act 2015 does not make provision in the nature of Section 438 CrPC and that Sections 10 and 12 of the Act 2015 are complete Code in themselves; is also not acceptable. Sections 10 and 12 of the Act 2015 operate "after" a child alleged to be in conflict with law is apprehended. Thus, they refer to "post" apprehension stage. They do not refer to "pre" apprehension stage. Therefore, they cannot be in conflict with the provisions of Section 438 CrPC. The non-obstante clause used in Section 12 operates only when there is a conflict between the provisions of the CrPC and



the provisions of Section 12 of the Act 2015. Since there is no conflict between the provisions of Section 438 of the CrPC and Section 10 or 12 of the Act 2015, therefore, availability of right under Section 438 CrPC is not taken away to the detriment of a child. It in no manner creates an ouster for the application of Section 438 CrPC. A non-obstante clause is added to a provision in order to uphold its enforceability over another provision that is contradictory to it. It is well settled that the non-obstante clause has overriding effect only in case of inconsistency. High Courts' progressive views in support of the above arguments: i) Calcutta High Court – Miss Surabhi Jain (Minor) and Ors. vs. State of West Bengal C.R.M. 405 of 2021 with CRAN 1 of 2021, dated 23.08.2021, ii) Gujrat High Court – Kureshi Irfan Hasambhai v. State of Gujrat, (Gujrat) 2021 (3) GujLH 1, iii) Allahabad High Court – a) Mohammad Zaid v. State of U.P. and Anr. 2023 (243) AIC 923 passed on 24.05.2023, b) Ali (Minor) v. State of U.P. passed on 20.05.2021, iv) Punjab & Haryana High Court – a) Jatin v. State of Punjab passed on 29.05.2024, b) Krishna Kumar (Minor) v. State of Haryana passed in CRM-M 19907 of 2020, v) Madhya Pradesh High Court -a) Satyendra Sharma v. State of M.P (2014) Supreme (MP) 354. b) Ankesh Gurjar v. State of M.PAIR Online 2020 (MP) 1862, vi) Kerela High Court Mr. X (Prashob) v. State of Kerela Bail Appl. No, 3320 of 2018, vii) Guahati High Court Dasarath Roy @ Dipjyoti Roy v. State of Assam AB / 3286 OF 2023 passed on 29.07.2024, viii) Jharkhand High Court Ashutosh Kumar Roy v. State of Jharkhand ABA No. 2172 of 2023 passed on 24.04.2023, ix) Odisha High Court Sabham Jena v. State of Odisha CRLREV No. 551 of 2022 passed on



05.01.2023, x) Delhi High Court Master X v. State NCT of Delhi (2023), Recognized emergency jurisdiction, laid down conditions for maintainability, balanced approach adopted, xi) Bombay High Court – Raman and Ors. vs. State of Maharashtra 2022 SCC Online Bom 1470. Thus, concluding that a “child” or a “child in conflict with law” as per the Act 2015 can file an application for anticipatory bail under Section 438 of the Criminal Procedure Code, 1973 and the same would be maintainable. Since there is no bar under Section 438 CrPC restricting its application in so far, a child in conflict with law is concerned, the same would be fully applicable. Further, since there is no bar for its applicability therein, the same would thus be applicable for a child in conflict with law as he cannot be left remedy-less till the time of his apprehension by the concerned authority or arrest whatever the case may be. The legislature has not barred the application of Section 438 CrPC. While legislating the Act 2015. Even the fundamental right of a child in conflict with law would get infringed if he is not given equal treatment in so far as the right for anticipatory bail is concerned. The same would apply to him subject to inbuilt restrictions in Section 438 CrPC.

6. Mr. De, learned senior counsel appearing on behalf of the Union of India has submitted and has relied on the written notes as follows. The present case raises a question relating to the applicability and maintainability of Section 438 of Code of Criminal Procedure in a case where a child in conflict with law is involved. The principal question as to whether a child in conflict with law will be entitled to prefer an application for anticipatory bail before this Court or any



other Court of Law or the provisions laid down under the Juvenile Justice (Care and Protection of Children), 2015 will prevail over the Code. On perusing the provision laid down in Section 10 of The Juvenile Justice (Care and Protection of Children), 2015, it could be construed that the aforesaid section only speaks about the procedure to be followed post the apprehension of the child in conflict with law. There is no whisper anywhere in the act either about the procedures to be followed or of any protection or bail to be provided to a child in conflict with law at the pre-apprehension stage. It is axiomatic to say that the aforesaid provision excludes the operation of any other law in relation to the subject indicated therein concerning the children in need of care and protection and the children in conflict with law. The word 'arrest' has not been used anywhere in the said Act and what is used is the word 'apprehension' and, therefore, it is a first and foremost duty to understand such distinction apropos the object and purpose of the Special Act. The word 'apprehends' generally means to seize under the process of law; to take custody of or make prisoner. In Concise Law Dictionary the "apprehension" is defined as "the seizing of taking hold of a man; the act of arresting or seizing under process of law; arrest; the apprehension of criminals or sometimes may be used as detention." Though the apprehension conveys the said same meaning that of the arrest but it is distinguished because of the legislative conscious decision in omission of such word in the said Act. The reason as one could visualise is the special procedure and a special prosecuting agency and the dealing with the children in conflict with law in a discreet manner in comparison to the other. Section 10 of the Juvenile



Justice Act deals with the apprehension of the child in conflict with law wherein such child is required to be placed before the charge of the Special Juvenile Protection Unit or Designated Child Protection Officer who, without any loss of time will produce him before the Juvenile Justice Board within 24 hours of such apprehension. The proviso makes it abundantly clear that such child shall not be placed in a police lock-up or put in a jail. Section 12 deals with the bail of such child by the Board and the distinguishing feature can be seen therefrom that such child will be released on bail with or without surety. In the event, the bail application of such child is refused on recording a proper ground in exercise of the powers under the proviso appended to Section 12(1) of the said Act, sub-Section (2) thereof mandates the keeping of such child in observation home in such manner as may be prescribed. Both Section 10 and Section 12 deals with a situation where the child is apprehended and placed before the Juvenile Justice Board and does not contain any specific provision relating to pre-apprehended situation. The subsequent provision contained in the said Act relates to various remedial measures to be undertaken for protection and welfare of the child in conflict with law. None of the provisions, as indicated above, are pointer to an issue raised in the instant application whether the child in conflict with law can approach the High Court or any other Court of Law seeking anticipatory bail under Section 438 of the Cr. P.C. The Juvenile Justice (Care and Protection of Children) Model Rules, 2016 in Rule 8 sub-rule (1), speaks about the pre-production actions to be followed by the Police and other Agencies. The Rule 9 of the Juvenile Justice (Care and Protection of Children)



Model Rules, 2016 lays down the following procedures to be followed relating to the production of the child in conflict with law before the Juvenile Justice Board. That the Bombay High Court in *Chapadgaon Vividh Karyakari Seva Sahakari Society and others vs. Collector of Ahmednagar* – 1989 SCC OnLine Bom 182 – 1989 Mah LJ 872 had laid down its observation with respect to the inconsistency between the Rules and Section and which of the two will prevail under such circumstances. Section 438 of the Code of Criminal Procedure specifically and clearly speaks of “person” as a whole and does not distinguish between a minor and a major. Therefore, it is evident from the plain reading of Section 438 of the Code of Criminal Procedure that it does not bar any child in conflict with law from seeking protection under this Section. Even the newly amended Act, Section 482 of the *Bharatiya Nagarik Suraksha Sanhita, 2023*, which speaks about the grant of bail to a person apprehending arrest, does not create an embargo upon a child in conflict with law from seeking protection under this Act at a pre-apprehension stage. That in order to deal with the question relating to the fact whether the Special Act will prevail over the Code or not, the Section 5 of the Code of Criminal Procedure has to be taken into consideration, which states as follows:-“Section 5 – Saving – nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.” Therefore, it can be safely stated that the special law would prevail over the general law only when there is an inconsistency or



conflict between the two statutes. Since, neither the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Code of Criminal Procedure creates an embargo upon a child in conflict with law from seeking protection under Section 438 of the Code of Criminal Procedure nor any of the statutes provide any protection to a child in conflict with law at a pre-apprehension stage, therefore, the question of 'conflict between the Juvenile Justice (Care and Protection of Children) Act, 2015 and Section 438 of the Code of Criminal Procedure does not arise herein. Hence, the Juvenile Justice (Care and Protection of Children) Act, 2015 will not have an overriding effect on the Code of Criminal Procedure, 1973 when the question arises with respect to the grant of bail to a child in conflict with law at pre apprehension stage. The Hon'ble Apex Court in paragraph 35 of (2020) 4 Supreme Court Cases 702: (2020) 2 Supreme Court Cases (Cri) 636: Chief Information Commissioner versus High Court of Gujarat and Others has also given observation on similar lines: "35. The non obstante clause of the RTI Act does not mean an implied repeal of the High Court Rules and orders framed under Article 225 of the Constitution of India; but only has an overriding effect in case of inconsistency, A special enactment or rule cannot be held to be overridden by a later general enactment simply because the latter opens up with a non obstante clause, unless there is clear inconsistency between the two legislations. In this regard, we may usefully refer to the judgement of the Supreme Court in R.S. Raghunath v. State of Karnataka (1992) 1 Supreme Court Cases 335, wherein, the Supreme Court held as under (SCC p. 153, para 38): In Ajoy Kumar Banerjee v. Union of India (1984) 3 Supreme Court Cases



127, paragraph 38: 38. ...As mentioned hereinbefore if the Scheme was held to be valid, then the question what is the general law and what is the special law and which law in case of conflict would prevail would have arisen and that would be necessitated the application of the principle "generalia specialibus non derogant". The general rule to be followed in case of conflict between the two statutes is that the later abrogates the earlier one. In other words, a prior special law would yield to a later general law, if either of the two following conditions is satisfied: (i) The two are inconsistent with each other. (ii) There is some express reference in the later to the earlier enactment." The Supreme Court in paragraph 36 of the judgement stated that: - "36. As pointed out earlier, Section 31 of the RTI Act repeals only the Freedom of Information Act, 2002 and not other laws. If the intention of the legislature was to repeal any other Acts or laws which deal with the dissemination of information to an applicant, then the RTI Act would have clearly specified so. In the absence of any provision to this effect, the provisions of the RTI Act cannot be interpreted so as to attribute a meaning to them which was not intended by the legislature. In the RTI Act, there is no specific reference to the rules framed by the various High Courts or any other special law excepting the Freedom of information Act, 2002." That the intention and intendment of statute has been described by the Hon'ble Supreme Court and the Hon'ble Bombay High Court in the following manner - "Intention and intendment - No canon of construction can be said to be more firmly established than this that the Legislature uses appropriate language to manifest its intention. {(1984) 2 Supreme Court Cases 50 = AIR 1984 SC 192 = Babaji



Kondaji Garad v. Nasik Merchants Co-Operative Banks Ltd, Nasik and Others). The intention of the Legislature must be gathered from the words used in the section itself, and the Courts cannot, on the possibility of abuse, give the Proviso a different construction when the grammatical construction undoubtedly achieves the object as indicated in the Proviso. (AIR 1974 Bom 281 = 1974 SCC OnLine Bom 14 Shankarrao Ramchandrarao Phate and Another u. Chatrapal Anandrao Kedar and Others). It is the primary duty of a Court to give effect to the intention of the Legislature as expressed in the words used by it, and no outside consideration can be called in aid to find that intention. {1950 SCC OnLine SC 21 = New Piece Goods Bazar Company Limited, Bombay v. Commissioner of Income Tax, Bombay). In order to arrive at true intendment of a statute, the Court should pose to itself the following questions: - (1) What was the situation prior to the provision under consideration; (2) What mischief or defect was noticed before introducing the provision; (3) Whether it was remedial; and (4) The reason for the remedy; = {(1984) 2 Supreme Court Cases 50 AIR 1984 SC 192 = Babaji Kondaji Garad v. Nasik Merchants Co-Operative Banks Ltd, Nasik and Others). That various High Courts have explained the construction of statutes in the following manner: - "Construction of statutes ordinarily, when interpreting a section or provision of law, the Court has to take that section or provision as it stands and find out its meaning. Where the meaning is plain it has to be given effect to. "No provision of statute can be said to be redundant or meaningless. It is well-settled rule of interpretation that- (a) no part of a statute must be construed in isolation for the intention of the law-



maker is to be found not in one part of the statute or another but in the entire enactment, and (b) that intention can be best gathered by viewing a particular part of the statute not detached from its context in the statute but in connection with its whole context. The Court should, as far as possible, construe a statute so as to avoid tautology or superfluity." Reference:- a) 1965 SCC OnLine Kar 153 = B. Sunkaiah v. Town Panchayat, Kottur and Others; b) 1989 SCC OnLine Bom 41 1989 Mah LJ 819 Kishinsingh and others v. State of Maharashtra; Sant Joginder Singh, c) 964 SCC OnLine Guj 14 AIR 1966 Guj 19 Patel Kanchanbhai Mangalbhai and another v. Maneklal Maganlal Gandhi and others; d) AIR 1975 SC 43 = (1975) 1 Supreme Court Cases 76 = Omed v. Raj Singh, e) AIR 2008 SC 1246 = (2008) 5 Supreme Court Cases 449 Bhailal Patel and Others v. State of Gujarat) Ramanlal. That the Division Bench of the Hon'ble Himachal Pradesh High Court in "Rakesh Kumar v. State of Himachal Pradesh 1980 SCC OnLine HP 19 = AIR 1981 Him Para 80" made an observation with regard to what should be the language of statute and the construction thereof. It was held that: "(a) When the language of a statute is susceptible of two interpretations, one of which are reasonable and the other is unreasonable, the Court should hold that the former must prevail. b) At the same time, where the language of a statute is general, doubtful or obscure, the language may be modified or varied by interpretation in order to avoid manifest absurdity, repugnance, mischief or justice. It is not to be supposed that the Legislature intended to do a palpable injustice. (c) Whenever the language of the legislation- (i) admits of two constructions, and (ii) if construed in one way,



would do obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention to bring it about has been manifested in plain words. (d) Where the result of one of the two interpretations would lead to an absurdity, the one which avoids absurdity should be followed." Even if we keep aside the aforesaid factors, and take into account the provision laid down in Section 10 of The Juvenile Justice (Care and Protection of Children), 2015, which states that a child who has been apprehended under the statute has to be produced before the Juvenile Justice Board within a period of 24 hours. The aforesaid procedure and/or procedure completely curtails the personal liberty of a child, which is contradictory and violative of Article 21 of the Constitution of India, where it has been clearly stated that: - "No person shall be deprived of his life or personal liberty except according to procedure established by law". In support of the aforesaid, in *Liversidge v. Anderson*, Lord Atkin spoke of "a principle which again is one of the pillars of liberty in that in English Law every imprisonment is prima facie unlawful and it is for a person directing imprisonment to justify his act". Therefore, upon perusal of the aforesaid, it can be concluded that neither the provisions laid down in The Juvenile Justice (Care and Protection of Children), 2015 nor the provisions laid down in the Code of Criminal Procedure, 1973 (now Bharatiya Nagarik Suraksha Sanhita, 2023) creates an embargo upon a child in conflict with law from seeking protection under Section 438 of the Code of Criminal Procedure. Also, the right to personal liberty of every person irrespective of his age is protected by Article 21 of the Constitution of India, which entitles a minor or a



child in conflict with law to make an application under Section 438 of the Code of Criminal Procedure before This Hon'ble Court or any other Court of Law. The right of personal liberty is sacrosanct and inviolable in nature except by established procedure of law. The aforesaid written argument primarily deals with the freedom from physical restraint of a person by incarceration or otherwise by passage of time and the advancement of the law in relation to the right of personal liberty. The expression 'procedure established by law' is probably used in the sense of the enacted law either by the Parliament or by the State and not in an abstract or general sense embodying the principle of natural justice. The Juvenile Justice Act, 2015 does not conceive of any situation i.e., pre-apprehension stage. A specific provision has been provided like Section 12 of the Act which operates post-apprehension stage. Section 5 of the Code of Criminal Procedure aims at saving the special or local law for the time being or any special jurisdiction of power conferred under the aforesaid law but the word "in absence of a specific provision to the contrary" should not be overlooked by any Court of Law. The harmonious reading of the language used therein leaves no ambiguity that the Code of Criminal Procedure shall not affect any special law or local law or special jurisdiction or the power or the special form of procedure so prescribed if there be the contrary provisions contained in the Code of Criminal Procedure. The assimilation of the reason assigned hereinabove make it galore that the special act like Juvenile Justice Act does not have any specific provision for anticipatory bail to be granted by the Juvenile Justice Board or any other special forum and, therefore, the right of



the child in conflict with law cannot be foreclosed if otherwise available under the general law. The Constitution does not make a distinction between an adult or the minor. The fundamental right guaranteed under the Constitution is equal to all and a special protection can be provided to marginalized person or a person with some disability to augment their need in juxtaposition with the individual invoking the provision for anticipatory bail but the child in conflict with law shall be denied such right when the special law applicable does not contain any such provision, is unacceptable. There is no contrary provision contained in the Juvenile Justice Act which runs counter to the provision of the Code of Criminal Procedure more particularly, under Section 438 of the Code of Criminal Procedure. Reliance may be placed on (2020) 4 SCC 702; (2020) 2 SCC (Cri) 638; 2020 SCC OnLine SC 285 - Chief Information Commissioner v. High Court of Gujarat and Another.

7. We heard the learned senior counsels appearing on behalf of the parties and perused the application and the respective written notes of submissions.

8. At the outset, it would be profitable to quote the provisions of pre-arrest bail as contained in “Section 438” of the Code of Criminal Procedure as under:-

“.....

438. Direction for grant of bail to person apprehending arrest.—(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. (2) When the High Court or the Court of Session makes a direction under sub-



section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including— (i) a condition that the person shall make himself available for interrogation by a police officer as and when required; (ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer; (iii) a condition that the person shall not leave India without the previous permission of the Court; (iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section. (3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1). 2[(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).] STATE AMENDMENTS West Bengal.— To sub-section (1) of section 438 of the principal Act, the following proviso shall be added:— “Provided that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the State not less than seven days’ notice to present its case. [Vide West Bengal Act 47 of 1981, s. 3].

West Bengal.— For sub-section (1) of section 438, of the principal Act the following sub-sections shall be substituted, namely:— “(1) (a) 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 that in the event of such arrest, he shall be released on bail: Provided that the mere fact that a person has applied to the High Court or the Court of Session for a direction under this section shall not, in the



absence of any order by that Court, be a bar to the apprehension of such person, or the detention of such person in custody, by an officer-in-charge of a police station. (b) The High Court or the Court of Session, as the case may be, shall dispose of an application for a direction under this sub-section within thirty days of the date of such application: Provided that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the State not less than seven days notice to present its case. (c) If any person is arrested and detained in custody by an officer-in-charge of a police station before the disposal of the application of such person for a direction under this sub-section, the release of such person on bail by a Court having jurisdiction, pending such disposal, shall be subject to the provisions of section 437. (1A) The provisions of sub-section (1) shall have effect notwithstanding anything to the contrary contained elsewhere in this Act or in any judgment, decree or order of any Court, tribunal or other authority.” [Vide West Bengal Act 25 of 1990, s. 3.]

.....”

9. On the other hand, Section 10 and 12 of the Juvenile Justice Care and Protection Act, 2015 provide as under:-

“

10. Apprehension of child alleged to be in conflict with law.—(1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended: Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail. (2) The State Government shall make rules consistent with this Act,— (i) to provide for persons through whom (including registered



voluntary or non-governmental organisations) any child alleged to be in conflict with law may be produced before the Board; (ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.

.....”

“

12. Bail to a person who is apparently a child alleged to be in conflict with law.—(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person: Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person’s release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision. 15 (2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home 1[or a place of safety, as the case may be] in such manner as may be prescribed until the person can be brought before a Board. (3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order. (4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.

.....”



10. It is trite law that a special law like the Juvenile Justice Care and Protection Act, 2015 would prevail over a general law like the Code of Criminal Procedure, 1973 to the extent of any inconsistency as regards provisions contained in the said Acts. Therefore, it needs to be emphasized that the question of one prevailing over the other would arise only and only if there is any inconsistency.

11. Incidentally, the Act of 2015 nowhere specifically bars the applicability of pre-arrest bail.

12. The supposed “bar” on the applicability of Section 438 of the Code of Criminal Procedure in the case of a juvenile primarily arises out of certain provisions contained in the Act of 2015 stipulating that in case of apprehension of a juvenile, certain orders may be passed as per the Act.

13. These clearly point towards two distinct levels at which a pre-arrest bail and steps to be taken after apprehension of a juvenile are to operate.

14. Steps to be taken in case of apprehension of a juvenile or a child in conflict with law are meant mainly to avoid putting him in custody like in a police lock-up as is done in case of adults. Putting him in an observation home is prescribed as an alternative to regular custody – police or judicial. But, even sending a juvenile to an observation home is a curtailment of liberty. Therefore, such measures as are meant merely to avoid sending a child in conflict with law to regular custody cannot be a surrogate for pre-arrest bail, which ensures a complete relief from any such curtailment of liberty. Then, there are provisions



under Sections 19 and 20 of the 2015 Act in view of which a child in conflict with law might have to spend the unexpired term of stay in a jail after attaining 21 years.

15. In other words, the issue of anticipatory bail or pre-arrest bail as contemplated under Section 438 of the Code of Criminal Procedure of 1973 is not envisaged anywhere in the Act of 2015. In this respect, the Acts operate on different planes. The Act of 2015 only deals with the steps to be taken once a juvenile or a child in conflict with law is apprehended.

16. In view of the above, this Court does not find any contradiction in the above referred provisions contained in the two Acts vis-à-vis the applicability of Section 438 of Code of Criminal Procedure, 1973 to a juvenile or a child in conflict with law.

17. Law is dynamic. Quite commensurately, the concept of anticipatory bail or pre-arrest bail, after its introduction in the Code, has also undergone changes over the years.

18. In *Dhanraj Aswani vs Amar S Mulchandani and Anr.*, (2024) 10 SCC 336, a Three Judges Bench of the Hon'ble Supreme Court held that, "The term arrest is not defined either in the procedural Acts or in the various substantive Acts, though Section 46, CrPC, lays down the mode of arrest to be effected.....". Thus, it would be too far-fetched to restrict the meaning of 'arrest' by adverting to the mode of arrest as prescribed in the Code.



19. Therefore, an interpretation may fairly be contemplated so as to include within its ambit, any kind of apprehension or detention or custody, curtailing the liberty of a citizen, especially when tested on the anvil of Article 21 of the Constitution of India. According to Black's Law Dictionary, 6th Edition, "arrest" means, among other things, "to deprive a person of his liberty by legal authority"; "taking, under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand."

20. Quite commensurately, some High Courts have held that the word "apprehension" in Section 10 of the Act of 2015 could be treated as synonymous with 'arrest' as used in Section 438 of the Code. A reference may be made to Kureshi Irfan Hasambhai vs State of Gujarat (supra) and Raman and Anr. vs State of Maharashtra, 2022 SCC Online Bom 1470.

21. There is even a concept of apprehension of arrest not being confined to an arrest only by the police. In Mahdoom Bava vs. CBI, reported at 2023 SCC Online SC 299, appeals against rejection of anticipatory bail were opposed by the CBI, inter alia, with a categorical stand that the Court had merely issued summons and not warrant for appearance of the accused. There, the Hon'ble Apex Court held that -

".....

10. More importantly, the appellants apprehend arrest, not at the behest of the CBI but at the behest of the Trial Court. This is for the reason that in some parts of the



country, there seems to be a practice followed by Courts to remand the accused to custody, the moment they appear in response to the summoning order. The correctness of such a practice has to be tested in an appropriate case. Suffice for the present to note that it is not the CBI which is seeking their custody, but the appellants apprehend that they may be remanded to custody by the Trial Court and this is why they seek protection. We must keep this in mind while deciding the fate of these appeals.

....."

22. Therefore, one may fairly hold that the apprehension of a juvenile or a child in conflict with law, for whatever purpose or consequence, would tantamount to restriction of his liberty and, therefore, a pre-arrest bail can be invoked even if such apprehension is contemplated.

23. In any event, a Court of Law cannot undertake a hyper technical or shallow approach in interpreting provisions of law, especially when the same relates to the rights and liberties of individuals, that too of juveniles. The true spirit and intent of a legislation needs to be carefully comprehended.

24. Although a preamble cannot control or restrict the substantive provisions of an Act, it may, nonetheless, be germane here to refer to the prefatory portions of the Act of 2015 to understand the true purport and intent, as under:-

"An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto.



Whereas, the provisions of the Constitution confer powers and impose duties, under clause (3) of article 15, clauses (e) and (f) of article 39, article 45 and article 47, on the State to ensure that all the needs of children are met and that their basic human rights are fully protected;

And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations, which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of the child;

And Whereas, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993), and other related international instruments.

.....”

25. It would, thus, be rather preposterous to accept a proposition that a special legislation meant for the benefits of juveniles like the Act of 2015 can actually take away a valuable right of pre-arrest bail given to any citizen including juveniles or children in conflict with law in a general law like the Code of 1973.

26. It is another thing that in the present case the parties including the State and the Union of India have all finally converged to the same view that for their respective reasons as discussed above, an anticipatory bail application would be maintainable when filed by a juvenile or a child in conflict with law.



27. In view of the above discussions, I am of the opinion that an application for pre-arrest bail filed by a juvenile or a child in conflict with law in terms of Section 438 of the Code of Criminal Procedure, 1973 is maintainable.

28. The reference is, accordingly, answered.

29. Urgent Photostat certified copy of this order, if applied for, be given to the parties, upon completion of requisite formalities.

(Jay Sengupta, J.)

**Tirthankar Ghosh, J:-**

I had the opportunity to consider the judgments of my brother judges, Hon'ble Justice Jay Sengupta and Hon'ble Justice Bivas Pattanayak wherein both of them have expressed their opinion in respect of the terms of reference which calls for this Larger Bench to answer the issue as to "whether an application for anticipatory bail under Section 438 of the Code of Criminal Procedure 1973 is maintainable in respect of a juvenile/ child in conflict with law under The Juvenile Justice (Care And Protection Of Children) Act, 2015."

The provisions of anticipatory bail as appearing in Section 438 of CrPC/ Section 482 of the BNSS is preferred usually when a person apprehends that he may be arrested on accusation of having committed non-bailable offence.

The word 'arrest' therefore assumes prominence and is required to be dealt with as the said term has not been used in the Juvenile Justice (Care And Protection Of Children) Act, 2015 (hereinafter referred to as the Act of 2015). It would not be out of place to state that with passage of time, the word 'arrest' by way of judicial interpretation has received an expansive meaning. The same has been exhaustively dealt with in ***Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440***. The relevant paragraphs are set out herein as follows:

"45. The first limb of sub-section (1) of Section 167 uses the expression "person is arrested and detained in custody". The word 'accused' occurring in the second limb of sub-section (1) and in sub-



section (2) of Section 167 refers only that person “arrested and detained in custody”.

46. The word ‘arrest’ is derived from the French word ‘Arreter’ meaning “to stop or stay” and signifies a restraint of the person. Lexicologically, the meaning of the word ‘arrest’ is given in various dictionaries depending upon the circumstances in which the said expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in *Roshan Beevi v. Joint Secretary, Government of T.N.* [1984 Cri LJ 134 : (1984) 15 ELT 289 : 1983 MLW (Cri) 289 (Mad)] had an occasion to go into the gamut of the meaning of the word ‘arrest’ with reference to various textbooks and dictionaries, the *New Encyclopaedia Britannica*, *Halsbury's Laws of England*, *A Dictionary of Law* by L.B. Curzon, *Black's Law Dictionary* and *Words and Phrases*. On the basis of the meaning given in those textbooks and lexicons, it has been held that:

“[T]he word ‘arrest’ when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested.”

47. There are various sections in Chapter V of the Code titled “Arrest of persons” of which Sections 41, 42, 43 and 44 empower different authorities and even private persons to arrest a person in given situation. Section 41 deals with the power of a police officer to arrest any person without an order from a Magistrate and without a warrant. Section 42



deals with the power of a police officer to arrest any person who in the presence of a police officer has committed or has been accused of committing a non-cognizable offence and who refuses on demand “to give his name and residence or gives a name or residence which such officer has reason to believe to be false”. Section 43 empowers any private person to arrest any person who in his presence commits a non-cognizable offence, or any proclaimed offender. Section 44 states that when any offence is committed in the presence of a Magistrate whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender and may thereupon subject to the provisions contained in the Code as to bail commit the offender to custody.

48. *Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words ‘custody’ and ‘arrest’ are not synonymous terms. Though ‘custody’ may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi [1984 Cri LJ 134 : (1984) 15 ELT 289 : 1983 MLW (Cri) 289 (Mad)] .*

49. *While interpreting the expression ‘in custody’ within the meaning of Section 439 CrPC, Krishna Iyer, J. speaking for the Bench in Niranjana*



Singh v. Prabhakar Rajaram Kharote [(1980) 2 SCC 559, 563 : 1980 SCC (Cri) 508] observed that: (SCC p. 563, para 9)

“He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions.”

50. *The next vital question, in this connection that crops up for consideration is as to whether the registration of a case and the entries in the diary relating to that case as prescribed by the Code are sine qua non for a Magistrate taking into custody of a person when that person appears or surrenders or is brought before the Magistrate and whether that person should have assimilated the characteristic of “an accused of an offence” at that stage itself within the meaning of sub-section (1) of Section 167 or sub-section (1) of Section 437 CrPC.*

51. *This question is in a way answered in Gurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : (1980) 3 SCR 383] . While examining the scope of Section 438 of the Code in that case, Chandrachud, C.J. speaking for the Constitution Bench held that: (SCR p. 418: SCC p. 590, para 37)*

“The filing of a first information report is not a condition precedent to the exercise of the powers under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.”

52. *The dictum laid down in that case indicates that the registration of a case and the entries of the case diary are not necessary for entertaining an application for grant of anticipatory bail, but the mere imminence of a likely arrest on a reasonable belief on an accusation of having committed a non-bailable offence, will be sufficient to invoke that provision.*



53. *In the backdrop of the above legal position, the conclusion that can be derived is that a Magistrate can himself arrest or order any person to arrest any offender if that offender has committed an offence in his presence and within his local jurisdiction or on his appearance or surrender or is produced before him and take that person (offender) into his custody subject to the bail provisions. If a case is registered against an offender arrested by the Magistrate and a follow-up investigation is initiated, or if an investigation has emanated qua the accusations levelled against the person appearing or surrendering or being brought before the Magistrate, the Magistrate can in exercise of the powers conferred on him by Section 167(2) keep that offender or person under judicial custody in case the Magistrate is not inclined to admit that offender or person to bail.”*

Further, the very apprehension of an individual being taken into custody even in response to summons has been dealt with by the Hon’ble Apex Court in ***Mahdoo Bava v. CBI, 2023 SCC OnLine SC 299***. The following paragraphs are relevant for the purpose of present case and as such are set out here in detail:

“10. *More importantly, the appellants apprehend arrest, not at the behest of the CBI but at the behest of the Trial Court. This is for the reason that in some parts of the country, there seems to be a practice followed by Courts to remand the accused to custody, the moment they appear in response to the summoning order. The correctness of such a practice has to be tested in an appropriate case. Suffice for the present to note that it is not the CBI which is seeking their custody, but the appellants apprehend that they may be remanded to custody by the Trial Court and this is why they seek protection. We must keep this in mind while deciding the fate of these appeals.*

11. *In the case of the prime accused, namely Shri Mahdoo Bava, an additional argument advanced by the learned Additional Solicitor General is that he was involved in eleven other cases. But the tabulation of those*



eleven cases would show that seven out of those eleven cases are complaints under Section 138 of the Negotiable Instruments Act, 1881 and three out of those seven cases are actually inter-parties and not at the instance of the Bank. The eighth case is a complaint filed by the Income Tax Officer and it relates to the non-payment of TDS amount. The remaining three cases are the cases filed by CBI, one of which is the subject matter out of which the above appeals arise.

12. *In view of the aforesaid, we are of the considered view that the appellants are entitled to be released on bail, in the event of the Court choosing to remand them to custody, when they appear in response to the summoning order. Therefore, the appeals are allowed and the appellants are directed to be released on bail, in the event of their arrest, subject to such terms and conditions as may be imposed by the Special Court, including the condition for the surrender of the passport, if any.”*

The provision of Section 12 of the Act of 2015 states as follows:

“Section 12. Bail to a person who is apparently a child alleged to be in conflict with law.-

(1) When any person, who is apparently a child and is alleged to have committed a available or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the persons release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home ¹[or



a place of safety, as the case may be in such manner as may be prescribed until the person can be brought before a Board.

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

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

It would reflect that in every case, the Board before whom the juvenile or the child in conflict with law appears or is brought before is not bound to release the juvenile/child in conflict with law on bail. The proviso clause itself reflects that in case the release of the child in conflict with law defeats the ends of justice, the Board is empowered to deny bail.

The preamble of the Act of 2015 states as follows:

“An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social reintegration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto”

Section 2 sub-Section (12) and (13) defines ‘child’ and ‘child in conflict with law’ as follows:



“Section 2(12): “child” means a person who has not completed eighteen years of age;

Section 2(13): “child in conflict with law” means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;”

Further Section 2 sub-Section (33), (45) and (54) defines the different categories of offences under which the child in conflict with law may be implicated. The definition of the aforesaid offences read as follows:

“Section 2(33): “heinous offences” includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more;

Section 2(45): “petty offences” includes the offences for which the maximum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment up to three years;

Section 2(54): “serious offences” includes the offences for which the punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force, is,-

(a) minimum imprisonment for a term more than three years and not exceeding seven years; or

(b) maximum imprisonment for a term more than seven years but no minimum imprisonment or minimum imprisonment of less than seven years is provided.”

As Section 12 of the Act of 2015 do not consider bail to be mandatory in all circumstances and the proviso clause empowers the Board to refuse bail, the particular issue as to whether a child in conflict with law apprehends that he may be arrested or taken into custody assumes importance.



The intention of the legislature in enacting the provisions of the Act of 2015 is for the benefit of the child as the preamble itself reflects that the Act has been enacted for proper care, protection, development, treatment, social reintegration of the child in conflict with law.

Thus, the Act is a beneficial legislation for the proper aid of a child. Consequently, when a child is faced with a criminal offence and the Act do not provide that the child would automatically be released on bail when he appears or is brought before the Board or in other words his personal liberty to go wherever he pleases is curtailed, I am of the view that it would be too harsh to take away the right from a child while the same remedy is available to an adult.

The Act is silent on the applicability of the Section 438 of Cr.PC/Section 482 of BNSS, but unlike the provision of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 do not expressly prohibit the applicability of Section 438 of the Cr.PC.

In ***Vijay Madanlal Choudhary v. Union of India, 2022 SCC OnLine SC 929*** the question for consideration was as to whether when the provision of Section 438 of the Cr.PC is not incorporated in the Act such benefit could be extended to an individual who is accused of an offence under the provision of the Prevention of Money Laundering Act, 2002. The Hon'ble Apex Court after taking into account the relevant provisions of Section 438 of the Cr.PC in the following paragraphs was pleased to hold as follows:



“309. Another incidental issue that had been raised is about the non-application of rigours of Section 45 of the 2002 Act in respect of anticipatory bail filed under Section 438 of the 1973 Code. This submission presumably is linked to the observation in SCC para 42 in *Nikesh Tarachand Shah* [*Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1 : (2018) 2 SCC (Cri) 302] . Similar argument was considered in *Enforcement Directorate v. V.C. Mohan* [*Enforcement Directorate v. V.C. Mohan*, (2022) 16 SCC 794] . We are in agreement with the observation in this decision that it is one thing to say that Section 45 of the 2002 Act refers to a scheduled offence under the general law, but, as noted earlier, the offence under this Act in terms of Section 3 is specific to involvement in any process or activity connected with the proceeds of crime which is generated as a result of criminal activity relating to a scheduled offence. It is also true that Section 45 does not make specific reference to Section 438 of the 1973 Code, but it cannot be overlooked that sub-section (1) opens with a non obstante clause and clearly provides that [notwithstanding] anything contained in the 1973 Code (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond, unless the stipulations provided therein are fulfilled. On account of the non obstante clause in Section 45(1) of the 2002 Act, the sweep of that provision must prevail in terms of Section 71 of the 2002 Act.

310. Further, the expression “anticipatory bail” is not used either in the 1973 Code or the 2002 Act. The relief granted in terms of Section 438 of the 1973 Code is one of directing release of the person on “bail” in case of his arrest; and such a relief has been described in judicial pronouncements as anticipatory bail. Section 45(1) uses generic expression “bail” without reference to any provision of the 1973 Code, such as Sections 437, 438 and 439 of the 1973 Code. Concededly, Section 65 of the 2002 Act states that the provisions of the 1973 Code shall apply to the provisions under the Act insofar as they are not inconsistent with the provisions of the 2002 Act. Further, Section 71 PMLA gives overriding effect to the Act. Section 45 PMLA begins with a



non obstante clause, thus excluding the application of the 1973 Code in matters related to “bail”.

311. *The word “anticipatory bail” has not been defined under the 1973 Code. In Sushila Aggarwal [Sushila Aggarwal v. State (NCT of Delhi), (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721] , it was held as under : (SCC p. 36, para 7)*

“7.1. At the outset, it is required to be noted that as such the expression “anticipatory bail” has not been defined in the Code. As observed by this Court in Balchand Jain [Balchand Jain v. State of M.P., (1976) 4 SCC 572 : 1976 SCC (Cri) 689] , “anticipatory bail” means “bail in anticipation of arrest”. As held by this Court, the expression “anticipatory bail” is a misnomer inasmuch as it is not as if bail is presently granted by the court in anticipation of arrest. An application for “anticipatory bail” in anticipation of arrest could be moved by the accused at a stage before an FIR is filed or at a stage when FIR is registered but the charge-sheet has not been filed and the investigation is in progress or at a stage after the investigation is concluded. Power to grant “anticipatory bail” under Section 438CrPC vests only with the Court of Session or the High Court. Therefore, ultimately it is for the court concerned to consider the application for “anticipatory bail” and while granting the “anticipatory bail” it is ultimately for the court concerned to impose conditions including the limited period of “anticipatory bail”, depends upon the stages at which the application for anticipatory bail is moved. A person in whose favour a pre-arrest bail order is made under Section 438CrPC has to be arrested. However, once there is an order of pre-arrest bail/anticipatory bail, as and when he is arrested he has to be released on bail. Otherwise, there is no distinction or difference between the pre-arrest bail order under Section 438 and the bail order under Sections 437 & 439CrPC. The only difference between the pre-arrest bail order under Section 438 and the bail order under Sections 437 and 439 is the stages at which the bail order is passed. The bail order under Section 438CrPC is prior to his arrest and in anticipation of his arrest and the order of bail under Sections 437 and 439 is after a person is arrested. A bare reading



of Section 438CrPC shows that there is nothing in the language of the section which goes to show that the pre-arrest bail granted under Section 438 has to be time-bound. The position is the same as in Section 437 and Section 439CrPC.”

(emphasis supplied)

312. *Thus, anticipatory bail is nothing but a bail granted in anticipation of arrest, hence, it has been held in various judgments by this Court that the principles governing the grant of bail in both cases are more or less on the same footing, except that in case of anticipatory bail the investigation is still underway requiring the presence of the accused before the investigating authority. Thus, ordinarily, anticipatory bail is granted in exceptional cases where the accused has been falsely implicated in an offence with a view to harass and humiliate him. Therefore, it would not be logical to disregard the limitations imposed on granting bail under Section 45 of the 2002 Act, in the case of anticipatory bail as well.*

313. *In P.Chidambaram [P. Chidambaram v. Enforcement Directorate, (2019) 9 SCC 24 : (2019) 3 SCC (Cri) 509] , this Court observed that the power of anticipatory bail should be sparingly exercised in economic offences and held thus : (SCC pp. 60 & 62, paras 77-78 & 83-84) “77. After referring to Siddharam Satlingappa Mhetre [Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] and other judgments and observing that anticipatory bail can be granted only in exceptional circumstances, in Jai Prakash Singh v. State of Bihar [Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379 : (2012) 2 SCC (Cri) 468] , the Supreme Court held as under : (SCC p. 386, para 19)*

‘19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See D.K. Ganesh Babu v. P.T. Manokaran [D.K. Ganesh



Babu v. P.T. Manokaran, (2007) 4 SCC 434 : (2007) 2 SCC (Cri) 345], State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain [State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain, (2008) 1 SCC 213 : (2008) 1 SCC (Cri) 176] and Union of India v. PadamNarain Aggarwal [Union of India v. PadamNarain Aggarwal, (2008) 13 SCC 305 : (2009) 1 SCC (Cri) 1].)

Economic offences

78. Power under Section 438CrPC being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In Enforcement Directorate v. Ashok Kumar Jain [Enforcement Directorate v. Ashok Kumar Jain, (1998) 2 SCC 105 : 1998 SCC (Cri) 510], it was held that in economic offences, the accused is not entitled to anticipatory bail.

83. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the respondent Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail.

84. In a case of money laundering where it involves many stages of “placement”, “layering i.e. funds moved to other institutions to conceal origin” and “interrogation i.e. funds used to acquire various assets”, it requires systematic and analysed investigation which would be of great advantage. As held in Anil Sharma [State v. Anil Sharma, (1997) 7 SCC 187 : 1997 SCC (Cri) 1039], success in such interrogation would elude if the accused knows that he is protected by a pre-arrest bail order. Section



438CrPC is to be invoked only in exceptional cases where the case alleged is frivolous or groundless. In the case in hand, there are allegations of laundering the proceeds of the crime. The Enforcement Directorate claims to have certain specific inputs from various sources, including overseas banks. Letter rogatory is also said to have been issued and some response have been received by the Department. Having regard to the nature of allegations and the stage of the investigation, in our view, the investigating agency has to be given sufficient freedom in the process of investigation. Though we do not endorse the approach of the learned Single Judge in extracting the note produced by the Enforcement Directorate, we do not find any ground warranting interference with the impugned order [P. Chidambaram v. CBI, 2019 SCC OnLine Del 9703] . Considering the facts and circumstances of the case, in our view, grant of anticipatory bail to the appellant will hamper the investigation and this is not a fit case for exercise of discretion to grant anticipatory bail to the appellant.”

(emphasis supplied)

314. Therefore, as noted above, investigation in an economic offence, more so in case of money laundering, requires a systematic approach. Further, it can never be the intention of Parliament to exclude the operation of Section 45 of the 2002 Act in the case of anticipatory bail, otherwise, it will create an unnecessary dichotomy between bail and anticipatory bail which not only will be irrational but also discriminatory and arbitrary. Thus, it is totally misconceived that the rigours of Section 45 of the 2002 Act will not apply in the case of anticipatory bail.

315. Suffice it to observe that it would be preposterous and illogical to hold that if a person applies for bail after arrest, he/she can be granted that relief only if the twin conditions are fulfilled in addition to other stipulations predicated in the 1973 Code; but another person, who is yet to be arrested in connection with the same offence of money laundering, will not be required to fulfil such twin conditions whilst considering application for grant of bail under Section 438 of the 1973 Code. The relief of bail, be it in the nature of regular bail or anticipatory bail, is circumscribed by the stipulations predicated in Section 45 of the 2002



Act. The underlying principles of Section 45 of the 2002 Act would get triggered in either case before the relief of bail in connection with the offence of money laundering is taken forward. Any other view would be counterproductive and defeat the purposes and objects behind the stringent provision enacted by Parliament for prevention of money laundering and to combat the menace on account of such activity which directly impacts the financial systems, including the sovereignty and integrity of the country.

316. *As a result, we have no hesitation in observing that in whatever form the relief is couched including the nature of proceedings, be it under Section 438 of the 1973 Code or for that matter, by invoking the jurisdiction of the constitutional court, the underlying principles and rigours of Section 45 of the 2002 Act must come into play and without exception ought to be reckoned to uphold the objectives of the 2002 Act, which is a special legislation providing for stringent regulatory measures for combating the menace of money laundering.”*

Having regard to the intention of the legislature so far as the provision of Juvenile Justice (Care And Protection of Children) Act 2015 is concerned, including the preamble of the Act and the remedy available under the general law as also the extended meaning of term ‘arrest’ as has been held by the Hon’ble Apex Court in the aforesaid pronouncements, I am of the opinion that an application under Section 438 of the Cr.PC/Section 482 of the BNSS is maintainable in case such an application is preferred by a Juvenile/Child in conflict with law.



Resultantly, I concur with the reasoning and conclusion of brother Justice Jay Sengupta and express my respectful dissent from the conclusion and findings reached by brother Justice Bivas Pattanayak.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh,J.)

**Bivas Pattanayak, J. :-**

1. The principal question, which is raised before us, is whether a petition under Section 438 of the Code for anticipatory bail at the behest of a child in conflict with law would be maintainable or not.
2. Section 438 of the Code provides that 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 the Section that in the event of such arrest he shall be released on bail and the Court may entertain such prayer after taking into consideration the factors noted therein. Therefore, it is apparent from the aforesaid provision that in order to invoke Section 438 of the Code, the foremost qualification is that the person making such application must have reason to believe that he may be arrested on accusation of having committed a non-bailable offence.
3. Now let me find out as to whether a minor/juvenile has any likelihood of being arrested by the law enforcing agencies under the purview of Juvenile Justice Act applicable to them. In this regard, the relevant provision under Section 10 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is reproduced, which reads as hereunder:

“Section 10. Apprehension of child alleged to be in conflict with law-

(1)As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated Child Welfare Police Officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended: Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lock-up or lodged in jail.....”



4. The proviso to the aforesaid provision, makes it abundantly clear that under no circumstances a juvenile or a child in conflict with law can be put behind bars either in police lock-up or in jail. It is further noted that confinement of juvenile in conflict with law or detention in police custody or jail custody of the child in conflict with law is foreign to the Juvenile Justice Act.

5. It may also be noted that a significant amendment to Section 12 of the Act of 2000 is incorporated in Act of 2015. Both the previous and the existing provisions of Section 12 of the Juvenile Justice Act are reproduced hereunder for the sake of convenience of discussion.

Section 12 of the Act of 2000-

Bail of Juvenile reads as follows:-

“(1) When any person accused of a bailable or nonbailable offence and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure 1973(2 of 1974) or in any other law for the time being in force, be released on bail with or without surety 12 (or placed under the supervision of a Probation officer or under the care of any fit institution or fit person) but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.....”

Section 12 of the Act of 2015 reads as hereunder-

“Bail to a person who is apparently a child alleged to be in conflict with law-

(1) When any person, who is apparently a child and is alleged to have committed a bailable or nonbailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure 1973(2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person: Provided that such person shall not be released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or that his release would defeat the ends of justice and the Board shall record the reasons for denying the bail and jurisdiction that led to such a decision.....”



6. Upon going through the aforementioned provisions embodied previously under Section 12 of 2000 Act and the subsequent amendment in the said provisions in the 2015 Act, it appears that the word “*arrested*” has been consciously done away with in the subsequent Act of 2015 by the legislature and replaced with the word “*apprehended*”. Thus, such purposive omission of the word “*arrest*” clearly shows the intention of the legislature not to apply any coercive measures as far as apprehension of any child in conflict with law is concerned. Such position is further fortified by the provisions of Section 10 of the Act which provides that in no case a child alleged to be in conflict with law shall be placed in police lock-up or lodged in jail. Accordingly, upon conjoint reading of the provisions embodied under Sections 10 and 12 of the Act, 2015, it is quite apparent that the legislature never intended to put a child in conflict with law behind bars and as such laid down varied procedures to be followed in case of apprehension of a child in conflict with law such as (i) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the Special Juvenile Police Unit or the designated Child Welfare Police Officer, who shall produce the child before the Board without any loss of time; (ii) The Board shall notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974) or in any other law for the time being in force, release such child on bail with or without surety or place under the supervision of a probation officer or under the care of any fit person, provided that such child shall not be released if there appears reasonable grounds for believing that the release is likely to bring the child into



association with any known criminal or expose the child to moral, physical or psychological danger or that his release would defeat the ends of justice and the Board shall record the reasons for denying the bail and jurisdiction that led to such a decision. Therefore, it manifests a definite purpose behind such legislation while making a distinct deviation from the procedure of the Code relating to arrest of a person. Accordingly, using the word “*apprehension*” in place and instead of “*arrest*” by legislature does not lead to the same consequence. Rather it is observed that those words though have similar meaning literally yet its application in the enactment should be construed differently for the reason that the legislature never had the intention of confinement or arrest and/or detention of the child in conflict with law in any police lock-up or in jail.

7. In exercise of powers conferred by Section 110 of the Act, 2015, the Union Government has also framed Model Rules namely Juvenile Justice (Care and Protection of Children) Model Rules, 2016. As per the Proviso appended to Rule 8(1) of the Model Rules, no child is to be apprehended except in case of commission of heinous offence or where it is otherwise in his best interest. In all other cases where apprehending the child is not necessary in the interest of the child, the police or Special Juvenile Police Unit or Child Welfare Police Officer shall forward the information regarding the nature of offence alleged to be committed by the child along with his social background report in Form I to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board. Rule 8(3) reiterates the



statutory restraint against transmitting the child to jail, placement of handcuffs, chain or otherwise fetter a child and shall not use any coercion or force on the child and on being apprehended, the police officer may send the child to a welfare home till his production before Board. Moreover, it mandates that the child be apprised of the charges levelled against him and also be provided with a copy of the FIR if lodged, appropriate medical assistance, assistance of interpreter or special educator or any other assistance which the child may require. Additionally, it requires that the child shall not be compelled to confess his guilt and shall be interviewed at Special Juvenile Police Unit or at child friendly premises and it requires the presence of the parents or guardian of the child during such interview and also obliges the authorities to inform the District Legal Services Authority to enable it to provide legal aid to the child. The Rule further prescribes that the juvenile shall not be compelled to sign any statement. Upon completion of the above formalities, the child is to be produced before the concerned Board not later than 24-hours from apprehension. Upon reading the aforesaid Rule and various obligations and safeguards put in place, it manifests that apprehension of the child under the Act, 2015 is not akin to arrest or incarceration as otherwise effected under the Criminal Procedure Code. Thus, it is quite apparent that by virtue of the 2015 Act, a distinct, comprehensive and special procedure has been pioneered and introduced relating to apprehension of a child in conflict with law.

8. The primary issue on presentation of the child before the Board is consideration of Bail. As per provisions of Section 12 of the 2015 Act, the



Board is required to release the child on bail unless it forms the opinion that the child is likely to fall into the association of known criminals, the release is likely to have a negative physical, moral or psychological impact or otherwise defeat the ends of justice. When the Board decides to refuse bail, the child is liable to be placed in an observation home till the completion of enquiry initiated under the 2015 Act. Rule 9 of the Model Rules also contains similar provisions as is appearing in Section 12 of the 2015 Act. As such, it is found that the 2015 Act and the Model Rules lay down a special procedure in order to deal with the apprehension of a child in conflict with law and the procedure so laid down constitutes a significant departure from the power and procedure for arrest and detention as contained in the Criminal Procedure Code. Upon enactment of the 2015 Act and the Model Rules, the legislature intended to put in place a self-contained, comprehensive and inclusive procedure to deal with the apprehension and enquiry of a child in conflict with law.

9. Further Section 1(4) of the Juvenile Justice Act (Juvenile Justice Care and Protection of Children) Act, 2015, provides as hereunder:-

“Notwithstanding anything contained in any other law for the time being in force, the provisions of the Act shall apply to all matters concerning children in need of care and protection and children in conflict with law including:- (i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social reintegration of children in conflict with law. (ii) procedures and decisions or orders relating to rehabilitation, adoption, reintegration and restoration of children for need of care and protection.”

10. In view of such provisions of the Act of 2015, the apprehension and/or detention of the child in conflict with law has to be made as per the provisions of the Act namely Section 10 and Section 12 and other provisions. The aforesaid provision also clearly puts in place the overriding effect of the special



enactment of 2015 as far as apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social integration of children in conflict with law are concerned. The essential intent underlying Section 1(4) underscores that the provisions of the 2015 Act relating to apprehension, detention, prosecution, penalty or imprisonment would apply in respect of children in conflict with law notwithstanding anything contained in any other law for the time being in force.

11. As per various provisions of the 2015 Act and the Model Rules, it can well be understood without any doubt whatsoever that a child in conflict with law cannot be arrested and thus there cannot be apprehension of arrest of the child. Accordingly, the legislature in its wisdom has done away with the provision of anticipatory bail in the 2015 Act as it intended that a child in conflict with law should not be arrested and put behind bar under any circumstances and the apprehension should be strictly as provided in the 2015 Act. Section 1(4) of 2015 Act is a clear manifestation of the intent of the legislature that the provisions dealing with apprehension and detention of the child will prevail over any other law for the time being in force.

12. It is a fact that the 2015 Act is bereft of any provision enabling a child in conflict with law to move an application for anticipatory bail. Section 4(2) of the Criminal Procedure Code provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or



otherwise dealing with such offences. Thus Section 4(2) of the Code would have limited application and be recognised as governing the field in areas for which no special procedure or provision is made as under the 2015 Act. Now the pertinent question which arises at this juncture is whether in its limited application as indicated above, Section 4(2) of the Code enables a child in conflict with law to seek anticipatory bail?

13. As per Section 12 of 2015 Act, whenever a child is apprehended or detained by the police or appears or brought before the Board, it shall notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974) or any other law for the time being in force, release the child on bail with or without surety or place the child under the supervision of a probationary officer or under the care of any fit person. The Section further empowers the Board not to release such child if it has reasonable grounds to believe that the release of the child is likely to bring the child into association with any known criminal or expose the said person to moral, physical or psychological danger or that his release would defeat the ends of justice. Therefore, it is found that there are several statutory parameters to be gone into by the Board while deciding the release of a child in conflict with law upon presentation. The allowing of an application for anticipatory bail of the child in conflict with law may lead to direct intervention into the aforesaid powers of the Board to decide the statutory parameters while releasing a child as envisaged in the provisions and make the powers conferred upon the Board in this regard nugatory and redundant.



14. Thus, mere absence of any provision for anticipatory bail in the 2015 Act does not *per se* entitle a child to approach for anticipatory bail under Section 438 of the Code for the reason that it impairs the provisions of the 2015 Act and leads to consequences, as discussed above, which are contrary to the provisions of the 2015 Act, if applied. In this regard, I am of the opinion that a purposive construction must be adopted for ascertaining the true intent of the Parliament as far as the Juvenile Justice Act is concerned. Whether releasing a child in conflict with law is beneficial or keeping him in an observation home is more desirable, are squarely matters which are to be decided by the Board as envisaged under Section 12 of the Juvenile Justice Act. Merely allowing the application for anticipatory bail cannot be said to be beneficial for a child in conflict with law, since such order may expose the child in conflict with law to moral, physical and psychological danger and may be counter-productive.

15. Accordingly, I am of the considered view that an application for anticipatory bail under Section 438 of the Criminal Procedure Code at the instance of a child in conflict with law is not maintainable.

16. For the reasons as noted above, I most respectfully dissent from the decision arrived at by my brother Judge Hon'ble Justice Jay Sengupta with regard the question under reference.

(Bivas Pattanayak, J.)