

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

ANTICIPATORY BAIL APPLICATION NO. 277 OF 2022

1. Raman S/o. Prakash Mundhe
Age- 16 years, Occupation – Education.
2. Manthan S/o. Prakash Mundhe,
Age- 14 years, Occupation – Education.
Since minor, through
Under Natural Guardian Mother
Urmila W/o. Prakash Mundhe.
Age- 37 years, Occupation- Household,
R/o. Pimpaldari, Tq. Gangakhed,
Dist. Parbhani.

... APPLICANTS

VERSUS

1. The State of Maharashtra,
Through Police Inspector
Pimpaldari Police Station,
Tq. Gangakhed, Dist. Parbhani.
2. XYZ.

... RESPONDENTS
(R.2 Org. Complainant)

...
Mr. Suvidh S. Kulkarni, Advocate a/w Mr. Vivek U. Rathod &
Ms. Pratiksha C. Kale, Advocate for Applicants.

Mr. Rajendra S. Deshmukh, Senior Counsel a/w Mr. Govind Kulkarni
& Mr. Vishal Chavan, Advocate (Amicus Curiae).

Mr. A. V. Deshmukh, APP a/w Mr. M. M. Nerlikar, Mr. R. V. Dasalkar,
Mr. S. J. Salgare, Mr. R. D. Sanap & Mr. S. D. Ghayal, APPs for the
State.

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CORAM : SARANG V. KOTWAL AND
BHARAT P. DESHPANDE, JJ.
RESERVED ON : 07th July, 2022.
PRONOUNCED ON : 15th July, 2022.

JUDGMENT : (Per Sarang V. Kotwal, J.)

. *“In absence of provisions of grant of anticipatory bail under the Juvenile Justice (Care and Protection of Children) Act, 2015, whether a juvenile in conflict with law can file such application under Section 438 of the Code of Criminal Procedure ?”*

This is the question, which we are required to answer in this reference.

2 The Anticipatory Bail Application No.277 of 2022 was rejected by a Single Judge Bench of this Court (Coram: Smt. Vibha Kankanwadi, J.) on the ground that it was filed by the applicants who were minors. They were covered by the definition of “Child in conflict with law” as defined under the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the “JJ Act”); and therefore, their application for anticipatory bail under Section 438 of

the Code of Criminal Procedure, 1973 (Cr.P.C.) was not maintainable. Learned Judge referred to various judgments of different High Courts and differed with the view with two orders of other Single Judge Benches of this Court in the following two cases:

- i) ***Yogesh Jagdish Joshi Vs. State of Maharashtra***, in Criminal Application No.2822 of 2001, decided on 18th September, 2021 (Coram: A.B. Palkar, J.) ; and
- ii) ***Snehal @ Abhi s/o Dinesh Shendre Vs. State of Maharashtra***, in Criminal Application (ABA) No.884 of 2018, decided on 10th December, 2018 (Coram: M.G. Giratkar, J.).

Snehal Shendre's order was based on *Yogesh Joshi's* order.

3 Learned Single Judge while passing the order in Anticipatory Bail Application No.277 of 2022 relied on following judgments in support of the view that she was taking :

- a) ***Suhana Khatun and Ors Vs. State of West Bengal***, decided on 20th January, 2022, in CRM No.2739 of

2021, by a Division Bench of the High Court of Calcutta ;

- b) ***Satendra Sharma Vs. The State of M.P.***, decided on 8th July 2014, in MCRC No.4183 of 2014, by a Single Judge Bench of the High Court of Madhya Pradesh (Gwalior Bench) ; and
- c) ***Ankesh Gurjar Vs. State of M.P.***, decided on 20th January, 2021, in Criminal Revision No.2112 of 2020, by a Division Judge Bench of the High Court of Madhya Pradesh (Gwalior Bench).

Learned Judge relied on many other judgments. However, their respective views and reasoning behind those views are similar and therefore, we have listed the prominent judgments referred to by learned Single Judge.

4 Learned Single Judge while passing the order in Anticipatory Bail Application No.277 of 2022 referred to following judgments which hold that such application under Section 438 of the Cr.P.C. was maintainable :

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

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

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

5 In view of her disagreement with the view expressed by other Single Judge Benches of this Court, reference was made to a division bench, which we are called upon to decide as mentioned earlier. We requested Shri Rajendra S. Deshmukh, learned Senior Counsel to appear and assist the Court as Amicus Curiae. He made his submissions. Shri Suvidh S. Kulkarni, learned counsel appeared for the original applicants and Shri A.V. Deshmukh, learned APP appeared for the State of Maharashtra. Before discussing further, it is necessary to note that Anticipatory Bail Application No.277 of 2022 is already disposed of by holding that it was not maintainable as mentioned earlier. Therefore, it is not necessary to refer to the facts of the case. We are discussing the issue and recording our conclusion only on the point of reference.

SUBMISSIONS OF THE AMICUS CURIAE SHRI RAJENDRA S. DESHMUKH, LEARNED SENIOR COUNSEL :

6 Shri Rajendra Deshmukh, learned Senior Counsel supported the view that the application under Section 438 of the Cr.P.C. by a child in conflict with law is not maintainable. He basically supported the reasoning given by Smt. Justice Vibha Kankanwadi in her order. He referred to various sections of the JJ Act and submitted that Section 12 of the JJ Act is a complete Code in itself and therefore, Section 438 of the Cr.P.C. was not available for a child in conflict with law. He submitted that there was no specific provision in the JJ Act for anticipatory bail. Section 12 of the JJ Act was a complete Code in itself and it was not permissible to travel beyond the said Act and particularly beyond Sections 10 and 12 of the JJ Act. He placed reliance on the judgment in *Suhana Khatun's* case and based his arguments on the reasoning mentioned in that judgment. Though he did not support the other view that the application was maintainable, he also presented the other view before the Court, which is discussed in *Miss Surabhi Jain's* case.

SUBMISSIONS OF SHRI SUVIDH KULKARNI, LEARNED COUNSEL FOR THE APPLICANTS :

7 Shri Suvidh Kulkarni, learned counsel for the applicants invited our attention to various sections and definitions provided under the JJ Act. He relied on the definition of “person” as defined under Section 11 of the Indian Penal Code (IPC). He submitted that Section 11 of the IPC defines “Person” thus – “The word “person” includes any Company or Association or body of persons, whether incorporated or not”. He submitted that a child as defined under the JJ Act is not excluded from the word “Person”. He submitted that Section 2(y) of the Cr.P.C. provides that the words and expressions used in Cr.P.C. and not defined but defined in the Indian Penal Code have the meanings respectively assigned to them in that Code. He then submitted that Section 438 of the Cr.P.C. uses the word “any person”; therefore, it would mean that the provisions of Section 438 of the Cr.P.C. are available to any person including a child as defined under the JJ Act. He referred to various other provisions of the JJ Act, which we shall discuss at the appropriate place. He submitted that personal liberty should be the paramount consideration. Nobody should be left remediless. There was no conflict between the language of Sections 10 and 12 of the JJ Act and Section 438 of

the Cr.P.C.

SUBMISSIONS OF SHRI A. V. DESHMUKH, LEARNED APP FOR THE STATE :

8 Learned APP submitted that though Article 14 of the Constitution of India provides for equality before law, but in case of the JJ Act, there is a purposeful differentiation made for protection of children and therefore, reasonable classification was permissible. The JJ Act flows from Sub-Article (3) of Article 15 of the Constitution of India. It is for the benefit of children. The JJ Act treats them as victims and not as offenders and therefore, separate special procedure is provided. It has overriding effect over all other Acts including the Cr.P.C. The concept of “arrest” is foreign to the JJ Act. The language of Section 12 of the JJ Act makes a reference to apprehension in case of bailable offences also, which is in stark contrast to Section 438 of the Cr.P.C. which is used only in cases of non-bailable offences. Learned APP submitted that the judgments relied on by Smt. Justice Vibha Kankanwadi are based on sound reasoning and therefore, it has to be held that the application of child in conflict with law is not maintainable under Section 438 of the Cr.P.C.

REASONS FOR OUR CONCLUSION :

9 Before making reference to specific provisions, general reasoning in various judgments taking opposite views can be considered. The judgments, which lay down the ratio that the application under Section 438 of the Cr.P.C. is not maintainable on behalf of child in conflict with law, take a view that Section 12 of the JJ Act is a complete Code in itself. There is no specific provision for anticipatory bail under the JJ Act. The JJ Act prevails over the Cr.P.C. The special provision under Section 12 of the JJ Act is made for protection of children. Section 438 of the Cr.P.C. deals with arrest of a person. This concept of “arrest” is not acceptable under the JJ Act. The word “arrest” is not used with reference to a child in conflict with law in the JJ Act. A proviso to Section 12 of the JJ Act mentions that in certain cases instead of granting bail to a child in conflict with law, he has to be kept in special homes.

10 The judgments, which have taken a view that such application is maintainable, have basically relied on the fact that it is a beneficial legislation and it cannot take away the right, which is available to a child. In *Yogesh Joshi's* case, reliance is placed on

the observations of the Honourable Supreme Court in the case of ***Shri Gurbaksh Singh Sibbia and others Vs. State of Punjab***, reported in, ***(1980) 2 Supreme Court Cases 565***, to hold that beneficent construction has to be put on the provisions relating to personal liberty. It would apply to a case of child in conflict with law a fortiori. It would be travesty of justice to say that such applicant was not entitled to protection and had he completed the age of 18 years, he would be entitled to protection.

11 In *Kureshi Irfan's* case, learned Single Judge of High Court of Gujarat has discussed the concept of arrest and has held that conjoint reading of Sections 10 and 12 places the word “apprehension” used in Section 10 of the JJ Act at par with and synonym of “arrest” used in Section 438 of the Cr.P.C. It was ultimately held that there was no bar for preferring an application under the provisions of Section 438 of the Cr.P.C. in such cases.

12 Article 14 of the Constitution of India is important, which reads as under:

“14. Equality before law.— The State shall not deny

to any person equality before the law or the equal protection of the laws within the territory of India.”

Article 14 of the Constitution of India refers to equality before law and provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Before proceeding further and before making reference to any of the provisions of the JJ Act or of the Cr.P.C., a plain reading of Article 14 of the Constitution of India would mean that any protection, which is available to any person under the law, is available also to a child as defined under the JJ Act. The provisions of Section 438 of the Cr.P.C. afford the earliest protection during or even before investigation and therefore, even a child in conflict with law has a right to use this remedy.

13 The JJ Act is enacted under the power of Sub-Article (3) of Article 15 of the Constitution of Indian, which gives power to the State to make special provision for women and children. The preamble of the JJ Act mentions that it was expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 to make comprehensive provisions for children alleged and found to be in conflict with law. The statement of Objects and Reasons refers to

Article 15 of the Constitution of India. Clause (4) of the statement of Objects and Reasons mentions the necessity to make provisions in respect of crimes committed by children in the age group of 16-18 years, as data showed that the crimes committed by the children in that age group had increased in certain categories of heinous offences. Clause (4) of the statement of Objects and Reasons mentions that the present JJ Act was enacted to provide for general principles and procedure regarding children in conflict with law by adopting a child-friendly approach keeping the best interest of the child in mind. The JJ Act was amended by an Amendment Act in the year 2021. The statement of Objects and Reasons of that Amending Act mentions that the JJ Act has been made in pursuance of the Constitution of India, which mandates equal rights for children.

14 Now, we turn to the relevant provisions of the JJ Act. The JJ Act broadly makes provisions for different purposes. Chapter IV provides for procedure in relation to children in conflict with law. Chapter VI deals with procedure in relation to children in need of care and protection. Chapter VII includes provisions for rehabilitation and social re-integration. Chapter VIII is about adoption process. Chapter IX is regarding offences against children.

For the purpose of deciding the issue before us, the procedure mentioned in Chapter IV, formation of Juvenile Justice Board under Chapter III and definitions and general principles given in Chapters I and II are relevant. Apart from that, there are provisions for appeals and revision under Sections 101 and 102 of the JJ Act and there are Maharashtra State Juvenile Justice (Care and Protection of Children) Rules, 2018 (hereinafter referred to as the “Rules”).

15 Following are some important provisions, which are relevant for the issue we are deciding:–

“1. Short title, extent, commencement and application.–

(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this 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 re-integration of children in conflict with law;

2. Definitions.– In this Act, unless the context otherwise requires,–

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

(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;

(20) “Children’s Court” means a court established under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), wherever existing and where such Courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act;

(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;

(35) “juvenile” means a child below the age of eighteen years;

(40) “observation home” means an observation home established and maintained in every district or group of districts by a State Government, either by itself, or through a voluntary or non-governmental organisation, and is registered as such, for the purposes specified in sub-section (1) of section 47;

(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;

(46) “place of safety” means any place or institution, not being a police lockup or jail, established separately or attached to an observation home or a special home, as the case may

be, the person in-charge of which is willing to receive and take care of the children alleged or found to be in conflict with law, by an order of the Board or the Children's Court, both during inquiry and ongoing rehabilitation after having been found guilty for a period and purpose as specified in the order;

(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;

(55) "special juvenile police unit" means a unit of the police force of a district or city or, as the case may be, any other police unit like railway police, dealing with children and designated as such for handling children under section 107;

(61) all words and expressions used but not defined in this Act and defined in other Acts shall have the meanings respectively assigned to them in those Acts."

16 There are certain principles provided under Section 3 of the JJ Act. The Central Government, the State Governments, the Board, the Committee or other agencies, as the case may be, while implementing the provisions of the JJ Act are to be guided by some fundamental principles. In all, sixteen principles are enumerated.

Some of the important principles are as follows:—

“3. General principles to be followed in administration of Act. –

(i) Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

(ii) Principle of dignity and worth: All human beings shall be treated with equal dignity and rights.

(iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

(viii) Principle of non-stigmatising semantics: Adversarial or accusatory words are not to be used in the processes pertaining to a child.

(x) Principle of equality and non-discrimination: There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.

(xiii) Principle of repatriation and restoration: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.

(xvi) *Principles of natural justice*: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.”

17 Section 4 provides for formation of Juvenile Justice Board consisting of a Metropolitan Magistrate or a Judicial Magistrate First Class, two social workers including one woman.

18 Sub-Section (1) of Section 8 gives exclusive power to the Juvenile Justice Board to deal with all the proceedings under the JJ Act, relating to children in conflict with law, in the area of jurisdiction of such Board. This power is to the exclusion of anything contained in any other law. Sub-Section (2) of Section 8 provides that powers conferred on the Board by or under the JJ Act can also be exercised by the High Court and the Children’s Court, when the proceedings come before them under section 19 or in appeal, revision or otherwise. Children’s Court is defined under the Commissions for Protection of Child Rights Act, 2005. Section 25 of the Act of 2005 reads thus:

“25. Children's Courts.— For the purpose of providing speedy trial of offences against children or of violation of child rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify at least a Court in the State or specify, for each district, a Court of Session to be a Children's Court to try the said offences:

Provided that nothing in this section shall apply if—

(a) a Court of Session is already specified as a special Court; or

(b) a special Court is already constituted, for such offences under any other law for the time being in force.”

19 Section 14 of the JJ Act 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 trial of the case to the Children's Court having jurisdiction to try such offences.

20 Chapter III of the Rules provides for procedure in relation to children in conflict with law. Pre-production action of police and

other agencies is provided under Rule 8 Sub-Rule (1), which reads thus:

“8. Pre-production action of police and other agencies.—

(1) No First Information Report shall be registered except where a heinous offence is alleged to have been committed by the child, or when such offence is alleged to have been committed jointly with adults. In all other matters, the Special Juvenile Police Unit or the Child Welfare Police Officer shall record the information regarding the offence alleged to have been committed by the child in the general daily diary followed by a social background report of the child in **Form 1** and circumstances under which the child was apprehended, wherever applicable, and forward it to the Board before the first hearing:

Provided that, the power to apprehend shall only be exercised with regard to heinous offences, unless it is in the best interest of the child. For all other cases involving petty and serious offences and 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 1** 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.”

This proviso indicates that such child should not be arrested unless absolutely necessary.

21 Now, we turn to the most important provisions in connection with the issue before us. Those are Sections 10 and 12 of the JJ Act, which read thus:

“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.

(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 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.”

22 The Maharashtra State Amendment to Section 438 of the Cr.P.C. mentions that 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 and the Court may after taking into consideration the factors mentioned in that section either reject the application or pass an interim order, which can be confirmed after hearing the parties. The argument in support of the view that such application is not maintainable for a child, relies on the words “apprehension of arrest”. According to learned APP, the word “arrest” is not used in Sections 10 and 12 or for that matter in any other provision relating to a child under the JJ Act and therefore, Section 438 of the Cr.P.C. was not applicable to a child in conflict with law under the JJ Act.

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

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

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

In both these sections, the titles use the words “apprehensions” and “apprehended” whereas in the body of the sections, the word used is “arrested”. Thus, the Cr.P.C. uses these

words synonymously. The effect of arrest or apprehension is to curtail liberty of a person. When a child in conflict with law is apprehended, his liberty is curtailed. Section 438 of the Cr.P.C. affords a valuable right to a person, who is likely to be arrested or in other words, whose liberty is likely to be curtailed. Section 438 of the Cr.P.C. does not make any distinction between different persons as rightly submitted by Shri Kulkarni, learned counsel for the applicants. The definition of the word “person” mentioned in Section 11 of the IPC, is an inclusive definition. It does not exclude a child. Section 438 of the Cr.P.C. does not exclude a child from the word “person”. Therefore, there is no reason to deny the benefit of the provisions of Section 438 of the Cr.P.C. to a child, who is likely to be apprehended.

23 The importance of enacting Section 438 of the Cr.P.C. is explained by the Honourable Supreme Court in *Shri Gurbaksh Singh Sibbia's* case. It is observed in paragraph 12 of the said judgment that a person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent. In fact, the stage at

which anticipatory bail is generally sought brings about its striking dissimilarity with the situation in which a person, who is arrested for the commission of non-bailable offences asks for bail.

In paragraph 26, the Honourable Supreme Court observed that the beneficent provision contained in Section 438 must be saved, not jettisoned.

In paragraph 31, it was observed that in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made.

In our opinion, these observations of the Honourable Supreme Court must apply to the benefit of the child, who is likely to be apprehended on some accusations. As observed by the Honourable Supreme Court, if accusations are made with some ulterior motive, the object being to injure and humiliate, then there is no reason as to why such child should not be afforded an opportunity of preferring an application under Section 438 of the Cr.P.C. The observations of the Honourable Supreme Court regarding presumption of innocence is also an important factor,

particularly when under Section 3(i) of the JJ Act, there is a specific presumption that any child shall be presumed to be innocent of any *mala-fide* or criminal intent up to the age of eighteen years.

24 Similar view regarding Section 438 of the Cr.P.C. is expressed by the Honourable Supreme Court in the case of ***Sushila Aggarwal and others Vs. State (NCT of Delhi) and another***, reported in, ***(2020) 5 Supreme Court Cases 1***. It has referred to *Shri Gurbaksh Singh Sibbia's* case. In paragraph 56, it is observed that 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. In paragraph 57, it is observed that the provision for anticipatory bail is pro-liberty and was enacted as a measure of protection against arbitrary arrests and humiliation.

There is absolutely no reason why this valuable right should be denied to a child, which is available to every

individual.

25 As mentioned earlier, the Article 14 of the Constitution of India as well as Sections 3(ii) and 3(x) of the JJ Act give a valuable right to a child to be treated equally with others. A child defined under the JJ Act enjoys equal rights with other persons. Therefore, it would be in violation of all these principles and provisions to deny him an opportunity to exercise his right of preferring an application under Section 438 of the Cr.P.C.

26 The argument that the JJ Act does not make provision in the nature of Section 438 of the Cr.P.C. and that Sections 10 and 12 of the JJ Act are complete Code in themselves; is also not acceptable. Sections 10 and 12 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 of the Cr.P.C. The non-obstante clause used in Section 12 operates only when there is a conflict between the provisions of the Cr.P.C. and the provisions of Section 12 of the JJ Act. However, as we see it, there is no conflict between the provisions of Section 438

of the Cr.P.C. and Section 10 or 12 of the JJ Act, therefore, availability of right under Section 438 of the Cr.P.C. is not taken away to the detriment of a child.

27 It is well settled that the non-obstante clause has overriding effect only in case of inconsistency. In that connection, reference can be made to a judgment of the Honourable Supreme Court in the case of *Chief Information Commissioner Vs. High Court of Gujarat and another*, reported in, *(2020) 4 Supreme Court Cases 702*. In that case, the Honourable Supreme Court was considering Section 22 of the Right to Information Act, 2005, which lays down that the provisions of the RTI Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secretes Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act. In paragraph 34 and 35, it was observed that in case of inconsistency of any law with the provisions of the Right to Information Act, overriding effect has been given to the provisions of the Right to Information Act. 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.

28 The non-obstante clause can be found in Section 1 Sub-Section (4) as well as in Section 12 of the JJ Act. That would only mean that in case of inconsistency alone, this provision under the JJ Act would prevail. The JJ Act, as mentioned earlier, is enacted as a beneficial legislation and therefore, if a child under the JJ Act has any right under the general law, it cannot be taken away to the child's detriment by relying on these non-obstante clauses; particularly when there is no inconsistency between the JJ Act and the provisions of Section 438 of the Cr.P.C.

29 Section 5 of the Cr.P.C. is also relevant in this context, which reads thus:

“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.”

This section makes it very clear that the Cr.P.C.

shall not affect any special form of procedure prescribed by any other law for the time being in force. If the JJ Act was to provide for procedure in the nature of Section 438 of the Cr.P.C., that procedure would have overridden the Cr.P.C. But if no special form of procedure is prescribed in the nature of Section 438 of the Cr.P.C., then the provisions of the Cr.P.C. shall operate. Only when there is a special procedure, which is departure from the procedure laid down in the Cr.P.C. for a particular remedy, then only the special procedure would operate to the exclusion of the Cr.P.C. But in the JJ Act there is no special provision, which could operate in the field of Section 438 of the Cr.P.C. and therefore, the provisions of Section 438 of the Cr.P.C. can operate in case of child in conflict with law.

30 As is provided under Section 8 (2) of the JJ Act, the High Court and the Children's Court can exercise the same powers, which can be exercised by the Board. These powers can be exercised in appeal, revision or otherwise. The proceedings under Section 438 of the Cr.P.C. are covered under these powers. Because these powers are also available besides proceedings of appeal or revision. Therefore, when deciding the anticipatory bail application, the High Court or the Sessions Court will have to give due importance to the

considerations mentioned in the proviso to sub-Section (1) of Section 12 of the JJ Act. However, that proviso does not make the Section 438 of the Cr.P.C. inconsistent with Sections 10 and 12 of the JJ Act. The inconsistency between Cr.P.C. and these two provisions is in respect of Sections 167 and 437 of the Cr.P.C. mainly because the child will have to be produced before the Board and not before any other Court. In those cases, the special procedure provided under Sections 10 and 12 of the JJ Act will have to be followed. But Section 438 of the Cr.P.C. is enacted for a different purpose as discussed earlier and there is no inconsistency.

31 As mentioned earlier, if accusations are made against a child with ill intention to cause humiliation and harassment, then the right to prefer application under Section 438 of the Cr.P.C. should be available to a child. Section 12 of the JJ Act provides for steps to be taken for production before the Juvenile Justice Board after apprehension. There is a possibility that the child can be detained for some period. However, in cases where accusations are false or are made with oblique motive, then it would be travesty of justice to keep the child away from the protection of his parents and from his usual environment and shelter. There is no reason why he should

be deprived of such protection even for a single minute. At that stage application under Section 438 of the Cr.P.C. is the effective remedy available to such child.

32 Based on this discussion, we answer the reference as under:

“A ‘child’ and a “child in conflict with law” as defined under the Juvenile Justice (Care and Protection of Children) Act, 2015 can file an application under Section 438 of the Code of Criminal Procedure, 1973.”

[BHARAT P. DESHPANDE, J.]

[SARANG V. KOTWAL, J.]

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