custody at the time of the election during the emergency. Lastly, there is the partly recorded statement of Shri S. S. Barnala, Central Minister for Agriculture and Irrigation, which is categorical on the point that he had cast only one preference vote in favour of respondent No. 4 and did not cast any second preference vote in favour of any other candidate.

(21) As has been pointed out a little too often in the present case already, it is plain that the whole election petition hinges on the tampering of the postal ballot-paper after these were marked by the Akali legislators in custody and the subsequent improper reception thereof in favour of respondent No. 1. The election-petitioners have brought on record ample material on which they rely in support of the case and it appears to me that in order to decide the dispute in the present election petition and in fact virtually the only primary fact in issue therein, the inspection of the postal ballot-papers in the present case is absolutely necessary. I had repeatedly asked the learned counsel for the respondents whether the allegation regarding the tampering of the ballot-papers could possibly be established in any other manner than by inspecting the ballot-papers and no satisfactory answer thereto could possibly be rendered. To my mind, in the very nature of things the allegation regarding the tampering of the postal ballot-papers can be proved or disproved only by first inspecting the same.

(22) I would accordingly allow the application and direct the inspection and examination of the postal ballot-papers in the present case. Inevitably, the witnesses relevant to these ballot-papers are also allowed to be examined with regard thereto in the interest of justice.

N.K.S.

FULL BENCH

CRIMINAL MISCELLANEOUS

Before S. S. Sandhawalia, Prem Chand Jain and S. C. Mital, JJ.

GURBAKSH SINGH SIBIA.—*Petitioner.*

versus

STATE OF PUNJAB,—*Respondent.*

Criminal Misc. No. 3753-M of 1977

September 13, 1977.

Code of Criminal Procedure (2 of 1974)—*Sections* 167(2), 437 *and* 438—*Indian Evidence Act* (I of 1872)—*Section* 27—*Power to grant*

anticipatory bail—Purpose, nature and scope of such power—Cases when such power can be exercised—Anticipatory bail for accusations yet to be lavelled—Whether permissible—Persons released on bail—Whether can be deemed to be in police custody for purposes of section 27—Mala fide motives of investigating agency—Mere allegations—Whether enough to prove such motives—Allegations of serious economic offences involving corruption at higher levels—Power under section 436—Whether to be exercised—Joining investigation whilst on anticipatory bail—Whether a substitute for investigation in custody—Section 438—Whether overrides section 167(2).

Held, that (1) the power under section 438, Criminal Procedure Code 1973, is of an extraordinary character and must be exercised sparingly in exceptional cases only ;

(2) neither section 438, Criminal Procedure Code nor any other provisions of the Code authorise the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled ;

(3) the said power is not unguided or uncanalised but all the limitations imposed in the preceding section 437, Criminal Procedure Code, are implicit therein and must be read into section 438 as well ;

(4) in addition to the limitations imposed in section 437, Criminal Procedure Code, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail ;

(5) where a legitimate case for the remand of the offender to the police custody under section 167(2) can be made out by the Investigating Agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under section 27 of the Evidence Act can be made out, the power under section 438 of the Code be not exercised ;

(6) the discretion under section 438, Criminal Procedure Code, be not exercised with regard to offences punishable with death or imprisonment for life unless the Court at that very stage is satisfied that such a charge appears to be false or groundless ;

(7) the larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power the discretion under section 438 of the Code be not exercised ;

(8) mere general allegations of *mala fides* in the petition are inadequate, and the Court must be satisfied on materials before it

that the allegations of *mala fides* are substantial and the accusation appears to be false and groundless. (Para 64).

Held, that the normal application of the provisions of section 438 of the Code would be to cases where the charge itself is of a frivolous nature. A case of this kind would be a fit one to exercise jurisdiction in order to needlessly prevent the humiliation of the offender. Similarly the source from which such a charge stems has been considered of significance and where it has been levelled by unscrupulous or irresponsible persons, that would itself be a ground for consideration in the exercise of the power. Where the Court can on adequate material come to a firm conclusion that the charge is totally false, it may nevertheless resort to section 438, however, serious be the nature of the crime. Section 438 of the Code is in the nature of a shield for protecting entirely innocent persons from malicious humiliation. if the necessary conditions for its exercise are satisfied. Care has to be taken that this provision does not become a sword in the hands of the unscrupulous persons to gain time for destroying the incriminating evidence against them and to mock at the legitimate investigative processes authorised by the law.
(Para 63)

Held, that the power under section 438 is not to be exercised in a vacuum, but only on the satisfaction of the conditions spelled out in the section itself. The jurisdictional fact for the exercise of the power under section 438 is the co-existence of the two conditions, namely, an existing accusation (or in any case an accusation which reasonably arises from the existing facts) and a reasonable apprehension of arrest on the basis of such an accusation. It is thus plain that the exercise of power under section 438 is with regard to a specific accusation and cannot be extended in a blanket fashion to cover all offences with which the petitioner may come to be charged. Therefore, no question of the grant of anticipatory bail can arise with regard to an accusation not yet levelled or in respect of an offence yet not committed. (Paras 29 and 30).

Held, that a person lawfully released on bail either on his own bond or with sureties cannot thereafter be deemed in fact or any legal fiction as being in the custody of a police officer for the purpose of section 27 of the Evidence Act 1872. (Para 48).

Tejpal Oswal etc. v. *The State of Punjab* (Cr. Misc. 3370-B of 1977 decided on the 19th August, 1977) *overruled*.

Held, that a mere allegation of *mala fides* by an offender and a vehement claim of innocence put forward by him are manifestly

insufficient for arriving at a conclusion by the Court that the charge levelled against him is *mala fide* and stems from ulterior motive. There is hardly any case where a person seeking bail on a serious charge does not plead innocence and further does not allege some reason for his alleged false implication. If the allegations by themselves are to be accepted at their face value, then virtually in every case the power under section 438 would have to be exercised. Therefore, what indeed is an extraordinary power for exceptional circumstances would in fact become routine and common place. That is not the intent of the law. A mere claim of innocence and liberal allegations of *Mala fide* motives invariably laid at the door of the investigating agency by the offender is not enough. The Court has to be independently satisfied about the *prima facie* falsity of the charge and the ulteriorness of the motive for levelling the same. Section 438 of the Code invariably operates at the very initial stage of the investigation and even the most competent prosecutor may not then be in a position to put before the Court conclusive material to bring the charge home against the person accused. To put the prosecutor to proof at the very inception of the investigation appears as running counter to the whole scheme of investigation into cognizable cases as laid down in Chapter XII of the Code. This, indeed, is not the stage for invoking the known maxim of the Criminal Law that the burden of proof rests upon the prosecution. That stage arrives at the end of the investigation and in the course of the trial itself. The inception of the investigation is not a trial. Thus the petitioner must show (and the court must be wary that mere allegations of *mala fides* by the petitioner are inadequate) and the court must be satisfied on materials before it that the allegations of *mala fides* are substantial and the accusations appear to be false and groundless. '(Paras 60 and 62).

Held, that it is difficult to unravel the crimes of corruption. It is harder to detect the same when it is committed by what is now a well known category of white-collar criminals. However, it is the hardest to bring to book when such crime stems from the corridors of executive power and the nitches of high offices. Therefore, the courts must ever remain wary of throttling and in any way impeding the legitimate investigative process in such cases. In cases of serious economic offences involving blatant corruption at the higher rungs of executive and political power, the larger interest of the public and the State demand that the extraordinary power under section 438 of the Code be not exercised in favour of the offenders at the very threshold of the investigation. (Para 57).

Held, that from a reading of the relevant provisions of the Code together, it is plain that in a serious cognizable offence, the Code authorises the arrest and detention in custody of the offender for the first twenty four hours without the interposition of the Magistracy and further police custody upto a period of 15 days with the

authority of the Magistrate. It is clear that the arrest and interrogation in police custody for cognizable crime is not only visualized but expressly authorised by the Code. Therefore, a mere joining of a person in the course of the investigation whilst on anticipatory bail is no substitute for investigation in custody in all those cases where his personal interrogation may be legitimately required. There is hardly any case where a party seeking bail would not zealously offer to join the investigation thereof and to similarly undertake not to tamper with the witnesses. If this by itself were to be sufficient then the provisions of section 167(2) of the Code need hardly be ever resorted to.

(Paras 37 and 40).

Held, that there is nothing in section 438 itself or in its Legislative history which could give the least indication that the provision was intended to override the legitimate procedure of investigation into serious crime which has been prescribed by the Code itself in Chapter XII of which section 167(2) forms the material part. Indeed, in the event of a conflict the discretionary grant of anticipatory bail must give way to the statutory rights and duties under section 167(2) of the Code. (Para 42).

Case referred by Hon'ble Mr. Justice S. S. Sandhawalia to a larger Bench on 1st September, 1977 for decision of an important question of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice S. S. Sandhawalia, Hon'ble Mr. Justice Prem Chand Jain and Hon'ble Mr. Justice S. C. Mittal, finally decided the case on merits on 13th September, 1977.

Application under section 438, read with Section 482 of the Code of Criminal Procedure praying that the petitioner be released on bail in the event of his arrest in cases concerning the Collection of funds regarding Mattaur Session of Indian National Congress,—vide F.I.R. lodged at Ludhiana Police Station under section 5(1)(d) and (e) read with section 5(2)47 of the Prevention of Corruption Act and section 406, 409, 477-A and 120-B of the Indian Penal Code.

Ajmer Singh, Advocate (Harbhagwan Singh. Sr. Advocate, A. S. Sandhu and Satish Bhanot and Vinod Kataria, Advocates with him), *for the Petitioner.*

I. S. Tiwana, Additional A. G. Punjab with D. N. Rampal, D.A.G.

S. C. Mohunta, A. G. Haryana with Mr. Naubat Singh, A.A.G. *for the Respondents.*

Kuldip Singh and K. S. Thapar, Advocates as interveners.

JUDGMENT

S. S. Sandhawalia, J.

(1) The purpose, nature and scope of the power to grant anticipatory bail vested in the higher echelons of the judiciary by section 438 of the Code of Criminal Procedure has been the subject-matter of debate before the Full Bench in these two petitions for bail which are before us on a reference.

(2) On the 26th of August, 1977, Shri Gurbachan Singh Behniwal, I.P.S., Superintendent of Police, vigilance Squad, forwarded a special report to the Police Station, Civil Lines, Ludhiana, on the basis of which a case under section 5(1)(d) and (e) read with section 5(2) of the Prevention of Corruption Act and section 406, 409, 477-A and 120-B of the Indian Penal Code, was registered. In the said report, it was alleged *inter alia* that Shri Zail Singh, former Chief Minister of the Congress Government in Punjab along with some members of his Council of Ministers, some office bearers of the Punjab Pradesh Congress Committee, some appointees to high public offices and senior ranking Government officials had conspired to collect huge funds for the holding of the Congress Party Session at Mattaur near Chandigarh and to personally amass wealth by abuse of authority and misuse of powers.

(3) In pursuance of the said conspiracy, Shri Zail Singh aforesaid accompanied by Shri Joginder Pal Pandey, then State Minister of Public Works Department and Shri Sat Pal Mittal (petitioner) then General Secretary of the Punjab Pradesh Congress Committee held a meeting at Ludhiana in which leading businessmen, industrialists and Government officials had participated. Shri Zail Singh abusing his authority as Chief Minister stressed upon the officials present to collect the maximum funds from industrialists and businessmen for the All India Congress Committee Session to be held at Mattaur and further threatened the businessmen and industrialists that in case of any failure on their part to contribute the maximum funds for the said purpose, drastic action would follow hampering their business.

(4) In furtherance of the said conspiracy Shri Santokh Singh Randhawa, then State Development Minister pressurised Mr. Dilbagh Singh Gill, General Secretary of the Punjab Poultry Farmers Association to collect a sum of Rs. five lakhs for the Congress Party coffers under the threat that in case of non-payment by them, the quota of 80 per cent rice bran at Rs 26 per quintal would be either reduced or

abolished. Under this threat Shri Dilbagh Singh Gill collected a sum of Rs. 1,16,005 from the Poultry Farmers and issued receipts therefor and handed over the same to Shri S. S. Randhawa for the purpose of the party funds.

(5) Shri Zail Singh along with Shri Dilbagh Singh Daleke, then State Minister for Transport again held a meeting at Amritsar in which Government officials and leading Industrialists also participated and identical demands were made on them. Another meeting of this very nature was held at Jullundur and Goraya by Shri Zail Singh along with Shri Yash then Excise and Taxation Minister, Punjab and Shri Gurbanta singh, then Agricultural Minister in the State Cabinet in which also high Government officials were present.

(6) It is the allegation that Shri Zail Singh collected a sum of Rs. three lakhs from various industrialists through cheques whilst Mr Joginder Pal Pandey collected a sum of Rs 2.85 lakhs from different firms in the same manner. Shri Yash Excise and Taxation Minister collected a sum of Rs. fifteen to twenty lakhs from liquor contractors and traders whilst Shri Dilbagh Singh Daleke collected Rs. eight to ten lakhs from the transporters in the State. Shri Hans Raj Sharma, then Finance Minister in the Congress Government is also alleged to have collected funds and minted money in lakhs and shared the booty with the Chief Minister Shri Zail Singh and some other Ministers unnamed had also collected lakhs of rupees through Government officials under their control by abusing their official position.

(7) The Ministers of the Congress Government are alleged to have blatantly misused their powers and deployed the Government officials under their control to work at Mattaur Session of the Congress Party though such Government officials could have no connection with a private political function of the Ruling Congress Party. It is alleged that the State Exchequer was unlawfully burdened to the tune of lakhs of rupees for incurring expenditure entirely for the purposes of holding the said session. Indiscriminate use of Government stores and machinery was also made in connection with the same. Specifically it is alleged that purchase of buckets worth Rs. 16,000 for the purpose of the Mattaur Session was unauthorisedly made. Shri Gurbax Singh Sibia, petitioner, then the State Irrigation and Power Minister had further ordered the purchase of 600 chairs costing nearly Rs. 37,000 and eight geysers worth Rs. 12,000 to be instaled at Government expense for the purpose of the said session. Vehicles were also

hired at public expense and a sum of Rs. one lakh was spent on this account by the Government though they were entirely utilised for the purpose of the Congress Party. It is alleged that Shri Hans Raj Sharma, Finance Minister without caring either for the financial rules or the propriety allowed the diversion of the Government funds for purposes which were entirely unauthorised in law.

(8) Mr. Jugraj Singh, Chairman of the Punjab Agriculture Marketing Board by misuse of his authority is alleged to have collected five to six lakhs of rupees and delivered the same over to Shri Zail Singh, Chief Minister. Similarly Shri Zora Singh Brar, Chairman of the Punjab State Electricity Board, Shri J. R. Bansal, Chairman, Punjab Public Service Commission Shri Niranjan Singh Mitha, Member, Punjab Public Service Commission along with Shri Sant Ram Singla, Political Secretary of Shri Zail Singh by abuse of their authority and misuse of their powers as public servants collected considerable wealth and funds and shared the same with Shri Zail Singh and covered their traces by showing nominal contributions to the funds of the Congress for election and for the All-India Congress Committee Sessions.

(9) A cheque of Rs. 30,000 was secured by Mrs. Sajda Begum, M.L.A. and General Secretary of the Punjab State Congress Committee from the Malerkotla Power Supply Company and the said cheque was endorsed by her for encashment through a Sale Tax Inspector. However, the cheque being crossed could not be cashed and had, therefore, to be returned to the Company and in lieu thereof Rs. 30,000 were then abtained in cash. It is aleged that Mrs. Sajda Begum aforesaid misappropriated the lions share of the collections made by her by misuse of the authority in collusion with Shri Zail Singh, Chief Minister.

(10) Shri Onkar Chand, part-time member of the Punjab State Electricity Board and Shri Sat Pal Mittal petitioner then the Chairman of the Agro Industries Corporation, Punjab, who were the General Secretaries of the Punjab Pradesh Congress at the time collected over one crore rupees for the Mattaur Sessions and other party purposes and misappropriated the same in connivance with the Chief Minister by preparing false records therefor. Lastly, it has been alleged that Shri Zail Singh, Chief Minister had obtained bribes from smugglers, blackmarketeers, industrialists and various business firms during the emergency for giving them protection against legal action. He obtained a sum of rupees two lakhs from Dharam Pal Garg and another similar amount from Mr Jawahar, Oswal Vegetable Oil

Dealers in 1975 just before the Mattaur Session for the consideration of stoping legal action pending against them.

(11) In sum, it is alleged that the conspirators aforesaid detained an amount exceeding rupees five crores by the methods detailed above and also acquired assets disproportionable to their known sources of income in the form of movable and immovable property and shares held Benami and clandestinely in other names.

(12) It is plain from the above that on the prosecution allegations, the respondents' stand is that the case against the two petitioners along with others is one of the most blatant cases of corruption and misuse of high authority for personal and political gain.

(13) On the other hand the stance taken on behalf of the petitioners apart from alleging that the allegations against them are false is that the present case is merely another weapon for the villification of the petitioners in particular and for the victimisation of the political opponents in general by the present Ruling party. It has been alleged that the Congress Government in the State had constituted a Commission of Enquiry headed by Justice Chhangani to enquire into certain allegations against the Ministers of the former Government of the Akali Party, headed by S. Parkash Singh Badal earlier. The said report had indicted many persons including S. Parkash Singh Badal now the Chief Minister and in consequence thereof criminal proceedings had been initiated against Shri Badal and others. It is alleged that the lodging of the present first information report is a reprisal for the same and is politically motivated.

(14) At the outset, it deserves highlighting that two rival, and if I may say so diametrically opposite views, vie for acceptance in these cases. On the one hand it is the stand that section 438 of the Code of Criminal Procedure gives an unlimited and unrestricted discretion to the court to grant anticipatory bail *if and when it thinks fit* and this discretion cannot in any way be constricted. On the other hand, the respondent-States contend that the power herein is of an extraordinary nature which is to be exercised in exceptional circumstances and is plainly circumscribed by the other provisions of Criminal Procedure Code.

(15) There has very recently been a spate of petitions for the grant of anticipatory bails from both the States of Punjab and

Haryana. Indeed the exercise of this power has become a matter of considerable legal and even public controversy. Within this Court, Tewatia J., has had occasion to consider the matter in a slightly different context of the grant of bail in similar cases under the general provisions. In both these cases *Shri Onkar Chand* v. *The State of Punjab* (1), *and Jagjit Singh* v. *The State of Punjab* (2), whilst declining bail to the petitioners it has been observed that the Courts should be very wary of throttling the legitimate investigation of such cases at the very threshold. It has been pointed out that the cancer of corruption in the higher echelons of the Government and of the political parties presents a greater menance to the society than conventional crime. On the other hand, learned counsel for the petitioners had placed reliance on numerous interim orders issued under section 438, Criminal Procedure Code, and also some brief confirmatory judgments thereafter in order to contend that this Court has so far exercised this power rather liberally in innumerable cases already. The conflict of judicial opinion is indeed plain and it was, therefore, that the matter was placed before the larger Bench to elucidate the larger principles and the necessary guidelines for the exercise of this extraordinary power by the Court. It is to this delicate task that we must now devote ourselves.

(16) Ere we come to the language of the existing provision itself, it becomes indeed necessary to examine, however, briefly, its legislative history. The Code of Criminal Procedure 1898 did not contain any specific provision therein corresponding to the present section 438 for specifically granting anticipatory bail. Consequently there was a sharp divergence of judicial opinion in the various High Courts about the exercise of any such power and the weight of authority tended to the view that there was no such power vested in the Court. When the matter of the revision of the Code came up before the Law Commission, it considered this aspect in its forty-first report (dated the 24th September, 1969). The desirability of introducing a fresh provision for conferring the power of anticipatory bail on the Courts was opined in the following terms:—

> "**. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purposes of

(1) 1977 P.L.R. 564.
(2) Cr. Misc. 3560 M of 1977 decided on 7th September, 1977.

disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail. We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter."

In order to give effect to the aforesaid recommendation, the Law Commission suggested the draft of a new provision to be inserted as section 497-A in the Code of Criminal Procedure of 1898. In the report, it was also pointed out that the Commission had considered the question of laying down certain conditions under which alone anticipatory bail could be granted but as it was not practicable to exhaustively enumerate those conditions, it was left to the discretion of the Court to exercise the same properly rather than fetter such discretion in the statutory provision itself.

(17) Apparently in accord with the aforesaid recommendations of the Law Commission, the Central Government introduced clause 447 in the draft bill of the Code of the Criminal Procedure 1970 for the purposes of conferring express powers to grant anticipatory bail on the High Court and the Court of Session. This provision was again considered by the Law Commission and in the relevant paragraph 31 of its forty-eighth Report it was observed as follows:—

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendations made by the previous Commission (41st Report). We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after

notice to the public prosecutor. The initial order should only be an interim one. *Further the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the Court is satisfied that such a direction is necessary in the interests of justice."*

Clause 447 aforesaid of the draft bill came to be ultimately enacted as section 438 of the Code of Criminal Procedure, 1973.

(18) Inevitably the argument here must revolve around the language of section 438 and for facility of reference, the relevant part thereof may first be set down:—

"438(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) **

(19) The learned counsel for the petitioners opened the argument on a rather flamboyant note by contending that the power to grant anticipatory bail under the aforesaid section was unlimited, uncanalised and totally unfettered. It was submitted that the Legislature had left the matter wholly in the discretion of the Court. Relying on the words 'if it thinks fit' used in sub-section (I), it was urged that wherever and whenever the Court thought so, it was empowered to direct that the petitioner in the event of his arrest should be released on bail.

(20) Though we are clearly of the view that this issue is concluded against the petitioners by the highest authority, yet we deem it necessary to remark that even on principle we find nothing therein to commend itself. The highest that may be said on the language used in section 438(1) is that a discretion has been vested in the High Court and the Court of Session for the purposes of grant of anticipatory bail. However, it is a far cry therefrom to infer that such a discretion is totally untrammelled and unfettered by any principle or by other statutory provisions as well. As I said earlier in the reference order, judicial discretion is never whimsical and always operates in a well defined channel. What perhaps deserves highligting in this context is the fact that the power under section 438 is not vested only in the High Court, but equally on the Court of Session. It was not disputed before us and appears to be well-settled by precedent that the power is concurrent in both the said forums. Reference to sections 9 and 10 of the Criminal Procedure Code shows that Additional Sessions Judges, who have co-ordinate jurisdiction would be equally vested with this power. Reference to sections 9(5) and 40(3) would further indicate that occasions may not be lacking when such a power would have to be exercised by Assistant Sessions Judges and the Chief Judicial Magistrates as well. It would thus be difficult to hold that an extraordinary and exceptional power like the one under section 438, could be vested in all the Courts aforesaid in totally absolute terms. More than two centuries ago, Lord Mansfield in the *case of John Wilkes* (3) stated in classic terms "Discretion means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful."

(21) It is unnecessary to dissert long on this aspect because their Lordships in *Balchand Jain* v. *State of M.P.* (4), have given

(3) (1770) 4 Burr. 2528.

(4) A.I.R. 1977 S.C. 366.

a conclusive answer against the view canvassed on behalf of the petitioners. Fazl Ali J. observed in no uncertain terms as follows :—

> "Section 438 does not contain unguided or uncanalised powers to pass an order for anticipatory bail, but such an order being of an exceptional type can only be passed if, apart from the conditions mentioned in Section 437, there is a special case made out for passing the order. The words "for a direction under this section" and "Court may, if it thinks fit, direct" clearly show that the Court has to be guided by a large number of considerations including those mentioned in Section 437 of the Code."

(22) Mr. Ajmer Singh on behalf of one of the petitioners had then sought to contend that apart from the limitations implicit in the language of section 438 itself, no further principle or guideline was either possible to be laid down by a precedent nor was it desirable to do so. According to him, the discretion of every Court exercising the power under section 438 must remain at large and cannot be circumscribed by judicial authority.

(23) Apart from raising the above said contention, the learned counsel was unable to advance any cogent reasoning in support of this omnibus proposition. It is more than well-settled that the function of interpretation inevitably is to canalise judicial discretion in well directed and foreseeable channels wherever it might appear to be conferred in unlimited terms by the statute itself. Indeed, a close reading of the judgment in Balchand Jain's case (supra) leaves no manner of doubt that by a process of construction their Lordships have clearly indicated some of the limitations and the guidelines within which the power under section 438 is to be exercised. These limitations were obviously not intended to be exhaustive, because the question for determination was whether the power under section 438 could be exercised in cases of an offence under rule 184 of the Defence and Internal Security of India Rules, 1971. In view of this, it is hardly open for this Court to accede to the proposition that judicial precedent cannot provide any guideline or limitation to the discretion vested by virtue of the aforesaid provision. Reference in this connection may also be made to a Division Bench judgment of Orissa High Court in *Bhagirathi*

Mahapatra and others v. *State* (5). Herein the Bench has spelled out some guidelines seriatim.

(24) The authorities relied upon by Mr. Ajmer Singh, learned counsel for the petitioner, in support of his contention appear to us as wholly wide of the mark. In the Allahabad High Court Full Bench judgment reported in *Onkar Nath* v. *State* (6), the only question referred was whether an application under section 438 of the Code is maintainable in the High Court without the same having been moved and rejected first in the Court of Session. The court held that the section contemplated two forums for moving an application and both the jurisdictions were concurrent and it was open to the petitioner to choose either of these two. Plainly, the ratio of the decision has no relevance to the point before us. In *Parhlad Singh* v. *U.T. Chandigarh*, (7), again the issue falling for determination was whether after the rejection of a petition of anticipatory bail by the Sessions Court a second application could lie. It was held that the same was not barred. The judgment is obviously of no aid to the petitioners in the present context. Similarly in *Hari Ram* v. *State of Haryana*, (8) we are unable to find any mention or observation relevant to the point before us. We may also notice that Mr. Harbhagwan Singh, learned counsel for one of the petitioners apparently repelled on his main contention by binding precedent and had himself contended that section 438, Criminal Procedure Code, is not to be read in isolation but along with preceding section 437. This argument by itself implies that the limitations clearly spelled out from section 437 are inherently implicit in the exercise of power under section 438. This, indeed, has authoritatively been laid down in *Balchand Jain's case* (4).

(25) We must, therefore, unreservedly reject the proposition that no principle or guideline can be provided by judicial precedent for the exercise of the extraordinary power vested in the Court under section 438.

(26) Before we proceed to examine the matter in some depth we are faced at the very threshold by an issue which goes indeed

(5) 1975 Cr. L.J. 1681:
(6) 1976 Cr. L.J. 1142.
(7) 1975 P.L.J. (Cr.) 186.
(8) 1976 P.LR. 1.

to the root of the matter. It is pointed out by the learned counsel for the petitioners that this Court has exercised the power to grant anticipatory bail not only with regard to offences already committed or accusations already levelled, but also with regard to those which may be committed or levelled in the future. It was brought to our notice that not in one but many cases it has been directed in absolute terms that the petitioner shall not be arrested or in the event of arrest shall be released on bail up to a clear and specified date in the future. It is thus contended that the Court has even power to grant blanket anticipatory bail to a petitioner with regard to an offence, which he might commit or at least which he might come to be charged with in future.

(27) The contention has patent substance. If it can be held that wide untramelled power vests in the Court under section 438, not only with regard to the accusations already levelled or suspected, but also with regard to those which might come to be levelled in the future, then it is plain that no guideline or limitation can be placed on the exercise of such a power as regards the existing accusations or an offence already committed. Obviously, the nature, number or manner of offence which a petitioner might commit in the future or be charged with must necessarily be unpredictable. If a valid blanket anticipatory bail can be granted for an offence that may be committed in the future, it can obviously be granted without limitation as regards those already committed.

(28) The learned Advocate General of Haryana has very forcefuly and indeed cogently assailed the existence of any power to grant blanket anticipatory bail of such a nature under section 438. It is contended that two conditions must pre-exist before the power of the Court under section 438 can even be invoked by the petitioner. There must be an accusation of the petitioner having committed a non-bailable offence. Plainly, this accusation must be an existing one or in any case stemming from the facts already in existenec. The learned Advocate General contended that the word 'accusation' though not actually defined in the Code has nevertheless a known legal connotation. Reference was made to both the wharton's Law Lexicon 14th Edition page 10, and the Law Terms and Phrases by Aiyer 1973 Edition page 18 to show that the word 'accusation' means formal levelling of a charge or an offence against a person. The aforesaid condition, however, is not enough by itself and there

must be a reasonable apprehension or belief in the mind of the petitioner that he would be arrested on the basis of such an accusation. It was argued that the *sine qua non* for invoking the jurisdiction of the Court under section 438 is the simultaneous existence of both the conditions aforesaid.

(29) We believe that the learned Advocate General is on firm ground in his aforesaid submission. The power under section 438 is not to be exercised in a vacuum, but only on the satisfaction of the conditions spelled out in the section itself. To import the language of civil law the jurisdictional fact for the exercise of the power under section 438 appears to be the co-existence of the two conditions, namely, an existing accusation (or in any case an accusation which reasonably arises from the existing facts) and a reasonable apprehension of arrest on the basis of such an accusation. We are fortified in our view by the following observations of the Full Bench in *Onkar Nath Aggarwal's case* (6) (supra) :—

> "It is obvious that the provision comprises of two parts. The first part envisages of the conditions under which a person is entitled to make an application for anticipatory bail in the Court of Session or in the High Court. There are only two conditions which must exist before he can move such an application. In the first place there must exist a ground to believe that he may be arrested and secondly there must be an accusation of his having committed a non-bailable offence. The language is plain and unambiguous."

(30) It is thus plain that the exercise of power under section 438 is with regard to a specific accusation and cannot be extended in a blanket fashion to cover all offences with which the petitioner may come to be charged. With great respect, therefore, we are of the view that no question of the grant of anticipatory bail can arise with regard to an accusation not yet levelled or in respect of an offence not yet committed.

(31) Apart from the above, it was rightly pointed out to us that the power of blanket anticipatory bail is not spelled out from the existing provisions of the Code itself, and further that any exercise of such a power would conflict with and render material provisions of the Code virtually nugatory. Reference was first made to section 151, which empowers a police officer to arrest any

person in order to prevent the commission of a cognizable offence. It was rightly pointed out that if a person, who has been granted blanket anticipatory bail, grievously assaults another person or attempts to commit a heinous cognizable offence, the police authorities would be powerless to take preventive action against him. Reference may then be made to sections 41 to 44 of the Code, which empower or authorise the arrest of offenders by the police, private persons and by Magistrates with regard to an offence committed in their presence. It is plain that in the case of a grant of blanket bail to a petitioner, the aforesaid persons and the police, would be rendered powerless to commit the offenders to custody as warranted by those provisions. Again, in such a situation, if the petitioner commits an entirely fresh non bailable offence and a case is registered under section 154, the investigating officer would be rendered powerless to do his duty of arresting the offender(s) under section 157(1) and to proceed further with the investigation of the case. Section 204 authorises issuance of non-bailable warrants by a Magistrate in a warrant case and even exercise of this judicial power would be cut down in the case of a person enlarged on blanket anticipatory bail.

(32) It is a settled rule of interpretation that a statute must be construed as a whole and any interpretation of a particular provision, which would render other material provisions nugatory, is to be avoided, if possible. Applying this maxim also, it is plain that the grant of blanket anticipatory bail cannot be read into section 438, Criminal Procedure Code.

(33) We have very closely perused the relevant sections of the Code pertaining to the grant of bail and bonds etc. and are unable to locate any provision which either in terms or by necessary implication would warrant the grant of a blanket anticipatory bail by a Court. Despite being repeatedly asked, the galaxy of the learned counsel for the petitioners and also those, whom we allowed to intervene in the course of arguments, were unable to draw our attention to any such provision. Faint suggestions had, however, emanated that such a power might be spelled out from the inherent powers vested in this Court by the Code itself. But it has been long well settled that the Code is exhaustive as regards the matters for which it specifically provides. Therefore, any theory of inherent power for the grant of blanket anticipatory bail has to be

negatived. The categoric observations in *Jairam Dass* v. *Emperor*, (9) deserve recollection in this context :—

> "Finally their Lordships take the view that Chapter 39 of the Code together with Section 426 is, and was intended to contains a complete and exhaustive statement of the power of a High Court of India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail."

We are constrained to hold that despite the recent exercise of such a power by the Court neither section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed, or with regard to accusation not yet even levelled.

(34) Now the matter has been very ably canvassed before us even on principle and we wish to place on record our gratitude for the able assistance rendered by the learned counsel; in particular by the learned Advocate-General of Haryana State and the learned Additional Advocate-General of Punjab State. We are, however, of the view that it would be wasteful to examine the matter as if it is *res integra* because a portion of the field regarding the principles and guidelines governing the discretion under section 438 is now covered by the binding precedent of their Lordships in *Balchand Jain's case* (4). It is nevertheless to be borne in mind that the judgment is not exhaustive on the point (indeed, no judgment can possibly be so) because the primary question before their Lordships was whether anticipatory bail can be granted with regard to an offence under rule 184 of the Defence and Internal Security of India Rules. It, therefore, suffices to notice briefly those aspects of the questions, which have been settled authoritatively by their Lordships. Bhagwati, J. in his concurring judgment first observed as to the nature of this power as follows:—

> "Now, this power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or 'there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail' that such power

(9) AIR 1945 P.C. 94.

is to be exercised. And this power being rather of an unusual nature, it is entrusted only to the higher echelons of judicial service, namely, a Court of Session and the High Court".

The exceptional nature of this power was further highlighted by Fazl Ali, J., who prepared the main judgment in the following words:—

"It would thus appear that while the Law Commission recommended that provision for an order of anticipatory bail to be effective when a person is arrested should be made, at the same time it stresssed that this being an extraordinary power should be exercised sparingly and only in special cases".

As regards the guidelines and the limitations on the exercise of the power under section 438, the Court laid them down in the following terms:—

"We have already stated that section 438 of the Code does not contain the conditions on which the order for anticipatory bail could be passed. As section 438 immediately follows section 437 which is the main provision for bail in respect of non-bailable offence it is manifest that the conditions imposed by section 437(1) are implicitly contained in section 438 of the Code. Otherwise the result would be that a person who is accused of murder can get away under section 438 by obtaining an order for anticipatory bail without the necessity of proving that there were reasonable grounds for believing that he was not guilty of offence punishable with death or imprisonment for life. Such a course would render the provisons of section 437 nugatory and will give a free licence to the accused persons charged with non-bailable offences to get easy bail by approaching the Court under section 438 and by-passing section 437 of the Code. This we feel, could never have been the intention of the Legislature. Section 438 does not contain unguided or uncanalised powers to pass an order for anticipatory bail, but such an order being of an exceptional type can only be passed if, apart from the conditions mentioned in section 437, there is a special case made out for passing the order. The

words "for a direction under this section" and 'Court may, if it thinks fit, direct' clearly show that the Court has to be guided by a large number of considerations including those mentioned in section 437 of the Code".

(35) From the above, it is plain that the following propositions for the grant of anticipatory bail have been finally settled by their Lordships:—

(1) That the power under section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only ;

(2) That the said power is not unguided or uncanalised, but all the limitations imposed in the preceding section 437, Criminal Procedure Code, are implicit therein and must be read into section 438 as well; and

(3) That in addition to the limitations imposed in section 437, the petitioner must further make out a special case for the exercise of the power to grant anticipatory bail.

So much of the field being authoritatively covered, the scope of the inquiry before this Bench is thus narrowed down to determine and elucidate the kind of the exceptional cases in which this power is to be exercised and the nature of the special case, which the petitioner must make out for securing an order in his favour. In *Balchand Jain's case* (4) their Lordships were not called upon to elaborate the exceptional circumstances or the kind of the special case to be made out which would warant the exrcise of this extraordinary power.

(36) The broad canvas against which the significant question aforesaid has to be examined cannot be better spelled out than in the memorable words of Lord Porter in *Emperor* v. *Khwaja Nazir Ahmed* (10):

"In their Lordships' opinion, however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he

(10) A.I.R. 1945 P.C. 18.

is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under section 491, Criminal Procedure Code, to give directions in the nature of habeas corpus".

(37) There is thus the authority of the Privy Council itself which has been reaffirmed by their Lordships of the Supreme Court times out of number for the proposition that the Code confers a statutory right on the police to investigate into cognizable crime without the sanction of any judicial authority. Therefore, it is unnecessary to elaborate on this aspect and the briefest reference to Chapter XII of the Code regarding the information of cognizable offences to the police and their powers to investigate therein would suffice. Section 154 requires that information regarding the commission of cognizable offence shall be reduced in writing and prescribes the procedure for recording the same. Section 156 in the clearest terms lays down that the Officer-in-charge of a police station may without the order of a Magistrate investigate forthwith into such a cognizable case. The succeeding section 157 whilst providing for the procedure for investigation in terms empowers the police to take measures for the discovery and arrest of the offender. In this context, it is worthwhile to recall that by virtue of section 57 of the Code, a police officer would be entitled to detain in custody such a person for twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court without seeking the sanction of any Court or Magistrate. This right of the police indeed seems to have constitutional sanction by virtue of Article 22(2) of the Constitution of

India which is almost in similar terms. However, if the investigation cannot be completed within the period of 24 hours aforesaid, the Code makes express provision therefor by section 167 and subsection (2) of the same is pertinent and the relevant part thereof may be set down here for facility of reference:—

"167(1) * * *.

* * *.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole, and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary he may order the accused to be forward to a Magistrate having such jurisdiction:

Provided that—

(a) the Magistrate may authorise detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so."

Now, reading the relevant provisions together, it is plain that in a serious cognizable offence, the Code authorises the arrest and detention in custody of the offender for the first twenty-four hours without the interposition of the Magistracy and further police custody up to a period of 15 days with the authority of the Magistrate. It is clear, therefore, that the arrest and interrogation in police custody for cognizable crime is not only visualised but expressly authorised by the Code. On behalf of the respondent-State, indeed the stand is that this is not merely a right of the police but a duty enjoined upon them and is the life blood of any effective investigation into a serious crime. It is contended on their behalf that if the power under section 438, Cr. P. C. is used indiscriminately and as a routine it would denude and render nugatory the provisions of section 167 of the Code even in those cases where the investigative agency can lay legitimate claim to the effective interrogation of an offender in their custody.

(38) On behalf of the petitioners, it was first sought to be contended that there is no inherent conflict between the power to

grant anticipatory bail under Section 438, Cr. P.C. and the right of the police under section 167 to secure the custody of the person of the offender. It was argued that the statute has itself taken care of the situation by providing that a condition may be imposed that a person enlarged on anticipatory bail shall make himself available for interrogation by a police officer as and when required.

(39) The learned Advocate-General of Haryana had forthrightly joined issued on the point that there was no conflict in the grant of the anticipatory bail to an offender and the powers of the investi, gating agency to interrogate him whilst in its custody. It was forthrightly contended that the mere joining in the investigation by a person on bail is indeed far from being the equivalent of an effective interrogation of the offender whilst in custody. The patent distinctions between the two were graphically highlighted by the learned Advocate-General. It was pointed out that the speed and swiftness of the investigation immediately after the commission or registration of the crime is indeed the essence thereof. Section 157(2) not only requires but virtually enjoins that the Investigating Officer shall forthwith take urgent measure for the discovery and arrest of the offender. It was pointed out that many a times, serious crime is unearthed only when the offender is taken unaware and forthwith confronted and questioned regarding the commission of the same. It is, threfore, that the law warrants the arrest and detention in police custody of an offender who has committed a cognizable crime for a period of up to 24 hours without any judicial intervention. The learned Advocate-General contended that this period is crucial to sometime securing invaluable pieces of incriminating evidence or get clues and leads for further investigation into the same. The grant of anticipatory bail at the very threshold, therefore; denudes the investigation of its vital elements of surprise, speed and swiftness. Counsel further contended that even after the initial period of 24 hours, the investigating officer is entitled on adequate material to secure the physical custody of an ofender from a Magistrate under section 167(2) of the Code for maintaining continuity of the investigation. With great plausibility this was highlighted as an invaluable right without which no serious or intricate crime which requires the questioning of the accused person can possibly be dug out or detected. They very purpose of section 167(2) was to allow an investigator to interrogate an accused person in isolation and to confront him with incriminating evidence regarding which he may have no answer. Such interrogation is a delicate and expert job in which the relative isolation of the offender is one of the

most material contributing factors. The grant of anticipatory bail, therefore, removes this valuable method or right from the hands of the Investigator. It further denies to the Investigating Officer a continuity of investigation which can only be guaranteed when a person is in custody. It was pointed out that a person merely joining the investigation would only present himself for a reasonable time for interrogation and thereafter be free to secure the support of friends and sympathisers for covering the traces of his crime. Interrogation during custody again denies the offender during this crucial period an opportunity to tamper with the witnesses or other evidence or secure the help of associates for the destruction of incriminating material. This is particularly so when influential accused persons who when at large have all the advantages of influence and power of money. In sum, it was contended that the grant of bail at the very initial stage of a serious crime in which the personal interrogation of the accused person is necessary would inevitably thwart a speedy investigation, leaving ample opportunity for the offender to cover the traces of his crime, influence and undermine the witnesses, secure the support and help of relations and sympathisers to impede the investigation apart from so many other imponderables which need not be specified.

(40) We are of the view that the learned Advocate-General Haryana is on firm ground in his submission in this context. As noticed repeatedly earlier, the Code in appropriate cases does authorises the detention in police custody of an offender and his interrogation as such. Adequate reasons have been advanced for the desirability and the necessity of such a power and indeed it is not for the Court to question the clearly enunciated policy of the Legislature on the point. We are clearly of the view that a mere joining of a person in the course of the investigation whilst on anticipatory bail is no substitute for investigation in custody in all those cases where his personal interrogation may be legitimately required. We have yet to come across a case where a party seeking bail would not zealously offer to join the investigation thereof and to similarly undertake not to tamper with the witnesses. If this by itself were to be sufficient then perhaps the provisions of section 167(2) need hardly ever be resorted to.

(41) Once one arrives at the conclusion that the mere joining in the investigation by a person on bail cannot be equated with investigation under section 167(2) of the Code then it becomes plain that as

soon as an effective order of anticipatory bail has been made under section 438, the provisions of section 167(2) cannot come into play thereafter. It is obvious that when a superior Court has enlarged a person accused of an offence on anticipatory bail then a Magistrate cannot possibly authorise his detention in police custody, however, legitimate a case therefor the investigating agency may be able to make. The end-result of the grant of anticipatory bail in such a case, therefore, would be that the investigating agency must thereafter be denuded of its right to interrogate the offender in custody and the magistracy denied its discretion to grant a police remand, however, incriminating the material on which this may be sought might be. In legal terminology, the exercise of power under section 438, Cr. P.C. would, therefore, override the provisions of section 167(3) of the Code even in those cases where an urgent and well-founded claim for interrogation in custody may be completely spelled out.

(42) Faced with this obvious conflict, Mr. Harbhagwan Singh, learned counsel for the petitioner, fell back on the argument of last resort that section 438 is intended to override and virtually repeal section 167(2) in this particular field. We are unable to accede to any such contention. There is nothng in section 438 itself or in its legislative history which could give the least indication that the provision was intended to override the legitimate procedure of investigation into serious crime which has been prescribed by the Code itself in Chapter XII of which section 167(2) forms the material part. Indeed as we indicate hereafter in the event of a conflict the discretionary grant of anticipatory bail must give way to the statutory rights and duties under section 167(2) of the Code.

(43) In *Balchand's case* (4), their Lordships of the Supreme Court have clearly held that the limitations under section 437 are implicit in the provisions of section 438, Criminal Procedure Code. Indeed it has been made plain in that judgment that the scope of anticipatory bail is much narrower than that under section 437 and the petitioner apart from satisfying the requirements of the latter section must in addition make out a special case therefor. Proceeding on those premises, the plain issue that arises herein is whether the court in an ordinary case would grant bail under the provisions of section 437, Criminal Procedure Code, where the investigating agency can clearly make out a legitimate case to secure the remand of the offender to police custody. The answer must obviously be in the negative. A *fortiori* it follows that if no bail can be granted in such a situation under section 437, it should not obviously be granted under section 438, Criminal Procedure Code, as well.

(44) Entirely linked to the aforesaid proposition is the question of the admissible evidence which the Investigating Agency is entitled to secure from the offender himself during the course of the investigation. It is to be borne in mind that section 162 of the code hits all statements made by any person to a police officer in the course of investigation and this obviously includes the offender himself. Sections 25 and 26 of the Indian Evidence Act again bar the admissibility of any confession made to a police officer. To this strict rule an exception is provided by section 27 of the said Act, the well-known provisions of which may also be quoted for facility of reference:—

> "27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved".

Relying upon the afore-mentioned provisions, the learned Advocate-General of Haryana had contended that not only is the investigating agency entitled in a proper case to interrogate the accused in custody but in order to obtain admissible evidence of incriminating facts having been recovered in consequence of information received from the offender be must necessarily be in the custody of a police officer at the time. It was plausibly contended that recoveries made under section 27 aforesaid are invaluable pieces of prosecution evidence which sometimes might even prove conclusive. It was submitted that the investigating agency is, therefore, both duty bound and entitled to secure material evidence from the offender which, however, can be admissible only when made in the custody of a police officer. Counsel, therefore, contended forcefully that the grant of anticipatory bail at the very threshold of the investigation would irreparably deny the investigating agency the right of securing admissible and sometimes conclusive evidence.

(45) We find apparent merit in the contention aforesaid. The law in India (in sharp contrast with many other jurisdictions) is stringent as regards the statements and confessions made to a police officer. Nevertheless in case of recoveries of incriminating facts at the instance of an accused person, an exception has been made regarding the admissibility of such a statement when it relates distinctly to the facts thereby discovered. It goes without saying that the obtaining of evidence where it can be so done under

section 27 of the Evidence Act is an invaluable right not only in investigation of a case but also in later establishing the same in a Court of law. In cases where the interrogation of the accused may well bring to light incriminating material there can hardly be any justification for denying the investigating agency their only mode of securing admissible evidence with regard thereto and connecting the same with the offender. If such an offender is granted anticipatory bail at the very inception of the investigation this may well be that section 27 of the Evidence Act thereafter can never come into play. We are of the considered view that this could hardly be the intention of the legislature whilst granting the concession of anticipatory bail in exceptional circumstances and when a special case has been made out.

(46) On behalf of the petitioners this patent hurdle in their way was sought to be crossed by contending that when a direction has been given under section 438 to the petitioner to make himself available for interrogation by the police officer, than any incriminating recoveries at his instance would be admissible under section 27 of the Act.

(47) On this argument the issue at once arises whether a person released on bail under the direction of the Court under section 438 can still be deemed to be in the custody of a police officer. We had repeatedly pressed the learned counsel for the petitioners to cite any authority wherein it has been held that a person granted bail by the Court is nevertheless deemed to be in the custody of a police officer for the purposes of section 27. Learned counsel had fairly conceded their inability to cite any such decision except the one referred to hereafter. The learned Advocate General of Haryana, however, contended on principle that the grant of bail under the direction of the Court is a contradiction in terms with the person being in the custody of a police officer. Counsel forcefully contended that once an accused person is enlarged on bail, no question of his being in actual or constructive custody can arise. Such a person, apart from being a free man, can at best be said to be in the custody of the Court or that of his surety.

(48) As already noticed on this point, we have not been well assisted by the citations of judicial precedent. As at present advised, we agree with the submission of the learned Advocate-General. It appears to us that a person lawfully released on bail either on his own bond or with sureties cannot thereafter be deemed in fact or

by any legal fiction as being in the custody of a police officer. The only divergent opinion brought to our notice is an observation of a learned Single Judge in *Tejpal Oswal, etc.* v. *The State of Punjab,* (11), whereby he confirmed an interim order of anticipatory bail. A perusal of the short judgment recorded therein would show that the learned Judge was apprehensive that the petitioner might be compelled to become a witness against himself and coercion might be used against him. Another consideration, which weighed with the learned Judge was that the counsel for the State had not filed any counter affidavit to show why anticipatory bail should not be granted. Another reason which impelled the learned Judge to confirm the interim grant of anticipatory bail was that the investigating agency claimed that it was difficult to effect recoveries during the short intervals when the petitioners were ordered to appear before the Investigating Officer which was not a good ground. From this judgment, we are unable to spell out any clear ratio that a person released by the Court on bail is nevertheless in the custody of a police officer for the purposes of section 27 of the Act. It appears that in a solitary observation, it was directed that any statement made during interrogation by him would be deemed to have been made by the petitioner in custody. Counsel for the petitioners sought to project this observation as the ratio of the case but we are unable to construe it as such. In any case no reasoning has been given for such a view point and it appears that no judgment or authority was either cited or considered. However, if this observation seeks to lay down that a person released on bail by the Court is nevertheless in custody of a police officer then we respectfully differ and would overrule the same.

(49) In view of the aforesaid discussion it is plain that where the investigating agency should reasonably claim that it has to secure incriminating material from information likely to be received from the offender himself, the power of the grant of anticipatory bail cannot be legitimately resorted to. Any such exercise would irreparably exclude the admissible evidence under section 27 of the Act which might well become available to the prosecution. We are, therefore, of the considered view that where a legitimate case for the exercise of discretion by the Magistrate to remand the offender to police custody can be made out under section 167(2) of the Code or a reasonable claim to secure incriminating material from information likely to be received from the offender under section 27 of

(11) Cr. Misc. 3370/M/77 decided on 19-8-77.

the Evidence Act can be made out, the power under section 438 of the Code be not exercised.

(50) It bears repetition that Balchand's case (4) has authoritatively laid down that in respect of non-bailable offences all the conditions imposed by section 437 of the Code are implicity contained in section 438 as well. Now a reference to section 437 would show that it, in terms, contains a prohibition to grant bail in all cases where there appears reasonable grounds for believing that the offender has been guilty of an offence punishable with death or imprisonment for life. The nature and the seriousness of the charge by itself, therefore, is one of the important considerations for the non-release of an accused person on bail. This aspect of the matter was authoritatively considered by their Lordships in *The State* v. *Captain Jagjit Singh*, (12) on the basis of the relevant provisions of the earlier Code. The charge against the accused person in the said case was under section 3 of the Indian Official Secrets Act, 1923. Their Lordships whilst reversing the order of bail granted by the High Court observed as follows:—

> "* * * Among other considerations, which a Court has to take into account in deciding whether bail should be granted in a non-bailable offence, is the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the court should refuse bail even though it has very wide powers under section 498 of the Code of Criminal Procedure".

It deserves highlighting that section 498 of the earlier Code was in the widest term and conferred unrestricted powers on the High Court or the Court of Session to grant bail. If such was the situation under so wide ranging powers, it is plain that the restriction and limitations would be greater under section 437 of the present code. What, however, is of greater significance is virtually the admitted position that the scope of section 438 is certainly narrower and more limited than that of section 437 of the Code. Apart from satisfying the conditions under section 437, special case has still to be made out for the exercise of the discretion thereunder. It, therefore, appears to us that where the nature of the charge is so serious as to be punishable with death or imprisonment for life it would normally be inapt to exercise the power of the

(12) A.I.R. 1962 S.C. 253.

grant of anticipatory bail at the very threshold of the investigation. An indication to this effect is authoritatively available *in Balchand's case* itself where Fazl Ali J., has observed that it could never have been the intention of the legislature that persons accused of serious charge, like murder, should get easy bail by approaching the Court under section 438, Criminal Procedure Code, and by-passing section 437 thereof. The view we are inclined to take, derives support from the following enunciation in *Somabhai Chaturbhai Patel* v. *State of Gujarat,* (13):—

> "The Court will not exercise the power to enlarge on bail at the stage of pendency of investigation in cases where the Court would be slow to do so after investigations have been completed or closed. In other words, the Court will not be hustled into exercising these powers in cases where the offence is one which is punishable with death or imprisonment for life".

We, are therefore, of the view that the discretion in section 438, Criminal Procedure, Code, should not be exercised with regard to offences punishable with death or imprisonment for life, unless the Court at that very stage is satisfied that such a charge is false or groundless.

(51) On behalf of the States of Punjab and Haryana, our attention was then sought to be focussed on both the peculiar nature of the crime alleged herein and the time of its commission. Mr. I. S. Tiwana, the learned Additional Advocate-General submitted that the two petitioners held high positions of governmental and political power at the time and were part and parcel of a huge conspiracy to commit corruption and embezzlement, the ramification of which runs into crores of rupees. He contended that whatever may be the consideration of individual rights, the larger interest of the State would inhibit the exercise of the exceptional jurisdiction under section 438 of the Code in these cases.

(52) The learned Advocate-General of Haryana has highlighted that these are crimes committed in the heyday of the last Emergency when unbridled executive power loomed large over the country when the legislatures were left inert and moribund and even the last citadel of the judiciary was sorely besieged and perhaps its outer ramparts breached. Learned counsel contends that the

(13) 1977 Guj. L.R. 131.

offenders in these cases had at their beck and call all the wide-ranging executive powers of the State to cover or camouflage the traces of their crime. Such criminality, according to him, was not easy to detect and now that the respondent-State has launched a crusade to unrevel this high corruption, the Courts in the larger interest of the State should not interpose to halt the investigation in its tracks at the very threshold.

(53) The aforesaid argument of the learned Advocate-General of Haryana is perhaps not bereft of plausibility. However, it has sharp political and emotional overtones and we deem it best not to pronunce upon the same in consonance with the well-known norm of judicial restraint.

(54) Nevertheless within this country perhaps even the most optimist person could hardly deny that corruption has been its bane. The evil tends to seep at all levels of the body politic, both high and low. We agree with the observations of Tewatia, J., in *Onkar Chand's case* (1), that 'if the society in a developing country faces a menace greater than even the one from the hired assassins to its law and order, then it is from the corrupt elements at the higher echelons of the Governments and of the political parties'. The country had attempted to remedy the evil by even enacting special legislation, like the prevention o Corruption Act but despite its enforcement it can fairly be said that as yet only the outer fringe of the vast problem has hardly been tackled. What deserves parti cular highlighting in this context is the herculean task of investigation in corruption cases. It is plain that the crime is committed in secrecy and leaves ample time to its perpetrators for ensuring the evasion and detection thereof later. The giver of the bribe is as much *particep criminis* in the crime and is as much interested in covering the traces thereof as the one who takes the bribe. In cases of corruption at a large-scale secret deals and *benami* transactions are indeed a common place. Diversion of ill-gotton funds to various known and unknown sources is equally in the scheme of things. Therefore, in such a case it is idle to expect from the Investigating Agency or the informant at its very inception to lay before the Courts adequate material to conclusively implicate the person complained against. It is to be borne in mind that the issue when unbridled executive power loomed large over the country, of the investigation. Therefore to require the investigating agency at the very threshold to prove the guilt of the accused persons would be putting them under a burden which would be impossible to

discharge. This aspect of the matter has been succinctly stated in the following two conclusions arrived at in *Somabhai Chaturbhai Patel's case* (13) (supra):—

> "The investigation being incomplete it would neither be feasible nor possible to anticipate the material that might be eventually collected.
>
> The Court will not be justified in acting on the hypothesis that no further or more serious material incriminating the accused will be unearthed".

(55) Again one cannot lose sight of the fact that in modern times with the inevitable concentration of powers in the higher echelons of the Government and the ruling political parties, the incumbents of such offices have become peculiarly exposed to the temptations laid in their way. It would perhaps be inapt at present to refer to any recent incidents within the country itself but instances are certainly not lacking in the neighbouring ones. To refer to a relatively recent one, Mr. Kakuei Tanaka, th former Prime Minister of Japan, who was the undisputed leader of the ruling Liberal-Democratic Party therein was involved for taking a bribe of $1,66,000 from the Lockheed Aircraft Corporation of the United States. He was detained and formally arrested in Tokyo on July 27, 1976, and the nature of the investigation in such like cases is exhibited by the fact that a task force of 40 prosecutors and 60 Secretaries had questioned 400 persons, raided 136 places and seized nearly 66,000 documents during the course of the probe. He was kept under detention for more than three weeks and ultimately indicted in Court in August, 1976. Nearer home across the western border a former head of the State is facing trial whilst under detention for a crime allegedly committed in 1974 when he was in power.

(56) The real issue herein before us is whether the Larger Interest of the State demands that in cases of allegations of blatant corruption at the higher echelons of the Government and political parties, the Court should not interpose in favour of the offenders by granting pre-arrest bail. On this aspect, the matter is not devoid of authority and their Lordships of the Supreme Court in two cases have clearly opined thereon even within the narrower field of grant of bail under the general provision of the Criminal Procedure Code. In *Capt. Jagjit Singh's case* (12), Wanchoo J., speaking for the Court

highlighted the larger interest of the public or the State as one of the material considerations in granting bail under section 498 of the old Code. The charge in that case was under section 3 of the Official Secrets Act and on this very larger principle, their Lordships not only declined the grant of bail but in fact reversed the exercise of the discretion by the High Court in favour of the Offender and cancelled the bail already granted. In the *State of Maharashtra* v. *Nainmal Punjabi Shah and another*, (14), which was a case of economic offences under the Customs Act, their Lordships interfered with the discretion of the High Court on this score with the following observations:—

> "* * The third consideration is the larger interest of the State, as pointed out by this Court in *State* v. *Jagjit Singh*, (12) (supra). We feel that this interest was not adequately kept in view by the High Court and this requires that the respondents should be kept in custody for six months from the order of the High Court, dated August 1, 1969".

(57) As we said earlier, it is difficult to unravel the crimes of corruption. It is harder to detect the same when it is committed by what is now a well-known category of white-collar criminal. However, it is the hardest to bring to book when such crime stems from the corridors of executive power and the niches of high offices. It is, therefore, that the Courts must ever remain wary of throttling and in any way impeding the legitimate investigative process in such cases. We are, therefore, of the view that in cases of serious economic offences involving blatant corruption at the higher rungs of executive and political power, the larger interest of the public and the State demand that the extra ordinary power under section 438 of the Code be not exercised in favour of the offenders at the very threshold of the investigation.

(58) We would perhaps be failing in our duty if we do not, however, notice briefly an argument which was seriously and vehemently presed before us on behalf of the petitioners. It was contended that the refusal of anticipatory bail to the petitioners would expose them to third degree methods and the alleged torture chambers employed by the police. It was rather melodramatically submitted that the petitioners would be compelled to become witnesses against themselves and that there is a constitutional protection against such coercion.

(14) (1970) 1 S.C.D. 141.

(59) We are unable to appreciate this contention and indeed slightly amused by the way in which it has been presented before us. Primarily the submission once again exhibits an uncalled for attitude of distrust towards the investigating agency which has been oft disapproved at the highest level. The rack, the thumb-screw and even the stake to which one of the learned counsel for the petitioners referred eloquently are indeed things of the past and of different claims. The Courts in India and the process of law stand as ever, vigilant sentinels to correct the abuse or misuse of power by the police or other executive authority. Indeed the alleged apprehension of torture in the present case seems to us more as a figment of imagination rather than an actual fact. It suffices to close this aspect of the case with the following oft-repeated observations of Venkatarama Ayyar, J., in *Aher Raja Khima* v. *State of Saurashtra* (15):

> "The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration."

Now it has been authoritatively settled in *Balchand Jain's case* (4) that in order to successfully invoke the jurisdiction under section 438, the petitioner apart from satisfying all the conditions requisite under section 437 must in addition make out a special case for securing an order of anticipatory bail which is of an exceptional type. Their Lordships did not elaborate and indeed were not called upon to do so as to what would be the exceptional circumstances which the petitioner must show and what is the nature of special case which he must establish over and above the requirements of section 437. It appears to us that these further limitations which fetter the discretion under section 438 would require that the petitioner should satisfy the Court that the accusation against him does not stem from ordinary reasons of furthering the ends of law and justice in relation to the case but solely from some other dishonest motive with the object of humiliating the petitioner. In other words, apart from coming within the four corners of section 437 the petitioner here must establish that the charge levelled against him is *mala fide* and stems from ulterior motive.

(15) A.I.R. 1956 S.C. 217;

(60) Now what is to be the basis and what is the nature of the material evidence upon which the Court is to be so satisfied for making the exceptional type of order under section 438. To our mind a mere allegation of *mala fides* by an offender and a vehement claim of innocence put forward by him are manifestly insufficient for arriving at such a conclusion by the Court. We have yet to come across a case where a person seeking bail on a serious charge does not plead innocence and further does not allege some reason for his alleged false implication. If the allegations by themselves are to be accepted at their face value then virtually in every case the power under section 438 would have to be exercised. Therefore, what indeed is an extraordinary power for exceptional circumstances would in fact become routine and common place. That does not appear to us to be the intent of the law. What deserves emphasis in this context is that a mere claim of innocence and liberal allegations of *mala fide* motives invariably laid at the door of the investigating agency by the offender is not enough. The court has thus to be independently satisfied about the *prima facie* falsity of the charge and the ulteriorness of the motive for levelling the same. As was said earlier, section 438 invariably operates at the very initial stage of the investigation and even the most competent prosecutor may not then be in a position to put before the Court conclusive material to bring the charge home against the person accused. To put the prosecutor to proof at the very inception of the investigation appears to us as running counter to the whole scheme of investigation into cognizable cases as laid down in Chapter XII of the Code. This, indeed, is not the stage for invoking the known maximum of the Criminal Law that the burden of proof rests upon the prosecution. The stage arrives at the end of the investigation and in the course of the trial itself. The inception of the investigation is not a trial.

(61) It has been authoritatively laid down that a special case has to be made out. Who is to make out this special case ? The answer plainly is the petitioner. It is well-settled that the burden of establishing *mala fides* is on the person alleging. It is thus for the petitioner to first *prima facie* substantiate his allegation that the charge of serious non-bailable offence against him has been levelled *mala fide*. Without pretending to be exhaustive one may take an instance in a case of criminal breach of trust where the petitioner can forth-with produce an authentic documentary proof demolishing wholly the allegation of criminal misappropriation against him. Similarly, even in a conventional crime like murder, the petitioner may be able

at the very initial stage to show a cast iron *alibi* like his having been confined in a jail at the material time of the alleged crime of murder elsewhere by him. This could be the kind of cases where the Court on a serious charge would be able to hold that a special case has been made out by the petitioner for the exercise of the extraordinary and exceptional power under section 438. We refrain from elaborating further on this aspect of the case on principle because it seems to be equally well covered by an authority of the Division Bench of Orissa High Court in **Bhagirathi Mahapatra** v. **State** (5) Supra wherein their Lordships observed as follows :—

> "These tests are to be applied by the Court while considering an application for anticipatory bail. In addition, the Court must be satisfied that the arrest and detention of the petitioner would be not from motives of furthering the ends of justice in relation to the case, but from some ulterior motive, and with the object of injuring the petitioner.
>
> The exercise of the power to grant anticipatory bail should be restricted to exceptional cases, whose facts satisfy the above conditions. Ordinarily, the Judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The power to interfere with the discretion of the police at the very earliest stages of an investigation would, therefore, require to be exercised with utmost care. Merely because it is alleged that the petitioner apprehends arrest on a false accusation and that such arrest will be a cause of disgrace and dishonour to him, the Court will not be justified in granting anticipatory bail. The Court has both a right and a duty to satisfy itself that the apprehension is reasonable. If the Court chooses to accept the allegations made in the petition without applying its mind and examining the materails available with the police, the Court will be failing to discharge its duty."

(62) We are, therefore, of the view that the special case which their Lordships of the Supreme Court had in mind *Balchand's case* cannot be spelled out from mere general allegations of *mala fides* in the petition. Indeed it would require that the petitioner must show (and the Court must be wary that mere allegations of *mala fides* by the petitioner are inadequate) and the Court must be satisfied on

materials before it that the allegations of *mala fides* are substantial and the accusations appear to be false and groundless.

(63) From the rather comprehensive discussion aforesaid, it is obvious that we have been concerned primarily to elucicate the guidelines and the limitations for the exercise of the discretion vested in the Court under section 438, Criminal Procedure Code. The positive aspect of this issue as to when such power must necessarily be exercised has not been adequately debated before us. Learned counsel for the two petitioners did not formulate or urge before us the grounds on which such power must be exercised apparently because of the reasons that their clients' cases may not be coming within the four-corners of that rule. However, we do find that the judgment of their Lordships in *Balchand's case* (4), in a way indicates the positive cases in which this jurisdiction is to be legitimately invoked. Fazl Ali J., observed therein as follows :—

> "*** From what has been said it is clear that the intention of the Legislature in enshrining the salutary provision in section 438 of the code ... which applies only to non-bailable offences was to see that the liberty of the subject is not put in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible persons or officers who may some times be in charge of prosecution."

It is evident from the above, that their Lordships conceived the normal application of the provisions of section 438 to cases where the charge itself is of a frivolous nature. A case of this kind would be a fit one to exercise jurisdiction in order to needlessly prevent the humiliation of the offender. Similarly the source from which such a charge stems has been considered of significance and where it has been levelled by unscrupulous or irresponsible persons, that would itself be a ground for consideration in the exercise of the power. We have in the earlier part of this judgment also indicated that where the Court can on adequate material come to a firm conclusion that the charge is totally false, it may nevertheless resort to section 438, however serious, be the nature of the crime. It is unnecessary to further elaborate this matter and all that we wish to indicate is that section 438, Criminal Procedure Code, appears to us in the nature of a shield for protecting entirely innocent persons from malicious humiliation, if the necessary conditions for its exercise are satisfied. Care has to be taken that this provision does not become a sword in the hands of

the unscrupulous petitioners to gain time for destroying the incriminating evidence against them and to mock at the legitimate investigative processes authorised by the law.

(64) In a matter of such significance we have necessarily been compelled to consider it in depth and deal with it at some length. However, for the sake of clarity we would wish to summarise our main conclusions in this regard in the following terms :—

1. That the power under section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only ;

2. That neither section 438, Criminal Procedure Code, nor any other provisions of the Code authorise the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled.

3. That the said power is not unguided or uncanalised but all the limitations imposed in the preceding section 437, Criminal Procedure Code, are implicit therein and must be read into section 438 as well.

4. That in addition to the limitations imposed in section 437, Criminal Procedure Code, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.

5. That where a legitimate case for the remand of the offender to the police custody under section 167(2) can be made out by the Investigating Agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under section 27 of the Evidence Act can be made out, the power under section 438 of the Code be not exercised.

6. That the discretion under section 438 Criminal Procedure Code, be not exercised with regard to offences punishable with death or imprisonment for life unless the Court at that very stage is satisfied that such a charge appears to be false or groundless.

7. That the larger interest of the public and State demand that in serious cases like economic offences involving

blatant corruption at the higher rungs of the executive and political power, the discretion under section 438 of the Code be not exercised.

8. That mere general allegations of *mala fides* in the petition are inadequate, and the Court must be satisfied on materials before it that the allegations of *mala fides* are substantial and the accusation appears to be false and groundless.

(65) In the light of the aforesaid principles we may now proceed to examine first the cases of the two petitioners which were placed before the Full Bench by the reference. Apart from other considerations, learned counsel for the petitioners highlight their claim to anticipatory bail on the ground that both the petitioners have held high office in public life, both in the Government or Semi-Government institutions as also in the organisational set up of the then ruling party. It is submitted that they are now men of substance who are not likely to abscond and would willingly face trial.

(66) Frankly we have been rather unable to appreciate the aforesaid argument based obviously as it is on the status of the petitioners. Learned counsel for the petitioners could hardly contend that every person charged with serious crime including that under section 469, Indian Penal Code, which is punishable with life imprisonment would be entitled to knock at the door of the Court for anticipatory bail. Now if the charge against the petitioners is untenable, it would be so irrespective of their status in public life or with regard to their property, but if the charge be true the fact of high office and the earlier wielding of political power is not mitigation but only an aggravation of the crime. The Constitution vests executive powers in the hands of the representatives of the people as a sacred trust, and its abuse or misuse is not to be lightly regarded. Again the charge of high political corruption and gross abuse of executive power is not, and perhaps can hardly ever be laid at the door of either the penurious or the lowly but invariably the mantle of such crimes in-evitably falls on the shoulders of those who whilst in high position of public and Government life have corruptly wielded the sacred trust laid in their hands. In such cases to treat the petitioners differently on grounds of status appears to us in a way a denial of the concept of equality before the law. The Courts cannot merely pay lip service to the rule that all are equal before the law yet in effect treat some as more equal than the others. We

believe that this concept of equality before the law applies both in the matter of rights as also in the matter of liability.

(67) The specific issue of the *mala fides* of the prosecution in the present case has then been vehemently pressed before us. It is pointed out that the present Government in the State of Punjab is headed by a political opponent of the two petitioners and therefore the present investigation by the authority of the said State must be deemed to be with the ulterior motive of discrediting the petitioners and others like them.

(68) We have earlier dilated on the nature of the material upon which a Court has to be satisfied on this issue before exercising the power under section 438 of the Code. It is significant to note here that hardly a word hsa been said about Shri Gurbachan Singh Behniwal, S. P. Vigilance who has provided the information upon which the case stands registered. Specific allegations have been made therein and the learned Additional Advocate General of Punjab has been forth-right in his stand that some of these have now been corroborated by documentary evidence as well. In this context one can visualise the situation where a particular official in the hierarchy of the Government acts *mala fide*. One can also understand the allegation that even a Minister of the Government in a particular situation might have acted for ulterior motives and if it can be so established perhaps such an action may be struck down in an appropriate case. But the petitioners level a blanket allegation that the whole State machinery in their case is acting in disregard of the law and with dishonest motives. It would indeed be a sad day where the Courts are asked to hold that the State as an institution or the Government as an organisation is *enmass* acting *mala fide*. We are unable to hold that on the mere allegations of the petitioners any such weird claim stands established before us. Nor can we deviate from the salutary rule that the presumption is that the State and its limbs act *bona fide* and for public weal and the burden lies heavily on those who wish to establish otherwise.

(69) The learned Additional Advocate-General of Punjab highlighted the fact that the present case was registered on 26th August, 1977 after a brief preliminary collection of facts by a very responsible officer in the Police Organisation. He submitted that not only two petitioners but virtually all the persons specified in the F.I.R. have secured interim anticipatory bails from this Court. With

considerable deference it was submitted that the invstigation of the case has, indeed, been halted in its tracks already by denuding the investigative agency of its basic right to interrogate the petitioners in custody. It was also submitted that the petitioners along with others mentioned in the F.I.R. still exercise vast influence because of their previous positions of power and also because of what has been termed as money-power before us. It was contended that their continuance on bail would denude the investigative agency from interrogation in custody of the petitioners as also from securing traces of the huge amassed wealth and the misappropriated amounts. The learned Additiinal Advocate-General took the firm stand that the accused persons here were required to be interrogated in custody under section 167(2) and further there were distinct possibilities of recovery under section 27 Indian Evidence Act on the basis of information which may be received from them.

(70) The learned Additional Advocate-General further points out the specific allegations already made against the two petitioners in the F.I.R. Apart from this, it was urged at the Bar that the investigating agency was in possession of evidence to show that Shri Sat Pal Mittal petitioner, who began his life as a beetle seller, and could hardly make both ends meet, is now in possession of property worth more than Rs. 41,00,000 in his own name and that of his near relatives. All this property, accordinng to the prosecution, is utterly disproportionate to the known financial sources of Shri Sat Pal Mittal. Similarly, the prosecution is alleged to be in possession of documentary evidence regarding the unauthorised collection of a sum of Rs. 40,250 only by Shri G. S. Sibia.

(71) From the aforesaid facts it is plain that the larger tests which we have laid down above are not even remotely satisfied in the present case. In our view, no special case for the exercise of exceptional power under section 438 has been made out. We accordingly dismiss these two petitions.

(72) Criminal Miscellaneous Nos. 3719/77, No. 3720/77 and No. 3718/77 Jaswant Rai Bansal, Niranjan Singh Mitha and Joginder Pal Pandey *versus* State of Punjab, have been directed by the order of Tewatia J. to be laid down before this Bench. These cases arise from the same F.I.R. and the nams of these three petitioners and specific allegations regarding them have been made in the F. I. R. Herein again, the stand of the learned Additional

Advocate-General for Punjab is identical to that of the two petitioners referred to above, whose petitions have been dismissed. It is stated by him that their interrogation in custody is absolutely essential for further investigation of the case. In addition, the learned Additional Advocate-General points out that the limited investigation so far made discloses that Shri Joginder Pal Pandey who began from humble origins had migrated to England in 1958 and returned to this country in 1962 and started working in hosiery. According to the learned Additional Advocate-General the net value of the property now in the name of Shri Pandey and his close relatives and held benami exceeds Rs 45 lakh. This is entirely disproportionate to all known sources of this petitioner's income.

(73) A close persual of the merits of the cases of these three petitioners shows that no case even remotely satisfying the test laid down by us is made out. These petitions therefore, must also necessarily be dismissed.

Prem Chand Jain, J.—I agree.

S. C. Mital, J.—I agree.

FULL BENCH

APPELLATE CIVIL

Before S. S. Sandhawalia, S. C. Mital and Rajendra Nath Mittal, JJ.

GANPAT,—*Appellant.*

versus

RAM DEVI ETC.,—*Respondents.*

Regular Second Appeal No. 79 of 1977

October 13, 1977.

Code of Civil Procedure (V of 1908) as amended by the Code of Civil Procedure (Amendment) Act (104 of 1976)—Sections 4 and 100—Punjab Courts Act (VI of 1918)—Section 41(1)—Amendment in section 100 of the Code—Whether has affected the provisions of section 41(1) of the Punjab Courts Act.

Held, that section 4(1) of the Code of Civil Procedure 1908 saves the provisions of the Punjab Courts Act 1918 in general and the specific provisions of section 41 thereof in particular, from being in any