

A CONSTITUTIONAL SCRUTINY OF SECTION 438(4) CRPC : UNVEILING THE IMPACT OF THE 2018 AMENDMENT ON ANTICIPATORY BAIL JURISPRUDENCE

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ABSTRACT

The landscape of criminal law in India underwent a significant transformation with the enactment of The Criminal Law (Amendment) Act, 2018. Among the noteworthy amendments was the insertion of Section 438(4) into the Code of Criminal Procedure (CrPC), introducing an absolute bar on the grant of anticipatory bail in cases involving accusations under sub-sections (3) of section 376 or section 376 AB or section 376 DA or section 376 DB of the Indian Penal Code, 1860.

This paper undertakes a comprehensive analysis of the constitutional validity of Section 438(4) in the context of the Indian legal system. Anticipatory bail, a procedural safeguard aimed at protecting an individual's right to personal liberty, has been a subject of scholarly discourse and judicial scrutiny. The 2018 amendment, while ostensibly targeting heinous sexual offences, raises fundamental questions about the balance between societal interests, the accused's rights, and the overarching principles enshrined in the Constitution of India. As we delve into the historical evolution of anticipatory bail, scrutinise the legal framework leading up to the amendment, and assess the provision's constitutional implications, this paper seeks to provide a nuanced understanding of the legal landscape post the 2018 amendment.

Keywords: *Anticipatory Bail, Code of Criminal Procedure, The Criminal Law (Amendment) Act, 2018*

I. INTRODUCTION

The Criminal Law (Amendment) Act, 2018 stands as a pivotal legislative milestone in the realm of Indian criminal law, signifying a concerted effort to address pressing issues and enhance the efficacy

of the justice system. Enacted as No. 22 of 2018, this amendment aimed to fortify legal provisions pertaining to sexual offences and related criminal procedures and thus had a profound impact on the Code of Criminal Procedure (hereinafter referred

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'CrPC'), a fundamental legal framework governing criminal proceedings in India. The amendment introduced substantial changes to the CrPC, notably through the insertion of new provisions and the modification of existing ones. This legislative overhaul sought to address the evolving challenges in dealing with sexual offences and ensure a more robust legal response to such heinous crimes. Of particular significance is the introduction of Section 438(4) into the CrPC, a provision that imposes an absolute bar on the grant of anticipatory bail in cases involving specific offences under the Indian Penal Code, 1860. The insertion of this provision reflects a legislative intent to prioritise the prevention and prosecution of serious sexual offences, aiming to create a more stringent legal framework to combat such crimes. As this research paper delves into the constitutional validity of Section 438(4), it does so against the backdrop of the broader legislative changes brought about by the Criminal Law (Amendment) Act, 2018. Understanding the significance of this amendment is essential for contextualising the legal landscape within which the provision in question operates.

The newly introduced provision, as manifested in the constitutional amendment, declares that:

In section 438 of the Code of Criminal Procedure, after sub-section (3), the following sub-section shall be inserted, namely:-

*"(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860)."*¹

This absolute restriction on anticipatory bail has become a focal point of constitutional concern, specifically as it appears to clash with the principles of equality before the law and the right to life and personal liberty.

II. UNDERSTANDING THE CONCEPT OF ANTICIPATORY BAIL

Section 438 of the Code of Criminal Procedure

¹ the Criminal Law (Amendment) Act, 2018

(CrPC) plays a pivotal role in safeguarding the fundamental right to personal liberty by introducing the concept of anticipatory bail. Enacted in 1973 following the recommendations of the 41st Law Commission Report (1969), anticipatory bail provides a legal recourse for individuals who anticipate being accused of non-bailable offences. When there is a genuine apprehension of arrest, an individual can apply to the High Court or the Court of Session for a pre-emptive direction under this section. The provision empowers the court to exercise its discretion, allowing the person to be released on bail even before an arrest is made, thereby averting the need for custodial detention.

Section 438 of the CrPC lays down the provisions on anticipatory Bail:

*Sec. 438(1): When any person anticipates that he/she may get arrested on an accusation of having committed a non-bailable offence, he/she may apply to the High Court or the Court of Session for a direction under this Section. The Court may direct (if it thinks fit) that in the event of such arrests, he/she shall be released on Bail even before an arrest is made without subjecting him/her to further restraints.*²

Black's Law Dictionary (4th edition) describes bail as "procuring release from the legal custody of an individual, undertaking to appear in the designated place and place and present him/herself to the court's jurisdiction and judgement."

The difference between an ordinary bail order and an anticipatory bail order was that while the former would be issued upon arrest and thus would entail freeing from police detention; the latter would be given in anticipation of the arrest and thus would be valid at the time of the arrest.³ Hence, Anticipatory bail order is not an order of stay of arrest, rather the order is only in case he is arrested, he shall be released on bail provided he furnishes the bail bond.

Anticipatory bail is an injunctive order (injunction against custody) whereas regular bail is a remedial order⁴. It is a remedial order in the sense that the accused is already in custody and as a relief he is

² The Code of Criminal Procedure, 1973

³ Sunita Devi v State of Bihar 2005 S.C.C. (Cri) 43

⁴ Gurbaksh Singh Sibbia v. State of Punjab 1980 AIR 1632, 1980 S.C.R. (3) 383

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released from custody.

The foundational principle behind the inclusion of anticipatory bail was to shield individuals from arbitrary violations of their right to personal liberty. In situations where influential individuals attempt to implicate their rivals in false cases for ulterior motives, anticipatory bail serves as a crucial preventive measure. Additionally, when there are reasonable grounds to believe that the accused is unlikely to abscond or misuse their liberty, anticipatory bail offers a pragmatic solution, eliminating the necessity of first subjecting the person to custody before seeking bail. This provision is particularly relevant in the context of arbitrary arrests, which often result in the harassment and humiliation of citizens. Recognizing the pervasive nature of such arrests, Section 438 stands as a legislative bulwark, acknowledged even by the Parliament as a “crucial underpinning to shield individual’s personal liberty in a free and democratic country.” Anticipatory bail, therefore, emerges as a procedural mechanism designed to balance the scales of justice, protecting individuals from unwarranted deprivation of liberty and ensuring a fair and just legal process.

III. DECODING THE APPLICABILITY OF SECTION 438(4): ANALYSIS OF THE RELEVANT SECTIONS IN THE INDIAN PENAL CODE

The Criminal Law (Amendment) Act, 2018, introduced a significant change to the Code of Criminal Procedure (CrPC) through the insertion of Section 438(4). This provision creates an absolute bar on the grant of anticipatory bail for offences specified under sub-section (3) of Section 376 and Sections 376AB, 376DA, and 376DB of the Indian Penal Code (IPC). To comprehend the implications of Section 438(4), a detailed examination of the relevant sections in the IPC is imperative.

Section 376 of the IPC deals with the offense of rape, one of the most heinous crimes against an individual. The section defines the elements of rape and prescribes the punishment for the offense. Rape is considered a grave violation of an individual’s bodily integrity and autonomy, and Section 376

reflects society’s condemnation of such acts. Section 376(3) addresses rape cases involving victims under the age of sixteen years. It provides for a rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, and shall also be liable to fine.

Section 376AB – Punishment for Rape on Woman under Twelve Years of Age:

Enacted through the Criminal Law (Amendment) Act, 2018, Section 376AB specifically addresses rape cases involving victims under the age of twelve. This section recognizes the heightened vulnerability of young children and imposes stringent punishments on those convicted of such offences.

Section 376DA – Punishment for Gang Rape on woman under sixteen years of age:

Section 376DA focuses on the crime of gang rape, acknowledging the aggravated nature of offenses committed by multiple perpetrators. Gang rape not only inflicts severe physical and psychological trauma on the victim but also highlights the need for specialized legal provisions to address such atrocities. It provides that “*Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and with fine.*”

Section 376DB – Punishment for Gang Rape on Woman under Twelve Years of Age:

Section 376DB targets the particularly heinous crime of gang rape committed against minors under the age of twelve. It provides that accused shall be punished with imprisonment for life or with death. This provision underscores the legislature’s intent to protect the most vulnerable members of society from egregious acts of sexual violence.

Hence, the insertion of Section 438(4) in the CrPC, as a response to the 2018 Amendment, reflects a legislative decision to restrict the grant of anticipatory bail for offences under Sections 376, 376AB, 376DA, and 376DB. The rationale behind this

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restriction lies in the heinous nature of these offences and the imperative to ensure the safety and security of potential victims. By disallowing anticipatory bail, the legislature seeks to prevent the misuse of the legal process and to prioritise the protection of society, especially vulnerable individuals.

However, the Critics argue that the provision may lead to unintended consequences, depriving individuals of a fair chance to establish their innocence based on the merits of each case. The lack of discretion in treating distinct cases uniformly raises concerns about potential arbitrariness and a departure from principles of equal protection. This analysis sets the stage for a comprehensive understanding of the complex legal landscape shaped by the interplay between these statutory provisions.

IV. CONSTITUTIONAL IMPERATIVE: UPHOLDING ARTICLE 14 AND ARTICLE 21

A central argument posited in this research contends that Section 438(4) of the CrPC violates the constitutional mandates articulated in Articles 14 and 21. Article 14 of the Constitution guarantees the right to equality before the law and equal protection of the law to all individuals. It prohibits arbitrary and unreasonable classifications, ensuring that similar cases are treated similarly and different cases are treated differently based on rational and justifiable reasons. Section 438(4) treats all cases involving the specified offences uniformly, disregarding the unique circumstances, individual facts, and merit of each case. This blanket classification leads to an unreasonable and arbitrary differentiation between cases that may have distinct factual and evidentiary contexts. This lack of discretion contradicts the principles of equal protection and fairness by depriving individuals of the opportunity to establish their innocence based on the prima facie strength of their case. It was held in the landmark case of *Ajay Hasia vs Khalid Mujib Sehravardi & Ors*⁵ that “ If the classification is not reasonable and does not satisfy

the two conditions, namely, (1) that the classification is founded on an intelligible differentia and (2) that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action, the impugned legislative or executive action, would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever, therefore, there is arbitrariness in State action whether it be the Legislature or of the executive or of an “authority under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution”

Also, the constitutional imperative enshrined in Article 21, guaranteeing the right to life and personal liberty, stands compromised by the categorical prohibition on anticipatory bail outlined in Section 438(4) of the Code of Criminal Procedure (Cr.P.C) Article 21 is an embodiment of dignity, fair trial, and protection against arbitrary deprivation of liberty and underscores the importance of the principle “*innocent until proven guilty*.” The pronouncement by the Hon’ble Supreme Court in *Suresh Thipmappa Shetty v. The State of Maharashtra*⁶ reinforced the constitutional roots of the presumption of innocence, affirming its origin in Articles 21 and 14. The historic ruling of the United States Supreme Court in *Coffin v. United States*⁷ echoed similar sentiments, emphasising the presumption of innocence as foundational to the administration of criminal law. Moreover, international instruments such as Article 11(1) of the Universal Declaration of Human Rights (1948) and comparable provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the International Covenant on Civil and Political Rights (1966) uphold the right to be presumed innocent until proven guilty. Therefore, the absolute bar on anticipatory bail imposed by Section 438(4) not only contravenes these constitutional principles but also results in the prejudiced assumption of guilt solely based on the

5 *Ajay Hasia Etc vs Khalid Mujib Sehravardi & Ors.*, (1981) 1 SCC 722

6 *Suresh Thipmappa Shetty Versus The State Of Maharashtra.*, 2023 SCC OnLine SC 1038

7 *Coffin Versus United States.*, 156 US 432 (1895)

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nature of the alleged offence, leading to arbitrary arrests and unwarranted deprivation of personal liberty, thereby inflicting trauma, humiliation, and hardship upon the accused.

V. ABUSE OF SECTION 438(4): POTENTIAL FOR MISUSE AND VENGEANCE

The well-intentioned 2018 Amendment to Section 438(4) of the Code of Criminal Procedure, while aiming to address heinous offences, introduces a structure that is inconsistent with foundational principles of liberty and accountability. This section, although created with the noble objective of protecting victims, presents a risk of being weaponized for malicious purposes. False allegations, driven by personal vendettas or extraneous motives, could trigger arrests or prosecutions with severe consequences on an individual's right to liberty. This restriction, which can lead to the wrongful arrest of individuals, challenges the bedrock principle that an accused is presumed innocent until proven guilty. Legal precedents, such as the case of *Dr. Rini Johar & Anr. vs State Of M.P. & Ors*⁸ emphasise the significance of Article 21 in safeguarding against wrongful arrests and affirm the entitlement of victims to compensation in cases of such violations. It was held that Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

The observations from *Joginder Kumar vs. State of U.P*⁹ underscores the expanding horizon of human rights and caution against indiscriminate arrests. The law of arrest is balancing individual rights, liberties and privileges, duties, obligations and responsibilities. The Court in this case noted the 3rd Report of the National Police Commission to the effect that 60% of arrests were unnecessary or unjustified. This Court observed that no arrest can be made merely because it is lawful to do so. In

*Arnesh Kumar versus State of Bihar*¹⁰ The Supreme Court observed that arrest brings humiliation, curtails freedom and casts scars forever. It is considered a tool for harassment and oppression. The drastic power is to be exercised with caution.

The courts considering the Anticipatory Bail application should try to maintain fine balance between the societal interest vis-à-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused is presumed to be innocent till he is found guilty by the competent court. Exclusion of anticipatory bail has been justified only to protect victims of perpetrators of crime. It cannot be read as being applicable to those who are falsely implicated for extraneous reasons and have not committed the offence on prima facie independent scrutiny. Access to justice being a fundamental right, grain has to be separated from the chaff, by an independent mechanism. Liberty of one citizen cannot be placed at the whim of another. Law has to protect the innocent and punish the guilty.

According to Blackstone's formulation in criminal law- It is better that ten guilty persons escape than one innocent suffer. Thus considered, exclusion has to be applied to genuine cases and not to false ones. This will help in achieving the object of the law.

VI. FURTHER RESTRICTIONS ON REGULAR BAIL IN CASES OF OFFENCES MENTIONED

The 2018 Amendment introduces additional complexities for individuals accused under Section 376(3), Section 376AB, Section 376DA or Section 376DB of the Indian Penal Code (IPC), particularly concerning their right to seek regular bail under section 439 of the CrPC.

The relevant abstract of the constitutional amendment is produced herein under-

In section 439 of the Code of Criminal Procedure,
(a) in sub-section (1), after the first proviso, the following proviso shall be inserted, namely:

“Provided further that the High Court or the Court

8 Dr. Rini Johar & Anr. vs State Of M.P. & Ors., 2015 SCC OnLine SC 1694

9 Joginder Kumar versus State of U.P., (1994) 4 SCC 260

10 Arnesh Kumar versus State of Bihar., (2014) 8 SCC 273

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of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.”¹¹

This new provision significantly exacerbates the difficulties faced by the accused, further encroaching upon their fundamental rights and rendering the process of securing regular bail even more arduous and protracted. The newly inserted Proviso to section 439(1) of the CrPC introduces a mandatory requirement for the court to give notice of the bail application to the Public Prosecutor within a specific timeframe as the word ‘shall’ has been used. Such mandatory notification requirement to the Public Prosecutor within a specific time frame adds layers of difficulty for the accused.

While the intention behind such a provision might be to ensure informed decision-making and give the parties an opportunity to present their views, the actual ramifications of this amendment are deeply problematic. This new obligation, specifically applicable to cases involving offences under section 376 and its derivatives, places an undue burden on the accused. Not only does this extend the timeline for the court to consider the bail application, but it also allows for a further delay, often resulting in prolonged pretrial detention, which amounts to a clear violation of the accused’s right to liberty as enshrined in Article 21 of the Constitution.

By imposing this notification requirement on the court, the amendment fails to consider the various circumstances that might necessitate the grant of bail, such as the prima facie innocence of the accused, lack of evidence, or other mitigating factors. This mechanistic approach disregards the principle that bail should not be withheld as a punitive measure, but should instead be granted unless there are compelling reasons to the contrary. Furthermore, the timeframe of fifteen days within which the Public Prosecutor must be notified further adds to the existing delays in the criminal justice system. This is especially concerning in cases of heinous offences,

where the accused might face prolonged detention even before their guilt is proven beyond reasonable doubt. This not only infringes upon the presumption of innocence, but also perpetuates a system where personal liberty is compromised for extended periods without proper justification. The cumulative effect of these factors exacerbates the suffering of the accused, denying them the speedy and fair trial that is their constitutional right.

VII. JUDICIAL DISCRETION TO BE EXERCISED IN GRANTING ANTICIPATORY BAIL

The research delves into the nuanced factors and parameters elucidated by the Hon’ble Supreme Court in *Siddharam Satlingappa Mhetre v. State of Maharashtra*¹² and *Gurcharan Singh v. State (Delhi Admn.)*¹³ in granting bail.

Emphasising that no universal formula exists for granting anticipatory bail, the Hon’ble Court in *Siddharam Satlingappa Mhetre* case held that: “The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

- (i) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;
- (ii) The possibility of the applicant to flee from justice;
- (iii) The possibility of the accused’s likelihood to repeat similar or other offences;
- (iv) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;
- (v) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;
- (vi) While considering the prayer for grant of anticipatory bail, a balance has to be struck be-

¹¹ Sec 439, The Code of Criminal Procedure, 1973

¹² *Siddharam Satlingappa Mhetre v State of Maharashtra.*, 8 (2011) 1 SCC 694

¹³ *Gurcharan Singh v. State (Delhi Admn.).*,(1978) 1 SCC 118

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tween two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

- (vii) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.” These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail.

In *Gurcharan Singh v. State (Delhi Admn.)*

¹⁴ It was observed by HMJ Goswami, who spoke for the Court, that “there cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.” The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit to do so on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code. The judicial discretion granted under Section 438 should not be read down by reading into the statute conditions that are not to be found therein. The courts have to be allowed a little freeplay in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly these are higher courts manned by experienced persons, secondly

their order are not final but are open to appellate scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges.

Hence, it underscores the importance of judicial discretion in granting or refusing bail, allowing for a case-specific evaluation rather than rigid adherence to predetermined conditions.

VIII. OTHER FACTORS TO BE TAKEN INTO CONSIDERATION BY THE COURT

It is a well known principle of law that instead of literal interpretation, the court must prefer purposive interpretation to achieve the object of law. There has been a jurisprudential shift elucidated in *Hema Mishra v. State of U.P.*¹⁵, challenging statutory bars against anticipatory bail. In this case, it has been expressly laid down that in spite of the statutory bar against grant of anticipatory bail, a Constitutional Court is not debarred from exercising its jurisdiction to grant relief. This Court considered the issue of anticipatory bail where such provision does not apply. Reference was made to the view in *Lal Kamendra Pratap Singh versus State of Uttar Pradesh and Ors*¹⁶ . to the effect that interim bail can be granted even in such cases without the accused being actually arrested. It is well settled that a statute is to be read in the context of the background and its object. Instead of literal interpretation, the court may prefer purposive interpretation to achieve the object of law. It is a well known principle of law that Procedure is the handmaid of justice and not its mistress which means the procedural law must be interpreted in such a manner so that it does not defeat the ends of justice. Procedure cannot control justice rather justice controls

¹⁵ *Hema Mishra versus State of U.P.*, (2014) 4 SCC 453

¹⁶ *Lal Kamendra Pratap Singh versus State of Uttar Pradesh and Ors.* (2009) 4 SCC 437

¹⁴ Ibid

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the procedure. This Doctrine of proportionality is well known for advancing the object of Articles 14 and 21. A procedural penal provision affecting liberty of citizens must be read consistent with the concept of fairness and reasonableness. Wisdom of the legislature in creating an offence cannot be questioned but individual justice is a judicial function depending on facts. As a policy, anticipatory bail may be excluded but exclusion cannot be intended to apply where a patently mala fide version is put forward. Courts have inherent jurisdiction to do justice and this jurisdiction cannot be intended to be excluded. Thus, exclusion of Court's jurisdiction is not to be read as absolute. There can be no dispute with the proposition that mere unilateral allegation by any individual, when such allegation is clearly motivated and false, cannot be treated as enough to deprive a person of his liberty without an independent scrutiny. Thus, exclusion of provision for anticipatory bail cannot possibly, by any reasonable interpretation, be treated as applicable when no case is made out or allegations are patently false or motivated. They can be black mailed with the threat of a false case being registered, without any protection of law. This cannot be the scenario in a civilised society. This is not the intention of law and such laws cannot stand judicial scrutiny. It will fall foul of guaranteed fundamental rights of fair and reasonable procedure being followed if a person is deprived of life and liberty. Thus, literal interpretation cannot be preferred in the present situation.

It is pertinent to mention here that despite the seemingly absolute bar on anticipatory bail under Section 18 and 18A(2) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, judicial precedent in *Prathvi Raj Chauhan v. Union of India*¹⁷ highlights the nuanced approach courts may take. The court held that there is no absolute bar against grant of anticipatory bail in cases where the complaint does not make out a prima facie case for applicability of the provisions of act of 1989. In cases where no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail. However, the power is to be used sparingly and under exceptional circumstances where no prima

facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. It cannot be used in a liberal or regular manner for that would defeat the intention of the Parliament with respect to the Act. This precedent reinforces the notion that even when a statutory provision excludes the possibility of anticipatory bail in certain cases, the courts still retain the inherent power to grant such bail if the circumstances warrant it.

Drawing a parallel, the Prathvi Raj Chauhan case showcases that courts are empowered to evaluate the merit of each individual case and determine whether an application for anticipatory bail should be granted, even when faced with seemingly absolute restrictions. This aligns with our argument in the writ petition that Section 438(4) should not impose an across-the-board bar on anticipatory bail for certain offences as it contradicts the core principles of fairness, justice, and individualised consideration in the legal process.

IX. CONCLUSION

In concluding the examination of the constitutional validity of Section 438(4) of the Code of Criminal Procedure, inserted by The Criminal Law (Amendment) Act, 2018, it is imperative to underscore the foundational principles enshrined in the Constitution of India. As the supreme law of the land, the Constitution establishes three distinct organs of the State, each assigned with unique functions that collectively uphold the pillars of the State. While Parliament and State Legislatures enact laws, and the Executive Government implements them, the judiciary assumes the pivotal role of sitting in judgement on both the implementation of laws by the Executive and the validity of legislation.

The judicial review power vested in the superior judiciary of India is unparalleled, encompassing the examination of legislative competence and consistency with Fundamental Rights. This expansive scope of judicial review extends even to constitutional amendments, as reiterated in landmark cases such as *Kesavananda Bharati Sripadagalayaru v. State of*

¹⁷ Prathvi Raj Chauhan v Union of India .,(2020) 4 SCC 727

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*Kerala*¹⁸, *Smt. Indira Nehru. Gandhi v. Raj Narain*¹⁹, *Minerva Mills Ltd. v. Union of India*²⁰, and *S. P. Sampath Kumar v. Union of India*²¹. The doctrine of basic structure affirms that no constitutional amendment can endure if it violates the fundamental framework of the Constitution.

The constitutional amendment in question, which imposes an absolute bar on anticipatory bail for specific offences under Section 376 of the Indian Penal Code, has been analysed in the preceding sections of this research paper. The arguments put forth highlight the potential infringement on the right to equality and equal protection under Article 14, as well as the right to life and personal liberty under Article 21. The indiscriminate classification imposed by Section 438(4), treating all cases uniformly without regard to individual facts and circumstances, raises constitutional concerns.

Drawing inspiration from the principles laid down in *Kesavananda Bharati* and other seminal cases, the judiciary must employ a purposive interpretation to uphold the objectives of justice and fairness. The Court, as the custodian of the Constitution, should not be shackled by literal interpretations but rather should have the flexibility to address evolving societal needs and challenges.

18 *Kesavananda Bharati Sripadagalayaru v. State of Kerala*, AIR 1973 SC 1461

19 *Smt. Indira Nehru. Gandhi v. Raj Narain*, (1976) 2 SCR 347

20 *Minerva Mills Ltd. v. Union of India*, (1981) 1 SCR 206

21 *S. P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124