

ANTICIPATORY BAIL TO JUVENILE: DILEMMA IN DISGUISE¹

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ABSTRACT

The Code of Criminal Procedure, 1973 under section Sec. 438 provides for anticipatory bail to protect the personal liberty of “any person” apprehending arrest. However, its applicability for ‘juveniles’ or ‘children in conflict with law’ is concerned, there seems a dilemma. Whether the term “any person” used in Section 438 of Cr.P.C. includes a juvenile or a child in conflict with law, is still in a state of flux. However, there are divergences of views by different benches of various High Courts, due to which, juveniles are being deprived of their right to anticipatory bail. The present paper is an attempt to critically analyze the views taken by different benches of various High Courts. The paper concludes that, debarring the juveniles from the relief of anticipatory bail is depriving their fundamental right to personal liberty and freedom. It further substantiates that; the child in conflict with the law should have the recourse of pre-arrest bail.

Keywords: Bail, Juvenile, Anticipatory bail to juvenile, Pre-arrest bail, Anticipatory bail for Child, Child in Conflict with Law, Rights of Child, Custody.

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INTRODUCTION

The liberty of an individual is of paramount importance and an essential concomitant of the well-being of an individual. Certainly, it is an inalienable and most sacrosanct fundamental right guaranteed by any democratic constitution. In the words of Justice H.R. Khanna; “Liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein there is no denial of the opportunity for the full growth of human personality, wherein the head is held high and there is no servility of the human mind or enslavement of the human body.”² It is an invaluable and fundamental human right enjoyed by any individual in a democratic state, irrespective of his race, religion, caste, sex, etc. Therefore, any unlawful apprehension or arrest of an individual by an authority is considered an invasion of his liberty.

The Constitution of India guarantees the protection of various liberties and freedoms and provides a mechanism for the enforcement of these freedoms. However, these liberties and freedoms are not absolute. The state may, by the procedure established by law, deprive the life and personal liberty of any person, provided, such a procedure is just, fair and reasonable.³ The Code of Criminal Procedure, 1973 empowers the police to arrest a person for investigation or prevention of crime, however, it also provides for the remedy of anticipatory bail or pre-arrest bail to avoid unreasonable invasion of the personal liberty to any person apprehending his arrest.

The term ‘anticipatory bail’ is not defined in the Code of Criminal Procedure, 1973. In general, the relief of anticipatory bail is sought when any person has a reason to believe or a reasonable apprehension that, he may be arrested in a non-bailable offence irrespective of having a formal written F.I.R. for grant of anticipatory bail, there has to be a reason to believe that he will be arrested and a mere fear of arrest will not be enough.⁴ In common parlance, regular bail is distinguishable from anticipatory bail, in the former case, the bail is granted in regular course to the person after the actual arrest and followed by custody but in the latter case, the bail is granted in anticipation of arrest and not being taken in actual custody. The term ‘anticipatory

²Speech delivered by Justice H.R. Khanna, 2 IJIL, Vol. 18 (1978), pg. 133

³*Maneka Gandhi V. Union of India* AIR 1978 SC 597

⁴*Gurubakash Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565

bail'⁵ was used for the first time by the Law Commission of India report wherein, it suggested the release of any person on bail prior to arrest.

The remedy of anticipatory is available to any person apprehending his arrest, however, when it comes to 'juveniles' or the 'child in conflict with law', there seems to be a dilemma which is unattended and unresolved till today. Whether the term 'any person' as contemplated in the provision under section 438 of the Code of Criminal Procedure includes a 'juvenile' or the 'child in conflict with law' or otherwise is still a mystery resulting in a conflict of views and divergences of opinions by different benches of various High Courts.⁶

There is the absence of an authoritative pronouncement by the apex Court of India amidst these conflicting views and judgments and the top court has not yet touched upon the issue of whether the term 'any person' would include a 'child in conflict with law'.⁷ Therefore, the law is uncertain and inconsistent regarding the applicability of pre-arrest or anticipatory bail to juveniles in India. The authors in the present paper have attempted to critically analyze the divergences of opinions and conflicting views taken by different benches of various High Courts in India.

The issue of anticipatory bail to the juvenile affecting personal liberty has been considered by the various High Courts time and again. However, there is no consistency in the views taken by the High Court's leading to confusion, chaos and lack of uniformity. Recently the Government of India in order to end the debate on this issue, urged the Supreme Court of India to give an authoritative decision concerning the fundamental 'right to personal liberty' of a minor.⁸

Before proceeding with the issues of anticipatory bail to juveniles it is imperative to understand the evolution of juvenile laws in India.

⁵ Law Commission of India, "41st on the Code of Criminal Procedure", 1898, 320-21, (1969), available at <https://lawcommissionofindia.nic.in/1-50/Report41.pdf> (last visited on May 21, 2022)

⁶ Shantanu Pachauri, "Anticipatory Bail and Children in Conflict with law", *CCLSNLUJ*, available at <https://criminallawstudiesnluj.wordpress.com/2020/06/07/anticipatory-bail-and-children-in-conflict-with-law/> (last visited on May 21, 2022)

⁷ Kalyani Paunikar, "Anticipatory Bail: Whether permissible to a child in conflict with law under the JJ Act or maintainable under CrPC", *The Law Culture*, (2021) available at [⁸ Krishnadas Rajagopal, *Centre urges SC to decide if children can apply for anticipatory bail*, *The Hindu* \(02/04/2022\), available at <https://www.thehindu.com/news/national/centre-urges-sc-to-decide-if-children-can-apply-for-anticipatory-bail/article65285154.ece> \(last visited on May 21, 2022\)](https://thelawculture.in/anticipatory-bail-whether-permissible-to-a-child-in-conflict-with-the-law-under-the-jj-act-or-maintainable-under-crpc/#:~:text=The%20Madras%20High%20Court%20has,not%20apply%20for%20anticipatory%20bail,(last visited on May 21, 2022)</p></div><div data-bbox=)

THE JUVENILES AND THE LAW

After independence, the Children Act, 1960 was the central legislation which separated the juvenile justice system from the customary criminal justice system. The term 'child' included a boy who has not attained the age of sixteen years and a girl who has not attained the age of eighteen years.⁹ The definition continued with replacement of the word 'juvenile' instead of 'child' in the very first comprehensive legislation on juvenile in the year 1986.¹⁰ India is a signatory to the 'United Nations Convention on the Rights of Children, 1989' and to fulfill its international obligations under it, the Parliament enacted the 'Juvenile Justice (Care and Protection of Children) Act, 2000' according to which the age of juvenile was fixed as eighteen years irrespective of their gender.

The highly publicized incident of "Nirbhaya Rape and Murder Case", wherein death penalty was imposed on all the accused persons except one juvenile accused who was of seventeen years old at the time of the commission of crime, it certainly paved the way for revamp of existing deficiencies in criminal law. The accused in this case, being a juvenile, was dealt with according to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, exempted from capital punishment and was released after three years.¹¹ This caused the people to raise their voices against the legal provision and unrest was seen in the country. To address this issue, a committee of three members headed by Justice J.S.Verma (Retd.)¹² was constituted. The committee discarded the demand to lower the age and recommended various reforms in existing criminal laws. However, the legislature felt the need to amend the old Act of 2000 regarding the trial and treatment of juveniles. Accordingly, the 'Juvenile Justice (Care and Protection of Children) Act of 2015' came into existence, with the object of consolidating the law relating to the juvenile. It was also brought to curb the heinous offences committed by juveniles between the age of sixteen and eighteen years. In the repealed Act of 2000, there was no category of offences for inquiry. However, the present Act categorizes and defines offences into three namely petty offences, serious offences and heinous offences. Similarly, it also categorizes

⁹ The Children Act, 1960 (Act 60 of 1960), s.2 (e).

¹⁰ The Juvenile Justice (Care and Protection of Children) Act, 2000 (Act 56 of 2000), s.2 (h).

¹¹ Atul S. Jaybhaye, "Critical Analysis of Juvenile Justice System in India", *Bharati Law Review* 101, 107(2017), available at <http://docs.manupatra.in/newsline/articles/Upload/85D28740-6B71-4969-970D-18EDDC7E245B.pdf>. (last visited on May 25, 2022)

¹² The Committee on Amendments to Criminal Law (The Government of India, 2013)

children into two categories for inquiry; the first category deals with children below the age of sixteen years on the date of commission of the offence¹³ and the second category deals with the child who has completed the age of sixteen or above and who has committed heinous offences.¹⁴

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015: LAW AND ITS APPLICATION

The Juvenile Justice (Care and Protection of Children) Act, 2015 is a special and beneficial legislation containing a 'non-obstante clause' giving an overriding effect on all other existing laws including the matters concerning children such as detention, apprehension, penalty, prosecution or imprisonment, rehabilitation and social reintegration of children in conflict with the law.¹⁵ The Act defines a child in conflict with the law as a child who is below the age of eighteen years on the date of the commission of the offence.¹⁶ The Act constitutes a separate judicial body in the form of 'Juvenile Justice Board' before whom the apprehended or detained child in conflict with law is produced. An important feature of the Board is that it comprises two social workers including one woman in addition to the 'Judicial Magistrate First Class' to constitute the Board.¹⁷

The High Court and the Children's Court¹⁸ constituted under this Act can exercise the powers conferred on the Board in Appeal and Revision or otherwise.¹⁹ The procedure adopted for holding any inquires, appeals and revisions under the Juvenile Justice (Care and Protection of Children) Act, 2015 is as same as prescribed in the Code of Criminal Procedure.²⁰ The police, on arrest, must produce the accused person before the Magistrate within twenty-four hours, but in the case of juvenile it is the Special Juvenile Police Unit²¹ or the Child Welfare Police²² who must produce the child before the Juvenile Board within twenty-four hours of apprehending. In

¹³The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.14(5)(f)

¹⁴The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.15(1)

¹⁵ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.1 (4)

¹⁶ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.2(13)

¹⁷ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s. 4(2)

¹⁸ Special Courts or Court of Sessions having jurisdiction to try and offence under the Act.

¹⁹ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.8 (2)

²⁰The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s. 103

²¹ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.2(55)

²² The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.2(18)

no circumstances, the child is sent to police lockup or put away in jail²³ as done in regular criminal cases. In other words, the child in conflict with the law cannot be remanded to police custody or incarcerated in jail. In such a case, without delay, the child is to be transferred to Child Welfare Police at the nearest Police Station.²⁴ Further, the ‘child in conflict with law’ under the Juvenile Justice (Care and Protection of Children) Act, 2015 cannot be labelled as an ‘accused’. The legislators while drafting the Act have consciously avoided using the term accused for child delinquents.²⁵ The enquiries and power to apprehend the child in conflict with law is to be exercised only regarding heinous offences having a maximum punishment of seven years or more, in the Indian Penal Code or in any other law unless it is in the best interest of the child.²⁶

PROVISIONS OF BAIL TO THE CHILD IN CONFLICT WITH LAW

Under the Juvenile Justice (Care and Protection of Children) Act, 2015, the Juvenile Justice Board enjoys the powers of Metropolitan Magistrate or Judicial Magistrate of First Class. The child in ‘conflict with law’ is released on bail irrespective of the nature or gravity of the offence one has committed. The bail to a child in conflict with law is granted mandatorily as a rule and refused in exceptional cases in which there exists some reasonable grounds that if the child so released is likely to come in association with the known criminals, or the release might expose the child to any moral, physical or psychological danger or the release of such child would defeat the ends of justice.²⁷ The bail to a child in conflict with the law cannot be refused in a routine manner; if so refused, the board has to give a reasoned order.²⁸ The provision of bail enumerated in the Act contains a non-obstante clause giving overriding effect against the provision of bail under the Code of Criminal Procedure, 1973.²⁹ Under the provisions of the Code of Criminal Procedure, the powers relating to bail are vested with the Magistrate and provide for certain limitations and conditions for releasing the accused persons. But if the conditions under the Act

²³ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.10(1)

²⁴ The Juvenile Justice (Care and Protection of Children) Model Rules, 2016, Rule 8 (1)

²⁵ Digvijay Sahni, “*Anticipatory Bail to Juveniles (?): A Dilemma Unresolved*”, available at <https://rmlnlulawreview.com/2021/08/09/anticipatory-bail-juvenile> (last visited on May 21, 2022)

²⁶ *Supra* note 13

²⁷ *Vishvas v. State of Punjab*, CRR No.53 of 2021 (Punjab & Haryana High Court, 08/02/2021)

²⁸ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.12

²⁹ The Code of Criminal Procedure, 1973 (Act 2 of 1974), s.436 and s.437

are fulfilled, the Juvenile Justice Board has the power to release a child in conflict with the law.³⁰ The refusal of bail to the child in conflict with the law results in sending the child to an observation home without being sent to prison as done in general cases.

The Juvenile Justice Board is empowered to call for the social investigation report under the model rules³¹ framed therein with the objective of enabling the Board to have a look at the background and circumstances concerning the child in conflict with the law such as the family, relatives, and socio-economic status. The Probation officer is required to furnish the child's history, mental condition and the factors relating to the offence and recommendations.³² On refusal of bail, the remedy available to the child in conflict with the law is to prefer an appeal to the Children's Court within a stipulated period. To challenge the legality and propriety of the order passed by any subordinate authority, the child may also prefer a revision application before the High Court. The Act has a special provision by which the juvenile above the age of sixteen years can be treated and tried as an adult after due assessment and passing such order by the Board and the trial of such a child in conflict with the law can be transferred to Children's Court.³³ In such circumstances, the remedy of pre-arrest bail (anticipatory bail) to a juvenile or the 'child in conflict with law' is certainly an important provision to safeguard the child when there is a reasonable apprehension of being apprehended rather than arrested and detained.

ANTICIPATORY BAIL TO JUVENILE: A CONUNDRUM

The 'Right to life and Personal liberty' is one of the fundamental human rights exercised by all humans irrespective of age and gender. The arrest of a person confines his movements and locomotion, deprives his life and personal liberty, affects his dignity and adversely affects his well-being. In the case of a child, this may also affect him psychologically and may result in permanent loss of his well-being and personal development.

India is a sovereign, republic and democratic country that has acknowledged the importance of

³⁰ Sonia Kinara, Dr Versha Vahini, "Law relating to bail to Juvenile Delinquent", 5 *International Journal of Law Management & Humanities* 1,7(2022) available at <https://www.ijlmh.com/paper/law-relating-to-bail-to-juvenile-delinquent/> (last visited on May 25, 2022)

³¹ The Juvenile Justice (Care and Protection of Children) Model Rules, 2016, Rule 2 (xvii)

³² *Nand Kishore (In JC) v. State*, 2006 (4) RCR (Criminal) 754

³³ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), s.18(3)

liberty and freedom. The *presumption of innocence* is the basic principle of criminal law and considering it as a substratum, the Law Commission of India³⁴ has introduced the concept of pre-arrest bail i.e. anticipatory bail in the Code of Criminal Procedure with an object to protect the liberty of an individual, who is falsely implicated or who is forced to face the disgrace.³⁵ It is a unique and special provision which provides the remedy of bail to any person, alleged to have committed a cognizable and non-bailable offence. Anticipatory bail is a grant of bail in the apprehension of arrest or before an actual arrest, unlike the regular bail granted after the arrest of a person and remanding him to custody.

The remedy of availing the benefit of anticipatory bail is available to any person however, when it comes to the juveniles, the question of its applicability is still unanswered. The Juvenile Justice (Care and Protection of Children) Act, 2015 neither provides nor expressly debars a child from availing the benefit of pre-arrest bail. It only deals with the procedural mechanism of bail after the child is apprehended and produced before the Board. This has created confusion as to whether the provision of “anticipatory bail” under the Code of Criminal Procedure is also available to the juvenile. There is a divergence of opinions and conflicting views of different benches of various High Courts regarding pre-arrest bail for juveniles. Let us discuss the judicial decisions on this issue in detail.

ANTICIPATORY BAIL TO JUVENILE: JUDICIAL APPROACH

The opinions and views of various High Courts are examined in this article signifying the judicial approach under the two principal heads of interpretation viz. Literal approach and Purposive approach.

A. Literal Approach

The will of the legislature is expressed in the object of the statute. The High Courts in deciding the issue of anticipatory bail to juveniles in some cases have adopted the literal approach, which is an age-old method of interpretation. It is also called a grammatical rule. In the literal method, the words in the statute are interpreted in their simple and usual grammatical sense determining

³⁴*Supra* note 5

³⁵*Shrenik Jayantilal Jain and Others v. State of Maharashtra*, 2014 (3) MhLJ (Cri) 130

its meaning and application.

One of the arguments made against the grant of anticipatory bail to juveniles is based on the contention that, the jurisdiction of the Juvenile Justice Board cannot be expanded to include the power of the Court of Sessions or High Court to decide anticipatory bail application. In the case of *Kapil Durgwani v. State of Madhya Pradesh*,³⁶ the charges of crime under the SC & ST Act, 1989 were levelled against the juvenile applicant. However, there is an express bar for granting anticipatory bail to a person charged under the provisions of the SC & ST Act, 1989.³⁷ The applicant relied on the judgment of the Rajasthan High Court in the case of *Tara Chand v. State of Rajasthan*,³⁸ wherein the court observed that, the Juvenile Justice Act is exclusively meant for juveniles, shall have an overriding effect on the SC & ST Act, 1989 and the Juvenile Justice Board can deal with anticipatory bail filed by the juveniles. The High Court disagreed with the view taken in the case of *Tara Chand* and observed that it would give rise to the inference that the Juvenile Justice Board has the powers of anticipatory bail, which otherwise is the exclusive jurisdiction of the Court of Sessions or High Court.

The Juvenile Justice Board includes a Judicial Magistrate of First Class as a member, therefore the argument that the board has the power to decide anticipatory bail was categorically denied in the cases of *Sandeep Tomar v. State of Madhya Pradesh*,³⁹ *Preetam Pathak v. State of Chhattisgarh*,⁴⁰ *Suriya v. State of Tamil Nadu*,⁴¹ and *Kamlesh Gurjar v. State of Madhya Pradesh*⁴² as there is no such enabling or special provision under the statute. The powers conferred on the Juvenile Justice Board under the Juvenile Justice Act may also be exercised by the High Court, the Children's Court or the Court of Sessions through appeal, revision or otherwise.⁴³ However, the court held that the above courts cannot exercise the powers relating to bail under Sec. 438 or 439 of Cr.P.C. while dealing with the Child, although the word 'appear' used in Sec.12 of the Juvenile Justice Act, 2015 is also used in Sec.437 of Cr.P.C. Further, the Act does not permit the juvenile to appear through a pleader.⁴⁴ The court concluded that, in the

³⁶ 2010 (4) MPJR 155

³⁷ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act 33 of 1989), s.18

³⁸ 2008 (2) RCR (Cri) 764 (Raj)

³⁹ 2014 ILR (M.P) 877

⁴⁰ M.Cr.C.(A), No. 1104 of 2014 (Chhattisgarh High Court, 17/12/2014)

⁴¹ Cr.I.O.P.(MD) No.433 of 2016 (Madras High Court)

⁴² 2019 (4) Cri.CC 13

⁴³ *Supra* note 19

⁴⁴ *Satendra Sharma v. State of Madhya Pradesh*, 2014 ILR (M.P) 2749

absence of any enabling provision, the benefit of anticipatory bail cannot be extended to the juveniles as the Juvenile Justice Board is the appropriate authority constituted exclusively to deal with all the proceedings in respect of juveniles, including bail.⁴⁵

Another approach to denying anticipatory bail to juveniles is that the Juvenile Justice Act being a special statute has an overriding effect due to the non-obstante clause, although the considerations of bail under Sec. 437 and Sec.439 of Cr.P.C. as compared with the provision of bail under the Juvenile Justice Act are different. The provisions regarding bail under the Juvenile Justice Act, although more liberal are binding, whereas, the provisions under the Code of Criminal Procedure are merely guiding principles to be adhered to by the court while deciding a bail plea. The Juvenile Justice Act contains a comprehensive provision for bail; however, it does not contain any provision for anticipatory bail. This entails that, the provisions of Cr. P. C. under Sec. 437 and Sec. 439 cannot be employed while dealing with the matters of bail relating to the child.⁴⁶

On the issue of arrest or apprehension of a juvenile, the legislature has deliberately used the word ‘*apprehend*’ instead of ‘*arrest*’ in the Juvenile Justice Act, whereas no police officer is empowered to arrest a child in conflict with the law.⁴⁷ Therefore, the Juvenile Justice Act does not envisage the arrest of a child in conflict with the law and if there is no fear of arrest no need to hunt for anticipatory bail. This issue was dealt with in the case of *K. Vignesh v. State represented by the Inspector of Police; Chennai*⁴⁸ in which the court took a view that, when there is no apprehension of arrest or there is no power of arrest, the application for anticipatory bail is non-maintainable. It is based on the proposition that the juvenile neither be remanded in a police lockup nor be sent to jail; however, when apprehended, would be immediately produced before the Juvenile Justice Board, where the board can interact with the child while deciding the bail. This essential consideration would be wiped-out if the juvenile is granted anticipatory bail.⁴⁹

Another argument raised in favor of refusing to entertain anticipatory bail is that, as per the proviso enumerated under Sec.438 of Cr.P.C., once the bail application gets rejected it impliedly authorizes the police to arrest the applicant. However, in no circumstances the child in conflict

⁴⁵*Supra* note 42

⁴⁶*Tejram Nagrachi v. State of Chhattisgarh*, 2019 CriLJ 4017

⁴⁷ *Supra* note 23

⁴⁸ 2017 (1) LW (Cri) 878

⁴⁹*Piyush v. State of Haryana*, 2021 (3) Crimes 138

with the law be put in a police lockup or languished in jail as it is the statutory vow. Whereas, allowing anticipatory bail to a child in conflict with law may lead to direct intervention into the powers of the Board.⁵⁰

The High Courts in the above cases have applied the literal approach while dealing with the scheme of the Juvenile Justice Act. These courts followed the strict rule while interpreting the provisions. However, a statute is not to be construed merely with reference to grammar, but should be construed reasonably in a particular way to give effect to the intent and purpose of the legislation, if the language permits.⁵¹ In this regard, some High Courts have adopted a purposive approach while dealing with the issues concerning anticipatory bail to juveniles.

B. Purposive Approach

The phrase ‘purposive interpretation’ occurs often in court decisions and legal literature. The common thread running through most references of purposive interpretation is that ‘purpose’ is a subjective term. It reflects, at various levels of abstraction but mostly at the highest levels of abstraction, the intention of the text’s creator.⁵² The Juvenile Justice Act is a special enactment thereby adopting a child-friendly approach in adjudication of matters in the best interest of the child. Thus, various courts have adopted a purposive approach to interpret the scheme of the Juvenile Justice Act.

The Chhattisgarh High Court in the case of *Mohan v. State of Chhattisgarh*⁵³ by adopting a purposive approach, took a view that the juvenile would be entitled to apply under Sec.438 for pre-arrest bail and under 439 of Cr.P.C. for regular bail only after he had exhausted the remedy available under Sec.12 of the Juvenile Justice Act before the Juvenile Justice Board. Whereas, the non-obstante clause in the Juvenile Justice Act does not erode the remedy under Sec. 438 and Sec.439 of Cr.P.C. as the word ‘otherwise’ used in the Act has wide edifice to include these remedies.

⁵⁰*Suhana Khatun & Others v. State of West Bengal*, CRM No.2739 of 2021 (Calcutta High Court, 20/01/2022)

⁵¹*M. Satyanarayana v. State of Karnataka*, AIR 1986 SC 1162

⁵² Vijay Awana, “*Jurisprudential Aspects and Significance of Rule of Purposive Interpretation*”, 2 *International Journal of Legal Science and Innovation*, 46(2020) available at <https://www.ijlsi.com/jurisprudential-aspects-and-significance-of-rule-of-purposive-interpretation/>(last visited on May 26, 2022)

⁵³ 2005 Cri.LJ 3271

One of the settled principles '*generalibus specialia derogant*', requiring that special legislation shall prevail over the general law was considered in the case of *Sudhir Sharma v. State of Chhattisgarh*⁵⁴ wherein, the Chhattisgarh High Court took a view that, in the case of conflict or any inconsistency between the general and special legislation, the special legislation shall prevail over the general only to the extent of that inconsistency. The High Court further viewed that, there was no warrant for the conclusion that the non-obstante clause in Sec. 12 of the Juvenile Justice Act excludes the availability of anticipatory bail.⁵⁵ It is pertinent to note that, there is no inconsistency in the Juvenile Justice Act but the Act is silent vis-à-vis remedy of anticipatory bail to juveniles.

A similar view was taken by the Punjab & Haryana High Court in the case of *Krishan Kumar (Minor through his mother) v. State of Haryana*⁵⁶ wherein, it emphatically noted that, the Juvenile Justice Act is a piece of social welfare legislation, which is specially enacted to address the welfare of the child and prevent them from turning into hardened criminals. Whereas, if the legislation is silent as regards to a particular provision then it has to be read with the general law and inference could not be drawn in the absence of such provision debarring a juvenile from seeking the relief of anticipatory bail.

The Allahabad High Court in the case of *Shahaab Ali & Others v. State of Uttar Pradesh*⁵⁷ adopted the rights-based purposive interpretation and held that the provision of the Criminal Procedure Code shall apply where the Juvenile Justice Act is silent on an issue. The Court cannot possibly leave a child in such a situation with no avenue of redress or protection against deprivation of liberty. However, the High Court confined the remedy of anticipatory bail to the juvenile only before the registration of the crime. Once the first information report is registered then Sec. 10 of the Juvenile Justice Act comes into play.

The distinction between the word *apprehension* and *arrest* was also a center point of debate as the Juvenile Justice Act provides only for the apprehension of the child in conflict with the law and not arrest. Various High Courts refused to entertain anticipatory bail plea of a juvenile by observing that, juveniles are only apprehended and not actually arrested. Owing to the lack of

⁵⁴ 2017 (3) CGLS 405

⁵⁵ *Ibid*

⁵⁶ 2020(3) R.C.R. (Criminal) 180

⁵⁷ 2020 (1) Crimes 276

clarity on this issue, the Kerala High Court in the case of *Mr. X.s/o Baby V.M. v. State of Kerala*⁵⁸ took a view that, apprehending a person necessarily involves touching or confining the body of that person or submission of the person to the control of the police officer. Therefore, apprehending a person involves the arrest of the person and apprehending a person curtails his personal freedom and liberty. Therefore, the use of the words apprehends or arrest would mean the same.

In the case of *Gopakumar v. State of Kerala*⁵⁹ the Kerala High Court took a broader view that the term 'any person' as used in Sec.438 of Cr.P.C. also includes juveniles and they are entitled to seek the relief of anticipatory bail. Similarly, the Gujarat High Court in the case of *Kureshi Irfan Hasambhai through Kureshi Kalubhai Hasambhai v. State of Gujarat*⁶⁰ also expressed that, the Juvenile Justice Act do not carve a complete bar on the right of individual for anticipatory bail as is expressly provided by the legislature in the SC & ST (Prevention of Atrocities) Act, 1989.

CONCLUSION

The rule of *verbis legis non est recelendum*⁶¹ is followed where the first and primary rule of construction is that, the intention of the legislature must be found in the words used by the legislature in the statute. However, when the material words are capable of two constructions, then the courts would prefer to adopt the construction which is likely to assist the achievement of policy and not likely to defeat or impair the policy.⁶²

Refusing the benefit of anticipatory bail to juveniles will render them remediless and will certainly deprive their fundamental right to life and personal liberty. The Juvenile Justice Act being a beneficial legislation, it will certainly defeat the object and spirit of the Act if the welfare of the child is not looked into. If the remedy of anticipatory bail is provided to the juveniles, indeed it will secure the welfare of the child without juveniles being stigmatized as accused and being dragged into the lengthy court procedures.

⁵⁸ 2018 ALL MR (Cri) Journal 472

⁵⁹ 2013 CriLJ 851

⁶⁰ R/Criminal Misc. Application No. 6978 of 2021 (Gujarat High Court, 09/06/2021)

⁶¹ Means there should be no departure from the words of law

⁶² *Kani Lal v. Paramnidh*, AIR 1957 SC 907

The literal approach adopted by various High Courts does not stand in consonance with the object and spirit of the Juvenile Justice Act. Although there is the absence of express provision regarding anticipatory bail to juveniles; if the legislature if so desired to debar the juvenile from the benefit of anticipatory bail, it could have expressly barred it, as it is done in SC & ST (Prevention of Atrocities) Act, 1989. But the lawmakers did not do so.

The purposive approach adopted by various High Courts is positively in consonance with the protection of the fundamental right to life and personal liberty, irrespective of any age group of person. It has valued the very cardinal principle of *presumption of innocence* as the Act also provides for the presumption of innocence to arise in favor of the child⁶³ and treating all human beings with equal dignity and rights.⁶⁴ The Juvenile Justice Act also mandates that the decisions with regards to the child shall be based on the primary consideration that, they are being given in the best interest of child.

The word '*apprehending*' and '*arrest*' denotes the same. There is actual confinement of the body, the movement is restricted and controlled by the police. Once the child is apprehended, he could be sent to the observation home or special juvenile police. It could seriously hurt the child's psychology and overall welfare. The Bombay High Court in the case of *Yogesh Jagdish Joshi (Minor) v. State of Maharashtra*⁶⁵ adopting the purposive approach held that, the powers under Sec.438 of Cr.P.C. the High Court and Court of Sessions are not in any way affected by coming into force the provisions of the Juvenile Justice Act. Relying on the landmark judgment of Apex Court in *Gurubaksh Singh Sibbia*,⁶⁶ the High Court also pointed out the need for beneficial construction of the provisions relating to personal liberty.

A similar view was taken in *Snehal @ Abhi Dinesh Shendre v. State of Maharashtra*⁶⁷ by the Bombay High Court. The purposive interpretation as compared with the literal interpretation is in total consonance with the special legislation as the former adjudicates in the best interest of the child and the latter is not. It would be utterly undesirable that a complete category of juveniles be excluded from the remedy of anticipatory bail. Certainly, the spirit of special legislation would

⁶³ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016),s.3(i)

⁶⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), s.3(ii)

⁶⁵ Criminal Application No.2822 of 200, (Bombay High Court, 18/09/2001)

⁶⁶ *Supra* note 4

⁶⁷ Criminal Application (ABA) No. 8848 of 2018 (Bombay High Court, 18/01/2019)

get defeated and could not attain its potentiality, if the juveniles are kept out of the ambit of such important relief. If there is lacuna or omission in the statute which prevents it from giving a complete idea, or makes it logically incomplete then certainly it has the duty of the court to make up the defect by adding or altering something.⁶⁸

Recently, the Parliament has passed new criminal laws which replaced the British-era laws.⁶⁹ The Bharatiya Nyaya Sanhita, 2023⁷⁰ is the new penal code streamlining the provisions relating to offences and penalties. The Bharatiya Nagarik Suraksha Sanhita, 2023⁷¹ is the new procedural law which is based on the use of technology and forensic science in investigation and provides a mechanism for conducting trials. The Bharatiya Sakshya Adhinyam, 2023⁷² is the new evidence law which operationalizes substantive as well as procedural laws. As regards the provision of anticipatory bail, the new criminal law⁷³ which is set to enforce from 1st July, 2024, has excluded the operation of the earlier proviso which authorizes the officer in charge of the police station to arrest a person if the Court of Sessions or High Court has not passed or refused an interim order. Therefore, it will be beneficial for the juveniles to take the recourse of anticipatory bail on a reasonable apprehension of being arrested in case of false accusation.

In order to give primacy to the personal liberty and freedom of juveniles as guaranteed in the Constitution, a juvenile must be accrued with the benefit of anticipatory bail and the final verdict by the Supreme Court clarifying this assorted position is seriously called for. The time has come for the Supreme Court to intervene and decisively resolve the judicial conflicts once and for all as it is significantly affecting the personal liberty and overall welfare of the juvenile.

⁶⁸ Alekhya Reddy, “*Literally Interpreting the Law – A Appraisal of the Literal Rule of Interpretation in India*”, Manupatra available at <https://manupatra.com/roundup/338/Articles/Literally%20interpreting%20the%20Law.pdf> (last visited on June 21, 2022)

⁶⁹ Vijaita Singh, Loksabha Passes Bills to replace British-Era criminal laws, *The Hindu*, Dec. 20, 2023 available at <https://www.thehindu.com/news/national/parliament-proceedings-lok-sabha-passes-three-criminal-law-bills/article67658633.ece> (last visited on March 17, 2024)

⁷⁰ Replaced Indian Penal Code of 1860 (Act 45 of 1860)

⁷¹ Replaced The Code of Criminal Procedure, 1973 (Act 2 of 1974)

⁷² Replaced The Indian Evidence Act, 1872 (Act 1 of 1872)

⁷³ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s.482