**IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL**

**Special Appeal No. 739 of 2018**

Vishnu Sahai ....Appellant

**Versus**

State of Uttarakhand ....Respondent

**With**

**Special Appeal No. 740 of 2018**

Mohan Kumar Mittal ....Appellant

**Versus**

State of Uttarakhand ....Respondent

*Mr. Aditya Singh, Advocate for both the appellants.*
*Mr. Paresh Tripathi, C.S.C. for the State.*

Dated- 19.09.2018

**Coram: Hon'ble Rajiv Sharma, A.C.J.**
**Hon'ble Manoj Kumar Tiwari, J.**

**Oral: Hon'ble Rajiv Sharma, A.C.J.**

1. Applications (CLMA 14262 and 14264 of 2018) seeking exemption to file certified copy of the impugned judgment is allowed. Appellant is exempted from filing certified copy of the impugned judgment dated 11.9.2018.

2. Since common questions of law and facts are involved, the present appeals have been taken up together and are decided by this common judgment. For the sake of clarity, facts of SPA No.740 of 2018 have been taken into consideration.

3. Appellant(s) has laid challenge to the judgment dated 11.9.2018 rendered by a learned Single Judge of this Court in WPMS No.2681 of 2018 and analogous petition.

4. Key facts, necessary for the adjudication of these appeals, are that the appellant(s), before the Writ Court, sought a direction, declaring the provisions contained under Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976), as

applicable to the State of Uttarakhand, as *ultra vires* being violative of Articles 14, 19, 21 and 22 of the Constitution of India. Learned Single Judge dismissed the writ petitions on 11.9.2018. Hence these appeals.

5. The State of Uttar Pradesh, by an amendment carried out by way of Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976), has omitted Section 438 of the Code of Criminal Procedure, 1973.

6. The State of Uttarakhand came into existence on 09.11.2000 on the basis of the Uttar Pradesh Reorganisation Act, 2000. Section 2(f) of the Act, being a dictionary clause, defines 'law' which reads as under: -

> *"**law**" includes any enactment, ordinance, regulation, order, bye- law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the existing State of Uttar Pradesh;*

7. Attention of the Court has been drawn to Section 87 of the Uttar Pradesh Reorganisation Act, 2000 which reads as under: -

> *"Power to adapt laws.- For the purpose of facilitating the application in relation to the State of Uttar Pradesh or Uttaranchal of any law made before the appointed day, the appropriate Government may, before the expiration of two years from that day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent authority.*
>
> *Explanation.- In this section, the expression" appropriate Government" means as respects any law relating to a matter enumerated in the Union List, the Central Government, and as respects any other law in its application to a State, the State Government."*

8. Section 87 of the Act is *pari materia* with Section 89 of the Punjab Reorganisation Act, 1966 (Act 31 of 1966).

9. Learned Counsel, appearing on behalf of the appellant(s), has placed strong reliance upon Section 87 of the Uttar Pradesh Reorganisation Act, 2000.

10. Learned Chief Standing Counsel, appearing for the State Government, has relied upon Sections 2(f), 86 and 87 of the Uttar Pradesh Reorganisation Act, 2000.

11. Section 438 of the Code of Criminal Procedure, 1973 reads as under: -

> *"(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Sessions for a direction under this Section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:*
>
> *(i) The nature and gravity of the accusation;*
>
> *(ii) The antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*
>
> *(iii) The possibility of the applicant to flee from justice; and*
>
> *(iv) Where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,*
>
> *either reject the application forthwith or issue an interim order for the grant of anticipatory bail:*
>
> *Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.*
>
> *(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.*
>
> *(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.*
>
> *(2) When the High Court or the Court of Sessions makes a direction under sub-section (1), it may include such*

*conditions in such direction 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 Section 437(3), as if the bail were granted under that Section.*

*(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the court under sub-section (1).”*

12. In **1980 (2) SCC 565**, in the case of *“Shri Gurbaksh Singh Sibbia & others vs. State of Punjab”*, and analogous matters, their Lordships of the Hon’ble Supreme have held that an anticipatory bail is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore, effective at the very moment of arrest. Their Lordships have further held that Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Their Lordships have further held that Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of

the offence in respect of which he seeks bail. Their Lordships have also held that any statutory provision concerned with personal liberty cannot be whittled down by reading restrictions and limitations into it. Their Lordships have held as under:-

> *"7. The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in its 41st Report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's LAW LEXICON, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction under Section 438 is intended to confer conditional immunity from this 'touch' or confinement.*
>
> *26. We find a great deal of substance in Mr Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all*

*costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."*

13. In **2011 (1) SCC Page 694**, their Lordships of Hon'ble Supreme Court in the case of '*Siddharam Satlingappa Mhetre v. State of Maharashtra and others*' have explained the concept of anticipatory bail u/s 438 Cr.P.C. and have also discussed the legislative history of Section 438 and object of providing anticipatory provision therein. Their Lordships have explained the right to life and liberty and origin of 'liberty'. Their Lordships have held that all human beings are born with some unalienable rights like life, liberty and pursuit of happiness. Liberty has many facets and meanings. It may be defined as the affirmation by an individual group of his or its own essence. "Liberty" generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Their Lordships have further held that the object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essential for a person or a citizen. Their Lordships have held as under: -

***"9.*** *The Code of Criminal Procedure, 1898 did not contain any specific provision of anticipatory bail. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether the courts had an inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power.*

***10.*** *The Law Commission of India, in its 41st Report dated 24-9-1969 pointed out the necessity of introducing a provision in the Code of Criminal Procedure enabling the High Court and the Court of Session to grant "anticipatory bail". It observed in Para 39.9 of its Report (Vol. V) and the same is set out as under:*

*"39.9. Anticipatory bail.—The suggestion for directing the release of a person on bail prior to his arrest (commonly known as 'anticipatory bail') was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cause for the purpose of 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."*

*The Law Commission recommended acceptance of the suggestion.*

***11.*** *The Law Commission in Para 31 of its 48th Report (July 1972) made the following comments on the aforesaid clause:*

*"31. Provision for grant of anticipatory bail.—The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. 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.*

*It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."*

***12.*** *Police custody is an inevitable concomitant of arrest for non-bailable offences. The concept of anticipatory bail is that a person who apprehends his arrest in a non-bailable case can apply for grant of bail to the Court of Session or to the High Court before the arrest.*

***13.*** *It is apparent from the Statement of Objects and Reasons for introducing Section 438 in the Code of Criminal Procedure, 1973 that it was felt imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace at the instance of influential people who try to implicate their rivals in false cases. The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present Section 438 CrPC. The only two clear provisions of law by which bail could be granted were Sections 437 and 439 of the Code. Section 438 was incorporated in the Code of Criminal Procedure, 1973 for the first time.*

***14.*** *It is clear from the Statement of Objects and Reasons that the purpose of incorporating Section 438 in CrPC was to recognise the importance of personal liberty and freedom in a free and democratic country. When we carefully analyse this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court.*

***36.*** *All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilised existence.*

***37.*** *Origin of "liberty" can be traced in the ancient Greek civilisation. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 BC, an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realise itself as fully as possible through the self-realisation of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the State was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realisation of the people.*

***39.*** *It is very difficult to define the term "liberty". It has many facets and meanings. The philosophers and moralists have praised freedom and liberty but this term is difficult to define because it does not resist*

*any interpretation. The term "liberty" may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three factors, firstly, harmonious balance of personality, secondly, the absence of restraint upon the exercise of that affirmation and thirdly, organisation of opportunities for the exercise of a continuous initiative.*

***40.*** *"Liberty" may be defined as a power of acting according to the determinations of the will. According to Harold Laski, "liberty" was essentially an absence of restraints and John Stuart Mill viewed that "all restraint, qua restraint is an evil". In the words of Jonathon Edwards, the meaning of "liberty" and "freedom" is:*

*"Power, opportunity or advantage that any one has to do as he pleases, or, in other words, his being free from hindrance or impediment in the way of doing, or conducting in any respect, as he wills."*

***41.*** *It can be found that "liberty" generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Restraints on man's liberty are laid down by power used through absolute discretion, which when used in this manner brings an end to "liberty" and freedom is lost. At the same time "liberty" without restraints would mean liberty won by one and lost by another. So "liberty" means doing of anything one desires but subject to the desire of others.*

***42.*** *As John Emerich Edward Dalberg in his monograph Essays on Freedom and Power wrote that liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilisation.*

***43.*** *A distinguished former Attorney General for India, M.C. Setalvad in his treatise War and Civil Liberties observed that the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the State. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the State can reach their goal of perfection. In brief, according to this doctrine, the State exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The State exists for the benefit of the individual.*

***45.*** *Harold J. Laski in his monumental work in Liberty in the Modern State observed that liberty always demands a limitation on political authority. Power as such when uncontrolled is always the natural enemy of freedom.*

***46.*** *Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book The Development of Constitutional Guarantees of Liberty that:*

*"whatever, 'liberty' may mean today, the liberty as guaranteed by our bills of rights, is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilised society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organised society to adjust that society to individuals."*

***47.*** *Blackstone in Commentaries on the Laws of England, Vol. I, p. 134 aptly observed that:*

*"Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law."*

***48.*** *According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that:*

*"Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." (Dicey on Constitutional Law, 9th Edn., pp. 207-08.)*

*According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.*

***54.*** *Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilised society.*

***56.*** *Mukherjea, J. in A.K. Gopalan case observed that "personal liberty" means liberty relating to or concerning the person or body of the individual and it is, in this sense, antithesis of physical restraint or coercion. "Personal liberty" means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right constitutes the essence of personal liberty. Patanjali Shastri, J., however, said that whatever may be the generally accepted connotation of the expression "personal liberty", it was used in Article 21 in a sense which excludes the freedom dealt with in Article 19. Thus, the Court gave a narrow interpretation to "personal liberty". This Court excluded certain varieties of rights, as separately mentioned in Article 19, from the purview of "personal liberty" guaranteed by Article 21.*

***64.*** *The object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essential for a person or a citizen. A fruitful and meaningful life presupposes life full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible to non-citizens. While invoking the provisions of Article 21, and by referring to the oftquoted statement of Joseph Addison, "Better to die ten thousand deaths than wound my honour", the Apex Court in Khedat Mazdoor Chetna Sangath v. State of M.P. posed to itself a question "If dignity or honour vanishes what remains of life?" This is the significance of the Right to Life and Personal Liberty guaranteed under the Constitution of India in its Third Part.*

***United Kingdom***

***68.*** *Life and personal liberty has been given prime importance in the United Kingdom. It was in 1215 that the people of England revolted against King John and enforced their rights; first time the King had acknowledged that there were certain rights of the subject which could be called Magna Carta, in 1215. In 1628 the Petition of Rights was presented to King Charles I which was the first step in the transfer of sovereignty from the King to Parliament. It was passed as the Bill of Rights in 1689.*

***69.*** *In the Magna Carta, it is stated "no free man shall be taken, or imprisoned or disseised or outlawed or banished or any ways destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land".*

***70.*** *Right to life is the most fundamental of all human rights and any decision affecting human right or which may put an individual's life at risk must call for the most anxious scrutiny. (See R. v. Secy. of State for the Home Deptt., ex p Bugdaycay.) The sanctity of human life is probably the most fundamental of the human social values. It is recognised in all civilised societies and their legal systems and by the internationally recognised statements of human rights. [See R. (Pretty) v. Director of Public Prosecutions.*

***USA***

***71.*** *The importance of personal liberty is reflected in the Fifth Amendment to the Constitution of USA (1791) which declares as under:*

*"No person shall be … deprived of his life, liberty or property, without due process of law. [The 'due process' clause was adopted in Section 1(a) of the Canadian Bill of Rights Act, 1960. In the Canada Act, 1982, this expression has been substituted by 'the principles of fundamental justice' (Section 7).]"*

***72.*** *The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the "due process clauses". Under the above clauses the American judiciary claims to declare a law as bad, if it is not in accordance with "due process", even though the legislation may be within the competence of the legislature concerned. Due process conveniently understood means procedural regularity and fairness. (Constitutional Interpretation by Craig R. Ducat, 8th Edn. 2002, p. 475.)*

***West Germany***

***73.*** *Article 2(2) of the West German Constitution (1948) declares:*

*"2.(2) Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of the legal order."*

*Though the freedom of life and liberty guaranteed by the above article may be restricted, such restriction will be valid only if it is in conformity with the "legal order" (or pursuant to a law, according to official translation). Being a basic right, the freedom guaranteed by Article 2(2) is binding on the legislative, administrative and judicial organs of the State [Article 1(3)]. This gives the individual the right to challenge the validity of a law or an executive act violative of the freedom of the person by a constitutional complaint to the Federal Constitutional Court, under Article 93. Procedural guarantee is given by Articles 103(1) and 104. Articles 104(1)-(2) provides:*

*"104. (1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein.…*

*(2) Only the Judge shall decide on the admissibility and continued deprivation of liberty."*

***74.*** *These provisions correspond to Article 21 of our Constitution and the court is empowered to set a man to liberty if it appears that he has been imprisoned without the authority of a formal law or in contravention of the procedure prescribed there.*

***Japan***

***75.*** *Article 31 of the Japanese Constitution of 1946 says:*

*"No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law."*

*This article is similar to Article 21 of our Constitution save that it includes other criminal penalties, such as fine or forfeiture within its ambit.*

***Canada***

***76.*** *Section 1(a) of the Canadian Bill of Rights Act, 1960 adopted the "due process" clause from the American Constitution. But the difference in the Canadian set-up was due to the fact that this Act was not a constitutional instrument to impose a direct limitation on the legislature but only a statute for interpretation of Canadian statutes, which, again, could be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian Parliament itself (Section 2). The result was obvious: The Canadian Supreme Court in Curr v. R. held that the Canadian Court would not import "substantive reasonableness" into Section 1(a), because of the unsalutary experience of substantive due process in USA; and that as to "procedural reasonableness", Section 1(a) of the Bill of Rights Act only referred to "the legal processes recognised by Parliament and the courts in Canada". The result was that in Canada, the "due process clause" lost its utility as an instrument of judicial review of legislation and it came to mean practically the same thing as whatever the legislature prescribes, —*

*much the same as "procedure established by law" in Article 21 of the Constitution of India, as interpreted in A.K. Gopalan.*

***Bangladesh***

***77.*** *Article 32 of the Constitution of Bangladesh, 1972 (3 SCW 385) reads as under:*

*"32. Protection of right to life and personal liberty.—No person shall be deprived of life or personal liberty save in accordance with law."*

*This provision is similar to Article 21 of the Indian Constitution. Consequently, unless controlled by some other provision, it should be interpreted as in India.*

***Pakistan***

***78.*** *Article 9 Right to Life and Liberty:*

*"9. Security of person.—No person shall be deprived of life and liberty save in accordance with law."*

***Nepal***

***79.*** *In the 1962 Constitution of Nepal, there is Article 11(1) which deals with right to life and liberty which is identical with Article 21 of the Indian Constitution.*

***International Charters***

***Universal Declaration of Human Rights, 1948***

***80.*** *Article 3 of the Universal Declaration says:*

*"3. Everyone has the right to life, liberty and security of person."*

*Article 9 provides:*

*"9. No one shall be subjected to arbitrary arrest, detention or exile."*

*Article 10 says:*

*"10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." [As to its legal effect, see M. v. United Nations & Belgium (Inter LR at pp. 447, 451.)]*

***Covenant on Civil and Political Rights (1966)***

***81.*** *Article 9(1) says:*

*"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."*

***European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950***

***82.*** *This Convention contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion."*

14. As noticed hereinabove, Section 438 of the Code of Criminal Procedure, 1973 was omitted by Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976)

15. According to the plain language of Section 87 of Uttar Pradesh Reorganization Act, 2000, in order to facilitate the application of any law in relation to the State of Uttar Pradesh or Uttaranchal made before the appointed day i.e. 09th November, 2000, the appropriate Government may, before the expiration of two years from that day, by

order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent authority.

16. In the instant case, a specific query was put to learned Chief Standing Counsel whether any adaptation order has been issued for adapting Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976). He fairly submits that it was not adapted. It was required to be adapted within a period of two years, which admittedly has not been done in this case.

17. It was open to the State Government to issue the adaptation order within two years and thereafter, it was always open to the State, either to alter, repeal or amend the same by a legislative act. However, the fact of the matter is that no Legislation, has been brought, till date, to continue or not to continue with Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976).

18. Needless to say that Code of Criminal Procedure is a Central Act. The State of Uttar Pradesh, may, in its own wisdom, taking into consideration the law and order problem, has omitted Section 438 of the Code of Criminal Procedure, 1973. Learned Advocate General has also submitted during the course of hearing that the matter is under active consideration of the State Government.

19. Under Section 89 of the Punjab Reorganization Act, 1966, the States of Haryana and Himachal Pradesh have passed the adaptation orders, either by adapting the laws of the erstwhile State of Punjab, or by modifying the same, as per their local requirements.

20. Now as far as Section 88 of the U.P. Reorganization Act, 2000 is concerned, it deals with the

manner in which the laws are to be construed. It does not deal with the substantive provisions. Sections 2(f), 87 and 88 of the U.P. Reorganization Act, 2000 are to be read harmoniously.

21. Adaptation/legislation is a question of vital public importance. Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976) affects the personal liberty of the person.

22. We, after hearing learned Counsel for the parties, are of the considered view that neither the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976), as a whole, nor Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976) has been adapted by the State of Uttarakhand in terms of Section 87 of the U.P. Reorganization Act, 2000. Thus, Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976) will not be applicable in the State of Uttarakhand.

23. Accordingly, both the appeals are allowed. Judgment, under challenge, is set aside. We declare that since Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No.16 of 1976) has not been adapted/legislated, the same will not be applicable to the State of Uttarakhand. In other words, Section 438 of the Code of Criminal Procedure, 1973 shall be applicable in the State of Uttarakhand.

24. All pending applications stand disposed of accordingly.

**(Manoj Kumar Tiwari, J.)** **(Rajiv Sharma, A.C.J.)**

NISHANT