

CASE NO.:
Appeal (crl.) 249 of 2007

PETITIONER:
D.K. Ganesh Babu

RESPONDENT:
P.T. Manokaran & Ors

DATE OF JUDGMENT: 23/02/2007

BENCH:
Dr. ARIJIT PASAYAT & R.V. RAVEENDRAN

JUDGMENT:
J U D G M E N T
(Arising out of SLP(Crl.) NO. 3374 of 2006)

Dr. ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the order passed by a learned Single Judge of the Madras High Court while dealing with an application filed in terms of Section 438 of the Code of Criminal Procedure, 1973 (in short the 'Code'). This Appeal has been filed by the complainant. The applicants before the High Court who are respondents 1 to 3 herein, filed the application as they were apprehending arrest in crime No. 1358 of 2006 which was under investigation of the Inspector of the concerned circle. It was alleged in the complaint that because of the dowry demands, the victim committed suicide and the accused-respondent Nos. 1 to 3 apprehended arrest for the alleged offence under Section 304 B of the Indian Penal Code, 1860 (in short the 'IPC') and Section 4 of the Dowry Prohibition Act, 1961 (in short the 'Act').

The application was disposed of by the learned Single judge inter-alia with the following observations and directions:

i. each of them should execute a bond for a sum of Rs. 25,000/- (Rupees Twenty Five Thousand only) together with two sureties each for the like sum to the satisfaction of XVII Metropolitan Magistrate Saidapet, Chennai.

ii. The first petitioner shall appear before the respondent police for a period of two weeks daily at 10.30 a.m. and thereafter the first petitioner shall appear before the respondent police as and when required.

iii. The petitioners 2 and 3 shall report before the respondent police for a period of three days from 10.30 a.m. to 12.30 noon everyday and thereafter they shall be available for interrogations as and when required.

iv. The petitioners 1 and 2, in consultation with the first accused, who is the husband of the victim in this case, shall take all necessary steps to hand over all the articles belonging to

the victim viz. gold and diamond jewellery, house held articles including the silver articles and the cash to the father of the victim within a period of two weeks after our execution of this order.

The petitioners shall surrender before the court referred to above for executing the bond and furnishing sureties within two weeks from the date of receipt of copy of this order, falling which, this order shall stand cancelled."

The only point urged in support of the appeal by the informant \026appellant is that the parameters to be kept in view, while dealing with an application under Section 438 of the Criminal Procedure Code, 1973 (in short the 'Code'), had not been kept in view. It was submitted that actually the respondents have been granted bail without surrender, since the terms for release have been stipulated in the order itself.

Learned counsel for the respondent Nos. 1 to 3 on the other hand submitted that the materials on record clearly justified passing of the order as done, and there is nothing illegal in the order to warrant any interference. Further the respondents have already surrendered and have been granted bail on the terms stipulated by Learned Single Judge.

The facility which Section 438 of the Code gives is generally referred to as 'anticipatory bail'. This expression which was used by the Law Commission in its 41st Report is neither used in the section nor in its marginal note. But the expression 'anticipatory bail' is a convenient mode of indication that it is possible to apply for bail in anticipation of arrest. Any order of bail can be effective only from the time of arrest of the accused. Wharton's Law Lexicon explains 'bail' as '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 the custody of Police. The distinction between an ordinary order of bail and an order under Section 438 of the Code is that whereas the former is granted after arrest, and therefore means release from custody of the Police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. (See: Gur Baksh Singh v. State of Punjab 1980(2) SCC 565). Section 46(1) of Code, which deals with how arrests are to be made, provides that in making an arrest the Police officer or other person making the same "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". The order under Section 438 of the Code is intended to confer conditional immunity from the touch as envisaged by Section 46(1) of the Code or any confinement. The apex Court in Balachand Jain v. State of Madhya Pradesh (AIR 1977 SC 366) has described the expression 'anticipatory bail' as a misnomer. It is well-known that bail is ordinary manifestation of arrest, that the Court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. The power exercisable under Section 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to be exercised under Section 438. The power being of an important nature it is entrusted only to the higher echelons of judicial forums, i.e. the Court of Session or the High Court. It is the power exercisable in

case of an anticipated accusation of non-bailable offence. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Session or High Court, he shall be released immediately on bail without being sent to jail.

Sections 438 and 439 operate in different fields. Section 439 of the Code reads as follows:

"439. (1) A High Court or Court of Session may direct -

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by the Magistrate when releasing any person on bail be set aside or modified."

(underlined for emphasis)

It is clear from a bare reading of the provisions that for making an application in terms of Section 439 of the Code a person has to be in custody. Section 438 of the Code deals with "Direction for grant of bail to person apprehending arrest".

In *Salauddin Abdulsamad Shaikh v. State of Maharashtra* (AIR 1996 SC 1042) it was observed as follows:

"Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Sessions or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted".

(Emphasis supplied)

In *K.L. Verma v. State and Anr.* (1996 (7) SCALE 20) this Court observed as follows:

"This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the

regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire."

(Emphasis supplied)

In *Nirmal Jeet Kaur v. State of M.P. and Another* (2004 (7) SCC 558) and *Sunita Devi v. State of Bihar and Anr. Criminal Appeal arising out of SLP (Crl.) No. 4601 of 2003* disposed of on 6.12.2004, certain grey areas in the case of *K.L. Verma's case* (supra) were noticed. The same related to the observation "or even a few days thereafter to enable the accused persons to move the Higher Court, if they so desire". It was held that the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is "in custody". In *K.L. Verma's case* (supra) reference was made to *Salauddin's case* (supra). In the said case there was no such indication as given in *K.L. Verma's case* (supra), that a few days can be granted to the accused to move the higher Court if they so desire. The statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation.

In view of the clear language of Section 439 and in view of the decision of this Court in *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.* (AIR 1980 SC 785), there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.

The direction which a Court can issue under Section 438 of the Code is that in the event of arrest of an accused on an accusation of committing a non-bailable offence, he shall be released on bail subject to such conditions as the Court may deem fit to impose. An application under Section 438 of the Code can be moved only by a person who has not already been arrested. Once he is arrested, his remedy is to move the concerned Court either under Section 437 or Section 439 of the Code. In the very nature of the direction which the Court can issue under Section 438 of the Code, it is clear that the direction is to be issued only at the pre-arrest stage. The direction becomes operative only after arrest. The condition precedent for the operation of the direction issued is arrest of the accused. This being so, the irresistible inference is that while dealing with an application under Section 438 of the Code the Court cannot restrain arrest.

Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code.

The aforesaid aspects have been highlighted in *Adri Dharan Das v. State of West Bengal* (2005(4)SCC 303).

In view of what has been stated above some of the directions, given by learned Single Judge, as quoted above, are not in line with what has been stated in *Adri Dharan Das's* case (supra). Accordingly we modify the directions. Since the respondents have already surrendered and have been granted bail in terms of the High Court's directions, they shall surrender before the concerned court and shall move for bail in terms of Section 439 of the Code within four weeks from today. On that being done the case shall be considered in its proper perspective uninfluenced by the fact we have disapproved stipulation of conditions by the High Court. The concerned court shall deal with the matter appropriately. It is brought to our notice that the husband of the deceased has already been released on bail after his surrender. The effect and/or relevance of that order shall be duly considered by the concerned court while dealing with the application for bail to be filed within stipulated time.

The appeal is allowed to the aforesaid extent.