A REKHA PATEL

v.

PANKAJ VERMA AND ORS.

(Criminal Appeal No. 428 of 2008)

MARCH 3, 2008

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[DR. ARIJIT PASAYAT AND J.M. PANCHAL, JJ.]

Code of Criminal Procedure, 1973 – s. 438 – Writ petition seeking quashing of FIR and stay of arrest – High Court C *ordering grant of anticipatory bail by appropriate court and if bail was refused direction to release the accused on personal bond – On appeal, held: Anticipatory bail cold not be granted as s. 438 has no application to the State concerned (Uttar Pradesh) – Even otherwise the protection of release on personal bond not permissible – However, since the accused* D *was subsequently granted bail by competent court, no interference called for.*

Respondents filed writ petition before High Court seeking quashing of FIR registered against them and for E **stay of arrest pending disposal of the writ petition. High Court refused to grant stay of arrest but ordered that if the petitioners-respondents put their appearance or were produced before the courts below and made application for release on bail, the same should be disposed of, and** F **if their case was not found fit for release on bail, they would be released on personal bond. Hence the present appeal.**

Disposing of the appeal, the Court

G **HELD: 1. Presently Section 438 Cr.P.C. has no application to the State of Uttar Pradesh. Even otherwise, after surrender of accused and rejection of his bail application, the protection of the nature granted by the High Court cannot be given. [Para 7] [798-G; 799-A]**

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Adri Dharan Das vs. State of West Bengal **2005 (4) SCC 303 – relied on.** A

2. However, in view of the fact that pursuant to the direction given by the High Court, the respondents had moved for bail and have been granted bail, this court declines to interfere in the appeal; but have considered it necessary to indicate the correct parameters so that the mistake committed by the High Court is not repeated. [Paras 8 and 9] [803-C, D] B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 428 of 2008. C

From the Judgment and Order dated 7.11.2006 of the High Court of Judicature at Allahabad in Crl. Misc. W.P. No. 13167/ 2006.

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Goodwill Indeevar and Z.K. Faizan for the Appellant.

Shakil Ahmed Syed, Manoj K. Dwivedi and Anuvrat Sharma for the Respondents.

The Judgment of the Court was delivered by

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DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the order passed by the Division Bench of the Allahabad High Court passed on a petition under Article 226 of the Constitution of India, 1950 (for short 'The Constitution'). F

3. The appellant was married to respondent No.1 on 12.11.2005. Alleging that she was being harassed for non-fulfilment of the demand of dowry, a complaint was filed at Thana, Jawan Police Station, District Aligarh. On the basis of appellant's complaint Crime No.277 of 2006 was registered for alleged commission of offences punishable under Sections 498A, 323, 504 and 506 of the Indian penal Code, 1860 (for short 'The IPC') and Sections 3/4 of the Dowry Prohibition Act, 1961 (for short 'The Dowry Act'). Respondent Nos.1 to 6 filed a G H

A writ petition for quashing the F.I.R. and for stay of arrest pending the disposal of the writ petition. The writ petition was filed on 1.11.2006. By the impugned order dated 7.11.2006 the High Court declined to accept the prayer for stay of arrest of the respondents but nevertheless passed the following order:

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> "Considering the facts and circumstances of the case, in the event the petitioners put in their appearance or are produced before the courts below and make application for their release on bail in case crime No. 277 of 2006 under Sections 498-A, 323, 504 and 506 I.P.C., Police
> C Station Jawan, District Aligarh, the same shall be heard and disposed of expeditiously in accordance with law and in case of petitioner Nos.1 to 5, if the learned Magistrate does not find fit case to release them on bail, they shall be released on personal bond of Rs.30,000/- each and they
> D shall remain on the same personal bonds till the final disposal of their bail application, if any, by the Court of Sessions and that too within a week thereafter."

4. Learned counsel for the appellant submitted that virtually there has been exercise of power under Section 438 of the
E Criminal Procedure Code, 1973 (in short 'The Cr.P.C.'). It is pointed out that in the State of U.P., Section 438 Cr.P.C. has no application.

5. The learned counsel for respondent Nos.7 to 9 submitted
F that the direction given by the High Court is clearly contrary to the decision of this Court in *Adri Dharan Das Vs. State of West Bengal* (2005 (4) SCC 303).

6. There is no appearance on behalf of respondent Nos.1 to 6 in spite of service of notice.

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7. As rightly contended by the learned counsel for the appellant, presently Section 438 Cr.P.C. has no application to the State of U.P. Even otherwise, as noted in *Adri Dharan Das's* case (supra), after surrender of accused and rejection of his bail application, the protection of the nature granted by the High

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Court cannot be given. In this context paragraphs 7, 8, 9 10, 11, 12 and 13 of *Adri Dharan Das's* case (supra) are relevant. They read as follows:

> "7. 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 the 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 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

A 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
B 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 important nature it is entrusted only to the higher echelons of judicial forums, i.e. the Court of Session or
C 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
D High Court, he shall be released immediately on bail without being sent to jail.

8. 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-
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> (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
F necessary for the purposes mentioned in that sub-section;
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> (b) that any condition imposed by the Magistrate when releasing any person on bail be set aside or modified."
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> (underlined for emphasis)

9. 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
H deals with "Direction for grant of bail to person

apprehending arrest" A

10. 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 B
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 C
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 D
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 E
after the investigation has made progress or the charge-sheet is submitted".

(Emphasis supplied)

11. In *K.L. Verma v. State and Anr.* (1996 (7) SCALE 20) F
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 G
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 H

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)

12. 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.

13. 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."

8. It is, however, submitted by the learned counsel for the State that pursuant to the direction given by the High Court, the respondents had moved for bail and have been granted bail by the learned Sessions Judge concerned.

9. In view of the aforesaid situation, we decline to interfere in the appeal; but have considered it necessary to indicate the correct parameters so that the mistake committed by the High Court is not repeated.

10. The appeal is disposed of, subject to the aforesaid observations.

K.K.T. Appeal disposed of.