Adri Dharan Das vs State Of West Bengal on 21 February, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1057, 2005 (4) SCC 303, 2005 AIR SCW 1013, (2005) 1 CTC 710 (SC), 2005 CRILR(SC&MP) 269, (2005) 27 ALLINDCAS 8 (SC), 2005 (3) SRJ 327, 2005 (27) ALLINDCAS 8, (2005) 2 JT 548 (SC), 2005 (2) SLT 614, 2005 CRILR(SC MAH GUJ) 269, 2005 (1) CTC 710, 2005 ALL MR(CRI) 1097, 2005 (2) SCALE 212, 2005 SCC(CRI) 933, 2005 (1) CALCRILR 532, 2005 CHANDLR(CIV&CRI) 349, (2006) SC CR R 1421, (2005) 2 EASTCRIC 197, (2005) 2 KER LJ 356, (2005) 2 RECCRIR 32, (2005) 2 SCJ 291, (2005) 2 SUPREME 363, (2005) 2 SCALE 212, (2005) 2 BOMCR(CRI) 308, (2005) 51 ALLCRIC 706, (2005) 2 CAL LJ 120, (2006) 2 CALLT 29, (2005) 117 DLT 686, (2005) 1 ALLCRIR 1013, (2005) 1 CHANDCRIC 229, (2005) 1 MADLW(CRI) 243, (2005) 2 MAH LJ 259, (2005) 30 OCR 793, (2005) 2 RAJ CRI C 489, (2005) 1 CURCRIR 221, (2005) 2 ALLCRILR 471, (2005) 1 CRIMES 359, 2005 (2) ALD(CRL) 67, 2005 (2) ANDHLT(CRI) 52 SC, (2005) 2 ANDHLT(CRI) 52

Author: Arijit Pasayat

Bench: Arijit Pasayat, S.H. Kapadia

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           CASE NO.:
Appeal (crl.)  326 of 2005

PETITIONER:
Adri Dharan Das

RESPONDENT:
State of West Bengal

DATE OF JUDGMENT: 21/02/2005

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
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J U D G M E N T (Arising out of SLP (Crl.) No.250 of 2004) ARIJIT PASAYAT, J.

Leave granted.

Refusal by a Division Bench of the Calcutta High Court to accept prayer made by the appellant to extend the protection available under Section 438 of the Code of Criminal Procedure, 1973 (in short the 'Code')is assailed by him. A brief reference to the factual position would suffice.

Complaint was lodged by one Dayaram Das in the Court of Chief Judicial Magistrate, Alipore, Calcutta (in short 'CJM') alleging commission of various offences more particularly those covered under Sections 406, 467, 468,471 and 420 of the Indian Penal Code, 1860 (in short the 'IPC'). This complaint was filed against the appellant and five others. It was claimed that the complainant Dayaram Das, who was the President of Calcutta Branch/Temple situated at 3C, Albert Road, Calcutta and manager of the premises at 22, Gurusaday Road, Calcutta was appointed by the International Society for Krishna Consciousness (in short the 'ISKCON') Bureau in accordance with Rules and Regulations. Appellant was the previous President, who was suspended by the Bureau on 2nd March, 2001 and was removed on 17th March, 2002. The other persons named in the complaint (accused Nos. 2 to 6) were stated to be his associates. Alleging that the accused persons had committed various offences, prayer was made to Learned Judicial Magistrate for taking action in terms of Section 156(3) of the Code. The CJM on 13th May, 2002 directed the officer in charge of the Ballygunj Police Station to investigate after taking the petition of complaint as FIR and to submit report before Learned Sub-Divisional Judicial Magistrate (in short the 'SDJM'). The case was registered as Ballygunj P.S. Case no. 81 dated 3.6.2002 in Bollygunj Police Station.

According to the appellant they were victims of a conspiracy. Large number of cases were pending between the parties which have been filed. Having failed in their attempt to get any relief from the Civil Courts, the complainant and his associates falsely instituted the complaint. An application in terms of Section 438 of the Code was filed before the Calcutta High Court which by the impugned order was rejected.

Mr. Gopal Subramanium, learned Senior Counsel appearing for the appellant submitted that without properly appreciating the factual background and the points involved in the application, the prayer should not have been rejected summarily. Two of the accused persons have been granted protection in terms of Section 438 of the Code by the Division Bench of the Calcutta High Court. The appellant is always willing to cooperate in the investigation. The efforts of the respondent are to humiliate the appellant in public and cause damage to his reputation. In the aforesaid background it is submitted that a case for interference is made out. It was submitted that in case the prayer for protection in terms of Section 438 of the Code is not accepted the appellant may be permitted to surrender before the concerned Court on 17/3/2005 and apply for bail. It was prayed that directions may be given for early disposal of the applications by the said Court and in case the prayer is not accepted by the lower Court, by the District and Sessions Court who shall be moved, it was submitted that the appellant would like to come to Calcutta on 10th of March, 2005 and is willing to co-operate in the investigation but he should not be arrested till the disposal of the application for bail before learned SDJM, Alipore.

In response, learned counsel appearing for the respondent submitted that there is no provision in the Code for the direction not to arrest and if such a direction is given it would be contrary to law. It was also submitted that the appellant has not made out any case for interference and his conduct is not above board. Considering the serious nature of the allegations, it is not a fit case where any order in terms of Section 438 of the Code can be passed. The appellant has abused process of law. He had not been granted protection by the Karnataka High Court which he mis-utilized. The two co-accused who had been granted protection by the High Court are not co-operating in the

investigation. It is, therefore, submitted that the application of the appellant has been rightly rejected by the impugned order. By way of clarification Mr. Subramaniam submitted that the order passed by the Karnataka High Court has not been violated. In fact, by order dated 20.10.2003, the learned Single Judge of the Karnataka High Court has clarified that mere filing of charge sheet does not mean that the petitioner has no right to file anticipatory bail application before the concerned competent court and, therefore, the application was filed before the Calcutta High Court.

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 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 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.

After analyzing the crucial question is when a person is in custody, within the meaning of Section 439 of the Code, it was held in Nirmal Jeet Kaur's case (supra) and Sunita Devi's case (supra) that for making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in Salauddin's case (supra) the protection in terms of Section 438 is for a limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.

If the protective umbrella of Section 438 is extended beyond what was laid down in Salauddin's case (supra) the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies upto higher Courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner.

Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead, innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' shows that the applicant may be arrested must be founded on reasonable grounds. Mere "fear" is not 'belief' for which reason it is not enough for the applicant

to show that h has some sort of vague apprehension that some one is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief on the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the Court concerned to decide whether a case has been made out of for granting the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such 'blanket order' should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device is secure the individual's liberty' it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed.

The next question is whether a Court can pass an interim order not to arrest the applicant, where an application under Section 438 of the Code is pending disposal.

In the instant case no application for protection in terms of Section 438 of the Code is pending. What the appellant can do after surrendering to custody on 17th March, 2005, is to file an application in terms of Section 437 or 439, as the case may be. Even otherwise, 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 dis- appearance to maintain law and order in the locality. For these or other reasons, arrest may become 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.

We make it clear that while upholding the rejection of the prayer in terms of Section 438 of the Code, we are not expressing any opinion on the merits of the case. When the bail application is moved in terms of Section 439 of the Code before the concerned Court the same shall be considered in its proper perspective in accordance with law. Let the appellant, as submitted by learned counsel for him, appear in the Court of learned SDJM, Alipore on 17th March, 2005. If an application for bail is moved, the learned SDJM would do well to dispose it of on the day it is filed. In case the prayer for bail is rejected and as stated by learned counsel for the appellant an application for bail is filed before learned District and Sessions Judge, 24, Parganas South, West Bengal on 17th March, 2005, the said Court would do well to dispose of the application as early as practicable, preferably by 19th of March, 2005. If it is filed at a later date, the learned District and Sessions Judge would make an effort to dispose it of within three days of its filing. Learned counsel appearing for the State has undertaken that all relevant records shall be produced before the Court dealing with the bail application and no adjournment shall be asked for on the ground of non-availability of records.

Appeal is accordingly disposed of with no order as to costs.