Supreme Court of India
Balchand Jain vs State Of Madhya Pradesh on 5 November, 1976
Equivalent citations: 1977 AIR 366, 1977 SCR (2) 52
Author: P Bhagwati
Bench: Bhagwati, P.N.

PETITIONER:
BALCHAND JAIN

Vs.

RESPONDENT:
STATE OF MADHYA PRADESH

DATE OF JUDGMENT05/11/1976

BENCH:
BHAGWATI, P.N.
BENCH:
BHAGWATI, P.N.
GUPTA, A.C.
FAZALALI, SYED MURTAZA

CITATION:
1977 AIR 366 1977 SCR (2) 52
1976 SCC (4) 572
CITATOR INFO :
RF 1980 SC1632 (24,25)
R 1982 SC 149 (1223)
RF 1988 SC 922 (21,22)
R 1991 SC 558 (7)

ACT:
Defence and Internal Security of India Rules, 1971--r. 184--If supersedes S. 438. Gr. P.C. 1973.

HEADNOTE:
Section 438 of the Code of Criminal Procedure, 1973 provides that when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this Section. Rule 184 of the Rules made under Defence and Internal Security of India Act, 1971 enacts that notwithstanding anything contained in the Code of Criminal Procedure, 1898, no person accused or convicted of a contravention of the Rules or orders made thereunder shall, if in custody, be released on bail or on his own bond unless (a) the prosecution has been given an opportunity to oppose the application for such release and (b) where the prosecution opposes the applica-

tion and the contravention is of any such provision of the Rules or orders made thereunder as the Central Government or the State Government may, by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention.

A Food Inspector raided the shop of the appellant, who was a merchant dealing in kiryana goods and kerosene oil etc., and seized his account books. Apprehending that he might be arrested on a charge of non-bailable offence for contravention of the provisions of the Defence and Internal Security of India Act and the Rules, the appellant approached the Sessions Judge for an anticipatory bail under s. 438 of the Code of Criminal Procedure, 1973. The Sessions Judge rejected the application. Dismissing his appeal, the High Court held that the express provisions of r. 184 of the Rules superseded s. 438 of the Code in so far as offences set out in r. 184 were concerned.

Allowing the appeal and remanding the case to the High Court:

HELD: (P. N. Bhagwati and A.C. Gupta,JJ.)

Section 438 and r. 184 operate at different stages, one prior to arrest.and the other after arrest and there is no overlapping between these two provisions. Rule 184 does not stand in the way of a Court of Sessions or a High Court granting anticipatory bail under s. 438. [57G]

1. The term 'anticipatory bail' is a misnomer. It is not as if the bail is presently granted by the court in anticipation of arrest. When the court grants anticipatory bail it makes an order that in the event of arrest a person shall be released on bail. Thin somewhat extraordinary power is exercised only in exceptional cases and is entrusted to the higher echelons of the judicial service namely the court of Sessions and the High Court. [55H]

2. (a) Rule 184 postulates the existence of power in the court under the Code and seeks to place a curb on its exercise by providing that a person accused or convicted of contravention of any rule or order, if in custody, shall not be released on bail unless the conditions mentioned in the rule are satisfied. When the two conditions are satisfied the fetters placed on the exercise of the power are removed and the power of granting bail possessed by the court under the Code and becomes exercisable. [56H]

(b) The non-obstante clause is intended to restrict the power of granting bail under the Code and not to confer a new power exercisable only on certain conditions. [57B]

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(c) Rule 184 does not lay down a self-contained code for grant of bail. It cannot be construed as displacing altogether the provisions of the Code in regard to bail. The provisions of the Code must be read alongwith r. 184 and full effect must be given to them except in so far as they are by reason of the non-obstante clause overridden by r.

184. [57B-C]

(d) An application under s. 438 is an application on an apprehension of arrest. On such an application, the direction that may be given under s. 438 is that in the event of his arrest the applicant shall be released on bail. Rule 184 operates at a subsequent stage when a person is accused or convicted of contravention of any rule or order made under the Rules and is in custody. It is only the release of such a person on bail that is conditionally prohibited by r. 184.

[57E]

If these are the conditions provided by the rule-making authority for releasing on bail a person arrested on an accusation of having committed contravention of any rule or order made under the Rules it must follow a fortiori that the same conditions must provide the guidelines while exercising the power to grant anticipatory bail to a person apprehending arrest on such accusation though they would not be strictly applicable. [58C]

(Fazal Ali, J.)

Section 438 of the Code has not been repealed by r. 184 of the Rules, but both have to be read harmoniously. Rule 184 is only supplemental to 8. 438 and contains guidelines which have to be followed by the Court in passing orders for anticipatory bail in relation to cases covered by r. 184. [70A]

1. (a) Section 438 of the Cede is an extraordinary remedy and should be resorted to only in special cases. [70C]

(b) Section 438 applies only to non-bailable offences. Anticipatory bail being an extraordinary remedy available in special cases, this power has been conferred on the higher echelons of judicial service, namely, the Court of Sessions or the High Court. What the section contemplates is not anticipatory bail but merely an order releasing an accused on bail in the event of his arrest. There can be no question of bail unless a person is under detention or custody. The object of s. 438 is that the moment a person is arrested, if he had already obtained an order from the Sessions Judge or the High Court, he would be released immediately without having to undergo the rigours of jail even for a few days. [63B-D]

2. (a) While interpreting statutes, the Court must infer repeal of a former statute by the latter only if it causes inconvenience or where it is couched in negative terms. The legislature does not intend to keep contradictory enactments on the statute book and, therefore, a construction should be accepted which offers an escape from it. [66A-C]

Aswini Kumar Ghosh and Anr. v. Arabinda Bose and Anr [1953] S.C.R. 1 referred to.

2. (b) If the intention of r. 184 were to override the provisions of s 438, then the Legislature should have expressly stated that the provisions of s. 438 shall not apply

to offences contemplated by r. 184. Therefore, the Legislature in its wisdom left it to the Court to bring about a harmonious construction of the two statutes so that the two may work and stand together. [65F-G]

Northern India Cateres Pvt. Ltd. & Anr. v. State of Punjab and Anr. [1967] 3 S.C.R. 399 followed.

(c) There is no real inconsistency between s. 438 and r. 184 and, therefore. the non-obstante clause cannot be interpreted in a manner so as to reveal or override the provisions of s. 438 in respect of cases where r. 184 applies. The conditions required by r. 184 must be impliedly imported in s. 438 so as to form the main guidelines to be followed while the Court exercises its powers under s. 438 in offences contemplated by r. 184. Such an interpretation would meet the ends of justice, avoid all possible anomalies and would ensure and protect the liberty of the subject which is the real intention of the Legislature in enacting s.438 as a new provision for the first time in the Code. [66E-F]

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Section 438 does not contain unguided or uncanalised power to pass an order for anticipatory bail; but such an order being of an exceptional type can only be passed if, apart from the conditions mentioned in s. 437, there is a special case for passing the order. The words 'for a direction under this section' and 'Court may, if it thinks fit, direct' clearly show that the Court has to be guided by a large number of considerations, including those mentioned in s. 437. When a Court is dealing with offences contemplated by r. 184 it is obvious that though the offences are not punishable with death or imprisonment for life so as to attract the provisions of s. 437, the conditions laid down by r. 184 would have to be complied with before an order could be passed under s. 438. [67A-B]

In re V. Bhuvaraha Iyengar, A.I.R. [1942] Mad. 221, 223, In re Surajlal Harilal Majumdar & others, A.I.R. 1943 Bom. 82, and Jagram Singh & Ors. v. Emperor, AIR 1945 Pat. 69 distinguished.

(b) The scope of r. 184. is wider than that of s. 438 inasmuch as s. 438 can be invoked only in cases of non-bailable offences and not in cases of bailable offences, r. 184 is applied not only to non-bailable offences but also to bailable offences and, therefore, the conditions mentioned in r. 184, would have to be impliedly imported into s. 436 which deals with orders for bail regarding bailable offences. [69D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 325 of 1975.

Appeal by Special Leave from the Judgment and Order dated the 30th September, 1975 of the Madhya Pradesh High Court in Criminal Misc. Case No. 1112 of 1975. V.M. Tarkunde and Pramod Swarup for the Appellant. Ram Panjwani, H.S. Parihar and I. N. Shroff for the Respond- ent.

The Judgment of P. N. Bhagwati and A.C. Gupta J.J. was delivered by Bhagwati, J. Fazal Ali, J. gave a separate concurring opinion.

BHAGWATI, J. The facts giving rise to this appeal are set out in the judgment about to be delivered by our learned brother S. Murtaza Fazal All and it is, therefore, not necessary to reiterate them. The question which arises for determination on these facts is a short once and it is: whether an order of 'anticipatory bail' can be competently made by a Court of Session or a High Court under section 438 of the Code of Criminal Procedure, 1973 in case of offences falling under Rule 184 of the Defence and Internal Security of India Rules, 1971 made under the Defence and Internal Security of India Act, 1971 (hereinafter referred as the Act).

There was at one time conflict of decisions amongst different High Courts in India about the power of a court to grant 'anticipatory bail'. The majority view was that there was no such power in the court under the old Criminal Procedure Code. The Law Commission, in its Forty First Report pointed out:

"The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases 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.", and recommended introduction of a provision for grant of 'anticipatory bail'. This recommendation was accepted by the Central Government and clause (447) was introduced in the draft Bill of the new Code of Criminal Procedure conferring express power on a Court of Session or a High Court/to grant 'anticipatory bail'. Commenting on this provision in the draft Bill, the Law Commission observed in paragraph 31 of its Forty-Eighth Report:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendations made by the previous Commission (41st Report). 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."

Clause (447) became section 438 when the Bill was enacted into the new Code of Criminal Procedure. That section is in the following terms:

"(1) When any person has reason to believe that he may be arrested on an accusation of having committed a nonbailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court .may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

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X
We do not find in this section the words

'anticipatory bail', but that is clearly the subject with which the section deals. In fact 'anticipatory bail' is a misnomer. It is not as if bail is presently granted by the Court in anticipation of arrest. When the Court grants 'anticipatory bail' what it does is to make an order that in the event of arrest, a person shall be released on bail.. Manifestly there is no question of release on bail unless a person is arrested and, therefore,, it is only on arrest that the order granting 'anticipatory bail' becomes operative. Now, this power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or "there are reasonable grounds for ho1ding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" that such power is to be exercised. And this power being rather of an unusual nature, it is entrusted only to the higher echelons of judicial service, namely, a Court of Session and the High Court. It is a power exercisable in case of an anticipated accusation of nonbailable offence and there is no limitation as to the category of nonbailable offence in respect of which the power can be exercised by the appropriate court.

Having examined the historical background and context of section 438 of the new Code of Criminal Procedure and the language in which it is couched, let us turn to Rule 184 of the Defence and Internal Security of India Rules, 1971. That is the Rule with which we are concerned in this appeal and it runs as follows:

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), no person accused convicted of a contravention of these Rules or orders made thereunder shall, if in custody, be released on bail or his own bond unless--

(a) the prosecution has been given an opportunity to oppose the application for such release, and

(b) where the prosecution opposes the application and the contravention is of any such provision of these Rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention." This Rule commences on a non-obstante clause and in its operative part imposes a ban on release on bail of a person accused or convicted of a contravention of the Rules or orders made thereunder, if in custody, unless two conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the

application for such release and the second condition is that when the contravention is of any such provision of the Rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the Court must be satisfied that there are reasona- ble grounds for believing that be is not guilty of such contravention. If either of these two conditions is not satisfied. the ban operates and the person concerned cannot be released on bail. The Rule, on its plain terms, does not confer any power on the Court to release a person accused or convicted of contravention of any Rule or order made under the Rules, on bail. It postulates the existence of power in the Court under the Code of Criminal Procedure and seeks to place a curb on its exercise by providing that a person accused or convicted of contravention of any Rule or order made under the rules, if in custody. shall not be released on bail unless the aforesaid two conditions are satisfied. It imposed fetters on the exercise of the power of granting bail in certain kinds of cases and removes such fetters on fulfilment of the aforesaid two conditions. When these two conditions are satisfied, the fetters are removed and the power of granting bad possessed by the Court under the Code of Criminal Procedure revives and becomes exercisa- ble. The non-obstante clause at the commencement of the Rule also emphasises that the provision in the Rule is intended to restrict the power of granting bail under the Code of Criminal Procedure and not to confer a new power exercisable only on certain conditions. It is not possible to read Rule 184 as laying down a self-contained code for grant of bail in case of a person accused or convicted of contravention of any Rule or order made under the Rules so that the power to grant bail in such case must be found only in Rule 184 and not in the Code of Criminal Procedure. Rule 184 cannot be construed as displacing altogether the provi- sions of the Code of Criminal Procedure in regard to bail in case of a person accused or convicted of contravention of any Rule or order made under the Rules. These provisions of the Code of Criminal Procedure must be read along with Rule 184 and full effect must be given to them except in so far as they are, by reason of the non-obstante clause overridden by rule 184.

We must, therefore, proceed to consider whether on a true and harmonious construction, section 438 of the Code of Criminal Procedure, which provides for grant of 'anticipato- ry bail can stand side by side with Rule 184 or there is any inconsistency between them so that to the extent of incon- sistency, it must be regarded as overridden by that rule. Now section 438 contemplates an application to be made by a person who apprehends that he may be arrested on an accusa- tion of having committed a nonbailable offence. It is an application on an apprehension of arrest that invites the exercise of the powers under section 438. And on such an application, the direction that may be given. under section 43 8 is that in the event of his arrest, the applicant shall be released on bail. Rule 184, on the other hand, deals with a different situation and operates at a subsequent stage when a person is accused or convicted of contravention of any Rule or order made under the Rules and is in custody. It is only the release of such a person on bail that is conditionally prohibited by Rule 184. If a person is not in custody but is merely under an apprehension of arrest and he applies for grant of 'anticipatory bail' under section 438, his case Would clearly be outside the mischief of Rule 184, because when the Court makes an order for grant of 'antici- patory bail', it would not be directing release of a person who is in custody. It is an application for release of a person in custody that is contemplated by Rule 184 and not an application for grant of 'anticipatory bail' by a person apprehending arrest. Section 438 and Rule 184 thus operate at different stages, one prior to arrest and the other, after arrest and there is no overlapping between these two provisions so as to give rise to a conflict between them. And consequently. it must follow as a necessary corollary that Rule 184

does not stand in the way of a Court of Ses- sion or a High Court granting 'anticipatory bail' under section 438 to a person apprehending arrest on an accusation of having committed contravention of any Rule or order made under the Rules.

But even if Rule 184 does not apply in such a case, the policy behind this Rule would have to be borne in mind by the Court while exercising its power to grant 'anticipatory bail' under section 438. The rule making authority obviously thought offences arising out of contravention of Rules and orders made thereunder were serious offences as they might imperil the defence of India or civil defence or internal security or public safety or maintenance of public order or hamper maintenance of supplies and. services to the life of the community and hence it provided in Rule 184 that no person accused or convicted of contravention of any Rule or order made under the Rules, shall be released on bail unless the prosecution is given an opportunity to oppose the application for such release and in case the contravention is of a Rule or order specified in this behalf in a notified order, there are reasonable grounds for believing that the person concerned is not guilty of such contravention. If these are the condi- tions provided by the Rule making authority for releasing on bail a person arrested on an accusation of having committed contravention of any Rule or order made under the Rules, it must follow a fortiori that the same conditions must provide the guidelines while exercising the power to grant 'antici- patory bail' to a person apprehending arrest on such accusation, though they would not be strictly applicable. When a person apprehending arrest on an accusation of having committed contravention of any Rule or order made under the Rules applies to the Court for a direction under 438, the Court should not ordinarily grant him 'anticipatory bail' under that section unless a notice has been issued to the prosecution giving it an opportunity to oppose the applica- tion and in case the contravention is of a Rule or order specialty notified in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention. These would be reasonably effective safeguards against improper exercise of power of granting 'anticipatory bail' which might in conceivable cases turn out detrimental against public interest. When we say this, we must, of course, make it clear that we do not intend to lay down that in no case should an exparte order of 'anticipatory bail' be made by the Court. There may be facts and circumstances in a given case which may justify the making of an exparte interim order of 'anticipatory bail' but in such an event, a short dated notice should be issued and the final order should be passed after giving an opportunity to the prosecution to be heard in opposition. Here in the present case, the High Court took the view, following its earlier decisions in Criminal Revision No. 285 of 1973 (State v. Shantilal & Ors.) and Criminal Revision No. 286 of 1973 (State v. Manoharlal & Ors.), that the Court of Session had no jurisdiction to grant 'anticipatory, bail' by reason of Rule 184 and on this view, did not consider the application of the appellant for 'anticipatory bail' on merits. Since we are taking the view that the power con- ferred on a Court of Session or a High Court under section 438 to grant 'anticipatory bail' is not taken away by Rule 184 in case of persons apprehending arrest on an accusation of having committed contravention of any Rule or order made under the Rules, we must set aside the order of the High Court and send the matter back to the High Court for decid- ing the appellant's application for 'anticipatory bail' on merits.

We accordingly allow the appeal, set aside the order made by the High Court and remand the case to the High Court with a direction that the application of the appellant for 'anticipatory bail' should be

decided on merits after hearing the parties in the light of the observations made in this judgment. The parties are directed to appear before the High Court on 25 November 1976 so as to enable the High Court to take up the application for hearing. The appellant is already on bail and we direct that until his application for 'anticipatory bail' is disposed of by the High Court, he will continue on bail.

FAZAL ALI, J. This is an appeal by special leave against the order of the Madhya Pradesh High Court dated September 30, 1975 dismissing the application of the petitioner in limine. In fact the High Court of Madhya Pradesh, following an earlier decision of that Court given in Criminal Revision No. 285/74 and No. 286/74 dated April 15, 1975, held that as the matter was fully covered by those two authorities, the petition merited summary rejection. Thereafter the peti- tioner field an application for special leave which, having been granted, the appeal has now been placed before us. The circumstances under which the appeal arises may be detailed as follows:

The petitioner was a businessman of Nowgong Cantonment carrying of the retail business of Kirana merchandise and other things for a large number of years and had been maintaining proper accounts regarding the sale of kero- sene-oil and other articles. On July 23, 1975 a Magistrate along with the Food Inspector and a number of police officers visited the shop of the petitioner and took posses- sion of his account books and started verifying their cor- rectness. The same party made a second visit to the shop of the petitioner on July 25, 1975 and took away Bahi-Khatas and Rokar kept in the shop of the petitioner. After prepar- ing a seizure memo, a copy of the same was given to one Nathuram a relation of the petitioner, the petitioner being absent on that day. Having regard to these facts, the petitioner who had a genuine apprehension that he might be arrested, for contravention of the provisions of the Defence of India Act and the Rules made thereunder which admitted- ly was a non-bailble offence, approached the Sessions Judge for passing an order for anticipatory bail under the provi- sions of s. 438 of the Code of Criminal Procedure, 1973. This application having been rejected by the Sessions Judge, the petitioner moved the High Court and that too unsuccess- fully. Hence this appeal by special leave. We are not at all concerned in this appeal regarding the merits of the case because the High Court has not gone into merits but has rejected the application on the ground that it was not maintainable as held by the Division Bench deci- sion of the Madhya Pradesh High Court. Thus the only point which arises for consideration before us is:

> "Whether the provisions of s. 438 of the Code of Criminal Procedure relating to anticipatory bail stand overruled and repealed by virtue of r. 184 of the Defence and Internal Security of India Rules, 1971, or on the rule of harmonious interpretation of statutes r. 184 of the Defence and Internal Security of India, Rules, 1971 is not in any way incon- sistent with s. 438 of the Code of Criminal Procedure, 1973, and both the provisions can exist side by side."

The Madhya Pradesh High Court has taken the view that the Defence and Internal Security of India Act, 1971--hereinaf- ter referred to as 'the Act' and the Defence and Internal Security of India Rules.1971-hereinafter referred to as 'the Rules' made thereunder being a sort of emergency legislation are special law which repeals and overrides the provisions of the Code of Criminal Procedure, 1973---herein after referred to as 'the Code'--insofar as they are inconsistent with the

provisions of the Rules. In other words, the High Court thought that in view of the express provisions of r. 184 (a) & (b) of the Rules, no question of anticipatory bail arose, and, therefore, s. 438 of the Code stood superseded insofar as offences under r. 184(a) & (b) were concerned Mr. V.M. Tarkunde learned counsel for the appellant has contended that the view taken by the Madhya Pradesh High Court legally erroneous and is based on a wrong interpreta- tion of the two provisions in question. He submitted that s. 438 of the Code. and r. 184 of the Rules cannot be read in isolation but in conjunction with the conditions laid down in r. 184 clauses (a) and (b) of the Rules and once this is done there would be no real inconsistency between the two provisions and the question of one repealing the other would not arise. Mr. Ram Panjwani, learned counsel for the respondent, however, supported the stand taken by the High Court of Madhya Pradesh and argued that having regard to the scheme of the Act and the Rules made thereun- der, this was a summary legislation with a completely exhaustive and self-contained Code and there was absolutely no justification for applying the provisions of the Code of Criminal Procedure which was the general law. In order to appreciate the contentions raised by coun- sel for the parties it may be necessary for us to examine the object and scheme of the Code as also of the Act and the Rules made thereunder particularly with respect to the impugned provisions. So far as the Act is concerned, this Act was passed by Act XLII of 1971 on December 4, 1971 at a time when the proclamation of emergency had already been issued by the President under el. (1) of Art. 352 of the Constitution. The preamble to the Act reads thus:

"And whereas it is necessary to provide for special members to ensure the public safety and interest, the de- fence of India and civil defence and internal security and for the trial of certain offences and for' matters connected therewith :"

It is, therefore. clear that the Act was meant to be a temporary measure in order to ensure public safety and interest and enable the Government to take immediate steps to protect the internal security and integrity of the country and for trial' of offences committed under the Act or the Rules made thereunder. Sec- tion 34 of the Act is the provision which authorises the Central Government to make Rules under the Act and under s. 35 of the Act the Rules have to be laid before both Houses of Parliament with such modification or annulment as the Houses may be pleased to make. Section 36 of the Act gives colour of finality to certain orders passed by an authority which is not a Court. Section 37 of the Act runs thus:

> "37. The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."
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> This section thus expressly overrules or repeals any provision which is inconsistent with the Act or the Rules. Another important provision which must be noticed is s. 38 of the Act which runs thus:
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> "38. Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be

consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence and the internal security."

The effect of s. 38 which contains a mandate to the authori- ty acting under the provisions of the Act from interfering with the ordinary avocations of life and enjoyment of property as little as possible clearly shows that the ri- gours of the Act have been softened to a great extent by limiting the actions of the authorities within the four corners of the express provisions of the Act. Legislature never intended that any drastic action should be taken by the authorities which may interfere with the liberty of the subject unless it was absolutely essential. We have re- ferred to this provision particularly because the question with which we are concerned involves the interpretation and applicability of s. 438 which relates to the liberty of the citizen visa vis the provisions of the Act and the Rules. Against the background of this important provision of the Act, we have to follow the rule of harmonious construction so as to avoid an interpretation which makes this provision (which is for protection of the liberty. of the citizen) come into conflict with the Act or the Rules made thereun- der, unless such intention is clearly expressed or implied by the Legislature. The Act further contains provisions for constitution of Special Courts to try particular type of offences, but the procedure is the same as provided for in the Code. As, however, no such Courts have been constituted in the State of Madhya Pradesh, it is not necessary for us to dilate on this point. Suffice it to say, that apart from the non obstante clause in r. 184 of the Rules, we are not concerned with any other provision of the Code which may have been repealed either directly or indirectly by r. 184. The question, therefore, that arises in this case is whether or not r. 184 of the Rules overrides the provisions of ss. 435 and 438 of the Code. In other words, we have to decide whether r. 184 of the Rules is in any way inconsistent with the provisions of ss. 436 and 438 of the Code. It may be mentioned here that even the offences created under the Act or the Rules made there- under are to be tried under the general law, namely, the Code with certain modifications, and even in respect of these offences the general law has not been repealed. The Defence of India Act was amended by Ordinance 5 of 1975 dated June 30, 1975 which was later replaced by Act XLII of 1971 dated August 1, 1975 and the Act was now known as the Defence and Internal Security of India Act, 1971, Rule 184 of the Rules runs thus:

"184. Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), no person accused or convicted of a contravention of these Rules or orders made thereunder shall, if in custody, be released on bail or his own bond unless :--

(a) the prosecution has been given an opportunity to oppose the application for such release, and

(b) where the prosecution opposes the application and the contravention is of any such provision of these Rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention."

An analysis of this rule would reveal a few important features, namely:

(1) This provision does not in terms confer any power on any Court to pass orders for bail;

(2) it merely lays down certain conditions which have to be followed before an order for bail could be passed in favour of an accused; and (3) that unlike s. 438 of the Code this rule applies not only to non-bailable offences but also to bailable offences.

The High Court was of the opinion that in view of this particular distinction between bailable and non-bailable offences which have been expressly made in s. 438 of the Code, and having regard to the conditions incorporated in r. 184(a)&(b), s. 438 of the Code is repealed by this rule as being inconsistent with it. We are, however unable to agree with the conclusion reached by the High Court for the reasons which we shall give hereafter.

To begin with s. 438 of the Code applies only to non- bailable offences. Secondly, the only authorities which are empowered under this section to grant bail are the Court of Session or the High Court. In view of the fact that an order for anticipatory bail is an extraordinary remedy available in special cases, this power has been conferred on the higher echelons of judicial service, namely, the Court of Session or the High Court. Another important considera- tion which flows from the interpretation of s. 438 of the Code is that this section does not contain any guidelines for passing an order of anticipatory bail. We might, however, mention here that the term 'anticipatory bail is really a misnomer, because what the section contemplates is not anticipatory bail, but merely an order releasing an accused on bail in the event of his arrest. It is manifest that there can be no question of bail, unless a person is under detention or custody. In these circumstances, there- fore, there can be no question of a person being released on bail if he has not been arrested or placed in police custo- dy. Section 438 of the Code expressly prescribes that any order passed under that section would be effective only after the accused has been arrested. The object which is sought to be achieved by s. 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Sessions Judge or the High Court, he would be released immediately without having to undergo the ri- gours of jail even for a few days which would necessarily be taken up if he has to apply for bail after arrest. Before, however, we dwell on the real concept of s. 438 of the Code, we would like to indicate the circumstances in which this section was added to the new Code of Criminal Procedure, 1973. Prior to the new Code there was no provi- sion for an order of anticipator), bail in the Code, and there appeared to be a serious divergence of judicial opin- ion on the question whether or not a Court had the power to pass an order for anticipatory bail. Some of the High Courts held that the Courts did possess the power, while the other High Courts held that the Court did not. It is not necessary for us now to decide as to which view is correct. The controversy that existed before has now been set at rest by enacting s. 438 in the new Code of Criminal Procedure. While the Bill in the Lok Sabha, Shri Ram Niwas Mirdha the concerned Minister detailed the various objects of the amendments and one of the observations made by him was that by virtue of the new amendment there was liberali- sation of bail provisions. The relevant part in paragraph-2 of the Statement of Objects and Reasons pub- lished in the Gazette of India Extraordinary Part II-Section 2 dated December 10, 1970 at p. 1309 runs thus:

> "2. The first Law Commission presented its Report (the Fourteenth Report) on the Reform of Judicial Administration, both civil and criminal, in 1958; it was not concerned with detailed scrutiny of the provisions of the Code of Criminal Procedure, but it did make some recommendation in regard to the law of criminal procedure,

some of which required amendments to the Code."

Apart from this, the clause-wise objects and reasons with respect to s. 438 of the Code (which was clause 447 in the Bill) run thus:

> "As recommended by the Commission, a new provision is being made enabling the superior courts to grant anticipatory bail, i.e., a direction to release a person on bail issued even before the person is arrested.. With a view to avoid the possibility of the person hampering the investigatition, special provision is being made that the court granting anticipatory bail may impose such conditions as it thinks fit. These conditions may be that a person shall make himself available to the Investigating Officer as and when required and shall not do anything to hamper investigation."

This clause clearly refers to the recommendations made by the Law Commission in its Forty-first Report which read as follows.

> "39.9. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory ball, 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 some-times influential persons try to implicate their rivals in false cases 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."

In its Forty-eighth Report the Law Commission while commenting on the bail provision observed in paragraph 31 as follows:

> "31. The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendations made by the previous Commission (41st Report). 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 would thus appear that while the Law Commission recommended that provision for an order of anticipatory bail to be effective when a person is arrested should be made at the same time it stressed that this being an extra-ordinary power should be exercised sparingly and only in special cases. It also recommended that this power should not be exercised without giving notice to. the other side. We think, this is why the Legislature has entrusted this power to high authorities like the Sessions Judge and the High Court and we also feel that in the interests of justice it would be desirable if a final order is made only after hearing the prosecution. Although this condition is not mentioned in s. 438 of the Code, but having regard to the setting in which the section is placed and the statement of the objects and reasons which is actually based on the recommendations of the Law Commis- sion, we think that rule of prudence requires that notice should be given to the other side before passing a final order for anticipatory bail so that wrong order of anticipa- tory bail is not obtained by a party by placing incorrect or misleading facts or suppressing material facts. We hope that in future the Courts will exercise this power keeping our observations in view. We may of course point out that in emergent cases the Courts may make an interim order of anticipatory bail before issuing notice to the other side. From what has been said it is clear that the intention of the legislature in enshrining the salutary provision in s. 438 of the Code which applies only to non-bailable offences was to see that the liberty of the subject is not put in jeopardy on frivolous grounds at the instance of unscrupu- lous or irresponsible persons or officers who may some times be in charge of prosecution. Now if the intention of the Legislature were that the provisions of s. 438 should not be applicable in cases falling within r. 184, it is diffi- cult to see why the Legislature should not have expressly saved r. 184 which was already there when the new Code of 1973 was enacted and excepted r. 184 out of the ambit of s.

438. In other words, if the intention of provision of r. 184 of the Rules were to override the provisions of s. 438 of the Code, then the Legislature should have expressly stated in so many words that the provisions of s. 438 of the Code shall not apply to offences contemplated by r. 184 of the Rules. There is, however, no such provision in the Code. In these circumstances, therefore, the Legislature in its wisdom left it t9 the Court to bring about a harmonious construction of the two statutes so that the two may world. and stand together. This is also fully in consonance with the principles laid down by this Court in construing the non obstante clauses in the statutes. In Northern India Caters Pvt. Ltd & Anr. v. State of Punjab and Anr.,(1) this Court observed thus:

> "A latter Act which confers a new right would repeal an earlier right if the fact of the two rights co-existing together produces inconvenience, for, in such a case it is legitimate to infer that the legislature did not intend such a consequence. If the two Acts are general enactments and the latter of the two is couched in negative terms, the inference would be that the earlier one was impliedly repealed. Even if the latter statute is in affirmative terms, it is often found to involve that negative which makes it fatal to the earlier enactment."

(1) [1967] 3 S.C.R. 399.

6 --1458SCI/76 Thus one of the main tests pointed out by the Court was that the Court while interpreting the statutes concerned must infer repeal by the latter statute only if it causes incon-

venience or where it is couched in affirmative or negative terms. Maxwell on Interpretation of Statutes, 11th Edn., p. 162 observes:

> "A sufficient Act ought not to be held to be repealed by implication without some strong reason."

We think it is reasonable to presume that the Legislature does not intend to keep contradictory enactments on the statute book and, therefore, a construction should be ac- cepted which offers an escape from it. Similarly in an earlier case in Aswini Kumar Ghosh and Anr v.Arabinda Bose and Anr(1) this Court laid down the proper approach in interpreting a non obstante clause and observed thus:

> "It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment."

Having regard to the principles enunciated above, we feel that there does not appear to be any direct conflict between the provisions of r. 184 of the Rules and s. 438 of the Code. However, we hold that the conditions required by r. 184 of the Rules must be impliedly imported in s. 438 of the Code so as to form the main guidelines which have to be followed while the Court exercises its power under s. 438 of the Code in offences contemplated by r. 184 of the Rules. Such an interpretation would meet the ends of justice, avoid all possible anomalies and would at the same time ensure and protect the liberty of the subject which appears to be the real intention of the Legislature in enshrining s. 438 as a new provision for the first time in the Code. We think that there is no real inconsistency between s. 438 of the Code and r. 184 of the Rules and, therefore, the non obstante clause cannot be interpreted in a manner so as to repeal or override the provisions of s. 438 of the Code in respect of cases where r. 184 of the Rules applies.

We have already stated that s. 438 of the Code does not contain the conditions on which the order for anticipatory bail could be passed. As section 438 immediately follows s. 437 which is the main provision for bail in respect of non- bailable offences it is manifest that the conditions imposed by s. 437(1) are implicitly contained in s. 438 of the Code. Otherwise the result would be that a person who is accused of murder can get away under s. 438 by obtaining an order for anticipatory bail without the necessity of proving that there were reasonable grounds for believing that he was not guilty of offence punishable with death or imprisonment for life. Such a course would render the provisions of s. 437 nugatory and will give a free licence to the accused persons charged with non-bailable offences to get easy bail by approaching the Court under s. 438 and by passing s. 437 of the Code. This, we (1) [1953] S.C.R. 1.

feel, could never have been the intention of the Legisla- ture. Section 438 does not contain unguided or uncanalised powers to pass an order for anticipatory bail, but such an order being of an exceptional type can only be passed if, apart from the conditions mentioned in s. 437, there is a

special case made out for passing the order. The words "for a direction under this section" and "Court may, if it thinks fit, direct" clearly show that the Court has to be guided by a large number of considerations including those mentioned in s. 437 of the Code. When a Court is dealing with offences contemplated by r. 184 of the Rules, then it is obvious that though the offences are not punishable with death or imprisonment for life so as to attract the provi- sions of s. 437, the conditions laid down by r. 184 of the Rules would have to be complied with before an order Under s. 438 of the Code could be passed. In other words, the words "for a direction under this section" and "Court may, if it thinks fit, direct" would impliedly contain a statuto- ry mandate to the Court in the shape of conditions mentioned in clauses (a) and (b) of r. 184 of the Rules, viz., (1) that an opportunity would be given to the prosecution to oppose the application for anticipatory bail; and (2) the Court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of the contra- vention of the Rules. While giving finding on this the Court will have to take into consideration that under the provi- sions of the Rules once contravention is alleged the onus lies on the accused to prove that there has been no such contravention. If we construe the two provisions in this manner, then there would be really no inconsistency between s. 438 of the Code and r. 184 of the Rules and both the provisions can co-exist without coming into conflict with each other. Further more, r. 184 would apply the moment the accused person is taken in custody and as an order passed under s. 438 of the Code cannot be effective until the person is taken in custody. It is therefore obvious that the conditions mentioned in r. 184 clauses (a) & (b) start applying the moment the accused is taken in custody, and if an order under s. 438 of the Code has been passed in his favour he would be released at once.

The Legislature never intended that while in Such seri- ous offences like murder or those punishable with death or imprisonment for life the accused should have the facility of an order of anticipatory bail, in offences of a less severe kind he should be denied benefit of s. 438 of the Code is by invoking r. 184 of the Rules.

The learned counsel for the appellant strongly relied on a decision of the Calcutta High Court in Badri Prasad v. State(1) where the Court was considering the provisions of s. 13A of the Essential Supplies (Temporary Powers) Act, 1946 which were couched almost in the same language as r. 184(b) of the Rules and the Court pointed out that there was no conflict between s. 13A and s. 497 of the Code of Crimi- nal Procedure and s. 13A can only be regarded as an exten- sion of s. 497 of the Code by incorporating the conditions mentioned therein in s. 497 of the Code. In this connection the Court observed as follows:

"Under s. 497, Criminal P.C., therefore, the Court has also to consider reasonable grounds for belief ..... But in a (1) A.I.R. [1953] Cal. 28, case, however, under s. 13A, Essential Supplies Act, it is the converse and more difficult case of reasonable ground for believing that the applicant for bail is not guilty .... Its effect is that s. 13A, Essential Supplies Act, represents a new species of non-bailable offence with its own rules for bail and that section, therefore, is an extension of s. 497, Criminal P.C."

As against this Mr. Ram Panjwani relied on a few deci- sions of the Madras, Bombay and Patna High Courts in support of the view that the previous section in the Defence of India Rules which was

couched almost in the same language as r. 184 of the Rules was held to have overruled the provisions of s. 497 of the old Code of Criminal Procedure. Reliance was placed on In re V. Bhuvarha Iyengar(1) where the Court was dealing with r. 130A of the old Defence of India Rules and observed as follows:

> "In respect of offences which come within the rules framed under the Defence of India Act that Act governs all other statutory provisions and therefore the provisions of the Code of Criminal Procedure with regard to bail do not here apply if R. 130A is intra vires, which we hold it to be."

This case is clearly distinguishable, because in the first place in the old Code of Criminal Procedure there was no provision for anticipatory bail at all and, therefore, the question that falls for consideration in the present case never arose in that case at all. Secondly, the Court has not considered the aspect which we have pointed out in the present case by holding that in view of the object of the new Code the provisions of r. 184 clauses (a) & (b) have to be impliedly imported into s. 438 of the Code. In these circumstances, therefore, this decision does not appear to be of any assistance to the counsel for the respondent. Reliance was then placed on a decision of the Bombay High Court in In re Surajlal Harilal Malumdar and others(2) and particularly to the following observations:

> "In my opinion the effect of that rule is to repeal the provisions of S. 496, Criminal P.C., in so far as it divests the Court of its discretion in the matter of refusing bail in cases of bailable offences. All that R. 130A says in effect is that notwithstanding the provisions of S. 496 no person accused or convicted of a contravention of the rules under the Defence of India Act shall be released unless an opportunity is given to the prosecution to oppose the application for such release. There is nothing left to implication. The Legislature may impliedly repeal penal Acts by a later enactment like any other statute even if the repeal introduces stringency of procedure or takes away a privilege."

Here also the Court does not expressly hold that the provi- sions of s. 496 were completely repealed by r. 130A of the old Defence of India Rules, but merely held that the said rule will be overruled only to the extent that the Court would have to give an opportunity to the prosecu- I,R. 1942 Mad. 221, 223. (2) A.I.R. 1943 Born. 82.

tion to oppose the application before granting.bail. This decision, therefore, does not take the view contrary to me one which we have taken in this case.

Lastly reliance was placed on a decision of the Patna High Court in Saltgram Singh and Ors v. Emperor(1) which also took almost the same view as the Bombay High Court. At any rate, these decisions have absolutely no bearing on the specific question which we are considering in this partic- ular case, because the provision of s. 438 of the Code is an absolutely new one and did not at all exist when the cases cited by the learned counsel for the respondent were decid- ed. We might like to indicate clearly that in the instant case we are only considering whether the provisions of r.

184 clauses (a) & (b) of the Rules are inconsistent with s. 438 of the Code and the question whether provisions of r. 184 are inconsistent with any other provision of the Code does not fall for determination in this case. Lastly we might point out that the scope of r. 184 of the Rules is wider than that of s. 438 of the Code inasmuch as while s. 438 can be invoked only in cases of non-bailable offences and not in cases of bailable offences, r. 184 of the Rules would apply not only to non-bailable offences but also to bailable offences and in these circumstances, there- fore, the conditions mentioned in r. 184 would have to be impliedly imported into s. 436 of the Code which deals with orders for bail regarding bailable offences. In other words, the position is that where a person who is an accused for offences contemplated by r. 184 of the Rules and which are bailable, yet he cannot get bail as a matter of right under s. 436 of the Code unless the Court complies with the conditions laid down in r. 184 clauses (a) and (b). We have already made it clear that so far as the question of anticipatory bail is concerned that does not apply to bailable offences at all. We have, therefore, interpreted the provisions of ss. 436 and 438 of the Code and r. 184 of the Rules in a harmonious manner so as to advance the object of both the statutes and to effectuate the intention of the Legislature.

Mr. Panjwani submitted that as the offences under the Rules are socio-economic offences which deserve to be curbed and dealt with severely, that is why, such a provision like r. 184 has been enshrined in the Rules. That might be so, but then on the interpretation placed by us it does not in any way soften the rigours imposed by the Act or the Rules made thereunder for such offences, because in any case the Court would have to comply with the conditions mentioned in clauses (a) & (b) of r. 184. The argument of the respondent may assume some importance if r. 184 of the Rules had contained a provision by which no bail under any circumstances could be granted to persons accused of of- fences contemplated by this provision. This, however, is not the case here.

For the reasons given above, we hold as under: (1) that s. 438 of the Code has not been repealed or overruled by r. 184 of the Rules but the two have (1) A.I.R. 1945 Pat. 69.

to be read harmoniously without interfering with the sphere contemplated by each of those provisions. In fact r. 184 of the Rules is only supplemental to s. 438 of the Code and contains the guidelines which have to be followed by the Court in passing orders for anticipatory bail in relation to cases covered by r. 184 of the Rules;

(2) that there is no real inconsistency between s. 438 of the Code and r. 184 of the Rules;

(3) that s. 438 of the Code is an extra-ordinary remedy and should be resorted to only in special cases. It would be desirable if the Court before passing an order under s. 438 of the Code issues notice to the prosecution to get a clear picture of the entire situation; and (4) that in cases covered by r. 184 of the Rules the Court exercising power under s. 436 or s. 438 of the Code has got to comply with the conditions mentioned in clauses (a) & (b) of r. 184 and only after the Court has complied with those conditions that an order under any of these sections of the Code in respect of such offences could be passed.

For these reasons, therefore, we think that the High Court of Madhya Pradesh in the instant case, as also in its Division Bench decisions in Criminal Revision No. 285/74 (State v. Shantilal & Others) and Criminal Revision No. 286/74 (State v. Manoharlal & Ors) mentioned in the order under appeal, was wrong in law, and therefore these deci- sions are hereby overruled.

I, therefore, concur with the judgment proposed by my brother Bhagwati, J., and accordingly allow this appeal, set aside the order of the High Court dismissing the application of the petitioner in limine and direct the High Court to re-admit the petition and decide the same on merits in the light of the observations made by us. The parties are di- rected to appear before the High Court which shall hear the petition and dispose it of. Until the decision of the High Court on merits, the appellant will continue on bail.

P.B.R. Appeal allowed.