Shri Indrajeet Roy vs Republic Of India on 10 October, 1997

Equivalent citations: 1997(II)OLR499, 1998 A I H C 1673, (1997) 84 CUT LT 692

Author: P.K. Misra

Bench: P.K. Misra

JUDGMENT

P.K. Misra, J.

1. This application under Section 439, read with Section 482 of the Code of Criminal Procedure (in short, the "Cr.P.C.") is a sequel to the judgment dated 15th, September, 1997, passed by Hon'ble Mr. Justice R.K. Dash, in Criminal Misc. Case No. 2803 of 1997. Since the question raised involves a point relating to interpretation of the said judgment, in normal course, the matter should have been placed before the very same Bench. However, as the matter has been moved during vacation and the learned Judge due to unavoidable circumstances is not in a position to take up the matter, the matter has been directed to be placed before me as the Vacation Judge under certain unusual circumstances. Initially, on 4.10.1997, the date of presentation of this application, Shri B.K. Nayak, the learned counsel for the petitioner, appeared before me at my residential office as I am in charge of Vacation Court will 10th of October, 1997, for the purpose of finding out about the convenience in the matter of taking up the petition. He also queried whether I would like to take up the case in view of the fact that Shri Govind Das, Senior Advocate, who had been engaged by the petitioner in the earlier disposed of case (CRMC 2803/97) was to conduct the present case also. Though Shri Govind Das is a relation by marriage being the father-in-law of my nephew (sister's son), keeping in view the fact that such relationship does not preclude him to appear before me as the relationship does not come within the categories indicated in Rule-6 of Chapter-II of Part-VI of the Bar Council of India Rules framed under the Advocates Act, 1961, and as Shri Dash had earlier appeared in some other cases before a Division Bench of which I was a member, and particularly in view of the urgency of the case, I expressed my willingness to take up the matter either, on the same date, i.e. 4.10.1997, or on 6.10.1997, when regular sitting of the Vacation Court was scheduled to be held. However, since Shri B.K. Nayak appeared to be hesitant, I told him that if learned Senior Counsel Shri Das was feeling embarrassed to conduct the case before me, appropriate mention may be made before the senior-most Judge available at station. Thereafter, as apparent from order dated 4.10.1997, mention was made before Hon'ble Mr. Justice, A. Pasayat. The relevant portion of the said order is extracted below :

> "A mention was made that a criminal misc. case has been filed by Shri Indrajeet Ray in the matter of an application under Sections 439 and 482 of the Code of Criminal Procedure, 1973 (in short, the "Code"),and a mention was made before Hon'ble Mr.

> Justice P.K. Misra, the Vacation Judge. It was submitted that though Hon'ble Mr. Justice P.K. Misra, has no objection to take up the matter for hearing, Mr. Govind Das, the learned Senior Advocate appearing for the petitioner feels embarrassment to appear before Hon'ble Mr. Justice Misra. In that view of the matter, a request was made that orders may be passed to place the matter before some other Hon'ble Judge.....
>
> 3. Let the Registry ascertain convenience of the senior-most-Judge available, and place the matter before the said Hon'ble Judge for necessary orders..."

Thereafter, it appears from the connected administrative file that the Registry contacted the other Hon'ble Judges available but due to various circumstances, the matter could not be placed before any other Hon'ble Judge till 7.10.1997. Thereafter, as appears from the office note, it seems that the Registrar (Judicial) apprised the situation to the Hon'ble Chief Justice, who was out of Headquarters, over phone and the office note indicates that on the basis of the direction of Hon'ble the Chief Justice on 7.10.1997, the matter was again directed to be placed before me, as 7.10.1997 was the date of expiry of the protection given by the High Court in the judgment dated 15th September, 1997. This is how the matter has again been placed before me and after the other listed matters--about 220 in number--were dealt with, in deference to the direction of Hon'ble the Chief Justice, I took up the matter at 8.30 P.M. for hearing which continued till 10.30 P.M.

2. The petitioner who is accused of having committed an offence under Section 376 read with Section 511 and Section 354, Indian Penal Code (in short, the "I.P.C.") had filed Criminal Misc. Case No. 2803 of 1997 under Section 438, Cr.P.C. for grant of anticipatory bail in Cantonment P.S. Case No. 67 dated 19.7.1997. Subsequently as per the direction of the High Court, the investigation of the case was transferred to the Central Bureau of Investigation (in short, the "C.B.I.") and case has been registered as R.C. 7/5/97-Cal. During pendency of the application under Section 438, Cr.P.C. the counsel for Republic of India was heard. Ultimately, by judgment dated 15th September, 1997, Hon'ble Mr. Justice R.K. Dash, passed the following order :

> "13. In view of the authoritative pronouncements of the apex Court referred to above, I am not inclined to grant anticipatory bail to the petitioner till end of the trial. I, however, feel that it will be just and proper if his such prayer is allotted for a limited duration. Accordingly, it is ordered that in the, event of arrest of the petitioner in case No. R.C. 5/7/97-Cal., the investigating/arresting officer of the C.B.I. shall release him till 25th September, 1997, on his furnishing a bond of Rs. 20,000/- with one surety for the like amount, within which period he may apply for bail to the regular Court in Seisin of the criminal case. Since a time-limit has been fixed, the petitioner may apply for bail as early as possible so that the Court concerned will get sufficient time to hear the parties and pass orders in accordance with law within that period, uninfluenced by any observation made in this order. In case bail application is filed, the Investigating Officer of the C.B.I. shall submit case diary to the Court on the date of hearing of the application. If the petitioner's prayer for bail is rejected, then in order to enable him to move the higher Court, the period of anticipatory bail shall stand

extended till 7th October, 1997".

3. After the aforesaid direction was given, the petitioner filed an application under Section 437, Cr.P.C., before the Additional Chief Judicial Magistrate, Bhubaneswar, who after consideration of the materials on record rejected the application for bail on merit by order dated 27.9.1997 in S.P.E. No. 5 of 1997. Therefore, on the very same day, the petitioner filed an application under Section 439, Cr.P.C. before the Sessions Judge, Khurda, who placed the matter before the Second Additional Sessions Judge, Bhubaneswar, for disposal. After taking up the case for hearing, orders were observed and ultimately, by order No. 4 dated 3.10.1997 in Criminal Misc. Case No. 95/461 of 1997, the Second Additional Sessions Judge. Bhubaneswar, rejected the bail petition as not maintainable by observing as follows :

> "7. A combined reading of the principles laid down in the above noted two cases makes it clear that when the person concerned surrenders before the Sessions Judge and moves for bail under Section 439, Cr.P.C. and the Court accepts such surrender, then the Sessions Court assumes jurisdiction to exercise the discretion cither way i.e. to grant bail or to refuse bail and to order remand of the person concerned to judicial custody, if the offence is non-bailable one. The petitioner has no doubt voluntarily surrendered before this Court and if his surrender is accepted and the discretion is exercised in his favour by granting bail then there is no problem. But if after acceptance of his surrender the bail application is found to be devoid of merit and the discretion is exercised against the petitioner refusing to grant bail, then the Court will have no power to order remand of the petitioner to judicial custody because of the peculiar circumstance now prevailing. The peculiar circumstance, is that the anticipatory bail order of the Hon'ble Court is in force till 7th of the current month. As a matter of fact, for that reason neither the learned Addl. C.J.M., refusing bail could be able to remand the petitioner to custody nor this Court could be able to do so on the last date when the petitioner was physically present in the Court and the order on his bail application was reserved. In such situation this Court is not in a position to exercise the discretion to accept the voluntary surrender of the petitioner. Hence the voluntary surrender of the petitioner before this Court is not accepted. Consequently, applying the principles laid down in the above noted decision of our own High Court, I would hold that the petitioner is not in 'custody' within the meaning of Section 439, Cr.P.C. and when one of the basic preconditions of that provision is not satisfied, the further question of consideration of his bail application on merit does not arise. As such without entering into the merits I hold that the bail application is not maintainable under Section 439, Cr.P.C.".

Aggrieved by the said order, the petitioner has filed the present application under Section 439, read with Section 482, Cr.P.C. challenging the legality of the aforesaid order.

4. At the fag end of hearing of this petition, the learned counsel for the petitioner pointed out that the petitioner has also filed a Criminal Revision challenging the legality of the order passed by the Second Additional Sessions Judge. He has further submitted that a separate application has been

filed in the disposed of Criminal Misc. Case No. 2803/97 for extension of the protection given in the judgment passed in the said case. The aforesaid two other matters have not been mentioned to be taken up, nor listed and copies of those petitions had not been served on the counsel for the Republic of India.

5. The learned counsel for the petitioner has submitted that the Second Additional Sessions Judge should have entertained the application under Section 439, Cr.P.C. in view of the specific direction contained in the judgment of the High Court which is based on observation made by the Apex Court in the decisions reported in AIR 1996 Supreme Court 1042 (Salauddin Abdulsamad Shaikh v. State of Maharashtra) and 1996 (7) SCALE (SP) 20 (K.L. Verma v. State and Anr.). He has also relied upon the decision bf the Supreme Court reported in AIR 1980 Supreme Court 785 (Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.) and contended that since the accused had appeared before the Addl. Chief Judicial Magistrate at the time of consideration of application under Section 437, Cr.P.C. and subsequently before the Sessions Judge, it must be taken that he was in custody and application under Section 439, Cr.P.C. was maintainable. He has further submitted that since the Court of Session has not decided the application on merit, the bail petition should be remanded for fresh disposal in case it is found to be maintainable.

The learned counsel for the Republic of India, on the other hand, relying upon the very same decision of the Supreme Court reported in AIR 1980 SC 785 (supra) followed in a Division decision of this Court reported in 1983 Cri.L.J. 1212 (The State v. Maguni Charan Sahu and Ors.) has contended that in spite of the order of this Court on earlier occasion permitting the petitioner to remain on interim anticipatory bail till 7.10.1997, it cannot be said that the petitioner was in custody when his application under Section 439 was being considered. He has also relied upon the decisions reported in 1991 (II) OLR 424, (1992) Cri.L.J. 3105) (Biswanath Bhagat v. Sanjay Saha and Nanki Saha and two Ors.) and 1993 Cri.L.J. 3817 (Bishnu Mallick v. State of Orissa and Anr.) in support of the said contention.

6. In view of the provision contained in Section 439 and in view of the decision of the Supreme Court reported in AIR 1980 SC 785, there cannot be any doubt that unless a person is in custody, an application for bail under Section 439, Cr.P.C. would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439, Cr.P.C. came up for consideration of the Supreme Court in the aforesaid decision, wherein it was observed :

"7. When is a person in custody, within the meaning of Section 439, Cr.P.C. ? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the Court having been remanded by judicial order, or having offered himself to the Court's jurisdiction and submitted to its orders by the physical presence. No lexical dexterity nor presidential profusion is needed to come to the realistic conclusion that he who is under the control of the Court or is in the physical hold of an office with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in Court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubiotics are

unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

Custody , in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court.

9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and may be, enabled the accused persons to circumvent the principle of Section 439, Cr.P.C. We might have taken a serious view of such a course, indifferent to, mandatory provisions, by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court, Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail....."

7. In the decision reported in 1983 Cri.L.J. 1212, the aforesaid observations of the Supreme Court were elucidated and followed by a Division Bench of this Court consisting of R.N. Misra, C.J. and R.C. Patnaik, J. (as their Lordships then were) and the following observation was made :

> "3. The decision in Niranjan Singh's case (AIR 1980 SC 785): (1980 Cri.L.J.) clearly indicates that the Court was considering directly whether the accused were in custody or not and while examining that question, the Court held that "custody" in the context of Section 439 of the Code was "physical control or atleast physical presence of the accused in Court coupled with submission to jurisdiction and orders of the Court". The Court further indicated that the accused can be in custody not merely when the police arrested him, produced him before a Magistrate and got a remand to judicial or other custody. He could also be stated to be in judicial custody when he surrendered before the Court and submitted to its directions. In Niranjan Singh's case, the learned Judges had, therefore, clearly laid down that whether the accused had been taken into custody by being arrested or had been remanded to judicial custody on being produced before a Magistrate or had surrendered before the Court and had submitted to its directions entitled him to ask for bail. All the three situations referred to above were, therefore, considered as amounting to "custody" within the meaning of Section 439(1) of the Code".

(Emphasis given by me)

8. The expression "custody" though used in various provisions of the Code of Criminal Procedure, including Section 439, has not been defined in the Code, but keeping in view the setting in which it is used and the provisions contained in Section 437 which relate to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterised as "in custody" in a generic sense, and the observation made in the Division Bench decision of the Orissa High Court noticed above, there cannot be any doubt that the expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate.

9. In the present case the Court below has observed that though the petitioner had surrendered on the last date of hearing before the Sessions Judge, but such surrender was not acceptable to the Court as there was no possibility of remanding the petitioner to custody in view of the older of anticipatory bail for limited duration passed by the High Court. The learned Additional Session Judge has placed reliance upon the decision of this Court reported in 1993 Cri.L.J. 3817 (Bishnu Mallick v. State of Orissa and Anr.) to come to a conclusion that though an accused person may surrender before the Court of Session, such Court is not bound to accept the Surrender and in such an event, the accused would not be entitled to be released on bail. Referring to the decision of the Supreme Court reported in AIR 1980 Supreme Court 785, it was observed in the aforesaid decision of this Court:

> "The Apex Court nowhere observed that once an application under Section 439, Cr.P.C. is filed before the Sessions Judge surrendering to its custody and moving it for bail, the Court comes under an obligation to accept the surrender of the accused and deal with his application for bail. Undoubtedly the application being made the Court acquires jurisdiction to deal with it, but entertaining the application and considering the same does not unequivocally mean the acceptance of this surrender....."

It was further observed :

> "……The Court has a discretion to exercise in the matter of acceptance of surrender and once it is exercised in the negative, the accused would not be entitled to be released on bail by it. There may be cases where surrender is accepted in which case the accused shall be in its custody and the Court would have a duty to pass orders regarding his bail, but if the precondition is not satisfied, the further question of consideration-of bail would not arise ....."

The aforesaid decision related to a case where the accused on receiving summons from the Court of the S.D.J.M. in a case exclusively triable by a Court of Session had directly surrendered before the Additional Sessions Judge and prayed for bail, but the Additional Sessions Judge refused the application to accept, the surrender and rejected the application for bail. In the aforesaid context,

this Court observed that there was no right of an accused person to surrender before the Sessions Judge and even if such surrender is made before the Sessions Judge, the Court had a discretion not to accept the surrender. I cannot see how the principle decided in the said case can be made applicable in the facts and circumstances of the present case and could have prompted the Additional Sessions Judge to hold that the application of the present petitioner was not maintainable in view of the specific direction of the High Court in an application under Section 438 permitting the accused to remain on interim bail and to file regular bail petition before the Magistrate under Section 437 and to move thereafter the higher Court in case the bail was rejected by a Magistrate.

In Black's Law Dictionary by Henry Campbell Black. M.A. (Sixth Edn.), the expression "custody" has been explained in the following manner:

> "..... The term is very elastic and may mean actual imprisonment or physical detention..... within statute requiring that petitioner be 'in custody' to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty .....Accordingly, persons on probation or parole or released on bail or on own recognisance have been held to be "in custody" for purposes of habeas corpus proceeding."

When the accused person surrenders before the Magistrate and moves for bail under Section 437, and his bail is rejected, he has got a right to approach the Court of Session under Section 439, provided he is in custody, Except in cases where an accused person is under the protection of an order of anticipatory bail, for a period beyond the date of dismissal of the application under Section 437, the accused person is bound to remain in custody and in cases where he is under the protection of an anticipatory bail, till a date beyond the date of rejection, he is deemed to be in judicial custody. It cannot be said that the petitioner was not in "custody" merely because, the lower Court felt that the accused could not have been remanded if his bail petition would have been eventually rejected. An accused released on anticipatory bail for a limited duration must be deemed to be a person "in custody".

10. The matter can be viewed from another angle. In the present case, as per the direction of the High Court, the petitioner had moved the bail before the Additional Chief Judicial Magistrate and it is not disputed at the Bar that on subsequent date while the bail was being considered, the petitioner was physically present in Court. It is not the case of the opposite party that the application of the petitioner under Section 437 for grant of bail by the Magistrate was irregular. Of course, in normal circumstances, when an application of an accused for bail under Section 437 is rejected by a Magistrate, the accused is to be remanded to custody. Bui for the protection given by this Court in the earlier application under Section 438, Cr.P.C., such a course would have been adopted by the Magistrate. However, merely because the Magistrate could not remand the accused cannot be a ground to hold that he had not exercised the jurisdiction under Section 437. It cannot be contemplated that if the petitioner's application for bail under Section 437 before the Magistrate was permissible, his subsequent application before the Sessions Judge became impermissible merely because the petitioner had not been remanded to custody by the Magistrate and could not have been

remanded by the Sessions Judge in the eventuality of dismissal of his application for bail, because of the order of anticipatory bail for a limited duration extending till a future date.

11. The learned counsel for the opposite party has contended that the intention of a Court exercising power under Section 438 and granting anticipatory bail for a limited duration is not to give opportunity to the accused to remain outside and yet his application under Section 439 should be considered for regular bail. According to him even where the Court permits such an accused to be on interim bail for a period beyond the date order under Section 437, such a period cannot be extended indefinitely and should be only for the purpose of enabling the accused to file the application for regular bail before the higher Court. He states that it can never be the intention of the Legislature that though prayer for anticipatory bail would be rejected, and interim protection be given for a limited period, it would enure beyond the time required for filing application for bail before the higher Court under Section 439, Cr.P.C., specially in a case like this where the allegations are serious. In the present case, I am not concerned with the question as to what should be the appropriate period of extended anticipatory bail. In the present case, an order has already been passed in the earlier application under Section 438, that the accused will continue on anticipatory bail even after rejection of his petition under Section 437 till 7th October, 1997. It is, of course, true that it was nowhere indicated in the earlier judgment that the period of such "extended anticipatory bail" should continue indefinitely, nor was it indicated that the higher Court (in this case, the Addl. Sessions Judge) was bound to dispose of the bail application before the expiry of the period of extended anticipatory bail. What was intended that even after the rejection of the regular bail application by the Magistrate under Section 437, a further opportunity was to be given to the accused to move bail application before the higher Court. Such an extended period of anticipatory bail had been contemplated and granted in the Supreme Court decision reported in 1996 (7) SCALE (SP) 20 Supreme Court has nowhere laid down that such an extended period of anticipatory bail is co-terminus with the filing of the bail application before the higher Court, nor the Supreme Court has indicated that the higher Court must decide the matter under Section 439, Cr.P.C. within such extended period of anticipatory bail. Similarly, in the previous decision of the High Court also, it was neither contemplated nor directed that the higher Court while dealing with the matter under Section 439, Cr.P.C. is required to dispose of the bail petition before the expiry of the extended date of anticipatory bail. The real import of the decision of the Supreme Court in 1996 (7) SCALE (SP) 20 which has been followed in the earlier decision of this Court is that the period of anticipatory bail may extend to a period beyond the dismissal of the application for regular bail under Section 437, to enable the accused person to file bail application before the higher Court contemplated in Section 439, Cr.P.C. The Court granting anticipatory bail for limited duration may, depending upon the facts and circumstances of a particular case, grant interim bail till the date of surrender of the accused before the Magistrate or till the date of disposal of such application under Section 437 before the Magistrate, or even till a date beyond the date of such disposal by the Magistrate. In the first two cases, there cannot be any dispute that the Magistrate gets jurisdiction to remand the accused if bail application is rejected, but in case where the duration of the limited anticipatory bail is for period beyond the date of disposal of the application under Section 437, though the Magistrate rejects the bail petition, the accused cannot be remanded, because he remains under the umbrella of anticipatory bail. Such an order can be passed indicating that period of anticipatory bail is to continue for a particular period from the date of disposal of the application for regular bail under

Section 437, as had been done by the Supreme Court, or by fixing a particular date till which it has to remain in force with the direction that the application for regular bail is to be disposed of by the Magistrate by a particular date, as had been done in the case of the present petitioner in his previous application under Section 438, Cr.P.C.. But in either case, it can not be said that the application under Section 437 is not to be considered or would be incompetent as the accused is not in custody. If such an application under Section 437 is competent, it is axiomatic that an application for bail under Section 439 before the higher Court would also be competent notwithstanding the fact that the accused may not be in actual custody and notwithstanding the further fact that neither Magistrate considering the application under Section 437, nor the higher Court considering the application under Section 439 would be in a position to remand the accused to actual custody till the expiration of the duration of the limited anticipatory bail. If such an application under Section 439 was maintainable at the time of filing the application, such application is bound to be considered notwithstanding the fact that at the time of consideration of the bail application, or even at the time of passing the final order, the accused still continues to be under the umbrella of anticipatory bail valid till a particular future date. This is not to suggest that in each and every case, the Court granting anticipatory bail for a limited duration should grant it for a period which, for all practical purposes, becomes an anticipatory bail for "unlimited period". What should be the proper period which would be fit case for grant of such anticipatory bail for limited duration would evidently depend upon facts and circumstances of each case. Be that as it may, the fact remains that in respect of the present petitioner, the High Court on earlier occasion had granted anticipatory bail till 7th October, 1997, if the decision of the Magistrate on the application under Section 437 was in the negative. Therefore, the Additional Sessions Judge could not have rejected the bail petition under Section 439 by saying that he was not in a position to accept the surrender of the accused-petitioner on the ground that the Court was powerless to remand the accused to custody in the eventual dismissal of the bail application.

12. In this context, the learned counsel for the opposite party has contended that the Supreme Court in the decision reported in 1996 (7) SCALE (SP) 20, had only observed that the anticipatory bail will enure till the regular Court decides for grant of bail for week thereafter, so that if the regular Court refuses the bail, the accused persons can, if so advised, move the higher Court. He submits that if circumstances so warrant, while granting anticipatory bail for a limited duration, the Court can protect the accused only to enable him to move the higher Court. He submits that the duration of such limited anticipatory bail must come to an end as soon as an accused moves the higher Court for bail by filing application for bail and such application for bail cannot be maintainable if by the time of consideration of the application the accused is not in actual custody. In support of such submission, he has relied upon the meaning of the expression "move" as indicated in Black's Law Dictionary (supra) which says :

> "Move : to make an application to a Court for a rule or order, or to take action in any matter. The term comprehends all things necessary to be done by a litigant to obtain an order of the Court directing the relief sought."

He submits that the application under Section 439 must be moved in a manner in accordance with law and the accused seeking a remedy under Section 439 must make it possible for the Court to

consider such petition. Though such submission appears to be attractive in the first flush, in view of the specific direction given in the earlier case, I am not in a position to countenance such a submission. As already indicated, the direction in the present case was that the period of anticipatory bail shall remain in force till a particular date and not a particular eventuality such as filing of application or actual disposal of the bail petition. The learned counsel for the opposite party has also submitted that the Supreme Court in the decision reported in 1996 (7) SCALE (SP) 20 had never staled that the order of anticipatory bail under Section 438 survives after the regular application under Section 439 is filed. I am to add here that the Supreme Court has also not stated that an order under Section 438 is co-terminus with the filing of regular application under Section 439. Such an interpretation does not appear to be warranted by the observation made in the Supreme Court decision. At any rate, having regard to the specific direction contained in the judgment of this Court that the period of anticipatory bail shall be deemed to be continuing till 7th October, 1997, the legality and propriety of which was not available to be questioned, either before the Courts below or in the collateral proceeding, the submissions of the learned counsel for the opposite party cannot be accepted. For the aforesaid reasons. I am of the view that the Second Additional Sessions Judge committed an illegality in observing that the application for bail under Section 439, Cr.P.C. was not maintainable on the ground that the Sessions Judge could not have remanded the accused to custody in the eventuality of dismissal of the bail application and as such he was not in a position to accept the surrender of the petitioner made before him on the last date of hearing.

13. The jurisdiction of the Sessions Judge and the High Court under Section 439. Cr.P.C. is concurrent. As a matter of practice and prudence, the Sessions Judge being lower in hierarchy, is to be approached first under Section 439, Cr.P.C. and the jurisdiction of the High Court under the selfsame section can be invoked thereafter. In the present case, the application before the Court below having been rejected, the petitioner has filed an application under Section 439 in this Court which could have been disposed of on merit. However, the learned counsel for the petitioner has submitted that since the Sessions Judge had refrained from considering the question of bail on merit and rejected the petition on the ground of maintainability alone, it would be appropriate to remand the matter to the Sessions Judge for consideration of the bail application on merit so that the petitioner can avail the remedy of filing further application for bail under Section 439 before the High Court in case the petition is rejected and the High Court would be in a better position to consider the matter as the findings of the Court of Session would be on record.

14. A controversy was raised by the counsel for the opposite party that the accused had not appeared personally before the Court though he was physically present on same dates. From the order of the Additional Sessions Judge, it appears that the accused-petitioner had surrendered before the Additional Sessions Judge on the last date of argument. Since the entire order-sheets of the Courts below are not available, it is not possible to come to a conclusion whether the petitioner had appeared before the Additional Chief Judicial Magistrate and the Additional Sessions Judge at the time of consideration of bail on all the dates. However, to avoid any confusion in the matter, it is made clear that the accused has to remain present in the Court on the dates when the matter would be taken up for hearing or for orders. Law is now well-settled that the accused must physically appear before, the Court for consideration of his application for bail under Section 437 or Section

439, Cr.P.C., and no accused even while under the umbrella of an order of anticipatory bail for a limited duration can move for regular bail by merely presenting an application through Advocate, but must remain present in the Court on the dates of hearing of final orders.

15. The learned Senior Counsel for the petitioner submitted that by virtue of the order passed by the High Court in the earlier case, the petitioner had the benefit of anticipatory bail till 7.10.1997 and the said benefit should be extended till disposal of the matter before the Court of Session. He has further submitted that no person should suffer because of a wrong committed by a Court of law. It is also submitted that apart from filing an application in the present case for extension of the duration of the benefit of anticipatory bail granted in the disposed of case, the petitioner has also filed a separate application for extension of the duration of the anticipatory bail in the disposed of case itself, that is to say, in Criminal Misc. Case No. 2803/97.

The learned counsel for the opposite party, on the other hand, submitted that the copy of the application for extension filed in the disposed of case had not been served on him and a copy was offered only at the fag end of hearing of the matter. He has further submitted that since the earlier case which had been disposed of by another learned Judge of this Court as well as the petition for extension of the benefit of anticipatory bail filed in the said disposed of case, is not before this Court, no order should be passed in the said disposed of case extending the benefit. He has further submitted that an application for extension of the said benefit filed in this case which is bail application under Section 439 is not proper and any such order, if passed in the present case, would amount to modification of an order in respect of another disposed of case. Apart from the above submissions, the learned counsel for the opposite party has also vehemently contended that the application of the petitioner under Section 437, Cr.P.C. having rejected by the regular Court on a finding that the allegations revealed commission of a heinous crime and a prima facie case had been found, no further indulgence should be shown to the petitioner. He also submitted that the impugned order was passed on 3.10.1997 and the present bail application was filed on 4.10.1997 and as such the petitioner should have taken prompt steps for getting it heard on merit as well as on point of law before the Vacation Judge without waiting till the eleventh hour of the last day of expiry of the order of anticipatory bail.

16. While it is true that no person should suffer because of any wrong or inadvertent mistake committed by any Court, in the facts of this case, it cannot be said that the Court below has committed any inadvertent or unavoidable mistake in holding that the petition under Section 439 was not maintainable, though, as already held in the earlier paragraphs, such view of the Court below was an erroneous view. Besides, the error committed by the Court below could have been easily and immediately rectified if the matter would have been argued promptly either on 4.10.1997 itself when the case was filed or soon thereafter. Moreover, since the disposed of case along with the application for extension filed in the said case is not presently before me (and could not have been brought in view of the closure of office due to Durga Puja), it would be inappropriate for me to pass any order of extension of the benefit of temporary anticipatory bail, while disposing of an application under Section 439, Cr.P.C.

17. In the result, this Criminal Misc. Case along with the Misc.Case No. 1854 of 1997 is disposed of subject to the observation made above. It would be open to the petitioner to move any available Judge in charge of the Sessions Court, Bhubaneswar, during vacation, or thereafter for fresh disposal of the bail application. Needless to point out that the bail application has to be disposed of afresh in accordance with law without being influenced in any manner by any observations made in this order regarding the merit of the case.

Copies of this Judgment be handed over to the respective counsels of the petitioner and the Republic of India.