

(2001) 07 CHH CK 0007

In the Chhattisgarh High Court

Case No : Misc. Cr. Case No's. 372 and 398 of 2001

Akhilesh Jindani (Jain) and Another

APPELLANT

Vs

State of Chhattisgarh

RESPONDENT

Date of Decision : 27-07-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437(3), 438, 438(2), 439, 439(1)

Citation : (2002) CriLJ 1660 : (2003) 1 MPJR 52

Hon'ble Judges : R.S. Garg, J

Bench : Division Bench

Judgement

R.S. Garg, J.—M. Cr. C. No. 372/2001 was filed by Akhilesh Jindani on 5-2-2001. When the matter came-up for consideration on 6-2-2001; this Court directed that case diary be requisitioned and as an interim measure this Court further directed that in the event of arrest, the applicant be enlarged on bail on his furnishing a personal bond in the sum of Rs. 20,000/- with one surety in the like amount to the satisfaction of the arresting Officer, subject to the conditions as contained u/s 438(2), Cr. P.C. The order dated 6-2-2001 did not give any liberty in favour of the applicant Akhilesh Jindani that during the pendency of the petition before the High Court he shall be entitled to make an application for grant of regular bail. The order was to a limited extent; the order simply said that as an interim measure ad-interim bail was given to him.

2. M. Cr. C. No. 398/2001 was filed by Murlidhar Makhija, Mahendra Kumar Makhija, Rupesh Makhija and Dharumal on 6-2-2001. On 9-2-2001 when the matter came-up for hearing this Court directed that the matter be listed for hearing along with M. Cr. C. No. 372/2001 (Akhilesh Jindani v. State of Chhattisgarh). Being in parity with the earlier order, this Court granted ad-interim bail to the applicants, inter-alia directed that in the event of arrest in connection with Crime No. 295/2000 of police station City Kotwali, Bhatapara, the applicants shall be enlarged on bail on their furnishing bail bond of Rs. 20,000/- each with one surety each of like amount each to the satisfaction of the

arresting officer.

3. Applicants of M.Cr. C. No. 398/2001 who had followed M.Cr.C. No. 372/2001 this time after obtaining an ad-interim order, made an application before the Judicial Magistrate, First Class, Baloda Bazar on 13-6-2001 for grant of regular bail. The said Magistrate, First Class, after perusing the interim orders passed by this Court observed that the application submitted by the applicants for grant of anticipatory bail was pending consideration before the High Court, therefore, no orders could be passed regarding their arrest or release. The said Court directed these four applicants to await final order of the High Court and produce the same before the Magistrate. It appears that the applicants were dis-satisfied with the said order of the Magistrate, First Class. On 14-6-2001, the applicants, though were not in custody, made an application u/s 439 Cr. P.C. before the Special Judge (Atrocities), Raipur, along with the affidavits of Rupesh, Dharumal, Murlidhar and Mahendra Kumar. Each of the deponent clearly stated before the said Court that there was an interim order in their favour and they would get their case dismissed and that their case is pending before the High Court would be got dismissed by them. It appears from the office records that on 20-6-2001, an application for withdrawal of bail petition was filed in this Court. In the petition filed u/s 439, Cr. P.C. it was contended that in view of the interim order granted by the High Court, the applicants were arrested and were released by the officer arresting them. It was also submitted that the challan had already been filed, therefore, the applicants were filing an application for grant of regular bail. The matter came up for consideration before the Special Judge (Atrocities), Raipur on 20-6-2001. The learned Judge in paragraph 2 of its order observed that the applicants of the bail petition No. 158/2001 (before the lower Court) did get their bail petition dismissed before the High Court. The Court also observed that as in accordance with the interim order the applicants were taken into custody and were later on released and as the challan has already been filed, application u/s 439, Cr. P.C. could be allowed.

4. Undisputedly on 20-6-2001, none of the applicants were in custody. Shri P. R. Bhawe, learned counsel for the applicant submits that statement of learned Judge as contained in paragraph 2 of the order that the applicants got their bail petition dismissed was contrary to the records. After interim bail granted to Akhilesh Jindani, on 21-6-2001, he also made an application u/s 439, Cr. P.C. In his affidavit dated 21-6-2001 Akhilesh Jindani submitted that he had instructed his counsel for preparation of an application and he is making an application on the date of the affidavit before the High Court for withdrawal of the bail petition. In paragraph 2 he made a further submission that his application be heard on merits and he would be withdrawing his bail petition pending before the High Court.

5. On 28-6-2001, the learned Presiding Officer Atrocities Court, Raipur, recorded that the applicant Akhilesh Jindani had withdrawn his bail petition which was pending before the High Court. Following the earlier order already passed by it,

granted this application also.

6. Undisputedly, on the date of the application the applicants were not in the custody and were released by the Officer arresting them, in view of the interim order passed by the High Court. When the case came-up for hearing on 3-7-2001, learned counsel appearing in both the cases sought permission of this Court for withdrawal of these two petitions. It would be necessary to note that in M.Cr. C. No. 372/2001, till date no application for withdrawal of the bail petition has been filed. When this Court made enquiry from the learned counsel as to why they were withdrawing the bail petitions, this Court was informed that during the pendency of these petitions, the applicants applied for grant of regular bail and as regular bail had been granted in their favour, they be permitted to withdraw the bail petitions. This Court was shocked to hear the submission. This Court required the parties to inform that under what provisions of law, during the pendency of a petition u/s 438, Cr. P.C. taking an advantage of the interim order the applicants could make an application for grant of regular bail u/s 439, Cr. P.C. The cases were take-up for hearing on 5-7-2001 and thereafter on 11-7-2001. On 11-7-2001 this Court directed that records of two bail petitions be requisitioned from the Atrocities Court. The record have already been received.

7. Shri Bhishma Kinger, learned counsel for the applicant-Akhilesh Jindani submits that the applicants were taken into custody by the police officer and as he was released in accordance with the interim order passed by this Court he was entitled to make an application u/s 439 Cr. P.C. He further submits that though the judgment in the matter of Kalachand Patel and Others Vs. State of Madhya Pradesh, did not consider the matter of grant of ad-interim bail, but if the analogy of the said judgment is applied, the applicants were justified in moving the trial Court so also to the Atrocities Court. He further submits that unless a man is taken into custody or arrested, the arresting officer would not be able to release him on bail, therefore, a formal arrest of the person even for the purposes of grant of interim bail in accordance with the High Court should mean that the applicants were in custody and were entitled to make an application u/s 439, Cr. P.C.

8. Shri P. R. Bhave, learned counsel for the applicants in M.Cr.C. 398/2001, submits that this Court did not give any liberty to the applicants to make an application for grant of regular bail, but the applicants misconstruing the order in the matter of Kalachand Patel (supra), bona fidely made an application for grant of regular. He, however, submits that a further protective order be given in favour of the applicants so that the applicants may make a fresh application for grant of regular bail.

9. Learned counsel for the State has opposed these two applications.

10. For proper appreciation of the matter and the dispute, it would be necessary to appreciate the difference between Sections 438 and 439, Cr.P.C. Section 438 known as anticipatory bail; in-fact is a pre-arrest bail. The legislature has given

authority or has conferred right upon a citizen of this country that if he apprehends his arrest in connection with some non-bailable offence, then, he can move an application to the Court of Session or the High Court for grant of pre-arrest bail and the Court may grant a protective order in favour of such person. While granting such order, the Court may impose certain conditions enumerated u/s 438(2), Cr.P.C. Section 439, Cr.P.C. deals with the powers of Sessions Court and High Court in cases where the accused has already been taken into custody. Any order passed u/s 439, Cr.P.C. would be a post-arrest order, it directs a competent Court to release the accused on his furnishing personal bond and/or surety bond or on complying certain conditions.

11. Application u/s 439, Cr.P.C. in view of the language employed u/s 439, Cr.P.C., would be maintainable only when the accused is in the custody. Section 439, Cr.P.C. reads as under :-

Section 439 :

Special Powers of High Court or Court of Session regarding bail :-

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

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

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

Section 439(1)(a) clearly says that the High Court or Court of Session may direct that any accused of an offence and in custody be released on bail. The pre-condition for an application u/s 439, Cr.P.C. is that the accused must be in custody.

12. Section 438 of Cr.P.C. relates to pre-arrest bail. Section 438, Cr.P.C. reads as under :-

Section 438 :

Direction for grant of bail to person apprehending arrest-

(1) 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; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under Sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that person shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under Sub-section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub-section (1).

Section 438, Cr.P.C. clearly says 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 Court of Session for a direction under this section; and that in the event of arrest, he be released on bail. Section 438, Cr.P.C. provides a protective order in favour of the accused, who is apprehending his arrest; while Section 439, Cr.P.C. applies to the accused who is in custody. The word "custody" for the purposes of Section 439 has been interpreted by the Supreme Court and by the High Court. According to the Supreme Court, a Court while disposing of an application filed u/s 438, Cr.P.C. may grant absolute bail in favour of the applicant before it or may grant bail for a limited period with a further direction that within the said period, the said applicant/accused shall make an application for grant of regular bail before the competent Court.

13. In a case where absolute bail is granted u/s 438, Cr.P.C, then, in the event of arrest of the applicant, he is required to be released on bail by the officer arresting him and as and when he appears before the competent Court, he is required to furnish bail to the satisfaction of the said Court. In such a case final order of bail granted by the "Court" is not for a limited period or for a limited

purpose, it is an absolute order and none can ignore it. There may be other type of cases where the Court of Session or High Court while disposing of the application for bail finally, may give a limited period protective order and may require the applicant/accused to make an application for grant of regular bail. Regular bail undisputedly would be granted to him u/s 439, Cr.P.C. Such an accused who has protective order in his favour for a limited period may appear before the competent Court and may make an application u/s 439, Cr.P.C. The moment he makes an application u/s 439, Cr.P.C. for grant of regular bail, he would be deemed to be in custody, though not actually but because of the protective order. If the competent Court grants him regular bail, then, the applicant/accused would be released on his furnishing regular bail and the order granting anticipatory bail would merge in the order of the regular bail. In a case where protective order is for a limited period, then, such an accused on his application for grant of regular bail would be deemed to be in custody, but even in case of rejection of his application for grant of regular bail, he would not be taken into custody if the protective order granted by the Sessions Court or High Court is for a further and larger period. It appears that Murlidhar and three others placed reliance upon the judgment of the High Court of Madhya Pradesh in the matter of Kalachand Patel (*supra*) to contend that in view of the protective order, the Atrocities Court was entitled to consider the application for grant of regular bail.

14. The said judgment was delivered by me. In the said judgment, I had clarified the position which I have narrated above. The said judgment is not an authority to say or to support the argument that during the pendency of the application submitted u/s 438, Cr.P.C, if an interim order is granted, then, such an accused taking shelter under the interim order, would be entitled to make an application for grant of regular bail. In the case the Court had said that in case of grant of absolute bail, it would (*sic*) is for all practical purposes, but if the bail is for a limited period, then, such an accused is required to make an application for grant of regular bail and obtain the same within the said limited protective period.

15. It appears from the order passed by the Court below that it did not care to see the order passed by the Judicial Magistrate, First Class, Baloda Bazar. The said Judicial Magistrate, in the opinion of this Court, properly and correctly appreciated the effect, impact and import of the interim order passed by this Court. The Judicial Magistrate, First Class, knowing its limitation, did not grant regular bail, nor took the applicants in custody, nor directed that they be released and justifiably directed that the accused persons would be required to inform the said Court about final outcome of the application pending before the High Court.

16. It appears that the learned Presiding Judge of the Atrocities Court did not read the judgment in the matter of Kalachand Patel (*supra*). Had he read the judgment, he could clearly understand that the said judgment was explaining a distinction between a final order granting absolute anticipatory bail and a final

order granting anticipatory bail for a limited period.

17. When an application u/s 438, Cr. P.C. is filed either before the Court of Session or before the High Court and interim order is sought and obtained, then, the said interim order would enure to the benefit of such applicant/accused for the period of which the application is pending before the Court of Session or High Court. Such an interim order shall not survive after the final orders are passed by the High Court. The word "interim" denotes and connotes that it has been passed at interim stage awaiting the final outcome of the matter pending before the competent Court. When an application for grant of anticipatory bail is pending, an interim order is also issued, then, without authority of the High Court or Court of Session, the accused/applicant cannot make an application for grant of regular bail, because till that date nobody knew that application for grant of anticipatory bail pending before the High Court would be finally allowed or not. In a case where an interim anticipatory bail is granted, if the applicant obtains a regular bail under the protective interim order and his application for grant of anticipatory (bail) is finally rejected, then, in such a case it would create a legal anarchism. On one side, the Sessions Court or the High Court does not find his case to be fit for grant of anticipatory bail, but at the same time, without being taken into custody he would be released on bail. The applicant/accused is entitled to make an application for grant of regular bail only when the Court of Session or the High Court grants him permission to make such application. Such permission can be given by the High Court or Court of Session only when his application is finally allowed and protective order is granted for a limited period. Where the protective order is conterminous with the final order of the Court of Session or the High Court, then, the accused is not entitled to make an application for grant of regular bail. The applications filed by two sets of the accused persons for grant of regular bail were contrary to the provisions of law and in fact were violation of interim orders granted by this Court. While granting interim orders, this Court did not permit or allow these applicants to make an application for grant of regular bail. The High Court simply directed that during the pendency of these petitions in the event of arrest of the applicants, they be released by the arresting officer.

18. Despite repeated reading of said orders, I am unable to find even a single word in the said order authorising or requiring the applicants to make application for grant of regular bail or conferring any jurisdiction upon the lower Court to entertain, consider or grant the application for regular bail. The submission of the applications by the applicants was bad; entertainment of the same was worse and grant of the same during the pendency of these petitions was worst and was not expected of Presiding Officer of "Atrocities" Court, Raipur. It is expected of a Judicial Officer that when it relies upon a reported judgment of the High Court or Supreme Court it would read whole judgment and would not simply rely upon the placitum of the said reported judgment. The wisdom of the Judge is reflected in the judgment while the placitum or "Head-note" simply reflects the understanding and wisdom of the Editor. The Judges do not prepare placitum,

they deliver the judgments. The Editors do not deliver judgments but prepare Head-note/placitum according to their understanding. It is expected of all concerned that before placing reliance upon the words employed in placitum, they would read the judgment and try to appreciate that under what particular circumstances a particular judgment was delivered by the Court. When a fact-based judgment is delivered by the Court, then, the said judgment would be applicable to a case of similar facts; but when the law is interpreted in a particular judgment, then, whenever question of said interpretation arises, the earlier judgment would be cited as precedent.

19. I am not only aggrieved by the conduct of the present applicants in making application for grant of regular bail during the pendency of these petitions, but I am also aggrieved by the affidavits which they had submitted. Akhilesh Jindani-applicant in M.Cr. C. No. 372/2001 clearly stated in his affidavit that he got an application prepared and asked somebody to file the same before the High Court on the same day. He did not stand true to his words; till date he has not filed any application for withdrawal of his case. The other four accused persons did file an application before this Court for withdrawal of this bail petition, but the assurance given by them before the Court below was that they will get their case dismissed on 20-6-2001; they did not assure the lower Court that they will make an application for withdrawal of the case. If the application was filed in this Court on 20-6-2001, then, the applicants were required to inform this Court that in view of their affidavits, they were not pressing their bail petitions.

20. From the order passed by the learned Court below it appears that for granting regular bail to these applicants it has misread the records. None of the applicants before it said that their cases stood dismissed. They had informed the said Court on oath that they will get their cases dismissed. In paragraph 2 of each order, the learned Court below has recorded that the applicants before it got their cases dismissed; in fact this was never the assertion of anybody before the lower Court. The conduct of the applicants in moving application for grant of regular bail during the pendency of these petitions that too without any authority or permission from this Court, persuades me to reject these petitions. Both the petitions are dismissed. The interim orders granted in favour of the applicants are vacated and withdrawn. The regular bail granted by the lower Court in favour of these applicants being contrary to the orders passed by this Court cannot be allowed to stand; because if the said orders are allowed to stand, then, this would ridicule the true spirit of the orders passed by this Court and the provisions of Section 438, Cr. P.C.

21. Issue notice to the present applicants to show-cause why they be not dealt with under the provisions of Contempt of Courts Act and proper sentence be not awarded to each of them for making an unauthorised and illegal application for grant of regular application for bail, even when their application for grant of anticipatory bail was pending and as in the opinion of this Court they misused the interim order granted in their favour.

22. Also issue notice to the Presiding Judge of Atrocities Court, Raipur, as to why an action be not taken against him for misreading the affidavits submitted before it and making wrong statements in the orders granting bail that applicants before it had already withdrawn the application for grant of anticipatory bail. He be also issued a notice to show-cause as to why this order be not kept in his service-book and be not kept before the Full Court for taking proper action against him.

23. As the interim protective order granted by this Court has already been withdrawn and the regular bail granted by the lower Court has been set aside in these proceedings, the police is free to take the applicants in custody.

24. Certified copy within three days.