

(2011) 01 PAT CK 0129
In the Patna High Court
Case No : Cr. Misc. No. 1257 of 2010

Bishundeo Sahu

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 20-01-2011

Acts Referred:

Citation : (2011) 01 PAT CK 0129

Judgement

Mridula Mishra, J.—These matters have been referred by Hon"ble Single Judge, for deciding the issue, that if the previous anticipatory bail order was for a limited period till submission of the charge-sheet and the accused after grant of anticipatory bail has surrendered before the Court for furnishing bail bond, whether in such cases on submission of charge-sheet, second anticipatory bail application is maintainable or the applicant will have to surrender and obtain an order of bail under Sections 437 or 439 of the Code of Criminal Procedure. The Single Judge has referred these matters in view of divergent opinion among the Judges about the maintainability of the second anticipatory bail application in such circumstance.

2. Petitioners in these applications were granted anticipatory bail till submission of the charge-sheet. Subsequently when the charge-sheet was submitted, again they filed application for grant of anticipatory bail, which gave rise to question whether in terms of previous order, they are required to appear and surrender before the Court below for seeking regular bail or their prayer for grant of anticipatory bail on the second occasion could be allowed.

3. The issue has been framed in view of the Constitution Bench decision of Apex Court in the case of Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, as well as divergent views taken by different Benches in the case of Salauddin Abdulsamad Shaikh Vs. State of Maharashtra, , in the case of Nirmaljeet Kaur v. State of M.P. as well as in the case of Mahendra Prasad Singh Vs. The State of Bihar, , Sheochandra Singh v. State of Bihar reported in 2007 (4) BBCJ V 66 as well as in the case of Jagnarayan Yadav alias Babajee and Ors. v. State of Bihar

reported in 2010 (2) PLJR 684 . The view taken in Salauddin's case has been followed in all these cases, with certain observations/modifications but so far the view taken by the learned Single Judge in the case of Anirudh Prasad @ Sadhu Yadav Vs. The State of Bihar is concerned, a different view has been taken.

4. Section 438 was introduced in the Code of Criminal Procedure on recommendation of the Law Commission in its Fortyfirst Reports. Section 438 Code of Criminal Procedure contemplates an application by a person on an apprehension of arrest in regard to the commission of non-bailable offence. The object of the provision u/s 438 Code of Criminal Procedure was to give relief to a person from unnecessary harassment and discourage in case of apprehension of arrest for non-bailable offence. This privilege could be granted on an application filed before the High Court or the Sessions Court, if the Court concerned is satisfied that: (i) The person will not abuse the liberty of anticipatory bail, (ii) The facts of the case reveal false implication of applicant in the matters of non-bailable offence, (iii) The applicant has reasonable apprehension of being arrested in the case, (iv) The person concerned will not abscond and will make himself available to face trial and also that the privilege of anticipatory bail will not be otherwise misused by person concerned.

5. Shri Rana Pratap Singh, Senior Advocate, while addressing the Court on this issue has referred different decisions, right from Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, , up to 2010 (2) PLJR 684 (Jag Narayan Yadav v. State of Bihar). He has submitted that it was for the first time in the case of Gurubaksh Singh Sibbia (supra) that the Apex Court has considered the scope of Section 438 Code of Criminal Procedure while granting anticipatory bail and discussed the jurisdiction of the Court. The view of the Apex Court in Gurubaksh Singh's case was that amplitude of judicial discretion, given to the High Court and the Court of Sessions should not be cut down by reading into statute. It is for the High Court and the Court of Sessions, to whom the anticipatory bail application is made to exercise freely their judicial discretion, on the particular facts and circumstances of the case and on such conditions as the case may warrant. The ends of justice will be better served by trusting these Courts governing the grant of bail, then by divesting them of their discretion, which the Legislature has conferred upon them, by laying down inflexible rules of general application. The view expressed by the Constitution Bench, sufficiently indicated that how and in which manner an application, for anticipatory bail should be considered. The only consideration was the judicial discretion of the concerned Court depending on the facts and circumstances of a particular case.

6. However, in this very decision, the Constitution Bench has held that provisions of Section 438 Code of Criminal Procedure cannot be invoked after the arrest of the accused. Grant of anticipatory bail to an accused, who is under arrest, involves contradiction to term of provision u/s 438 Code of Criminal Procedure as the first pre-condition for granting anticipatory bail is a reasonable apprehension of being arrested, on an accusation of having committed a non-bailable offence.

The Constitution Bench also decided that operation of an order passed u/s 438 Code of Criminal Procedure necessarily should not be limited in point of time. The normal rule should be, not to limit the operation of the order in relation to period of time.

7. But the view of Apex Court in Gurubaksh Singh's case was changed in Salauddin Abdulsamad Shaikh Vs. State of Maharashtra, . In this decision the view of the Apex Court was that if any person has reason to believe that he may be arrested on an accusation of having committed non-bail-able offence, the High Court or the Court of Sessions, may, if it thinks fit, direct that in the event of arrest, he shall be enlarged on bail, it may include such conditions, having regard to the facts of the particular case. It was also held that since anticipatory bail is granted to any person in anticipation of arrest in non-bailable case, it does not mean that the regular Court, which is to try the offender, should be bypassed and for that reason the High Court or the Court of Sessions should fix a outer date for continuation of bail and on the date of its expiry, Petitioner should be directed to move for regular bail. The anticipatory bail as per decision was an ad-interim relief till the investigation is going on. Once investigation is completed and charge-sheet submitted bringing some tangible evidence against the accused, he has to surrender before the Court having jurisdiction for regular bail.

8. The earlier view of the Apex Court in Salauddin Abdulsamad Shaikh Vs. State of Maharashtra, was also upheld in the decision reported in K.L. Verma Vs. State and Another, , where the Apex Court was of the view that the order of anticipatory bail do not ensure restraining from arrest till the end of trial but for a limited duration: The matter should be left for regular bail, giving sufficient time to the accused to move regular Court for bail and only in case of refusal by the Regular Court, to approach Higher Court.

9. The view taken in K.L. Verma's case did not find favour in Bharat Chaudhary and Another Vs. State of Bihar and Another, . In this case anticipatory bail of the Petitioner had been rejected by the High Court and appeal was preferred by him before the Supreme Court. The Apex Court was inclined to grant bail to the Petitioner Bharat Chowdhary but a serious objection was raised by the counsel appearing for the State. The objection of the State Counsel was that since trial court had taken cognizance of the offence, Section 438 Code of Criminal Procedure cannot be made applicable for granting anticipatory bail and only remedy available to the Appellant is to approach trial court, surrender before it and apply for regular bail. The objection raised by the State Counsel, however was not found acceptable to the Supreme Court and it was held that object of Section 438 Code of Criminal Procedure was to prevent undue harassment of the accused persons on account of pre-trial arrest. While granting anticipatory bail, the consideration of gravity of the offence should be an important factor. Simply because cognizance has been taken, these things in itself cannot be construed as prohibition against grant of anticipatory bail.

10. The Apex Court again reverted back to the findings recorded in Salauddin

case (supra) in Nirmaljeet Kaur's case. The view of the Apex Court in this case was also that anticipatory bail should be granted for a limited duration, so as to enable the accused to move the regular Court for bail, in terms of Section 439 Code of Criminal Procedure. Such limited duration may extend to the date on which bail application filed by the accused is disposed of or even few days thereafter to enable the accused to move higher Court. This view was not accepted by another Bench of the Apex Court in K.L. Verma's case (supra). However in Nirmal Jeet Kaur Vs. The State of Madhya Pradesh and Another, , also the view taken in Salauddin Abdulsamad Shaikh Vs. State of Maharashtra, was affirmed, holding that a person who had been granted anticipatory bail u/s 438 Code of Criminal Procedure for a limited period, has to move regular court for bail u/s 439 Code of Criminal Procedure. But in this case a new theory was propounded that after bail is not granted within that period, he has to surrender so that application u/s 439 Code of Criminal Procedure can be taken for disposal. High Court, cannot during the pendency of the application u/s 439 Code of Criminal Procedure, by a blanket order extend the ad-interim anticipatory bail, so as to enable the accused to obtain bail u/s 439 Code of Criminal Procedure.

11. Observation of the Supreme Court in K.L. Verma's case was that even after expiry of the limited period of anticipatory bail, for a few days ad-interim relief can be granted to the accused to move higher Court. This view was held per incuriam as the decision was without giving reference to the requirement of Section 439 Code of Criminal Procedure.

12. Similar view has also been taken in the decision reported in 2009 (2) BBCJ 119 : 2009 (2) PLJR (SC) 35, where it has been held that protection in terms of Section 438 Code of Criminal Procedure is for a limited duration, during which one has to move to the regular Court for bail in terms of Section 439 Code of Criminal Procedure. Mandate of Section 439 Code of Criminal Procedure is that the applicant has to be in custody. The distinction between order under Sections 438 and 439 Code of Criminal Procedure shall be rendered meaningless and redundant, if the protective umbrella u/s 438 Code of Criminal Procedure is extended beyond the required period.

13. The view taken in the decision reported in Anirudh Prasad @ Sadhu Yadav Vs. The State of Bihar , is on the line of decision reported in Gurubaksh Singh's case as well as Bharat Choudhary's case, where it has been held that mere submission of the charge-sheet does not denude the Court, the power to grant anticipatory bail. As a proposition of law, it cannot be said that in a case, in which once the anticipatory bail is given till submission of charge-sheet, another application cannot be entertained, based on the premise that later, on investigation, fresh materials come.

14. On perusal of all these decisions what transpires, that the scope of Section 438 Code of Criminal Procedure has been considered differently in different decisions. In most of the cases the view of the Apex Court is that an accused cannot be granted anticipatory bail from the stage of investigation, till the stage

of trial, since it is a protection given to the accused from harassment, in a case where the investigation is in the initial stage. But once the accused is charge-sheeted and material evidence has been collected against him, he will have to surrender before the Trial Court and pray for regular bail.

15. What I find that scope of Section 438 Code of Criminal Procedure is to give relief to an accused who anticipates his arrest in connection with non-bailable offence. The Court is empowered in exercise of jurisdiction u/s 438 Code of Criminal Procedure to grant him bail in anticipation of arrest. That arrest can be before submission of charge-sheet or after submission of the charge-sheet or after the cognizance has been taken in the case. If the Court has applied its juridical mind and is of this view that the person concerned despite being named as accused in a non-bailable offence is capable of granting anticipatory bail for the reason that: (i) there is no chance of misuse of privilege of bail by him, (ii) there is no apprehension of his absconding, (iii) no chance of tampering with the evidence and, (iv) will present himself for facing trial, in such cases, even if charge-sheet is submitted or cognizance is taken, anticipatory bail can be granted. Anticipatory bail which was granted earlier to an accused will not come to an end, and it will continue till conclusion of the trial, unless the order granting anticipatory bail is either cancelled by a judicial order, or the accused has been taken into custody, simply because the charge-sheet is submitted, it does not mean that the person who was granted anticipatory bail, has come beyond the protective umbrella of Section 438 Code of Criminal Procedure

16. Only distinction in between Sections 438 and 439 Code of Criminal Procedure is that bail granted in exercise of jurisdiction u/s 438 Code of Criminal Procedure is before the arrest of the accused and u/s 439 Code of Criminal Procedure it is granted when the accused has either surrendered or has been taken into custody. The privilege which is given to the accused under both the sections are the same, but only distinction is of stage.

17. On account of certain changes and amendment brought in Section 438 Code of Criminal Procedure in case of grant of anticipatory bail, the Petitioners-accused has to surrender before the Court concerned. In case where anticipatory bail has been granted for a limited period, till submission of the charge-sheet, the Petitioner again has to make a fresh prayer for bail, since, already on earlier occasion he had to surrender before the concerned Court and had furnished bail bond, so on submission of charge-sheet, the first prerequisite for grant of anticipatory bail i.e. the person concerned must not have been arrested or surrendered before any Court, is not available to him. He has lost the requisite criteria of granting anticipatory bail, in that case except the surrendering before the competent court for grant of regular bail, he is left with no other option.

18. A similar matter was considered in case of bailable offence. A person who is named as accused for bailable offences and granted bail by the police on execution of bail bond. Subsequently on completion of investigation, if the charge-sheet is submitted for non-bailable offence or despite submission of

charge-sheet for bailable offence, cognizance is taken by the Magistrate for non-bailable offence, which he can make prayer for anticipatory bail. This issue was considered and decided in the case of Mahendra Prasad Singh Vs. The State of Bihar, . In this decision it was held that once the bail had been granted and bail bond executed, at a later stage, if the offence is treated as non-bailable, the applicant cannot file his application for grant of anticipatory bail. The only remedy available to him is to surrender before the concerned Court. The Court concerned will grant him bail without taking into custody, considering his conduct while on police bail and also that he has not misused the privilege of bail.

19. In case of non-bailable offences also, similar view can be taken, in case anticipatory bail was granted for a limited period till submission of the charge-sheet. Since the accused has already surrendered before the Court below for grant of anticipatory bail and has executed bail bond, as such at his instance another anticipatory bail application cannot be maintainable. He will have to surrender and pray for regular bail u/s 439 of the Code of Criminal Procedure. The Court concerned, instead of taking him into custody, considering the previous order of anticipatory bail passed in his favour and also that he has not misused the privilege or his conduct is such that despite submission of charge-sheet or order taking cognizance, he is capable of granting bail, will grant him bail. In case where the anticipatory bail granted for limited period has been misused, the concerned Court will have discretion, either to grant or refuse the bail. In case of non-bailable offence, anticipatory bail, if granted for limited period, the Court concerned will pass order in similar manner as laid down in the case of Mahendra Pd. Singh (supra). In no case, second anticipatory bail application at the instance of such accused person is maintainable.

20. So far Petitioners in these Criminal Miscellaneous Applications are concerned, they are also directed to surrender before the concerned Court within four weeks from the date of this order. In case these Petitioners will surrender and file their applications for bail u/s 439 of the Code of Criminal Procedure, the concerned Court will pass an order in the similar manner as has been decided in the case of Mahendra Prasad Singh Vs. The State of Bihar, .

21. These Petitioners will be granted bail without taking them into custody as there is no allegation against them that during the limited period of anticipatory bail or the provisional bail order passed during pendency of these applications by the High Court, they have misused the privilege of bail.

22. These applications are allowed.

Dharnidhar Jha. J.

23. I had the privilege of going through the order proposed by my esteemed Sister Smt. Mishra, J., on the reference made by the learned Single Judge by order dated 12.5.2010, jointly passed in Cr. Misc. Petition No. 1257 of 2010* and Cr. Misc. Petition No. 2875 of 2010*. It appears that subsequently another petition bearing Cr. Misc. No. 21131 of 2010 was also referred to the larger

Bench by an order passed on 7.7.2010 by the same learned Judge who had passed the order of reference on 12.5.2010.

24. Considering the matter and the issue which was referred and placed before us for decision in spite of having deeply been benefited by the erudite order proposed by my esteemed Sister, I want to express my own opinion on the issue.

25. The three petitions had been filed by the accused persons of three different cases, as indicated in the orders of reference, who had been granted anticipatory bail by competent courts for a particular duration, i.e., up to the submission of the charge-sheet. On the charge-sheets being submitted, the original court of jurisdiction took cognizance of the offence on those basis and issued summons for appearance of the accused persons. Because the accused of those three cases were on bail u/s 438 Code of Criminal Procedure for that limited period, they filed fresh petitions before the respective Sessions Judges, namely, of Khagaria, Buxar and Patna, but those petitions were dismissed by different orders passed in the fresh petitions preferred by the accused persons. Those accused persons preferred three Cr. Misc. Petitions in this Court which were listed before the learned Single Judge. The learned Single Judge, finding that the Petitioners were placing before his Lordship the decision of this Court reported in Anirudh Prasad @ Sadhu Yadav Vs. The State of Bihar , to buttress their submission that their petitions were very much maintainable in spite of the three decisions of this Court reported in Mahendra Prasad Singh Vs. The State of Bihar, 2007 (4) B.B.C.J. V-66 Sheo Chandra Singh and Anr. v. State of Bihar and 2010 (2) P.L.J.R. 684 Jag Narayan Yadav alias Babajee Yadav v. State of Bihar taking a contrary view, found that there was a conflict of opinion on the maintainability of such petitions amongst the Judges of this Court and, as such, directed listing of the three petitions before a" larger Bench so as to ironing out the differences in opinion of the Court on similar issue. This was how the three petitions were placed before us for reconsideration.

26. On perusing the order of reference dated 12.5.2010 passed jointly in Cr. Misc. No. 1257 of 2010* and Cr. Misc. No. 2875 of 2010* what appears is that the learned Judge was rather referring the issue to a larger Bench for deciding the correctness of the above decisions by noting as to whether an accused who had been granted anticipatory bail u/s 438 Code of Criminal Procedure for a limited period, i.e., up to the submission of the charge sheet, could he be entitled to maintain a similar petition u/s 438 Code of Criminal Procedure before the competent court again after submission of the charge-sheet.

27. While enacting the Code of Criminal Procedure, 1973, the Legislature was considering the 41st Report of the Law Commission which had proposed introduction of the provision in the Code enabling the court to grant anticipatory bail. The relevant suggestion was appearing in paragraph 39.9 of its Report. The Law Commission, at the same time, was also presenting a draft Section for consideration. It was pointing out, "the necessity for granting anticipatory bail arises mainly because some influential persons try to implicate their rivals in

false case for the purpose of disgracing them or for other purposes by getting them detained in jail for some time. In the recent times, with the accentuation of the 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 the custody, remain in prison for some days and then apply for bail".

28 The report of the Law Commission was accepted by the Parliament. While amending Code of Criminal Procedure 1898, it introduced a new provision vide Section 438 Code of Criminal Procedure What is the crux in matters of granting anticipatory bail has been pointed out time and again and it has consistently been noted by different decisions, probably, the first which was coming from this Court in *Sk. Nizamuddin Vs. State of Bihar and Sk. Mukhtar*, . In that case S.K. Jha, J. (as his Lordship then was) was pointing out in paragraph 4 of the report as to what could be the import of the terms like "accusation" and "reason to believe" besides the meaning of other terms like "suspected of the commission of any non-bailable offence". While considering the ambit and scope of the section his Lordship was further considering the comparative scope and ambit of Section 438 Code of Criminal Procedure with Sections 437 and 439 Code of Criminal Procedure and was holding as under:

It was submitted that whereas Section 437 speaks of bail to be granted to "any person accused of or suspected of the commission of any non-bailable offence" and Section 439(1) speaks of such bail to "any person accused of an offence and in custody", Section 438(1) on the contrary speaks of an anticipatory bail to "any person having reason to believe that he may be arrested on an accusation of having committed a non-bailable offence". Stress has been laid by learned Counsel on the difference between the words "accused" and "may be arrested on an accusation" and it is sought to be contended that by implication it must be held that the Legislature intended to preclude a case where accusation has already been made from the operation of Section 438. Learned Counsel wants me to read after the word "accusation" in Section 438(1) "likely to be made". In other words, the term "accusation" is sought to be qualified by the term "likely to be made" and not covering a case of accusation already made. I am afraid, this contention cannot be held to be tenable in law. Where the term "accusation", has been used in Section 438(1), it must in the fitness of things include an accusation made as such as an accusation likely to be made. So far as Sections 437 and 439 are concerned, the terms "accusation" or "suspected of the commission of any non-bailable offence" had to be used as they were dealing with the cases of persons already arrested or detained and in custody. In Section 438, on the other hand, the person approaching the Court of Session or the High Court is neither arrested nor detained nor in custody. A person may have "reason to believe that he may be arrested on account of an accusation" which has already been made against him of having committed a non-bailable offence. Such a person may also have reason to believe that he may be arrested on an

accusation likely to be made of having committed a non-bailable offence. I see no reason to restrict the language of Section 438 to only such cases where accusation is only likely to be made and not to cases where accusation has already been made, for it is seldom, if at all there be any such case, where a person without any accusation being made against him shall have reason to believe that he may be arrested. The very object of the legislation will be frustrated if such a narrow construction be put upon the language of Section 438 as learned Counsel for the Petitioner wants me to put.

29. The Supreme Court also considered the scope and ambit of Section 438 Code of Criminal Procedure in *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, and while so doing was pointing out the distinction between an ordinary order of bail and order of anticipatory bail. It was pointed out that "distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and, therefore, is release from custody of the police, the latter is granted in anticipation of the arrest and is, therefore, effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offence. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence and offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued, is thereafter arrested on the accusation in respect of which the direction is issued, he may be released on bail. Thus, a petition u/s 438 Code of Criminal Procedure could be maintainable only when a person reasonably believes him being arrested on an accusation of having committed a non-bailable offence. As soon as the person is arrested, there is no scope for him to take resort to the remedy u/s 438 Code of Criminal Procedure He is left only with the remedies which could be available to him under Sections 437 and 439 Code of Criminal Procedure

30. While passing the judgment in *Gurbaksh Singh Sibbia* (supra) the Supreme Court was also considering as to what could be the duration for which such an order of bail could be made. The learned Single Judge has also referred to those observations of the Supreme Court in his order. Considering the context and the issue, I also want to reproduce the relevant part of the Supreme Court observation in paragraph 38 of the report which appears at page 1649:

There was some discussion before us on certain minor modalities regarding the passing of bail orders u/s 438(1). Can an order of bail be passed under that section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed u/s 438(1) be limited in point of time? Not necessarily. The Court may, if there are reasons for doing so, limit the

operation of the order to a short period until after the filing of an F.I.R. in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail u/s 437 or 439 of the Code within a reasonably short period after the filing of the F.I.R. as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

Thus, as per the observation of the Supreme Court the order of bail u/s 438 Code of Criminal Procedure may be for the whole period of the case or may be for a limited stage of the case.

31. Subsequently, in several decisions right from *Salauddin Abdulsamad Shaikh Vs. State of Maharashtra*, the Apex Court was considering the same question which was considered by the Constitution Bench of the Supreme Court in *Gurbaksh Singh Sibbia (supra)* regarding the duration of the period for which such an order of anticipatory bail could be existing. In *Salauddin Abdul Samad Shaikh (supra)* it was held:

When the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration, the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.

It was further held in that judgment as under:

Ordinarily the court granting anticipatory bail should not substitute itself for the original court which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail.

32. In *K.L. Verma Vs. State and Another*, the Apex Court was issuing a direction which was somewhat contrary to the procedure and practice prevailing as regards the provision of Section 438 Code of Criminal Procedure. In that case an accused who had been granted anticipatory bail for a limited period approached the Apex Court and while not disturbing the earlier direction or not holding that it could not have been issued, the Supreme Court directed the Appellant before their Lordships to approach the original courts for bail after submission of the charge-sheet at the end of the duration for which the order u/s 438 Code of Criminal Procedure was available to him and directed that High Court may extend it with a direction to the accused to move the original court for grant of regular bail. However, the above observation of the Apex Court appears not approved by its subsequent decision in *Nirmal Jeet Kaur Vs. The State of Madhya Pradesh and Another*, by referring to the provisions of Sections 437 and 439 Code of Criminal Procedure which require an accused to move for bail under those provisions only

when he was in custody of the courts. Reference in the above behalf was made to the decision in *Niranjan Singh and Another Vs. Prabhakar Rajaram Kharote and Others*, in which the Apex Court adumbrated upon the word "custody" and it was held that direction issued in *K.L. Verma (supra)* was per incurium.

33. In *Bharat Chaudhary and Another Vs. State of Bihar and Another*, , the issue was not as is before us, that's to say, as to whether an accused who had been earlier admitted to an order u/s 438 Code of Criminal Procedure for a particular duration, could file a similar prayer after expiry of that duration or, say, after submission of charge-sheet or passing of cognizance order. For that the accused in that case had filed a petition u/s 438 Code of Criminal Procedure for the first time after cognizance order had been passed. It appears that the resistance to the maintainability of the anticipatory bail petition after submission of the charge-sheet and passing of the cognizance order was on the ground that as soon as the order of cognizance was passed the petition was not maintainable and for resisting the prayer reliance was placed on *Salauddin Abdul Samad Shaikh v. State of Maharashtra (supra)*. The Apex Court made the following observations in paragraph 11 of *Bharat Chaudhary's* case (*supra*):

We respectfully agree with the observations of this Court in the said case that the duration of anticipatory bail should be normally limited till the trial court has the necessary material before it to pass such orders and it thinks fit on the material available before it. That is only a restriction in regard to blanket anticipatory bail for an unspecified period. This judgment in our opinion does not support the extreme argument addressed on behalf of the learned Counsel for the Respondent State that the courts specified in Section 438 of Code of Criminal Procedure are denuded of their power under the said section where either the cognizance is taken by the court concerned or a charge-sheet is filed before the appropriate court. As stated above, this would only amount to defeat the very object for which Section 438 was introduced in Code of Criminal Procedure in the year 1973.

Thus, what appears from the above observations is that the Supreme Court was never laying down the proposition in *Bharat Chaudhary* that in a case in which an accused had obtained a protective order u/s 438 Code of Criminal Procedure till submission of the charge sheet, he could again file a similar petition after cognizance order had been passed. In fact, the whole decision in *Bharat Chaudhary* does not appear considering the above issue and the observations contained in paragraph 11 extracted above were simply negating the submission of the Respondent State that the courts were not empowered to act u/s 438 Code of Criminal Procedure

34. However, the proposition which appears laid down in *Bharat Chaudhary* in paragraph 11 was laid down by this Court long back in *Bajranglal Agrawal and others Vs. The State of Bihar*, . In that case also the accused had applied for anticipatory bail after submission of the charge-sheet and passing of cognizance order. Before that he had not prayed for bail under any of the provisions of the

Code of Criminal Procedure The State was resisting the prayer on the same premise as was done by the Respondent State in *Bharat Chaudhary*. Hon"ble late L.M. Sharma, J. (as his Lordship then was) was pointing out in *Bajranglal Agrawal* (supra) that the petition was very much maintainable even after submission of the charge-sheet or taking of cognizance because the language employed to frame the provision of Section 438 Code of Criminal Procedure did not permit a narrow construction of it.

35. From the discussions of the relevant law set down by the Supreme Court, it is abundantly clear that an order of anticipatory bail may also be only for a limited period of time or till a particular stage of investigation of the case, like, till submission of the charge-sheet or passing of order of cognizance in a case and it may not be bad if the accused was directed to surrender and pray for regular bail thereafter before the original courts of competent jurisdiction. The above view appears taken by three of the decisions of this Court cited by the learned Single Judge in his order of reference which are reported in *Mahendra Prasad Singh Vs. The State of Bihar*, 2007 (4) B.B.C.J. V-66 *Sheochandra Singh and Ors. v. State* and 2010 (2) P.L.J.R. 684 *Jagnarayan Yadav alias Babajee Yadav and Ors. v. The State of Bihar*. However, what I find is that except the proposition that such accused persons could not file another anticipatory bail petition and the same could not be maintainable, no further and definite reason has been assigned by any of the decisions including those of the Apex Court in support of the above as regards explaining the scope, ambit and application of the provision of Section 438 Code of Criminal Procedure I, in fact, find that there could be some very good reason flowing from the provision and scheme of the Code of Criminal Procedure itself in the above behalf which gets clear support from the prevailing practice on the provisions regarding bail. In my considered view, the reason for not maintaining the anticipatory bail petition again by such accused persons could be deduced from some of the provisions in the same Chapter-XXXIII of the Code of Criminal Procedure

36. As may appear from the provision of Section 438 Code of Criminal Procedure, the accused may be directed to be released on bail if his case is found fit for granting him the relief prayed for under that provision. After the accused is granted bail, he is required to furnish his bond before the competent court and the contents of the bond which is required to be executed by an accused in the case including one u/s 438 Code of Criminal Procedure is indicated by the provision of Section 441 Code of Criminal Procedure which reads as under:

441. Bond of accused and sureties.--(1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the Police Officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police Officer or Court, as the case may be.

(2) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

(3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

(4) For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or, if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the Court, as to such sufficiency or fitness.

Thus, the bond has to be executed by the accused after appearing and undertaking before the court that he shall attend the court at the time and place mentioned in the bond and shall continue to so attend until otherwise directed by the Police Officer or court, as the case may be. It hardly requires to be noted that the accused could execute the bond only when he had appeared before the court and had submitted himself to its custody. The word "custody" does not appear either in the provision of Section 438 Code of Criminal Procedure or u/s 441 Code of Criminal Procedure extracted above. However, the same appears in Sections 437 and 439 Code of Criminal Procedure. The very Section 441 presupposes that no bond could be executed by an accused unless he appears before the court to execute the bond which has to be accepted by it. Not only that, the very provision also indicates that the accused shall have to put down the conditions which might have been imposed upon him for his release on bail in the very bond to be executed by him. The provision of Section 441 Code of Criminal Procedure itself indicates that before the accused is released on bail on his bond, the bond has to be executed before the court. Therefore, I have noted that such an accused who has been ordered to be released on bail even u/s 438 Code of Criminal Procedure shall have to appear before a court for executing the bond. In other words, what is meant by the above is that the accused has to submit himself to the custody of the court for executing the bond.

37. The word "custody" has not been defined in the Code of Criminal Procedure though this has some vital importance as regards the chapter of bail. The Supreme Court in *Niranjan Singh and Another Vs. Prabhakar Rajaram Kharote and Others*, was considering and indicating its import. In that case the accused had been summoned for committing offences u/s 302, etc., of the Indian Penal Code and his prayer for bail had been refused by the Magistrate. The refusal was without surrender of the accused and the Magistrate also stayed the warrant of arrest which had been issued by him for appearance of the accused. The Sessions Judge was approached by the accused before whom later he surrendered too, and the Sessions Judge without satisfying that the accused was in custody of the Magistrate who refused his prayer, admitted the accused to bail which order was challenged before the High Court and the High Court also upheld the order of the Sessions Judge by putting certain conditions in its order of bail.

Niranjan Singh, the complainant, challenged the order before the Apex Court. This is how the Apex Court was considering the issue as to when a person could be said to be in "custody" in the light of Section 439 Code of Criminal Procedure. It was held as follows:

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 physical presence. No lexical dexterity nor precedential 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 officer 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 u/s 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.

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.

Thus, if an accused puts himself in the control of the court even after surrendering himself or even, in my opinion, appearing before it for the purposes of fulfilling formalities of executing a bail bond directed to be executed by him by an order u/s 438 Code of Criminal Procedure then he could be said to have offered himself to the courts' jurisdiction and have further submitted himself to its orders by his physical presence in court. Is not it even in case of an order u/s 438 Code of Criminal Procedure that the accused has to execute a bond and as I have just noticed, only when he had executed a bond he is legally and truly released on bail? Further, from where he is said to be released on bail as per the provision of Section 441 Code of Criminal Procedure? He has definitely to be from the custody of the court. When we consider the provision of Section 441 and Form No. 45 which is the form created by the Legislature for executing a bond by the accused in pursuance to an order of bail in his favour then it may be more clear that as soon as he appears before a court, he submits himself to its jurisdiction and custody and, thus, undertakes to it to remain present before it as and when the court requires him to. Thus, what appears from the above

discussion is that as soon as an accused appears and goes into the custody of the court so as to observing the legal obligation cast upon him by Section 441 Code of Criminal Procedure he is in custody of the court and that custody in spite of his release, is subject to the terms of the bond and those terms are further creating perennial and permanent constructive custody of the court in which the accused puts himself and could be said to be lying in spite of having got an order, of bail. Thus, as soon as an accused appears before a court and executes a bond in terms of Section 441 Code of Criminal Procedure and Form No. 45 appended to its II Schedule, he could remain very well in the constructive custody of the court and, as such, there could not be any question of any statutory right being vested in him for filing yet another application for bail u/s 438 Code of Criminal Procedure

38. The learned Judge who passed the judgment in Anirudh Prasad @ Sadhu Yadav Vs. The State of Bihar was simply extracting a single line from the decision of the Supreme Court in Bharat Chaudhary and Another Vs. State of Bihar and Another, which is as under:

This judgment in our opinion does not support the extreme argument addressed on behalf of the learned Counsel for the Respondent State that the courts specified in Section 438 of Code of Criminal Procedure are denuded of their power under the said section where either the cognizance is taken by the court concerned or a charge-sheet is filed before the appropriate court.

I have already referred to the case of Bharat Chaudhary (supra) and I have already held that it never fell for consideration by the Apex Court in that case as to whether an accused who had been admitted to anticipatory bail till submission of the charge-sheet could prefer yet another anticipatory bail petition after submission of the charge-sheet and passing of cognizance order. In my considered view, the judgment in Anirudh Prasad Yadav alias Sadhu Yadav (supra) rendered by the learned Single Judge was not laying down the correct proposition of law and appears a thoroughly bad law which is hereby overruled.

39. My esteemed Sister has issued certain directions in such cases of granting anticipatory bail up to a particular stage as may appear from paragraph 19 of the order of her Lordship for guidance, of the courts which could be approached by such accused after expiry of the period of anticipatory bail. I simply want to add that in all such cases, in which charge sheet is submitted and the period of bail comes to an end, the only course left to the accused has to pray for regular bail before the original courts of jurisdiction which shall have the advantage of perusing and considering the materials which had been collected by the investigating agency during the investigation and could, thus, come to a conclusion as to whether his liberty should be protected further or it be cut down on account of commission of some serious offence. In all such cases, the original courts must consider some important factors, like, that the accused was granted anticipatory bail after considering some material by the competent court and that he had enjoyed that liberty. If the material as against him remains the same or

almost the same, and there is no complain of tampering, etc., then his liberty must not be put to jeopardy. The court, in such case, may have to undertake hearing which may spill over a few days. In all such cases, the court should not send the accused into custody, rather allow him to remain on bail till the court finds, for definite reasons, it no more permissible in the facts of the case as presented before it. One has hardly to be worried about circumstances under which anticipatory bail may be granted as the same appears very much restricted to the newly incorporated provision of Section 438 Code of Criminal Procedure which has made it compulsory for considering many factors as may appear from the newly amended provision. The court which has to consider the prayer for anticipatory bail, has to consider the nature and gravity of the accusation, antecedents of the accused including the instance of his previous conviction and imprisonment by a court in respect of any cognizable offence, the possibility of the accused running away from justice and, lastly, whether the accusation had been made with the object of injuring or humiliating the applicant by having him arrested. One aspect of the matter which is often confronted by us in Court is that in spite of having been granted anticipatory bail, sometimes the accused may be remanded to custody as he had not furnished the bail bond. It is expected that the courts below shall consider proceeding u/s 438(3) Code of Criminal Procedure and act in that light in all such cases.

40. With these reasons, I completely agree with the order passed by my esteemed Sister