

Shri Balchand Jain

Vs

State of Madhya Pradesh

Criminal Appeal No. 325 of 1975

(P.N. Bhagwati, A.C. Gupta, Syed M. Fazal Ali JJ)

05.11.1976

JUDGMENT

BHAGWATI, J. -

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

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

The necessity of granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail., and recommended introduction of a provision for grant of 'anticipatory bail'. This recommendation was accepted by the Central Government and clause (447) was introduced in the draft Bill of the new Code of Criminal Procedure conferring expressed power on a court of session or a High Court to grant 'anticipatory bail'. Commenting on this provision in the draft Bill, the Law Commission observed in paragraph 31 of its Forty-eighth Report :

The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendations made by the previous Commission (41st Report). We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one. Further the relevant section should make it clear that this direction can be issued only for reasons to be recorded, and if the Court is satisfied that such a direction is necessary in the interests of justice.

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

(1) When any person has reason to believe 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) * * * *##

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

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

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

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

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

This rule commences on a non-obstante clause and in its operative part imposes a ban on release on

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

4. We must, therefore, proceed to consider whether on a true and harmonious construction, Section 438 of the Code of Criminal Procedure, which provides for grant of 'anticipatory bail' can stand side by side with Rule 184 or there is any inconsistency between them so that to the extent of inconsistency, it must be regarded as overridden by that rule. Now Section 438 contemplates an application to be made by a person who apprehends that he may be arrested on an accusation of having committed a non-bailable offence. It is an application on an apprehension of arrest that invites the exercise of the power under Section 438. And on such an application, the direction that may be given under Section 438 is that in the event of his arrest, the applicant shall be released on bail. Rule 184, on the other hand, deals with a different situation and operates at a subsequent stage when a person is accused or convicted of contravention of any rule or order made under the Rules and is in custody. It is only the release of such a person on bail that is conditionally prohibited by Rule 184. If a person is not in custody but is merely under an apprehension of arrest and he applies for grant of 'anticipatory bail' under Section 438, his case would clearly be outside the mischief or Rule 184, because when the court makes an order for grant of 'anticipatory bail', it would not be directing release of a person who is in custody. It is an application for release of a person in custody that is contemplated by Rule 184 and not an application for grant of 'anticipatory bail' by a person apprehending arrest. Section 438 and Rule 148 thus operate at different stages, one prior to arrest and the other, after arrest and there is no overlapping between these two provisions so as to give rise to a conflict between them. And consequently, it must follow as a necessary corollary that Rule 184 does not stand in the way of a court of session or a High Court granting 'anticipatory bail' under

Section 438 to a person apprehending arrest on an accusation of having committed contravention of any rule or order made under the Rules.

5. But even if Rule 184 does not apply in such a case, the policy behind this rule would have to be borne in mind by the court while exercising its power to grant 'anticipatory bail' under Section 438. The rule-making authority obviously thought offences arising out of contravention or rules and orders made thereunder were serious offences as they might imperil the defence of India or civil defence or internal security or public safety or maintenance of public order or hamper maintenance of supplies and services to the life of the community and hence it provided in Rule 184 that no person accused or convicted of contravention of any rule or order made under the Rules, shall be released on bail unless the prosecution is given an opportunity to oppose the application for such release and in case the contravention is of rule or order specified in this behalf in a notified order, there are reasonable grounds for believing that the person concerned is not guilty of such contravention. If these are the conditions provided by the rule-making authority for releasing on bail a person arrested on an accusation of having committed contravention of any rule or order made under the Rules, it must follow a fortiori that the same conditions must provide the guidelines while exercising the power to grant 'anticipatory bail' to a person apprehending arrest on such accusation, though they would not be strictly applicable. When a person apprehending arrest on an accusation of having committed contravention of any rule or order made under the Rules applies to the court for a direction under Section 438, the court should not ordinarily grant him 'anticipatory bail' under that section unless a notice has been issued to the prosecution giving it an opportunity to oppose the application and in case the contravention is of a rule or order specially notified in this behalf, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention. These would be reasonably effective safeguards against improper exercise of power of granting 'anticipatory bail' which might in conceivable cases turn out detrimental against public interest. When we say this, we must, of course, make it clear that we do not intend to lay down that in no case should an ex parte order of 'anticipatory bail' be made by the court. There may be facts and circumstances in a given case which may justify the making of an ex parte interim order of 'anticipatory bail' but in such an event, a short-dated notice should be issued and the final order should be passed only after giving an opportunity to the prosecution to be heard in opposition.

6. Here in the present case, the High Court took the view, following its earlier decisions in Criminal Revision 285 of 1974 (State v. Shantilal) and Criminal Revision 286 of 1974 (State v. Manoharlal), that the court of session had no jurisdiction to grant 'anticipatory bail' by reason of Rule 184 and on this view, did not consider the application of the appellant for 'anticipatory bail' on merits. Since we are taking the view that the power conferred on a court of session or a High Court under Section 438 to grant 'anticipatory bail' is not taken away by Rule 184 in case of persons apprehending arrest on an accusation of having committed contravention of any rule or order made under the Rules, we must set aside the order of the High Court and send the matter back to the High Court for deciding the appellant's application for 'anticipatory bail' on merits.

7. We accordingly allow the appeal, set aside the order made by the High Court and remand the case to the High Court with a direction that the application of the appellant for 'anticipatory bail' should be decided on merits after hearing the parties in the light of the observations made in this judgment. The parties are directed to appear before the High Court on November 22, 1976 so as to enable the High Court to take up the application for hearing. The appellant is already on bail and we direct that until his application for 'anticipatory bail' is disposed of by the High Court, he will continue on bail.

Fazal Ali, J. (concurring) -

This is an appeal by special leave against the order of the Madhya Pradesh High Court dated September 30, 1975 dismissing the application of the petitioner in limine. In fact the High Court of Madhya Pradesh, following an earlier decision of that court given in Criminal Revision 285 of 1974 and 286 of 1974 date April 15, 1975, held that as the matter was fully covered by those two authorities, the petition merited summary rejection. Thereafter the a petitioner filed an application for special leave which having been granted, the appeal has now been placed before us.

9. The circumstances under which the appeal arises may be detailed as follows :

9A. The petitioner was a businessman of Nowgong Contonment carrying on the retail business of kirana merchandise and other things for a large number of years and had been maintaining proper accounts regarding the sale of kerosene oil and other articles. On July 23, 1975 a magistrate along with the Food Inspector and a number of police officers visited the shop of the petitioner and took possession of his account book and started verifying their correctness. The same party made a second visit to the shop of the petitioner on July 25, 1975 and took away bahikhatas and rokar kept in the shop of the petitioner. After preparing a seizure memo, a copy of the same was given to one Nathuram a relation of the petitioner, the petitioner being absent on that day. Having regard to these facts, the petitioner who had a genuine apprehension that he might be arrested, for contravention of the provisions of the Defence of India Act and the Rules made thereunder which admittedly was a non-bailable offence, approached the Sessions Judge for passing an order for anticipatory bail under the provisions of Section 438 of the Code of Criminal Procedure, 1973. This application having been rejected by the Sessions Judge, the petitioner moved the High Court and that too unsuccessfully. Hence this appeal by special leave.

10. We are not at all concerned in this appeal regarding the merits of the case because the High Court has not gone into merits but has rejected the application on the ground, that it was not maintainable as held by the Division Bench decision of the Madhya Pradesh High Court. Thus the only point which arises for consideration before us is :

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

The Madhya Pradesh High Court has taken the view that the Defence and Internal Security of India Act, 1971 - hereinafter referred to as 'the Act' and the Defence and Internal Security of India Rules, 1971 - hereinafter referred to as 'the Rules' made thereunder being a sort of emergency legislation are special law which repeals and overrides the provisions of the Code of Criminal Procedure, 1973 - hereinafter referred to as 'the Code' - insofar as they are inconsistent with the provisions of the Rules. In other words, the High Court thought that in view of the express provisions of Rule 184(a) and (b) of the Rules, no question of anticipatory bail arose, and, therefore, Section 438 of the Code stood superseded insofar as offences under Rule 184(a) and (b) were concerned.

11. Mr. V. M. Tarkunde learned counsel for the appellant has contended that the view taken by the Madhya Pradesh High Court is legally erroneous and is based on a wrong interpretation of the two

provisions in question. He submitted that Section 438 of the Code and Rule 184 of the Rule cannot be read in isolation but in conjunction with the conditions laid down in Rule 184 clauses (a) and (b) of the Rules and once this is done there would be no real inconsistency between the two provisions and the question of one repealing the other would not arise. Mr. Ram Panjwani, learned counsel for the respondent, however, supported the stand taken by the High Court of Madhya Pradesh and argued that having regard to the scheme of the Act and the Rules made thereunder, this was a summary legislation with a completely exhaustive and self-contained Code and there was absolutely no justification for applying the provisions of the Code of Criminal Procedure which was the general law.

12. In order to appreciate the contentions raised by counsel for the parties it may be necessary for us to examine the object and scheme of the Code as also of the Act and the Rules made thereunder particularly with respect to the impugned provisions. So far as the Act is concerned, this Act was passed by Act XLII of 1971 on December 4, 1971 at a time when the proclamation of emergency had already been issued by the President under clause (1) of Article 352 of the Constitution. The preamble to the Act reads thus :

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

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

37. The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

This Section thus expressly overrules or repeals any provision which is inconsistent with the Act or the Rules. Another important provision which must be noticed is Section 38 of the Act which runs thus :

38. Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence and the internal security.

The effect of Section 38 which contains a mandate to the authority acting under the provisions of the Act from interfering with the ordinary avocations of life and enjoyment of property as little as possible clearly shows that the rigours of the Act have been softened to a great extent by limiting the actions of the authorities within the four corners of the express provisions of the Act. Legislature never intended that any drastic action should be taken by the authorities which may interfere with

the liberty of the subject unless it was absolutely essential. We have referred to this provision particularly because the question with which we are concerned involves the interpretation and applicability of Section 438 which relates to the liberty of the citizen vis-a-vis the provisions of the Act and the Rules. Against the background of this important provision of the Act, we have to follow the rule of harmonious construction so as to avoid an interpretation which makes this provision (which is for protection of the liberty of the citizen) come into conflict with the Act or the Rules made thereunder, unless such intention is clearly expressed or implied by the legislature. The Act further contains provisions for constitution of special courts to try particular type of offences, but the procedure is the same as provided for in the Code. As, however, no such courts have been constituted in the State of Madhya Pradesh, it is not necessary for us to dilate on this point. Suffice it to say, that apart from the non-obstante clause in Rule 184 of the Rules, we are not concerned with any other provision of the Code which may have been repealed either directly or indirectly by Rule 184. The question, therefore, that arises in this case is whether or not Rule 184 of the Rules overrides the provisions of Sections 436 and 438 of the Code. In other words, we have to decide whether Rule 184 of the Rules is in any way inconsistent with the provisions of Section 436 and 438 of the Code. It may be mentioned here that even the offences created under the Act or the Rules made thereunder are to be tried under the general law, namely, the Code with certain modifications, and even in respect of these offences the general law has not been repealed.

13. The Defence of India Act was amended by Ordinance 5 of 1975 dated June 30, 1975 which was later replaced by Act 32 of 1975 dated July 31, 1975 and the Act was known as the Defence and Internal Security of India Act, 1971. Rule 184 of the Rules runs thus :

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

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

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

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

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

(2) it merely lays down certain conditions which have to be followed before an order for bail could be passed in favour of an accused; and

(3) that unlike Section 438 of the Code this rule applies not only to non-bailable offences but also to bailable offences.

The High Court was of the opinion that in view of this particular distinction between bailable and non-bailable offences which have been expressly made in Section 438 of the Code, and having

regard to the conditions incorporated in Rule 184 (a) and (b), Section 438 of the Code is repealed by this rule as being inconsistent with it. We are, however, unable to agree with the conclusion reached by the High Court for the reasons which we shall give hereafter.

14. To begin with Section 438 of the Code applies only to non-bailable offences. Secondly, the only authorities which are empowered under this section to grant bail are the court of session or the High Court. In view of the fact that an order for anticipatory bail is an extraordinary remedy available in special cases, this power has been conferred on the higher echelons of judicial service, namely, the court of session or the High Court. Another important consideration which flows from the interpretation of Section 438 of the Code is that this section does not contain any guidelines for passing an order of anticipatory bail. We, might, however, mention here that the term 'anticipatory bail' is really a misnomer, because what the section contemplates is not anticipatory bail, but merely an order releasing an accused on bail in the event of his arrest. It is manifest that there can be no question of bail, unless a person is under detention or custody. In these circumstances, therefore, there can be no question of a person being released on bail if he has not been arrested or placed in police custody. Section 438 of the Code expressly prescribes that any order passed under that section would be effective only after the accused has been arrested. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Sessions Judge or the High Court, he would be released immediately without having to undergo the rigours of jail even for a few days which would necessarily be taken up if he has to apply for bail after arrest.

15. Before, however, we dwell on the real concept of Section 438 of the Code, we would like to indicate the circumstances in which this section was added to the new Code of Criminal Procedure, 1973. Prior to the new Code there was no provision for an order of anticipatory bail in the Code, and there appeared to be a serious divergence of judicial opinion on the question whether or not a court had the power to pass an order for anticipatory bail. Some of the High Courts held that the courts did possess the power, while the other High Courts held that the courts did not. It is not necessary for us now to decide as to which view is correct. The controversy, that existed before has now been set at rest by enacting Section 438 in the new Code of Criminal Procedure. While the Bill was in the Lok Sabha, Shri Ram Niwas Mirdha the concerned minister detailed the various objects of the amendments and one of the observations made by him was that by virtue of the new amendment there was liberalisation of bail provisions. The relevant part in paragraph 2 of the Statement of Objects and Reasons published in the Gazette of India Extraordinary Part II - Section 2 dated December 10, 1970 at p. 1309 runs thus :

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

Apart from this, the clausewise objects and reasons with respect to Section 438 of the Code (which was Clause 447 in the Bill) run thus :

As recommended by the Commission, a new provision is being made enabling the superior courts to grant anticipatory bail, i. e., a direction to release a person on bail issued even before the person is arrested. With a view to avoid the possibility of the person hampering the investigation, special provision is being made that the court

granting anticipatory bail may impose such conditions as it thinks fit. These conditions may be that a person shall make himself available to the investigating officer as and when required and shall not do anything to hamper investigation.

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

39.9. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

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

31. The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendations made by the previous Commission (41st Report). We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one. Further the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the Court is satisfied that such a direction is necessary in the interests of justice.

It would thus appear that while the Law Commission recommended that provision for an order of anticipatory bail to be effective when a person is arrested should be made, at the same time it stressed that this being an extraordinary power should be exercised sparingly and only in special cases. It also recommended that this power should not be exercised without giving notice to the other side. We think, this is why the legislature has entrusted this power to high authorities like the Sessions Judge and the High Court and we also feel that in the interests of justice it would be desirable if a final order is made only after hearing the prosecution. Although this condition is not mentioned in Section 438 of the Code, but having regard to the setting in which the section is placed and the statement of the objects and reasons which is actually based on the recommendations of the Law Commission, we think that rule of prudence requires that notice should be given to the other side before passing a final order for anticipatory bail so that wrong order of anticipatory bail is not obtained by a party by placing incorrect or misleading facts or suppressing material facts. We hope that in future the courts will exercise this power keeping out observations in view. We may of course point out that in emergent (sic) cases the courts may make an interim order of anticipatory bail before issuing notice to the other side. From what has been said it is clear that the intention of the

legislature in enshrining the salutary provision in Section 438 of the Code which applies only to non-bailable offences was to see that the liberty of the subject is not put in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible persons or officers who may sometimes be in charge of prosecution. Now if the intention of the legislature were that the provisions of Section 438 should not be applicable in cases falling within Rule 184, it is difficult to see why the legislature should not have expressly saved Rule 184 which was already there when the new Code of 1973 was enacted and excepted Rule 184 out of the ambit of Section 438. In other words, if the intention of provision of Rule 184 of the Rules were to override the provisions of Section 438 of the Code, then the legislature should have expressly stated in so many words that the provisions of Section 438 of the Code shall not apply to offences contemplated by Rule 184 of the Rules. There is, however, no such provision in the Code. In these circumstances, therefore, the legislature in its wisdom 'left it to the court to bring about a harmonious construction of the two statutes so that the two may work and stand together. This is also fully in consonance with the principles laid down by this Court in construing the non-obstante clauses in the statutes. In *Northern India Caterers Pvt. Ltd. v. State of Punjab* ((1967) 3 SCR 399 : AIR 1967 SC 1581), this court observed thus :

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

Thus one of the main tests pointed out by the court was that the court while interpreting the statutes concerned must infer repeal by the latter statute only if it causes inconvenience or where it is couched in an affirmative or negative terms. Maxwell on Interpretation of Statutes, 11th Edn., p. 162 observed :

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

We think it is reasonable to presume that the legislature does not intend to keep contradictory enactments on the statute book and, therefore, a construction should be accepted which offers an escape from it. Similarly in an earlier case in *Aswini Kumar Ghosh v. Arabinda Bose* (1953 SCR 1 : AIR 1952 SC 369) this Court laid down the proper approach in interpreting a non-obstante clause and observed thus :

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

16. Having regard to the principles enunciated above, we feel that there does not appear to be any direct conflict between the provisions of Rule 184 of the Rules and Section 438 of the Code. However, we hold that the conditions required by Rule 184 of the Rules must be impliedly imported in Section 438 of the Code so as to form the main guidelines which have to be followed while the court exercises its power under Section 438 of the Code in offences contemplated by Rule 184 of

the Rules. Such an interpretation would meet the ends of justice, avoid all possible anomalies and would at the same time ensure and protect the liberty of the subject which appears to be the real intention of the legislature in enshrining Section 438 as a new provision for the first time in the Code. We think that there is no real inconsistency between Section 438 of the Code and Rule 184 of the Rules and, therefore, the non-obstante clause cannot be interpreted in a manner so as to repeal or override the provisions of Section 438 of the Code in respect of cases where Rules 184 of the Rules applies.

17. We have already stated that Section 438 of the Code does not contain the conditions on which the order for anticipatory bail could be passed. As section 438 immediately follows Section 437 which is the main provision for bail in respect of non-bailable offences it is manifest that the conditions imposed by Section 437 (1) are implicitly contained in Section 438 of the Code. Otherwise that result would be that a person who is accused of murder can get away under Section 438 by obtaining an order for anticipatory bail without the necessity of providing that there were reasonable grounds for believing that he was not guilty of offence punishable with death or imprisonment for life. Such a course would render the provisions of Section 437 nugatory and will give a free licence to the accused persons charged with non-bailable offences to get easy bail by approaching the court under Section 438 and bypassing Section 437 of the Code. This, we feel, could never have been the intention of the legislature. Section 438 does not contain unguided or uncanalised powers to pass an order for anticipatory bail, but such an order being of an exceptional type can only be passed if, apart from the conditions mentioned in Section 437, there is a special case made out for passing the order. The words "for a direction under this section" and "Court, may, if it thinks fit, direct" clearly show that the court has to be guided by a large number of considerations including those mentioned in Section 437 of the Code. When a court is dealing with offences contemplated by Rule 184 of the Rules, then it is obvious that though the offences are not punishable with death or imprisonment for life so as to attract the provisions of Section 437, the conditions laid down by Rule 184 of the Rules would have to be complied with before an order under Section 438 of the Code could be passed. In other words, the words "for a direction under this section" and "Court may, if it thinks fit, direct" would impliedly contain a statutory mandate to the court in the shape of conditions mentioned in clauses (a) and (b) of Rules 184 of the Rules, viz. (1) that the opportunity would be given to the prosecution to oppose the application for anticipatory bail; and (2) the court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of the contravention of the Rules. While giving finding on this the court will have to take into consideration that under the provisions of the Rules once contravention is alleged the onus lies on the accused to prove that there has been no such contravention. If we construe the two provisions in this manner, then there would be really no inconsistency between Section 438 of the Code and Rule 184 of the Rules and both the provisions can coexist without coming into conflict with each other. Furthermore, Rule 184 would apply the moment the accused person is taken in custody and as an order passed under Section 438 of the Code cannot be effective until the person is taken in custody. It is therefore obvious that the conditions mentioned in Rule 184 clauses (a) and (b) start applying the moment the accused is taken in custody, and if an order under Section 438 of the Code has been passed in his favour he would be released at once.

18. The legislatures never intended that while in such serious offences like murder or those punishable with death or imprisonment for life the accused should have the facility of an order of anticipatory bail, in offences of a less severe kind he should be denied benefit of Section 438 of the Code by invoking Rule 184 of the Rules.

19. The learned counsel for the appellant strongly relied on a decision of the Calcutta High Court in

Badri Prasad v. State (AIR 1953 Cal 28 : ILR (1953) 1 Cal 280 : 54 Cri LJ 198) where the court was considering the provisions of Section 13A of the Essential Supplies (Temporary Powers) Act, 1946 which were couched almost in the same language as Rule 184 (b) of the Rules and the court pointed out that there was no conflict between Section 13A and Section 497 of the Code of Criminal Procedure and Section 13A can only be regarded as an extension of Section 497 of the Code by incorporating the conditions mentioned therein in Section 497 of the Code. In this connection the court observed as follows :

Under Section 497, Cr. P. C. therefore, the court has also to consider reasonable grounds for belief But in a case, however, under Section 13A, Essential Supplies Act, it is the converse and more difficult case of reasonable ground for believing that the applicant for bail is not guilty Its effect is that Section 13A, Essential Supplies Act, represents a new species of non-bailable offence with its own rules for bail and that section, therefore, is an extension of Section 497, Cr. P. C.

20. As against this Mr. Ram Panjwani relied on a few decisions of the Madras, Bombay and Patna High Courts in support of the view that the previous section in the Defence of India Rules which was couched almost in the same language as Rule 184 of the Rules was held to have overruled the provisions of Section 497 of the old Code of Criminal Procedure. Reliance was placed on *In re V. Bhuvanarsha Iyengar* (AIR 1942 Mad 221, 223 : ILR 1942 Mad 414 : 43 Cri LJ 447) where the court was dealing with Rule 130A of the old Defence of India Rules and observed as follows :

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

This case is clearly distinguishable, because in the first place in the old Code of Criminal Procedure there was no provision for anticipatory bail at all and, therefore, the question that falls for consideration in the present case never arose in that case at all. Secondly, the court has not considered the aspect which we have pointed out in the present case by holding that in view of the object of the new Code the provisions of Rule 184 clause (a) and (b) have to be impliedly imported into Section 438 of the Code. In these circumstances, therefore, this decision does not appear to be of any assistance to the counsel for the respondent.

21. Reliance was then placed on a decision of the Bombay High Court in *In re Surajlal Harilal Majumdar* (AIR 1943 Bom 82 : ILR 1943 Bom 167 : 44 Cri LJ 399) and particularly to the following observations :

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

Here also the court does not expressly hold that the provisions of Section 496 were completely repealed by Rule 130A of the old Defence of India Rules, but merely held that the said rule will be overruled only to the extent that the court would have to give an opportunity to the prosecution to oppose the application before granting bail. This decision, therefore, does not take the view contrary to the one which we have taken in this case.

22. Lastly reliance was placed on a decision of the Patna High Court in *Saligram Singh v. Emperor* (AIR 1945 Pat 69 : ILR 23 Pat 22 : 46 Cri LJ 420) which also took almost the same view as the Bombay High Court. At any rate, these decisions have absolutely no bearing on the specific question which we are considering in this particular case, because the provision of Section 438 of the Code is an absolutely new one and did not at all exist when the cases cited by the learned counsel for the respondent were decided. We might like to indicate clearly that in the instant case we are only considering whether the provisions of Rule 148 clauses (a) and (b) of the Rules are inconsistent with Section 438 of the Code and the question whether provisions of Rule 184 are inconsistent with any other provision of the Code does not fall for determination in this case.

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

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

25. For the reason given above, we hold as under :

(1) that Section 438 of the Code has not been repealed or overruled by Rule 184 of the Rules but the two have to be read harmoniously without interfering with the spheres contemplated by each of those provisions. In fact Rule 184 of the Rules is only supplemental to Section 438 of the Code and contains the guidelines which have to be followed by the court in passing orders for anticipatory bail in relation to cases covered by Rule 184 of the Rules;

(2) that there is no real inconsistency between Section 438 of the Code and Rules 184

of the Rules;

(3) that Section 438 of the Code is an extraordinary remedy and should be resorted to only in special cases. It would be desirable if the court before passing an order under Section 438 of the Code issues notice to the prosecution to get a clear picture of the entire situation; and

(4) that in cases covered by Rule 184 of the Rules the court exercising power under Section 436 or Section 438 of the Code has not to comply with the conditions mentioned in clauses (a) and (b) of Rule 184 and only after the court has complied with those conditions that an order under any of these sections of the Code in respect of such offences could be passed.

26. For these reasons, therefore, we think that the High Court of Madhya Pradesh in the instant case, as also in its Division bench decisions in Criminal Revision 285 of 1974 (State v. Shantilal) and Criminal Revision 286 to 1974 (State v. Manoharlal) mentioned in the order under appeal, was wrong in law, and therefore these decisions are hereby overruled.

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

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