SUPREME COURT OF INDIA

Nirmal Jeet Kaur

Vs.

The State of M.P.

Crl.A.No.978 of 2004

(A Pasayat and C.K. Thakker JJ.)

01.09.2004

JUDGMENT

ARIJIT PASAYAT,J.

Leave granted.

Protection to the respondent no.2 Dr. Harminder Singh Bhawara under Section 438 of the Code of Criminal Procedure 1973 (in short the 'Code') is assailed by the appellant.

A brief reference to the factual aspects would suffice.

Appellant and respondent no.2 entered into a wedlock on 11.5.1997. Alleging that she has been subjected to physical and mental torture for not satisfying the demand for dowry, a complaint was lodged at Women Police Station, Jabalpur (Madhya Pradesh) on 24.2.2003 by the appellant. She alleged commission of offences punishable under Sections 498A and 506 read with Section 34 of the Indian Penal Code 1860 (for short the 'IPC') and Sections 3 and 4 of the Dowry Prohibition Act, 1961 (in short the 'Dowry Act') against respondent no.2 and some of his relatives. On 29.4.2003 respondent no.2 filed an application for protection in terms of Section 438 of the Code before the High Court of Madhya Pradesh, Jabalpur Bench, which was registered as Misc. Crl. Case No. 2890/2003. By order dated 15.5.2003 the High Court disposed of the application to the following directions:

"(i) That the petitioner shall make himself available to the police for investigation in connection with the above offences as and when required in this behalf;

(ii) That the petitioner shall not, directly or indirectly, tamper with the prosecution evidence.

(iii) The petitioner may approach the appropriate court within the period of four weeks for regular bail."

It appears that respondent no.2 applied for regular bail before the Judicial Magistrate, First Class, Jabalpur, which was rejected. On 5.6.2003 prayer for bail was made before the Sessions Court, Jabalpur, but that also was rejected. On 7.6.2003 respondent no.2 filed an application in terms of Section 439 of the Code before the High Court. On 12.6.2003 the matter was listed before the vacation Judge. The matter was adjourned to 16.6.2003 when the impugned order was passed. The same reads as follows:

"This Court on 15.5.2003 in M. Cr. C.No. 2890/2003 allowed the application for bail for a period of four weeks. Looking to the nature of the case, the application of ad-interim anticipatory bail is hereby allowed on the condition of furnishing a personal bond of Rs.20,000/- with one surety of the like amount to the satisfaction of the station Officer In-charge concerned."

According to the appellant M. Cr. C no.3697/2003 which was filed in terms of Section 439 of the Code is still pending. The case diary was called for and in M.(Crl.)P. No.2734/2003 the order as quoted above has been passed.

According to the learned counsel for the appellant the impugned order is clearly at variance with the earlier order dated 15.5.2003. By the said order the application in terms of Section 438 of the Code was disposed of and four weeks time was granted to respondent no.2 for making application in terms of Section 439 of the Code. The period was over by the time the High Court passed the subsequent order. It is a blanket order extending the ad-interim arrangement indicated in the earlier order. Since the period indicated in the earlier order was over and the respondent no.2 is not in custody in terms of Section 439 of the Code, the order is clearly not maintainable. Learned counsel for the State of Madhya Pradesh supported the stand of the appellant.

Per contra, learned counsel for the respondent No. 2 submitted that in view of what has been stated in K.L. Verma v. State and Another (1996 (7) SCALE 20), protection given by the High Court is clearly in order. It was submitted that for the purpose of making an application in terms of Section 439 of the Code, when the same is pursuant to an order passed on application under Section 438 of the Code, it is not necessary that the applicant should be in custody.

Sections 438 and 439 operate in different fields. Section 439 of the Code reads as follows:

"439. (1) A High Court or Court of Session may direct –

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

(b) that any condition imposed by the Magistrate when releasing any person on bail be set aside or modified."

(underlined for emphasis)

It is clear from a bare reading of the provisions that for making an application in terms of Section 439 of the Code a person has to be in custody. Section 438 of the Code deals with "Direction for grant of bail to person apprehending arrest". In Bal Chand Jain v. State of M.P. (1976) 4 SCC 572) it was observed that the expression "anticipatory bail" is really a misnomer because what Section 438 contemplates is not an anticipator bail, but merely an order directing the release of an accused on bail on the event of his arrest. It is, therefore, manifest that there is no question of bail unless a person is arrested in connection with a non-bailable offence by the police. The distinction between an order in terms of Section 438 and that in terms of Section 439 is that the latter is passed after arrest whereas former is passed in anticipation of arrest and become effective at the very moment of arrest. (See Gur Baksh Singh v. State of Punjab (1980) 2 SCC 565).

In Salauddin Abdulsamad Shaikh v. State of Maharashtra (AIR 1996 SC 1042) it was observed as follows:

"Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Sessions 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".

(Emphasis supplied)

In K.L. Verma's case (supra) this Court observed as follows:

"This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed. It was, therefore, pointed out that it was 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. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may

extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire."

(Emphasis supplied)

The reference to this Court's observation as quoted above was to Salauddin's case (supra).

The grey area according to us is the following part of the judgment in K.L. Verma's case (supra) "or even a few days thereafter to enable the accused persons to move the Higher Court, if they so desire".

Obviously, the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is "in custody". In K.L. Verma's case (supra) reference was made to Salauddin's case (supra). In the said case there was no such indication as given in K.L. Verma's case (supra), that a few days can be granted to the accused to move the higher Court if they so desire. The statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation.

In view of the clear language of Section 439 and in view of the decision of this Court in Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors. (AIR 1980 SC 785), there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.

The crucial question is when a person is in custody, within the meaning of Section 439 Criminal Procedure Code? 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 to an officer with coercive power is in custody for the purpose of Section 439. The 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 dubieties are unfair evasions of the straightforwardness of the law.

Since the expression "custody" though used in various provisions of the Code, including Section 439, has not been defined in the Code, it has to be understood in setting in which it is used and the provisions contained in Section 437 which relates to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterized as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate.

In Black's Law Dictionary by Henry Campbell Black, M.A. (Sixth Edn.), the expression "custody"

has been explained in the following manner:

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

It is to be noted that in K.L. Verma's case (supra) the Court only indicated that time may be extended to "move" the higher court. In Black's Law Dictionary the said expression has been explained as follows:

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

In Salauddin's case (supra) also this Court observed that the regular Court has to be moved for bail. Obviously, an application under Section 439 of the Code must be in a manner in accordance with law and accused seeking remedy under Section 439 must ensure that it would be lawful for the Court to deal with the application. Unless the applicant is in custody his making application only under Section 439 of the Code will not confer jurisdiction on the Court to which the application is made. The view regarding extension of time to "move" the higher Court as culled out from the decision in K.L. Verma's case (supra) shall have to be treated as having been rendered per incuriam, as no reference was made to the prescription in Section 439 requiring the accused to be in custody. In State through S.P. New Delhi v. Ratan Lal Arora (2004) 4 SCC 590) it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedent value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of.

"Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All E.R. 293, is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short the 'Constitution') which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. and another v. Synthetics and Chemicals Ltd. and another (1991) 4 SCC 139). To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience.

For making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in Salauddin's case (supra) the protection in terms of Section 438 is for a limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.

If the protective umbrella of Section 438 is extended beyond what was laid down in Salauddin's case

(supra) the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies upto higher Courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner.

In the aforesaid background, the protection given to the respondent no.2 by the High Court while the application under Section 439 of the Code is pending is clearly unsustainable. Respondent no.2 would surrender to custody as required in law so that his application under Section 439 of the Code can be taken for disposal. We are very sure that the High Court will take up the matter for disposal in accordance with law immediately after the respondent no.2 is in custody as required under Section 439 of the Code. We make it clear that we are not expressing any opinion on the merits of the matter.

The appeal is allowed to the extent indicated.