



Citation : CDJ 2004 MHC 2138

Court : High Court of Judicature at Madras

Case No : CrI.O.P.No. 8119 of 2004

Judges : THE HONOURABLE MR. JUSTICE A.K. RAJAN

Parties : R. Sarathkumar Versus The Inspector of Police, C-9, Police Station, Neelankarai, Cheenai

Appearing Advocates : For the Appearing Parties: K. Ramu, L. Murali Krishnan, I. Subramanian, Public Prosecutor, Advocates.

Date of Judgment : 10-03-2004

Head Note :

Criminal Procedure Code (II of 1974) - Section 70 -

Cases referred to:

Bharat Chaudhary v. State of Bihar 2003 S.C.C. (Crl.) 1953 [Paras. 6, 31]

Francis Xavier v. Neelamegam, Inspector of Police [1995] 2 M.W.N. (Crl.) 114 [Para. 6]

Manickam v. Inspector of Police, Kumara-palayam [1994] 2 L.W. (Crl.) 764 [Para. 6]

Natturasu v. State 1998 CrI.L.J. 1762 [Para. 6]

Budhan Choudhary v. State of Bihar 1955 S.C.J. 163; A.I.R. 1955 S.C. 191 [Para. 8]

Krishnan Singh v. Rajasthan A.I.R. 1955 S.C. 795 [Para. 8]

Karuthan Ambalam IN RE. I.L.R. 38 Mad. 1088 [Paras. 10, 20]

The Government of Assam v. Sahebulla 27 C.W.N. 857 [Para. 10]

Morula Sidda Sivamulu v. Emperor 1911 M.W.N. 452 [Paras. 19, 21]

Comparative Citation:

2004 (1) MLJ(Crl) 421,

Judgment :

1. This is a petition for anticipatory bail, in a case under Sec. 138, Negotiable Instruments Act.

2. In the petition it is stated that one Ramesh has lodged a false complaint under Sec. 138 of the Negotiable Instruments Act, before IX Metropolitan Magistrate, Saidapet, Chennai, in C.C.No.1949 of 2003 against the petitioner. The learned counsel for the petitioner states that the matter was compromised on 24.3.2003, and the complainant agreed to withdraw the complaint on receiving Rs.30,00,000 and had also received the said sum. The complainant had also agreed not to proceed with the complaint and agreed to withdraw the same. Further, summons in this case was not served on the petitioner. Believing the words of the complainant, the petitioner did not appear before the Court. When the petitioner came to know that a non-bailable warrant had been issued by the Court as if the summons had been personally served on him, he was shocked. He apprehends that he may be arrested by executing the warrant. Hence, he has filed this petition.

3. The learned counsel for the petitioner states that the warrant has been issued mechanically; that he is prepared to be available for interrogation, on prior notice, and that he is ready to cooperate with the investigation; and that he is prepared to abide by any condition that may be imposed by this Court, in the event of his being enlarged on anticipatory bail.

4. No counter has been filed by the respondent. The learned Public Prosecutor submits that the provisions of Sec.438, CrI.P.C. can be resorted to only in case of a non-bailable offence. The offence under Sec.138, Negotiable Instruments Act is punishable with imprisonment for two years, and therefore the offence is bailable and hence anticipatory bail cannot be granted. On that ground alone the petition is liable to be dismissed.

5. Mr.K.Ramu, the learned counsel for the petitioner, submits that though it is a bailable offence, the Magistrate has issued non-bailable warrant; hence the petitioner is entitled for anticipatory bail, and there is no prohibition for granting anticipatory bail.

6. Mr.I.Subramanian, the learned Public Prosecutor, points out that the Supreme Court in *Bharat Chaudhary v. State of Bihar* 2003 S.C.C. (CrI.) 1953 has held that-

“The object of Sec.438 is to prevent undue harassment of the accused persons by pretrial arrest and detention. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail. So also the need for custodial interrogation, but these are only factors that must be borne in mind by the Courts concerned while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance of filing of a charge-sheet cannot by itself be construed as a prohibition against the grant of anticipatory bail. The Courts i.e., the Court of Sessions, High Court or Supreme Court have the necessary power vested in them to grant anticipatory bail in the non-bailable offences under Sec.438, CrI.P.C. even when cognizance is taken or a charge-sheet is filed provided the facts of the case require the Court to do so.”

That is, even after taking cognizance the Courts can grant anticipatory bail; but only in non-bailable offences. Therefore for bailable offences, Sec.438, CrI.P.C. does not come to the help the petitioner.

The learned Public Prosecutor also refers to an earlier judgment of this Court by Ali Mohammed, J. in *Francis Xavier v. Neela-megam, Inspector of Police* (1995)2 M.W.N. (CrI.) 114 to the effect that even after filing of charge sheet, anticipatory bail can be granted in a non-bailable offence. In *Manickam v. Inspector of Police, Kumarapalayam* (1994)2 L.W. (CrI.) 764, Janardanam, J. has observed that—

“The offence under Sec. 138, Negotiable Instruments Act, being bailable, it behoves upon the Superintendent of Police, Salem to whom the endorsement had been endorsed for the purpose of execution, to very well take security under Sec.71 and forward the security he had so taken from the petitioner to the Court concerned with a direction to the petitioner to appear before the said Court on the date prescribed in the warrant...”

In *Natturasu v. State* 1998 CrI.L.J. 1762, M.Karpagavinayagam, J. held that:

“The only criteria for Sec.438 is the apprehension of arrest on an accusation of non-bailable offence either by the police or by the Magistrate irrespective of the stage of the proceedings initiated against him.”

Therefore, the learned Public Prosecutor submitted, that only when an endorsement as under Sec.71, CrI.P.C. is made in the warrant of arrest security can be taken by the police officer who makes the arrest. In the absence of such an endorsement, the petitioner cannot be released under Sec.438,

Crl.P.C. on anticipatory bail since the offence is only bailable.

7. Sec. 138, Negotiable Instruments Act unconstitutional—The learned counsel for the petitioner submits that Sec. 138 of the Negotiable Instruments Act was introduced in the year 1988, thereby an erstwhile civil liability was converted as a criminal liability. Though the Negotiable Instruments Act defines cheque, promissory note and bill of exchange as “negotiable instruments”, only the cheque is given a pride of place and treated differently, under Sec. 138 of the Act. But mere dishonour of cheque is not an offence; only when the notice of demand to pay the amount is not complied with, it becomes an offence. Even in case of a promissory note, the amount is payable on demand. Therefore, when the demand is made on the basis of a promissory note, and if the demand is not complied with, it should also be made an offence. But, in such cases non satisfaction of the demand on the basis of the promissory note, Sec. 138 of the Negotiable Instruments Act is not attracted and therefore Sec.138 is arbitrary and violative of equality before law and equal protection of laws guaranteed by Art. 14 of the Constitution of India.

8. This argument of the learned counsel for the petitioner has force. Under Sec. 138, Negotiable Instruments Act, the offence is not complete immediately when the cheque is dishonoured. After the dishonouring of the cheque, a notice to pay the amount shall be served on the drawer of the cheque. If the amount of the cheque is not paid even after notice, it becomes an offence under Sec.138 of the Act. So also in a case of promissory note (to which also all the presumptions specified under Sec. 118, Negotiable Instruments Act applies) the amount is payable on demand made by the promisee. But in the case of a promissory note, if the promisor fails to pay the amount after demand, it is not an offence under Sec.138 of the Negotiable Instruments Act, even though promissory note is also a negotiable instrument. Only in cases of issue of a cheque the non-payment is made an offence. That is, cheques are classified and treated differently. Such a classification appears invidious and arbitrary. Arbitrariness is ante-thesis of concept of equality before law and equal protection of the laws as held by the Honourable Supreme Court in a large number of cases. The classification of ‘cheques’ as one group and the promissory note as another group made under Sec. 138 of the Negotiable Instruments Act does not appear to satisfy the “twin-test” required for a valid classification under Art. 14 of the Constitution as laid by the Honourable Supreme Court in *Budhan Choudhary v. State of Bihar* 1955 S.C.J. 163 : A.I.R. 1955 S.C. 191 by a Bench of Seven Judges and reiterated in all subsequent judgments. In *Krishnan Singh v. Rajasthan* , A.I.R. 1955 S.C. 795, a Constitution Bench of the Supreme Court has held that Art. 14 prohibits unequal treatment of persons similarly situated. Therefore, out of the payees of a negotiable instruments, who are denied payments, inspite of a specific demand made in writing only the payees under a cheque is treated differently; the promisee under promissory note is not given the same benefit. Thus, there appears an invidious and a hostile discrimination between the payees under a cheque and promisee under a promissory note; after the demand was made, when the amount is payable when demanded. But, at this stage this Court cannot hold that the provisions of Sec. 138 of the Negotiable Instruments Act as unconstitutional, in view of the fact that the Supreme Court has already upheld the validity of the said Sec.138. Unless and until the Honourable Supreme Court reconsiders its view and hold differently, this Court is bound to enforce Sec. 138 of the Negotiable Instruments Act as it stands at present.

9. When and how warrant of arrest is to be issued:—The learned counsel for the petitioner next submitted that as per Sec.70, Crl.P.C. a warrant cannot be issued unless the Court is satisfied that the circumstances necessitates the issue of warrant of arrest. But, in this case there is no evidence that such satisfaction was arrived at by the Magistrates; and therefore the issue of warrant is illegal and cannot be executed.

10. In so far as this argument is concerned, this Court, as early as in 1914 in *Karuthan Ambalam* IN RE. , I.L.R. 38 Mad. 1088, has held as follows:

“The legislature requires in such a case that the reason for proceeding by warrant should be recorded

in writing. It is on this ground, that assuming the warrant was as a matter of fact purported to be issued under Sec.90 and assuming that it could lawfully be issued under the Section, it is a necessary preliminary for the exercise of the power that reasons should be given in writing; and failure to do so vitiates the warrant in my opinion.”

But, a Full Bench of the Calcutta High Court in *The Government of Assam v. Sahebulla* 27 C.W.N. 857 has held that the words “after recording its reasons in writing” are not mandatory but directory. The decision of the Full Bench of the Calcutta High Court has only a persuasive force whereas the decision of this Court has a binding force. This Court is therefore bound to follow *Karuthan Ambalam IN RE.*, I.L.R. 38 Mad. 1088, Therefore, when the Magistrate decides to issue warrant under Sec.70, CrI.P.C, reasons shall be given. A warrant issued without giving reasons in writing is illegal and not executable.

11. Considering the enormous number of cases filed under Sec.138 of the Negotiable Instruments Act, in every Magistrates’ Courts in Tamil Nadu the provisions with reference to issuing warrant of arrest under Sec. 138 of the Negotiable Instruments Act assumes great importance.

12. Violation of Sec. 138 Negotiable Instruments Act is a bailable offence as it is punishable with imprisonment which may extend to two years. As per Sec. 143 Negotiable Instruments Act, notwithstanding anything contained in the Code of Criminal Procedure, the offences are triable summarily in accordance with the provisions of Secs. 262 to 265, CrI.P.C. Yet, (even though it is summary trial) sentence can be imposed upto one year and more than Rs.5,000 may be imposed as fine. From this it is clear that only summary proceedings can be initiated and the trial of these offences are only in accordance with the provisions prescribed for the trial of summons cases.

13. Sec.204, CrI.P.C. deals with issue of process —

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be -

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2)

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under Sub-sec.(1) shall be accompanied by a copy of such complaint.

Even after the summons were served, if the respondent does not appear before the Court, Sec.87, CrI.P.C. is attracted.

“87. Issue of Warrant in Lieu of or in addition to, summons: A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest-

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to

admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.”

Therefore, under Sec.87, CrI.P.C. warrant is to be issued only after the summons are issued to make the respondent appear before the Court. Since the proceedings cannot be completed, unless the respondent appears before the Court, in order to make the respondent appear, a warrant may also be issued.

14. “Bailable”and “Non-Bailable” warrants:Secs.70 and 71 provides for issue of warrant of arrest, as follows:

“70. Form of warrant of arrest and duration:(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court. (2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

71. Power to direct security to be taken:(1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state-

(a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound;

(c) the time at which he is to attend before the Court

(3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.”

In this case, it is stated in the petition that a “non-bailable warrant” (NBW) has been issued. As per Form II, prescribed under CrI.P.C, only a “warrant of arrest” is prescribed; there is no such thing as “bailable warrant” or “non-bailable warrant” under the Code of Criminal Procedure. There are only “bailable offences” and “non-bailable offences”. In the common parlance when an endorsement as provided under Sec.71 is also incorporated in the warrant it is known as ‘bailable warrant’; if no such endorsement is incorporated in the warrant it is a “non-bailable warrant’. In the present case, since no such endorsement (as provided under Sec.71) has been made in the warrant, it is “non-bailable warrant’. When the “bailable warrants” are executed, the persons arrested shall be released by the police officer who executes the warrant after furnishing sureties as per the terms of the warrant. If the warrant is “non-bailable warrant” -the person shall be produced before the Magistrate.

15. The learned Public Prosecutor refers to Sec.76 and submits that the police officer or other person executing a warrant of arrest shall (subject to the provisions of Sec.71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person, and under the proviso to that section he shall be so produced before expiry of 24 hours excluding the time taken for travel to reach the Magistrate's Court. Therefore, when the non-bailable warrant is executed, even though the offence is bailable, he shall not be released after getting security before producing before the Magistrate.

16. The learned counsel for the petitioner refers to Sec.81, which prescribes the procedure when a

warrant is executed, which is as follows:

“81. Procedure by Magistrate before whom such person arrested is brought:(1) The Executive Magistrate or District Superintendent of Police or Commissioner of Police shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under Sec.71 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond, to the Court which issued the warrant:

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under Sec. 71.”

Relying upon this, the learned counsel for the petitioner submits that since the offence under Sec. 138 of the Negotiable Instruments Act is a bailable offence, the warrant should contain a provision for furnishing security to the police officer who executes the warrant of arrest. Even if the warrant does not contain the endorsement of Sec.71, CrI.P.C, as per Sec.81, the petitioner is entitled to give security and he is entitled for bail as it is a bailable offence.

17. The learned Public Prosecutor points out that Sec.81, CrI.P.C. is applicable only when a person is arrested outside the jurisdiction of the Court, which issued warrant. But when a person is arrested within the jurisdiction of the Court, Sec.81 does not come into play. This argument of the learned Public Prosecutor is acceptable. The provision of Sec.81 would apply only if he is arrested outside the jurisdiction of the Magistrate, and when he' is arrested within the jurisdiction of the Magistrate, Sec.81, CrI.P.C. has no application, and only Sec.76 will come into play.

18. But at the same time, a combined reading of Secs.76 and 81 would show that a person arrested by a warrant issued by a Magistrate for a bailable offence outside the jurisdiction of the Magistrate, shall be released on bail on furnishing security even when there is no endorsement as provided under Sec.71, CrI.P.C. But, if the same person is arrested within the jurisdiction, he is not entitled for such a bail. This is an anomalous situation. It is likely and possible that a person arrested by execution of warrant may not be produced immediately for some reason and the police may take the full 24 hours to produce before the Magistrate even though it would be possible to produce him within a few minutes.

19. As early as in 1911 in *Morula Sudda Sivamulu v. Emperor* 1911 M.W.N. 452 even though a warrant was issued for non-bailable offence, this Court has held (on the facts and circumstances of that case) that only a bailable warrant should have been issued. Therefore, this Court has taken a view as far back as in 1911 that even in cases of non-bailable offence, depending on the facts of the case only a bailable warrant shall be issued.

20. Under the Code of Criminal Procedure, there is no restriction to issue a “non-bailable warrant” for a bailable offence. At the same time, in view of the judgment of this Court In *re.Karuthan Ambalam*, I.L.R. 38 Mad. 1088, referred to above, the Magistrate concerned shall give reasons in writing for issuing warrant of arrest. While doing so, the Magistrate shall also decide whether a bailable warrant including the endorsement as provided under a Sec.71, CrI.P.C. or non-bailable warrant without endorsement as provided under Sec.71, CrI.P.C. should be issued, depending upon the facts and circumstances of each case. It cannot be lost sight of that the issue of a warrant for the offences under Sec. 138 of the Negotiable Instruments Act is only to make the respondent answer for the complaint filed against him. Only for that purpose, the respondent's appearance before the Court

is necessary. Since it is only a summons case and only the procedure of summary trial is to be adopted, summons were issued to the respondent to appear. Under Sec.87, CrI.P.C, warrants are issued “in lieu of, or in addition to summons” as seen from the marginal note. Therefore, before issuing a warrant, the Court (Magistrate) shall satisfy that the summons have already been served on the respondent; and also the Court must have reasons to believe that the petitioner has “absconded or will not obey the summons”; the Court must also satisfy that even after effecting service on him, no reasonable excuse was given. Only then the Court shall issue warrant. Even while issuing warrants, the purpose for which the warrant is issued cannot be lost sight of.

21. The power to issue warrant cannot be exercised mechanically. The purpose for which the warrant is issued in a case under Sec. 138 of the Negotiable Instruments Act is not to see the respondent behind the bars; but only to see that the respondent appears before the Court to answer the charges levelled against him. Therefore, when the Magistrate decides to issue a warrant of arrest under Sec.87, CrI.P.C, in a case under Sec.138 of the Negotiable Instruments Act, the Magistrate shall issue a warrant along with an endorsement as provided under Sec.71, CrI.P.C. This Court in *Morula Sidda Sivamulu v. Emperor*, 1911 M.W.N. 452 (as referred to above) has held that even in case of non-bailable offence, a bailable warrant should have been issued. It is to be noted that the Court had jealously protected the personal liberties prior to commencement of the Constitution of India. Now, the personal liberties of persons are protected in Art.21 of the Constitution of India. Therefore, non-bailable warrant shall not be issued in Sec. 138 of the Negotiable Instruments Act cases unless it is absolutely necessary and unless the Magistrate is satisfied that the respondent will not obey the bailable warrant or had absconded. Considering the fact that Sec. 138, Negotiable Instruments Act is a matter of dispute between two individuals relating to civil liabilities, though it is made an offence under the Act, the Magistrate shall always use his discretion in favour of the accused and issue only a “Bailable warrant” at the first instance (i.e.) with the endorsement as provided under Sec.71, CrI.P.C.

22. When a non-bailable warrant is executed outside the jurisdiction of the Magistrate, and if the offence is bailable, he can furnish security to the police officer and appear before the Magistrate on the date fixed by the Magistrate. There is no reason to deny the same, when the arrest is effected within the jurisdiction of the Magistrate. Such benefits can be given considering the fact that the person's personal liberties are affected and according to the constitution of India the personal liberty of a person cannot be deprived of whimsically.

23. Further in the *Sohoni's Code of Criminal Procedure* the opinion of the author is that “The provisions of Sec.71, CrI.P.C. would be applicable to the warrants issued under this Section”. (Sec.87). The very same view is also expressed by another author B.B.Mithra, *Code of Criminal Procedure*. Though this is not a judicial pronouncement by any of the Courts, this view of the authors is acceptable in view of Sec.90, CrI.P.C. which is as follows:

“90. Provisions of Chapter VI generally applicable to summonses and warrants of arrest: The provisions contained in this Chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.”

Chapter VI (Secs.61 to 90, CrI.P.C.) deals with PROCESSES TO COMPEL APPEARANCE; it has four sub-chapters:

- (A) Summons,
- (B) Warrant of arrest,
- (C) Proclamation and attachment, and

(D) Other rules regarding processes.

That is, Sec.90 provides that Secs.61 to 90, CrI.P.C. (contained in Chapter VI) relating to summons and warrant, and their issue, service and execution, shall apply to every summons and every warrant of arrest issued under this Code. In view of Sec.90, CrI.P.C, Secs.87 and 71, CrI.P.C. go together.

Therefore, every warrant of arrest issued for a bailable offence, at the first instance, shall contain the endorsement as provided under Sec.71, CrI.P.C. Only after service of such bailable warrant, if a person still fails to appear, a warrant of arrest without endorsement of Sec.71, CrI.P.C. -a non-bailable warrant, shall be issued.

24. This view is further fortified by the provisions of Sec.438, CrI.P.C. Sub-sec.(3), which runs as follows:

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

The words ‘such person’ found in Sub-clause 3 would mean the person who has been granted anticipatory bail by a Court for a non-bailable offence. Even when the offence is non-bailable, if a Magistrate taking cognizance of such offence decides that warrant should be issued, when the Court has granted anticipatory bail, shall issue only a bailable warrant in the first instance. Therefore, in a case of bailable offence when the Magistrate decides to issue a warrant, at the first instance, he shall issue only a bailable warrant, (i.e.), the warrant containing endorsement specified under Sec.71, CrI.P.C. Therefore, non-bailable warrant issued without a preceding bailable warrant where the offence is bailable, is not in accordance with the scheme of the criminal procedure code and hence illegal. Therefore, while exercising the power conferred under Sec.87, CrI.P.C. and issuing a warrant, in a case of bailable offence, the Magistrate shall always issue at the first instance a bailable warrant (including the endorsement provided under Sec.71, CrI.P.C). If the person does not appear before the Court even after execution of bailable warrant, then, and only then the Magistrate may issue a non-bailable warrant. Therefore, in all cases under Sec.138 of the Negotiable Instruments Act, though it is possible or there is no legal infirmity for the Magistrate to issue a non-bailable warrant for the reasons to be recorded in writing, yet, considering the bailable nature of the offence, under Sec. 138 of the Negotiable Instruments Act the Magistrate shall always issue “bailable warrant” at the first instance. For the above reasons there appears no reason or no circumstances warranting the issue of non-bailable warrant in this case.

25. Applicability of Sec.482, CrI.P.C:It is also seen Sec.70(2), CrI.P.C. provides that-

“Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.”

In view of this provision, a warrant issued by one Court cannot be cancelled by any other Court. Therefore, the warrant already issued, though it is not in conformity with the Code of Criminal Procedure, cannot, (sic.) But, under Sec.482, CrI.P.C, the High Court has got inherent power to pass any orders in the interests of justice, and thereby it can quash such a warrant. But, in this petition, there is no prayer for quashing the non-bailable warrant; the prayer in this petition is only for anticipatory bail.

26. The learned counsel for the petitioner states that originally he filed a petition under Sec.482,

Crl.P.C. to quash the warrant issued. Since the office returned it with an endorsement that such a petition is not maintainable, he filed the present petition seeking anticipatory bail. (He has also produced the original petition filed by him in S.R.No.12940 where the endorsement "the matter has been returned" by the offence is also found).

27. In the present case, if the petitioner is arrested on the warrant, within the jurisdiction of the Magistrate, namely, in the Chennai City, the Police officer cannot release the petitioner on his furnishing security; but the Police Officer is bound to release the petitioner, if he is arrested outside the limits of the city of Chennai, since the offence is bailable. Under those circumstances, in the interest of justice, though the warrant issued by a Court cannot be cancelled, the High Court has the inherent power under Sec.482, Crl.P.C. to quash the warrant. But there is no prayer before this Court for quashing the warrant. Though Sec.482, Crl.P.C. can be exercised even in the absence of a specific prayer under the Section, since that was not argued, no orders are passed exercising the power of this Court under Sec.482, Crl.P.C. Therefore this Court exercising the power under Sec.482 read with 438, Crl.P.C. has the power to grant anticipatory bail, since non-bailable warrant has been issued by the Magistrate for a bailable offence.

28. Original-Dishonoured cheque to be produced while filing the complaint:It has been stated by the learned counsel for the petitioner that the Magistrates are taking the complaints filed under Sec.138, Negotiable Instruments Act on to the file without the original dishonoured cheques being filed, (only photo-copies are filed). If that be true, such a procedure is a gross illegality. The Magistrate cannot take cognizance of an offence under Sec. 138, Negotiable Instruments Act unless the original dishonoured cheque was produced/filed when the complaint was filed. Filing of the original-dishonoured cheque is a sine-qua-non for taking a complaint under Sec. 138 of the Act on to the file. The learned Public Prosecutor submits that the cheques in originals are produced at the time of filing of the complaint; but, since there is likelihood of that original cheque being lost, the procedure is adopted whereby the original cheques are produced before the Magistrate at the time of filing the complaint and the Magistrate makes an endorsement on the reverse of the original cheque but retains only the photo-copy of the cheque along with the complaint and registers the complaint; the original cheques are returned to the complainant to be produced while recording evidence. Such a method if adopted cannot be said to be unlawful or illegal. But, instances are not rare where the same cheque being dishonoured more than once and at more than one place and on the basis of each dishonouring a different case was filed at different Courts.

29. To avoid such multiple complaints in future, the following directions are issued:

(i) While filing of the complaint under Sec. 138 of the Negotiable Instruments Act, the original dishonoured cheques (on which the complaint is based) shall be produced; the Magistrate shall make an endorsement on the back of such original cheques, after affixing the Court seal and also entering the complaint-registration number Only after that, a photo-copy of the cheque may be received; the original cheque may be returned to the complainant to be produced while examination of witnesses. The photo-copy of the dishonoured cheque cannot be marked as an exhibit in the case, except where secondary evidence is permissible as per the provisions of the Evidence Act;

(ii) Considering the fact that the Magistrate invariably issues warrants without an endorsement as provided for under Sec.71, Crl.P.C, (even though the Magistrate is bound to make such an endorsement in the case of bailable offence) this Court directs that where the offence is bailable, the Magistrate shall not issue "non-bailable warrant", at the first instance;

(iii) The Magistrate shall initially serve summons on the respondent along with the copy of the complaint as provided under Sec.204(3), Crl.P.C.

(iv) If the respondent does not appear even after the summons are duly served, the Magistrate may

after recording the reasons issue warrant of arrest;

(v) Even then the Magistrate shall issue only bailable warrant at the first instance; (vi) Only in cases where after receiving the bailable warrant the respondent does not appear, the Magistrate can forfeit the bond executed by the accused as well as the sureties as may be necessary, and a non-bailable warrant may also be issued.

30. The following are the guidelines to be followed by Magistrates when the complaints under Sec. 138 of the Negotiable Instruments Act are taken on file:

(1) At the time of taking the complaint on file, the original cheques shall be produced before the Magistrate.

(2) The Magistrate shall after affixing the seal of the Court with the date and entering the other particulars such as the Registration number, make an endorsement to that effect on the back of the original cheque.

(3) Thereafter, the original cheque may be returned to the complainant; a photocopy of the dishonoured cheque may be attached with the complaint.

(4) The original cheque shall be marked while adducing the evidence, (photo-copies are not admissible in evidence when the originals are available).

(5) Summons to the respondents shall be sent along with the copy of the complaint.

(6) After the service of summons, if the respondent does not appear, only bailable warrant shall be issued since the offence is bailable.

(7) While issuing such warrant reasons for issuing warrant of arrest shall be recorded.

(8) If, even after the execution of the bailable warrant, the respondent does not appear, the securities furnished shall be forfeited, and a non-bailable warrant may also be issued.

31. Considering the fact that it is a bailable offence and the judgment of the Supreme Court, with respect to Sec.438, CrI.P.C, as held in *Bharat Chaudhary v. State of Bihar* 2003 S.C.C. (CrI.) 1953 (referred to above) - “The object of Sec.438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the Courts concerned while entertaining a petition for grant of anticipatory bail.....”, the following order is passed:

(i) The petitioner is directed to be released on bail in the event of arrest or on his surrender before the Magistrate on condition that he executes a bond for a sum of Rs.5,000 (Rupees Five thousand only) with two sureties each for a like sum to the satisfaction of the IX Metropolitan Magistrate, Saidapet, Chennai.

(ii) Petitioner shall surrender before the Magistrate, if not arrested, within 15 days from this date, failing which anticipatory bail granted shall stand cancelled.