Citation : CDJ 2008 MHC 5964

Court : Before the Madurai Bench of Madras High Court

Case No : M.P.(MD)No.1 of 2008 in Crl.O.P.(MD)No.8180 of 2008

Judges : THE HONOURABLE MR. JUSTICE K. RAVIRAJA PANDIAN, THE HONOURABLE MR. JUSTICE R. REGUPATHI & THE HONOURABLE MR. JUSTICE K.N. BASHA

Parties : S. Swaminathan Versus The State, represented by the Inspector of Police, Vigilance and Anti-Corruption Wing, Thanjavur

Appearing Advocates : For the Petitioner : V. Gopinathan, Sr.Counsel for M. Subash Babu, S. Ashok Kumar, Senior Counsel (MBHA), Mohideen Batch (Madurai Bar), V. Ramakrishnan, Party-in-Person, A.S. Anbu - Salem Bar, T.S. Viswanathan (FDSCBA), S. Murali, G. Veerakumar (T & P), P. Paramasivam, Chairman (FDSCBA-T & P), Advocates. For the Respondent: Raja Ilango, Public Prosecutor.

Date of Judgment : 03-12-2008

Head Note :

Comparative Citations:
2008 (2) LW(Crl) 1396, 2009 (1) CTC 193, 2009 (3) MLJ(Crl) 26

Judgment :

ORDER ON REFERENCE:

K. Raviraja Pandian, J.

The petitioner, apprehending arrest for the offence punishable under Sections 120(B), 420, IPC read with Sections 7 & 13(2) and 13(10)(d) of the Prevention of Corruption Act, filed a petition in Crl.O.P.(MD)No.8180 of 2008 under Section 438 of the Code of Criminal Procedure (in short "the Code") seeking for a direction from this Court for releasing him on bail, in the event of his arrest. According to the petitioner, one Mr.Balu (defacto complainant) lodged a complaint with the respondent police on the allegation that the petitioner, being a Village Administrative Officer, received a sum of Rs.1000/- from him as bribe for giving birth certificate in the year 2006, but failed to give any birth certificate. In that petition, this Court on 10.09.2008 passed orders as follows:

"5.Considering the facts and circumstances of the case and considering the fact that the occurrence had taken place in the year 2006, I am of the view that the petitioner could be enlarged on anticipatory bail. Accordingly, the petitioner shall appear before the Investigating Officer within a period of two weeks from the date of receipt of a copy of this order and on his appearance, in the event of arrest, he shall be released on bail, subject to the following conditions:

(i) The petitioner shall execute a bond for a sum of Rs.10,000/- (Rupees ten thousand only) with two sureties for a like sum to the satisfaction of the Investigating Officer; and

(ii) The petitioner shall appear before the Investigating Officer every day at 10.30 a.m. for a period of two weeks."

2. Thereupon, the petitioner filed the present M.P.(MD)No.1 of 2008 in Crl.O.P.(MD)No.8180/2008 seeking modification of the condition imposed in the order dated 10.09.2008 directing the petitioner to approach the Investigation Officer to execute sureties to his satisfaction into one of directing the petitioner to execute the sureties before the learned Judicial Magistrate No.I, Thanjavur, on the premise that due to personal vengeance of the Investigation Officer alone the false case has been foisted against him and if the petitioner is directed to appear before the Investigation Officer to execute the sureties, he, in all probabilities, might reject the sureties and arrest and remand the petitioner to custody.

3. Learned Single Judge, while considering the petition for modification, entertained a doubt as to whether it is permissible in law to

grant such a direction, in spite of the fact that in normal practice the Sessions Courts and High Court in Tamil Nadu are granting such a direction while disposing of the petitions filed under Section 438 of the Code, by referring to the decision of the Supreme Court in the case of D.K. Ganesh Babu vs. P.T. Manokaran and others, reported in (2007) 2 SCC (Crl.) 345 and referred the matter to be decided by a Larger Bench by framing the question of law as follows:

"While passing an order of anticipatory bail whether either Sessions Court or High Court can direct the accused even at the pre-arrest stage to appear before the concerned Magistrate and to execute bond thereby preventing the police officer from arresting the accused."

As per the administrative order of My Lord the Hon'ble The Chief Justice, dated 15.10.2008, the matter is placed before us for consideration.

4. Mr.V.Gopinath, learned Senior Counsel, appearing for the petitioner placed before us several decisions of the Supreme Court, such as (i) M.P.Lohia vs. State of W.B., (2005 2 SCC 686); (ii) Amarjit Singh vs. State of NCT of Delhi; (2002 (2) Supreme 249) and (iii) U.Palaniappan & Another vs. Sub-Inspector of Police, (2006 (1) Crimes 168 (SC)) to contend that in all the above cases the Apex Court itself has granted direction as sought for by the petitioner in this case and, therefore, there is no embargo or fetters on the powers of the High Court or Court of Sessions to grant such a relief.

5. Mr.Ashok Kumar, learned Senior Counsel, appearing for the Bar argued with reference to Section 44 of the Code by contending that even Magistrates have power to arrest as per the provisions of the Code and in view of investment of such power on Magistrates, it is well open to the Court of Sessions or the High Court, while dealing with an application under Section 438 of the Code, to direct the accused to appear before the concerned Magistrate and execute sureties.

6. Mr.V.Ramakrishnan of Salem Bar, appeared as a party in person, argued that the provision Section 438 has to be interpreted literally and in the alternative, has to be interpreted applying the principle of purposive interpretation having regard to the object sought to be achieved as stated in the 41st Law Commission Report, which is the basis for introduction of Section 438 in the Code.

7. Mr.Mohideen Basha of the Madurai Bar argued with reference to Section 441 of the Code in respect of furnishing of sureties.

8. We also heard the learned Public Prosecutor for the State on the above aspect and considered the arguments of the learned counsel on either side and perused the material on record.

9. The question arises for consideration is that "While passing an order of anticipatory bail whether either Sessions Court or High Court can direct the accused even at the pre-arrest stage to appear before the concerned Magistrate and to execute bond thereby preventing the police officer from arresting the accused.

10. In order to consider the above said question. it is necessary to refer the relevant provision of the Code. Section 438 of the Code reads hereunder:

"438. Direction for grant of bail to person apprehending arrest -

(1) Where any person has reason to believe that he may be arrested on 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 that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely: -

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grant an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence

necessary in the interest of justice.

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

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

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

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

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

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

11. From the reading of the above said provision, it is very clear that the High Court as well as the Sessions Court are empowered to give direction that the person who is having reasonable apprehension of arrest for the accusation of a non-bailable offence be released on bail in the event of such arrest.

12. The scope and object of granting the relief of anticipatory bail is threadbare analysed by the Constitution Bench of the Apex Court in the decision in GURBAKSH SINGH SIBBIA V. STATE OF PUNJAB reported in 1980 SCC (Cri.) 465, which is a locus classicus on the subject. In that decision, the Apex Court has held that,

"An anticipatory bail is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail."

13. The Apex Court in the very same decision, namely, GURBAKSH SINGH SIBBIA's case (cited supra) highlighted the distinction between an ordinary order of bail and an order of anticipatory bail as follows:

"7. The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in its 41st Report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's LAW LEXICON, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognizance, surety ship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction under Section 438 is intended to confer conditional immunity from this 'touch' or confinement." (Emphasis supplied)

14. It is apropos to refer to the decision of the Apex Court in ADRI DHARAN DAS V. STATE OF W.B. reported in 2005 SCC (Cri.) 933, wherein, the Apex Court has incorporated the principle laid by the constitution Bench in GURBAKSH SINGH SIBBIA's case (cited supra) in para 7 and other decisions of the Supreme Court and further held as follows:

"7. .... The order under Section 438 of the Code is intended to confer conditional immunity from the touch as envisaged by Section 46 (1) of the Code or any confinement. The Apex Court in Balchand Jain V. State of M.P. (1976 SCC (Cri.) 689) has described the expressions "anticipatory bail" as misnomer. It is well known that bail is ordinary manifestation of arrest, that the court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. The power exercisable under Section 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable ground for holding that a person accused of an offence is not likely to otherwise misuse his

liberty, then power is to be exercised higher echelons of judicial forums i.e., the Court of Session or the High Court. It is the power exercisable in case of an anticipated accusation of non-bailable offence. 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 Court of Sessions or the High Court, he shall be released immediately on bail without being sent to jail." (Emphasis supplied)

15. In the very same decision in the case of ADRI DHARAN DAS V. STATE OF W.B. reported in 2005 SCC (Cri.) 933, the Apex Court further observed as follows:

"18. .... the direction which a court can issue under Section 438 of the Code is that in the event of arrest of an accused on an accusation of committing a non-bailable offence, he shall be released on bail subject to such conditions as the court may deem fit to impose. An application under Section 438 of the Code can be moved only by a person who has not already been arrested. Once he is arrested, his remedy is to move the court concerned either under Section 437 or Section 439 of the Code. In the very nature of the direction which the court can issue under Section 438 of the Code, it is clear that the direction is to be issued only at the pre-arrest stage. The direction becomes operative only after arrest. The condition precedent for the operation of the direction issued is arrest of the accused. This being so, the irresistible inference is that while dealing with an application under Section 438 of the Code the court cannot restrain arrest." (Emphasis supplied)

16. The above portion has been extracted in the order of reference by the learned single Judge to form basis for the reference. That was an appeal before the Supreme Court against the refusal of grant of a direction to extend the protection under Section 438 of the Criminal Procedure Code. While making the submission on behalf of the appellant in the case of Adri Dharan Das case, an argument was advanced that the Division Bench of the Calcutta High Court without appreciating the factual background and the points involved rejected the application summarily. Alternatively a submission was made that in case the prayer for protection in terms of Section 438 of the Code is not accepted, the appellant may be permitted to surrender before the Court concerned on 17.3.2005 and apply for bail and it was prayed that directions may be given for early disposal of the applications by the said Court and in case the prayer is not accepted by the lower Court, by the District and Sessions Judge Court, which shall be moved. The first part of the contention that the appellant therein was entitled to protection under Section 438 was rejected by the Apex Court and in respect of various other submissions made on behalf of the appellant for surrender, the Court raised a question to the effect that whether a Court can pass an interim order not to arrest the applicant where an application under Section 438 of the Code is pending disposal at paragraph NO.17 of the judgment. While answering the said question in paragraph No.18, the Apex Court observed that an application under 438 of the Code can be moved only by a person who has not already been arrested. Once he is arrested, his remedy is to move the Court concerned either under Section 437 or 439 of the Code. In the very nature of the direction which the Court can issue under Section 438 of the Code, it is clear that the direction is to be issued only at the pre-arrest stage. The direction becomes operative only after arrest. The condition precedent for the operation of the direction issued is arrest of the accused. That being so, the irresistible inference is that while dealing with the application under Section 438 of the Code, the Court cannot restrain arrest. As it is already pointed out, the last sentence of the above observation of the Apex Court has formed the basis for the reference as seen from the reference order.

17. The principle laid down by the Apex Court in ADRI DHARAN DAS V. STATE OF W.B., reported in 2005 SCC (Cri.) 933, is further reiterated by the Apex Court In D.K.GANESH BABU V. P.T.MANOKARAN reported in (2007) 4 SCC 434 : (2007) 2 SCC (Cr.) 345 by observing that:

"?. 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 Court of Session or the High Court, he shall be released immediately on bail without being sent to jail. ?."

18. In the very same decision, namely, D.K.GANESH BABU's case, the Apex Court has further held that,

"?. It is well known that bail is ordinary manifestation of arrest, that the court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. ?."

19. It is pertinent to be noted from the above principle laid down by the Apex Court that anticipatory bail order becomes operative and effective at the very moment of arrest and as such the person, who is armed with an order of direction from the High Court or the Sessions Court to release him on bail, in the event of such arrest, shall be released forthwith without taking him into custody or remanding him to judicial custody.

20. Therefore, it is clear from the decisions of the Apex Court cited supra that the condition precedent for operation of the direction given by the High Court or the Sessions Court under Section 438 of the Code is the arrest of the accused.

21. Now the crucial question arises for consideration is that "in the event of such arrest" as mentioned in the provision under Section 438 would be confined only to the arrest by the police officer or other person including the Magistrate. At this juncture, it is relevant to note that under Section 438 of the Code, the legislator thought it fit to frame the phrase as "in the event of such arrest he shall be released on bail" and not as "in the event of such arrest by the police officer". Therefore, the term "in the event of such arrest" mentioned under Section 438 of Cr.PC. is having wide meaning and it covers the arrest not only by the police officer but also by the Magistrate and other person.

22. In this context, it is better to refer certain provisions under the Code of Criminal Procedure relating to arrest of the persons dealt with in Chapter V of the Code running from Section 41 to Section 46.

23. Under Section 43, any private person is also entitled to arrest any person who in his presence commits a non-bailable and cognizable offence. Under Section 44, Magistrate is entitled to arrest a person if any offence is committed in his presence. The said two provisions read as under:

Section 43. Arrest by private person and procedure on such arrest -

(1) Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of Section 41, a police officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 42 ; but if there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

Section 44. Arrest by Magistrate -

(1) When any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

(2) Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant."

24. Section 46 of the Code deals with mode and manner of arrest which reads as under :

46. Arrest how made -

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

As seen from the above position, it is clear that arrest not only to be made by the police officer but also by other person.

25. The Apex Court in GURBAKSH SINGH SIBBIA's case (cited supra) has held in respect of the provision under Section 46(1) of the Code that a direction under Section 438 is intended to confer conditional immunity from the 'touch' or confinement. At the risk of repetition it is to be re-iterated that Section 46 (1) of the Code not only deals in respect of the arrest by the police officer, but also by other person.

26. From the conjoint reading of Sections 44(2) and 46 of the Code, it is obvious that the Magistrate can also arrest or direct to arrest a person for which he is competent.

27. Now the remaining question to be considered is that whether appearance before the Court concerned would amount to arrest.

28. Section 437 of the Code which reads as follows:

"437. When bail may be taken in case of non-bailable offence - (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, ..." (Emphasis supplied)

29. It is significant to note that the above said Section also makes it clear that if a person accused of a non-bailable offence appears before a Court he is entitled to be released on bail if he is armed with the protective umbrella of anticipatory bail order.

30. We can usefully refer to the decision of the Apex Court in the case of NIRANJAN SINGH V. PRABHAKAR, reported in AIR 1980 SC 785. While dealing with the custody and arrest, the Court has held as follows:

".... No person accused of an offence can move the court for bail under S.439, unless he is in custody. .... Where the accused had appeared and surrendered before the Sessions Judge, the Judge would have jurisdiction to consider the bail application as the accused would be considered to have been in custody within the meaning of S.439. Custody, in the context of S.439, is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the court. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions." (Emphasis supplied)

31. The Apex Court in a later decision in DIRECTORATE OF ENFORCEMENT V. DEEPAK MAHAJAN, reported in 1994 SCC (Cri.) 795), has elaborately dealt with the aspect of arrest and custody as under:

"46. The word 'arrest' is derived from the French word 'Arreter' meaning "to stop or stay" and signifies a restraint of the person. Lexicologically, the meaning of the word 'arrest' is given in various dictionaries depending upon the circumstances in which the said expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in Roshan Beevi v. Joint Secretary, Government of T.N. had an occasion to go into the gamut of the meaning of the word 'arrest' with reference to various textbooks and dictionaries, the New Encyclopaedia Britannica, Halsbury's Laws of England, A Dictionary of Law by L.B. Curzon, Black's Law Dictionary and Words and Phrases. On the basis of the meaning given in those textbooks and lexicons, it has been held that :

"[T]he word 'arrest' when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested."

47. There are various sections in Chapter V of the Code titled "Arrest of persons" of which Sections 41, 42, 43 and 44 empower different authorities and even private persons to arrest a person in given situation. Section 41 deals with the power of a police officer to arrest any person without an order from a Magistrate and without a warrant. Section 42 deals with the power of a police officer to arrest any person who in the presence of a police officer has committed or has been accused of committing a non-cognizable offence and who refuses on demand "to give his name and residence or gives a name or residence which such officer has reason to believe to be false". Section 43 empowers any private person to arrest any person who in his presence commits a non-cognizable offence, or any proclaimed offender. Section 44 states that when any offence is committed in the presence of a Magistrate whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender and may thereupon subject to the provisions contained in the Code as to bail commit the offender to custody.

48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi [(1980) 2 SCC 565]." (Emphasis supplied)

32. The Apex Court in a latest decision in STATE OF HARYANA v. DINESH KUMAR reported in (2008) 3 SCC 222, has concurred with the view taken in NIRANJAN SINGH V. PRABHAKAR (AIR 1980 SC 785) and held as follows:

"23. In our view, the law relating to the concept of "arrest" or "custody" has been correctly stated in NIRANJAN SINGH CASE. Paras 7, 8 and the relevant portion of para 9 of the decision in the said case state as follows : (SCC pp.562-63)

"7. When is a person is in custody, within the meaning of Section 439 Cr.P.C.? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibbings 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. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus

arose."

8 . ...

9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions." (Emphasis supplied)

33. Therefore, in the light of the above settled principle of law laid down by the Apex Court and in view of the provisions contained under the Code, 'any person accused of a non-bailable offence, on appearance before the Magistrate concerned is also entitled to be released on bail, if he is granted the relief under section 438 of the Code.

34. In tune with the above said principle the Apex Court has granted the relief of anticipatory bail in number of cases directing the accused to execute the sureties either before the arresting police official or before the court concerned. It is suffice to refer few such cases of the Apex Court as follows:

(i). The Apex Court in the case of KAMALJIT SINGH V. STATE OF PUNJAB reported in 2006 CRI.L.J. 4617 has passed the following order:

"2. Heard the counsel for the parties. In the facts and circumstances of the case we are of the view that it is an appropriate case in which the application of the appellant for grant of anticipatory bail ought to have been allowed, particularly when on similar allegations the remaining two accused have been granted the benefit of anticipatory bail. In these circumstances the appeal is allowed and the appellant is directed to be released on bail in the event of arrest or surrender on his furnishing bail bonds to the satisfaction of the arresting officer or the Court, as the case may be, subject to the conditions laid down in S.438, Cr.P.C. (Emphasis supplied)

(ii). A Three-Judge Bench of the Apex Court in the case of U.PALANIAPPAN & ANR. V. SUB-INSPECTOR OF POLICE reported in 2006 (1) CRIMES 168 (SC) while passing the order modifying the condition imposed by the High Court has held that,

"3. On the facts and circumstances of this case, the condition imposed by the High Court while granting anticipatory bail that the first appellant should deposit Rs.10 lakhs and the second appellant should deposit Rs.5 laksh before getting the benefit of anticipatory bail in our opinion is onerous. Hence, in modification of the said order while affirming the grant of anticipatory bail, we direct the appellants to furnish a self-bond of Rs.50,000 each and one surety for the like sum each to the satisfaction of the Court or the arresting authority as the case may be." (Emphasis supplied)

(iii). Even in a latest case in JONATHAN NITIN BRADY V. STATE OF WEST BENGAL reported in (2008) 8 SCC 660 = 2008 AIR SCW 6342 the Apex Court has passed the following order of granting the relief of anticipatory bail:

"13. We, accordingly, allow the appeal and order that in the event of the arrest of the appellant for the alleged offence, he shall be released on bail subject to the following conditions: -

(i) The appellant shall furnish personal bond in the sum of Rs.10,000/- with one solvent surety of the like amount to the satisfaction of the Chief Judicial Magistrate, Darjeeling, or the Investigating Officer.

(ii) The appellant shall make himself available for interrogation as and when he is so directed by the Investigating Officer by sending written Hukumnama to him.

(iii) The appellant shall not directly or indirectly make any inducement, promise or threat to any witness acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court." (Emphasis supplied)

35. It is also relevant to refer yet another principle laid down by the Constitution Bench of the Apex Court in GURBAKSH SINGH SIBBIA's case to the effect that the order of anticipatory bail does not take away the right of the police officer to investigate into the charges made against a person released on anticipatory bail. The Apex Court in that decision has held as follows:

"An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. While granting relief under Section 438 (1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery." (Emphasis supplied)

36. It is to be further stated that the police officer, namely, Investigating Officer is not at all prevented from proceeding with his investigation in view of the grant of the relief of anticipatory bail under Section 438 of Cr.P.C.

37. It is seen that the Apex Court in D.K.GANESH BABU's case also mainly incorporated the principle laid down by the Constitution Bench of the Apex Court in the case of GURBAKSH SINGH SIBBIA V. STATE OF PUNJAB reported in 1980 SCC (Cri.) 465.

38. In D.K.Ganesh Babu's Case, referred to by the learned Single Judge, the question presently involved has neither directly considered nor a decision rendered. It is settled principle of law that a decision is an authority for what it decides and not what can logically be deduced therefrom. A decision is not an authority on a point which has not been considered. A decision is an authority on the question that is raised and decided by the Court. It cannot be taken as an authority on a different question though in some cases the reason stated might have a persuasive value. Decision is not an authority for proposition which did not fall for consideration. Point not raised before Court would not be authority on the said question. Useful reference can be had to the judgments of the Supreme Court in the case of Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO, (2007) 5 SCC 447, Commr. of Customs (Port) v. Toyota Kirloskar Motor (P) Ltd.,(2007) 5 SCC 371, Executive Eng., Dhenkanal Minor Irrigation Division v. N.,C.Budharaj; (2001) 2 SCC 721, Zee Telefilms Ltd. v. Union of India; (2005) 4 SCC 649, R.L.Jain(D) by LRs v. DDA and Others, (2004) 4 SCC 79, Union of India v. Chajju Ram, (2003) 5 SCC 568.

39. The Division Bench order of this Court in H.C.P.No.597 of 2008 dated 19.09.2008 which also prompted the learned Single Judge to refer this matter to the Full Bench. It is pointed out by the learned Single Judge that the Division Bench in the above said order passed in the said H.C.P. observed in paragraph 13 as follows:

"13. So from the above, we see that the Court had the option of accepting the sureties, if for some reason the Court was not inclined to do so, the court shall grant interim bail."

The learned Single Judge raised a question as to how a Magistrate is empowered to grant interim bail to the accused, even without being in custody. But it is brought to the notice of this Court across the Bar that on the date of referring this matter to Full Bench, i.e., on 29.09.2008 itself, the Division Bench modified the observations made in paragraph 13 as follows:

"13. So from the above, we see that the Court had the option of accepting the sureties, if for some reason the Court was not inclined to do so, the court shall grant interim order of release."

The above modification in the order of the Division Bench was not brought to the notice of the learned Single Judge at the time of referring this matter. Therefore, nothing more requires for us to state in respect of the Division Bench order.

40. For the foregoing reasons, we are of the view that the High Court or the Sessions Court can very well give directions to release an accused on bail in the event of arrest or his appearance before the concerned Magistrate Court to execute the bond and sureties. We are constrained to state that, directing the accused to execute sureties before the concerned Court would not at all prevent the police officer from arresting and taking into custody of the accused as already pointed out only in the event of arrest the order under Section 438 of the Code comes into operation and as such the concerned accused comes under the protective umbrella of the order passed under Section 438 of the Code at the very moment of the arrest and he shall be released immediately on bail after executing bonds and furnishing sureties without being sent to jail.

41. Thus, the question of law referred to us is answered in the affirmative. The M.P.(MD)No.1 of 2008 in Crl.O.P.(MD)No.8180/2008 is remitted back to the learned Single Judge for disposal of the petition in terms of the order made in the reference.

R. Regupathi, J.

"Can the High Court or Courts of Session issue directions under Section 438 of the Code of Criminal Procedure, while granting anticipatory bail, to an accused person to appear for execution of bond and sureties before a Magistrate?

Will it not amount to surrender?

If so, he can only come out on bail and will it not defeat the power of arrest of a police officer? ".

A Question of great importance in procedural criminal law has been forwarded for consideration by the Full Bench.

While answering the reference, my learned Brother K.Raviraja Pandian, J. has given His considered opinion in His order and my learned Brother K.N.Basha, J. agreed with the opinion. While I respectfully concur, I desire to give my own reasonings by delivering this separate order.

2. In the above Miscellaneous Petition, filed for modification, the petitioner sought permission to execute a bond with sureties before the Judicial Magistrate concerned instead of the respondent police as directed originally by order passed in the main Petition. Learned single Judge, by order dated 29.09.2008, referred the matter for decision by a Full Bench on the following question:-

"While passing an order of anticipatory bail whether either Sessions Court or High Court can direct the accused even at the pre-arrest stage to appear before the concerned magistrate and to execute bond thereby preventing the police officer from arresting the accused."

3. It would be gainful at the first instance to touch the backdrop in which the matter came to be referred to the Full Bench.

In the main Original Petition viz., Crl.O.P. (MD) No.8180 of 2008, the petitioner prayed for grant of anticipatory Bail and while granting relief, one of the conditions imposed was - to execute a bond for a sum of Rs.10,000/- with two sureties for a likesum to the satisfaction of the Investigating Officer and the other condition was to appear before the Investigating Officer every day at 10.30 A.M. for a period of two weeks. Expressing certain difficulties in producing sureties before the police officer, the petitioner sought for modification of the condition. The learned Judge, referring to the decision of the Hon'ble Apex Court in D.K.Ganesh Babu v. P.T.Manokaran and others (2007 (2) SCC Crl. 345), whereby the order passed by another learned Judge of this Court in Crl.O.P. No.17233 of 2006 came to be set aside on the ground that some of the directions given by the learned Judge were not in line with what has been stated in the earlier decision of the Supreme Court in Adri Dharan Das vs. State of W.B. (2005 5 SCC (Crl.) 933), made an observation that no direction or option be given to the accused to produce sureties before court and in parallel, posed a question, "whether High Court can direct the accused to appear before the Magistrate and produce sureties without coming to the custody of court". The learned Judge, by referring to the orders passed by five learned single Judges of this Court (including the one passed by myself) with reference to the condition imposed while granting anticipatory bail; by adverting to the case in HCP No.597 of 2008, wherein, though the detenu obtained anticipatory bail and directed to be released on bail in the event of arrest, was remanded to judicial custody since the Magistrate found that the sureties were not satisfactory, whereupon, the custody was challenged and, by order dated 19.09.2008, it was observed thus,

"13. So from the above, we see that the Court had the option of accepting the sureties, if for some reason the Court was not inclined to do so, the court shall grant interim bail." ;

and by expressing that 'this court is not able to understand how a Magistrate is empowered to grant interim bail, even without being in custody' and that 'this Court feels that direction to Magistrate to grant interim bail in a pre-arrest stage seems to be contra to criminal procedure code and decision of Honourable Supreme Court', referred the matter for consideration by a Full Bench on the question aforementioned.

4. Thus, the actual question referred is enveloped by certain core issues as reflected from the observations of the learned Judge, viz.,

a) while granting anticipatory bail during pre-arrest stage, whether the accused should be ordered to execute bond and produce sureties exclusively before the Investigating Officer/police and whether the persona of the court/Magistrate should be totally excluded;

b) whether the prevailing practice viz., while granting anticipatory bail, directing release of the petitioner/accused on bail 'in the event of arrest', to execute bond to the satisfaction of the Judicial Magistrate concerned and to appear before the Investigating Officer for interrogation, is not in consonance with the procedure prescribed and the law laid down by the Apex Court; and

c) what is the recourse available when the court/Magistrate finds that the sureties are not satisfactory?

5. Mr.V.Gopinath, learned Senior Counsel, referring to the language employed in Section 438 Cr.P.C., submitted that directing the accused to execute bond/sureties before the police officer will defeat the very object behind introduction of the provision. The concept, orbit and procedure concerning 'pre-arrest' and 'post-arrest' were considered in depth and analysed exhaustively and profoundly by the Apex Court in Gurbaksh Singh Sibbia v. State of Punjab (1980 SCC (Cri) 465) and other cases, and in one of the case laws, a positive direction has been given to the effect as the one in question. Sending an accused person to a police officer about whom he is afraid of, expecting that such officer would look at the accused with mercy and sympathy as he is in possession of an order from the court is unacceptable as such exercise would only operate contrastive to the finer nuances of the provision. Moreover the respondent-police is the complainant for whom the accused is an "opposite party". If such a person is sent to the police officer, who is always interested in the success of his investigation, and empowered and armed with a mighty and dangerous weapon of 'arrest', every caution must be shown reflecting to the delicacy and fragility of the situation. Learned Senior Counsel, ventilating the grievance of the Bar, submitted that a police officer would never be friendly with an accused person and in such circumstance, the accused necessarily needs the assistance of an Advocate for executing the bond/surety. Moreover, the police officer may not be available during office hours and he cannot be blamed for that, because, he is always busy with the hectic task of maintaining law and order, pursuing investigation etc. Unlike courts, one cannot expect him at the police station at the appointed time. Even if he is available, there is every possibility that he may unnecessarily find fault with the sureties and their solvency. If arrest is effected after creating a record of insufficient sureties, even the courts cannot rectify the wrong resulting in incalculable damage to the accused person/s. Acceptance of surety is a quasi-judicial job. An affidavit has to be filed regarding the particulars and solvency of a surety. The solvency and the correctness must be assessed sometimes through Probation Officers. Therefore, the process pertaining to acceptance of surety itself is an enquiry. Such enquiry can be conducted justly and aright only by a Magistrate. Therefore, it is not desirable to entrust the task with an investigating/police officer who has to devote his time and energy for collection of materials. It is pointed out that the Supreme Court and other High Courts including Madras High Court have been passing orders directing execution of sureties only before the Magistrates concerned and such procedure is a well established one stemming from the rationale behind the provision and the judicial reflection to the prevailing state of affairs. To substantiate the same, he relied on various such orders passed by the Supreme Court.

6. Learned Senior Counsel, Mr.S.Ashok Kumar, submitted that Section 438 Cr.P.C. deals with warrant of arrest by police as well by the Magistrates. The object of the provision is to safeguard the interest of an innocent person accused of an offence by granting anticipatory bail. When there is possibility of foisting false cases and fallacious implication, an innocent must be protected. Undoubtedly, arrest causes incalculable and irreparable damages to innocents and only with an intention to prevent unjustified arrests, Section 438 Cr.P.C. has been introduced. By referring to Sections-44 and 46 of the Code pertaining to 'arrest by Magistrate' and how such arrest is to be

made; Sec.438 dealing with 'direction for grant of bail to person apprehending arrest'; and the referral order speaking about arrest by the police and their powers; it is submitted that execution of bond/surety before the Magistrate is the only convenient method for the accused and the direction to execute the same before the police officer is unknown to criminal law.

7. Mr.Ramakrishnan, Party-in-Person/Advocate from Salem Bar, submitted that arrest is not a condition precedent or sine qua non as per Section 438 Cr.P.C. While interpreting Section 438, the object behind its introduction must be looked into. The Supreme Court in Gurbaksh Singh Sibbia's case, categorized the relief as "conditional immunity"; therefore, there must be immunity from arrest if the condition is complied with. For complying with the condition, there must be an assurance from the accused and such assurance is obtained through an affidavit and by execution of bond/sureties. Such act of receiving assurance must be entrusted with an unbiased officer and therefore, such officer cannot be a police officer, who is the complainant and naturally having bias against the accused person. According to him, the execution of bond/sureties must be done only before the court and not before the police officer.

8. Mr.Mohideen Basha, Advocate representing Madurai Bar, submitted that the execution of bond/sureties pertains to quasi-judicial function and such job cannot be entrusted with an investigating officer. Moreover, approach of the police officer against an accused would always be hostile and his perching intention would be to punish an accused by hook or crook. Innocence of an accused will not be visible to him. Evidently, the object of Section 438 Cr.P.C. is to protect an innocent. If sureties are produced or directed to be produced before the police officer, he must be vested with the power to proceed against such sureties in the event of the accused absconding or violating the conditions imposed. For such contingencies, a police officer can only approach the court. He states that there are several practical difficulties in execution of sureties by an Advocate before a police officer at the police station. Similar submissions have been made by counsels representing other Bar Associations/Advocates' Federation.

9. Per contra, Mr.Raja Elango, learned Public Prosecutor, submitted that the condition imposed by the learned single Judge is absolutely in consonance with what has been laid down by the Apex Court in D.K.Ganesh Babu's case and therefore, having regard to Article 141 of the Constitution of India, the High Court has to strictly adhere to the same. By relying on a judgment of the Gauhati High Court reported in 1982 Crl.L.J. 1816 (State of Assam vs. Mobarak Ali and others), wherein, it has been held thus:-

"The ambit and scope of Section 438 are quite distinct and separate. A direction for grant of bail to a person apprehending arrest can be made in favour of a person who apprehends arrest. No application under Section 438 can be made by a person detained or arrested by the police. The applicant need not appear in court nor should be brought in court. He cannot be granted bail by the Court forthwith. He can only get a direction from the Court that in the event of his arrest he may be enlarged on bail by the police. Therefore, the distinctive features are that in Sec.438-(i) the applicant need not be an accused person, (ii) he need not be brought before a court nor his personal appearance in Court is a condition precedent; he may apply without personally appearing before the court; (iii) the applicant need not surrender to the physical control of the Court nor need he submit to the custody of the Court; (iv) the application must be for anticipatory bail in the event of his arrest. Therefore, on arrest no application under Section 438 is maintainable; (v) the court cannot direct that he should be released on bail forthwith. It can only make a direction that in the event of his arrest, he should be released on bail. The authority to grant bail is the officer-in-charge of police station, if the applicant is wanted to be arrested without warrant, on such accusation.", he reiterates that the observation of the learned Judge that no direction or option could be given to the accused to produce sureties before court is within the ambit of the Code and the law laid down by the Apex Court.

10. Having regard to the question referred and the submissions made on either side, it would be serviceable to first traverse into the relevant provisions of the procedural law viz., Criminal Procedure Code (in short Cr.P.C) encompassing the arena of 'conditional immunity'/anticipatory bail and the exegesis of the Hon'ble Apex Court on the point through its decisions holding the field.

11. From the discussion of the learned Judge, it could be discerned that, on the question,

Whether High Court/Session Court can direct an accused person before even arrest,

(a) to execute a bond (with or without sureties) before a Magistrate; and

(b) then appear before the police officer for interrogation;

the objection raised is that (a) and (b) must be done only by a police officer, otherwise, such course would operate against the judgment of the Supreme Court in D.K. Ganesh Babu's case (cited supra). The reason assigned is that this exercise (arrest) must be done only by police as per Section 438 (3) Cr.P.C. and that the accused must be subjected to custody, coming into effect at the time of arrest or at the time while in custody of such police officer. Therefore, it is plain that it is the police officer who must receive the bond, that is, as per the orders of the High Court/Session Court, the formality of accepting the bond must be done only by police officers, otherwise, the object of the provision would be defeated. If bond/sureties is executed prior to that, before a Magistrate - the procedure involved is,

a) Surrender; and thereafter,

b) execution of bond/surety;

thus, it is similar to grant of bail. That being so, if the accused thereafter goes to the police station - "it will prevent the police officer from arresting the accused".

12. Ex facie, the savvy or interpretation is totally against the object of Section-438 viz., to grant relief in cases relating to non-bailable offences, where there is reason to believe that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty; and also to ensure that the accused must not be harassed unnecessarily. Thus, by virtue of Section-438, such power of arrest is subject to the condition imposed. In other words, the power of arrest exists, however, having obtained 'conditional immunity', the accused is released without being sent to Prison. Undoubtedly, it is an extraordinary power and that is the reason why it has been conferred to the Higher echelons of the Judiciary viz., High Court and the Session Court.

13. With reference to the issue on debate, it is worthy to look at the purpose of execution of bond/sureties. In a very simple manner, it can be said that the one and only purpose is to ensure compliance of the conditions by the accused. Such bond can be executed either before a police officer or before the jurisdiction magistrate concerned and there is no prohibition or specification in the Code. If an accused, in order to co-operate with the investigation, ensures his appearance by executing bond/surety and then goes to the police officer, can one categorise such practice as a wrong procedure and, by adopting such procedure, is the power of the police to arrest and interrogate the accused taken away. Though the answer is an emphatic 'no', it has to be pointed out that if a contra interpretation is given and applied, definitely, the same would ultimately defeat the object of Section 438 Cr.P.C. and result in violation of the orders of High Court and Session Court. For example, in such an event, the condition would be,

"(a) In the event of arrest by or on appearance before the respondent police;

within 15 days from the date of receipt of copy of the order, the petitioner shall be enlarged on bail on execution of personal bond for Rs.10,000/- (Rupees Ten Thousand only) each, with two sureties each for the likesum to their satisfaction;".

For better appreciation, Section 438 (3) Cr.P.C. is extracted below,

"438. 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-section (1)."

The language employed in the above provision, in particular "and is prepared ..... to give bail, he shall be released on bail" must be looked into very carefully. The word 'prepared' connotes a clear meaning that the accused is willing to execute bond/sureties as directed by the High Court/Session Court. As per such willingness/preparation, if he executes bond (value Rs.10,000/-) with surety before the Police Officer, there would be either one of the two consequences, viz.,

(i) on such execution, he would be released on bail; and equally,

(ii) the Police Officer can also simply reject the surety and say 'you have not complied with the order of the High Court/Session Court, you are already under arrest and it is a non-bailable case';

therefore, the only course available would be to remand him. In such a case, even at the time of production of the accused before Magistrate, he cannot question the police officer because discretion is already given by Higher Courts to the police officer; thereby, the object of Section 438 is defeated.

14. With reference to execution of bond with sureties, it is useful to refer to the following provisions of the Code.

Section 437 begins with the caption "when bail may be taken in case of non-bailable offence". Sub-section (2) thereof provides that if it appears to such officer or court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446-A and pending such inquiry, be released on bail, or, at the discretion of such officer or court on the execution by him of a bond without sureties. This is the lonesome provision which empowers the police officer and gives discretion to him to release an accused on bail. Even then, the accused is released on execution of a bond "without surety" i.e., the police officer cannot insist for production of surety; as obviously, such powers vest only with the Courts.

15. Section 437 (3) makes it very clear that when a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1) the court may impose any condition (to execute bond with sureties) in order to ensure,

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of

which he is suspected, or

(c) otherwise in the interests of justice.

Section 437 (2) deals with cognizable offences punishable with imprisonment below seven years while Section 437 (3) relates to grave offences punishable with more than 7 years' imprisonment and it does not empower a police officer to exercise his discretion. Thus, in such cases, it goes without saying that only the courts are empowered to impose conditions relating to sureties to ensure certain compliance.

16. Let us now delve into the domain relating to execution of sureties. If the offence alleged is of minor nature, no doubt, a police officer, in his own discretion, release an accused on bail after receiving a bond. But, if the offence said to have been committed is of grave nature, courts alone are empowered to release him after imposing a condition for execution of a bond with sureties. Section 439 simply repeals Section 437(3) and empowers the High Court and the Session Court regarding grant of bail. As pointed out already, Section 438 is an extraordinary provision which empowers the High Court/Session Court to give certain directions in the event of arrest of a person so that he shall be released on bail. The said provision gives direction to the police officer/Magistrate how to deal with such person in the event of arrest ie., (a) if a police officer arrests him, and (b) if the Magistrate decides to arrest him; in both cases, imposing a condition is mandatory. It means imposing a condition to execute bond with sureties, hence, it is similar to Sec.437(3). In the light of the procedure prescribed and adumbrated in the provisions, it is abundantly clear that a police officer is empowered to receive a bond without surety in cases relating to minor offences and if it relates to serious offences where the condition to execute bond with sureties is imperative, under Section 437(3), only courts can impose the condition. In the light of the provisions adverted to above; for the bleak but not baffling question viz., after the court's imposing the condition to execute a bond with sureties, is there any provision which requires that such bond must be executed only before a police officer; the reflexive answer is, 'No'.

17. Section 441(1) speaks about acceptance of a bond with or without sureties while Sec.441(4) empowers only the court to accept the sureties and the said provision reads as follows:-

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

Section-442 empowers a Magistrate, after execution of sureties, to issue direction for release of an accused. Section-444 gives liberty to a surety for cancellation of his bond and Magistrates are empowered thereunder to pass an order for re-arrest or for insisting fresh sureties in the event of release on bail. Sections 446, 446-A, and 449 deal with violation of conditions in the bond, its cancellation, appeal etc. Therefore, if anticipatory bail is granted by imposing condition to execute bond with sureties, it is self-referent that the execution can be ordered/done only before court/magistrate. If the condition is execution of own bond, it can be done before the police officer. It must be highlighted here that, even if the court, in its discretion, orders execution of sureties before a police officer, for cancellation, forfeiture, modification etc., such police officer is not empowered at all and those aspects would be dealt with by the court. The empowerment of the Court in that regard is re-affirmed by Section 443, which reads as follows:-

443. Power to order sufficient bail when that first taken is insufficient.

If, through mistake, fraud, or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and on his failing so to do, may commit him to jail.

Therefore, on a close reading of the provisions in the Code, we can safely conclude that the actual power to impose the condition to execute "bond with sureties" is conferred only upon courts.

18. By virtue of Section 438 Cr.P.C., courts are required to direct for execution of bond with sureties before Magistrates only. It gives harmonious effect in implementation of the orders passed under Section 438 Cr.P.C. Moreover, the execution and acceptance is the job not only allocated by the Code but it is convenient for the accused that, after complying with execution of bond with surety, he can go to the police officer without any fear of arrest. Otherwise, not only the fear but possibility of arrest is always there; thereby, the very object and rationale behind the introduction of the provision viz., Section 438 Cr.P.C., is defeated. On a plain reading of the provision, the manifest meaning conveyed is that the bond must be executed only before actual arrest by the police officer. Section 438(3) has been drafted after two clauses i.e., 438(1) and 438(2). Subsection(1) speaks about the empowerment of High Court/Session Court while sub-section(2) about the High Court or the Court of Session making a direction under sub-Section (1) which may include such conditions in such directions in the light of the facts of the particular case as it thinks fit. As per sub-section (3), 'if such person is thereafter arrested', meaning thereby,

(a) he is in possession of an order granted by the High Court/Session Court, and

(b) such condition (execution of bond) is also complied with.

Then, he goes to the Police Officer / or police goes to his place to arrest him for which he is empowered. Either (a) at the time of arrest

or (b) at any time while in custody, the accused is prepared i.e., the words 'is prepared' mean,

(i) he is already prepared at the time of arrest with an order after complying the conditions prescribed therein and the same is a full-fledged order; and

(ii) he got an order but not executed bond/surety and, at any time while in custody of such officer, he will be allowed to execute surety.

Section 437(2) makes it clear that a bond without surety could be executed before a Police Officer. As per Section 437 (3), the court will accept the sureties.

Only under such circumstances, it came to categorised as 'conditional immunity' or 'anticipatory bail'. Relevant portion from the landmark Judgment of the Apex Court in Gurbaksh Singh Sibbia v. State of Punjab (cited supra), which still holds the field, is extracted below:-

"The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modification, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully:

Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in paragraph 39.9 that it had " considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in clauses (i) to (iv) of sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicitly as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail is generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437. "

19. High Court/Session Court, after passing conditional order/direction to the Police Officer can very well accept the bond/surety by the same Judge who grants the order. But there are certain practical difficulties, viz.,

(a) availability of the accused in the court,

(b) making ready the surety as per the order etc.,. The very same court can accept the surety and give further direction to the police. That is the reason why, the provision is carefully worded "at the time of arrest or at any time while in the custody of such officer". If such an order, with due obedience, is produced, the Police Officer has no other option but to release the accused by receiving the order. Higher Courts, loaded with hectic work and left with decision making, issue direction and the procedural aspect is carried out by the subordinate judiciary viz., the Magistrates. Therefore, it is a continuation of the process in the direction and not a separate act of surrender and bail etc. As adverted to in the previous portion of the order, there are two different acts in the process as per sub-sections-(1) & (2) of Section 438; then only, the direction will have a full meaning. If those clauses are read together with sub-Section(3), a harmonious construction could be derived. A person, who gets an order from the High Court/Session Court, goes to the Magistrate as per the direction of such court only to execute bond/surety and obtains a certificate; beyond that, the Magistrates cannot do anything. If solvency of the sureties produced are doubtful, the Magistrate will only adjourn the process for production of solvent surety and he has no power to remand at that stage. Therefore, if an accused appears for such formality, at no stretch of imagination, it could be construed as 'surrender'. If it is not a surrender, where does the question of bail arise. However, this appearance is very often confused as surrender and as if subjecting the accused into the custody of a Magistrate. In other circumstances, an accused person can surrender. His appearance before the Magistrate for complying with the condition as per the order of the superior court while granting anticipatory bail cannot be said to be a 'surrender' which is altogether different from 'appearance'. In fact, the learned Magistrates do not pass any order but simply carry out the job of acceptance of surety and give a certificate; thereby, performs one of the jobs under Section 438

(2), enabling the accused to comply with the conditions imposed by the Higher Courts.

20. The learned single Judge, while referring the question to the Full Bench, strongly relied on D.K. Ganesh Babu's Case. In the said case, the Honourable supreme Court was considering the order passed by another learned Judge of this Court, granting anticipatory bail in favour of the accused with certain conditions. It was contended that an order of bail was granted without surrender since the terms for release have been stipulated in the order itself. It was replied on behalf of the accused that they already surrendered before the learned Magistrate as per the order of the High court and bail was granted. Therefore, the Hon'ble Supreme Court took an exception to this procedure adopted and observed that the procedure prescribed for anticipatory bail has not been followed because of the reason that a direction for 'surrender' before the court has been made. While granting relief to an accused who was not yet arrested and when the prayer is for grant of anticipatory bail, the High Court proceeded to pass a direction to the accused to surrender before the court and in parallel, with an implied direction to the Magistrate to accept the sureties prescribed, that is, to release him on bail; therefore, it was only an order of bail and not an order of anticipatory bail. The Apex Court, by making it clear that the scope of Sections 437 and 439 Cr.P.C. with reference to Bail is different from Section 438 pertaining to Anticipatory Bail, observed thus:-

"It is the power exercisable in case of an anticipated accusation of non-bailable offence. 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 Court of Session or the High court, he shall be released immediately on bail without being sent to jail."

Referring to the case law in Adri Dharan Das v. State of W.B. (2005 (4) SCC 303), it has been observed as follows:-

"The condition precedent for the operation of the direction issued is arrest of the accused. This being so, the irresistible inference is that while dealing with an application under Section 438 of the Code the court cannot restraint arrest."

"An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code."

Their Lordships, by relying on several judgments of the Apex Court holding the field, vividly clarified that the sphere and rule of bail and anticipatory bail operate in two different fields and angles. As could be seen, in the order impugned before the Supreme Court, a direction for surrender was made. If so, it absolutely defeats the scope of anticipatory bail. Once surrender by the accused is accepted, it goes without saying that the procedure prescribed for bail must be followed. The accused cannot be released even by the Magistrate immediately. Notice must be ordered to the Public Prosecutor and an order thereafter must be passed on merits. Under such circumstances, the learned Magistrate may even decline to grant bail. He has to exercise his discretion. That is the reason why the Supreme Court made it clear viz.,

(a) In the event of surrender, an accused can come out only on bail. If so, an order of release cannot be given by court of Session or High Court beforehand while exercising power under Section 438; therefore, he must be sent to jail.

(b) But, the scope of 438 is that he shall be released immediately on bail without being sent to Jail.

So clarifying, the Supreme Court ultimately concluded thus:-

"In view of what has been stated above some of the directions, given by the single Judge, as quoted above are not in line with what has been stated in Adri Dharan Das case. Accordingly, we modify the directions.".

As the order of the Supreme Court is unambiguous, perfect and instructive, there is no scope at all for misinterpretation. Actually, the Hon'ble Supreme Court clarified the direction given by the learned Judge viz., 'to surrender before court', while granting the relief of anticipatory bail. The subsequent other orders passed by the High Court, Madras, which have been referred to in the Order under reference do not contain any such direction for surrender before court. They deal with the procedural aspect with regard to execution of bond/sureties while complying with the condition and an option has been given that such execution of bond/sureties could be done before (a) court or (b) before the police officer.

21. At the risk of repetition, it is added that, in the process of acceptance of sureties by the Magistrates, "an interim order, restraining arrest" is not made but what is done is mere "verification and acceptance of sureties". On the contrary, if surrender is accepted, it may amount to forestalling the arrest since bail is granted; for, after a person is granted bail, police officer cannot arrest him. Thus, inasmuch as the acceptance of sureties by the Magistrate does not restrain arrest, obviously, it will not amount to interference in the investigation and in fact, will advance the object of Section 438 Cr.P.C. Likewise, when an accused person surrenders before court, it means, he is under restraint, deprived of his personal liberty and he cannot move to the places wherever he wants. Surrender follows judicial custody. Appearance before a court by an accused may amount to surrender but not in all circumstances. If a person, who has committed a cognizable offence, appears before court and informs that he is the person concerned, certainly, it will amount to surrender. In that event, the Magistrate has no other option but to accept the surrender and proceed to the next course of action either to remand him to judicial custody or release him on bail with or without surety. But, if an accused, after receiving an order of anticipatory bail from the Higher Court, appears before a Magistrate to execute bond/surety in compliance with the condition imposed by the Higher Court, it goes without saying that he is not at all surrendering since he is already enjoying the conditional immunity and his personal liberty cannot be impeached by the Magistrate.

21-A. Of course, in consonance with the procedure established, the Supreme Court, in Jonathan Nitin Brady v. State of W.B. (2008 (8) SCC 660), after elaborate discussion of the facts and law, granted anticipatory bail and the relevant portion at para No.14 is extracted below.

"14. We, accordingly, allow the appeal and order that in the event of the arrest of the appellant for the alleged offence, he shall be released on bail subject to the following conditions:

(i) The appellant shall furnish personal bond in the sum of Rs.10,000/- with one solvent surety of the like amount to the satisfaction the Chief Judicial Magistrate, Darjeeling, or the investigating officer.

(ii) The appellant shall make himself available for interrogation as and when he is so directed by the investigating officer by sending written hukumnama to him.

(iii) The appellant shall not directly or indirectly make any inducement, promise or threat to any witness acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court. "

22. After the Orders passed by the Apex Court in D.K.Ganesh Babu's Case, in Crl.O.P. No.14682/07, I imposed the following conditions while granting anticipatory bail,

"I am of the view that the petitioners can be granted the relief prayed for and accordingly:

(a) In the event of arrest by or on appearance before the respondent police;

(b) In the event of appearance before the learned Judicial Magistrate, Tambaram;

within 15 days from the date of receipt of copy of the order,

(i) The petitioners shall be enlarged on bail on execution of personal bond for Rs.10,000/- (Rupees Ten Thousand only) each, with two sureties each for the likesum to their satisfaction;".

Similar orders were passed by other learned Judges of this Court.

23. In the matter referred, while passing orders in the main Petition i.e., Crl.O.P. No.8180 of 2008, filed for anticipatory bail, the learned single Judge, issued the following direction:-

"Accordingly the petitioner shall appear before the Investigating Officer within a period of two weeks from the date of receipt of a copy of this order and on his appearance in the event of arrest, he shall be released on bail subject to the following conditions:

(i) The petitioner shall execute a bond for a sum of Rs.10,000/- with two sureties for a likesum to the satisfaction of the Investigating Officer, and,

(ii) The petitioner shall appear before the Investigating Officer every day at 10.30 a.m., for a period of two weeks. "

In fact, the learned single Judge is consistent in passing orders with such condition and is of a very firm opinion that the High Court/Court of Session, while imposing condition relating to execution of bond (with sureties), should direct that the bond should be executed only to the satisfaction of the Investigating Officer. One such order was taken by way of the Appeal to the Supreme Court and it was modified to the following effect in N.Jothi vs. Addl. DGP and another (Ref:SLP (Crl) No.8205-8206 of 2007),

" ..... directing the appellant to execute a bond for a sum of Rs.25,000/- with one surety for a likesum to the satisfaction of Principal Session Judge, Chennai. "

24. The word 'investigation', defined in Section 2(h) of the Code, is succinctly interpreted by the Apex Court in H.N. Rishbud v. State of Delhi, (1955) 1 SCR 1150 as follows:-

"Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173. "

Section 167 Cr.P.C. falls under Chapter XII relating to 'information to the police and their powers to investigate'. Sub-section(1) thereof speaks about arrest by a police officer and the follow-up investigation by him. In this context, the following observation made by the

Constitution Bench of the Supreme Court regarding the effect of anticipatory bail in Gurbaksh Singh Sibbia's case is of much relevance:-

" ... These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. ..."

It has been further observed,

" ... this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2)(i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made under section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. ..."

The recent judgments of the Apex Court including the one in D.K.Ganesh Babu and Adri Dharan Das Case, without deviating from the above decision of the Constitution Bench, re-affirm the position of law on the issue raised.

25. In such circumstances, in the light of the above discussion, the emphatic answer is that, while passing orders under Section 438 Cr.P.C., the High Court and Session Courts can direct,

(a) an accused at the pre-arrest stage to appear for execution of bond/sureties before the Magistrate concerned by way of complying the pre-condition in consonance with the orders passed, and

(b) thereafter, to surrender before the police for interrogation and while so, the power of the police to arrest an accused is retained."

The Reference is answered accordingly. I place on record my deep appreciation for the Senior Counsels, counsels on record and the Public Prosecutor for their elucidative presentation of the points covering the issue involved.