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SUDAM CHARAN DASH

v.

STATE OF ORISSA & ANR.

(Criminal Appeal No. 1862 of 2013)

B

OCTOBER 25, 2013

**[RANJANA PRAKASH DESAI AND
MADAN B. LOKUR, JJ.]**

*Code of Criminal Procedure, 1973 – ss.438 and 439 –
C Scope and purport of – Application for anticipatory bail –
Rejected by High Court but further direction issued by it to
trial court to release respondent 2-accused on bail – Propriety
– Held: After rejecting the prayer for anticipatory bail, the High
Court should not have negated its own order by directing that
D respondent 2 should be released on bail – This is
contradiction in terms – It dilutes the order rejecting
anticipatory bail – Such order is not legally sound and
overlooks the scope and purport of ss.438 & 439 CrPC – The
Magistrate released respondent 2 on bail solely on the
E ground that the High Court had issued such direction – The
Magistrate had no alternative but to do so – Thus, there was
no consideration of the application for bail filed by respondent
2 on merits – Order passed by Magistrate therefore quashed
– Direction issued that if respondent 2 appears and
F surrenders before the Magistrate and prefers application for
bail, the Magistrate shall decide his application on merits and
in accordance with law.*

**The appellant's son was murdered in a hotel. It is the
appellant's case that the police did not investigate the
G case properly. The appellant ultimately filed writ petition
in the High Court. Subsequently, non-bailable warrant
was issued against accused-respondent 2, by the
Magistrate. Respondent 2 preferred application for
anticipatory bail.**

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The High Court disposed of the application by the impugned order. The Court observed that considering the nature of the allegations made against respondent 2, it was not a fit case for grant of anticipatory bail, however, it gave direction that in the event respondent 2 surrenders before the Magistrate within four weeks and moves an application for bail, he shall be released on bail on such terms and conditions as the Magistrate deems fit and proper. Pursuant to this direction, respondent 2 surrendered before the Magistrate and was released on bail.

Disposing of the appeal, the Court

HELD: 1.1. When the High Court rejected the application for anticipatory bail, it was sufficient indication that the High Court thought it fit not to put a fetter on the investigating agency's power to arrest respondent 2. In such a situation, the investigating agency, if it so desired and if it thought that the custodial interrogation of respondent 2 was necessary, could have arrested him. Therefore, after rejecting the prayer for anticipatory bail, the High Court should not have negated its own order by directing that respondent 2 should be released on bail. This is contradiction in terms. It dilutes the order rejecting anticipatory bail. Such order is not legally sound. It overlooks the scope and purport of Sections 438 and 439 of the Code of Criminal Procedure, 1973. Such orders put restriction on the power of the trial court to consider the bail application on merits and grant or reject prayer for bail. Such orders should never be passed. [Paras 3, 5] [287-E-G; 289-D]

1.2. The Magistrate released respondent 2 on bail solely on the ground that the High Court had issued the above mentioned direction. The Magistrate had no alternative but to do so. Thus, there was no consideration

A of the application for bail filed by respondent 2 on merits. The consequential order passed by the Magistrate is therefore quashed. In the circumstances, if respondent 2 appears and surrenders before the Magistrate and prefers an application for bail, the Magistrate shall decide
 B respondent 2's application on merits and in accordance with law. [Para 7] [289-E-H]

Rashmi Rekha Thatoi & Anr. v. State of Orissa & Ors. (2012) 5 SCC 690: 2012 (5) SCR 674; *Gurbaksh Singh Sibbia v. State of Punjab* (1980) 2 SCC 565: 1980 (3) SCR 383 and *Savitri Agarwal v. State of Maharashtra* (2009) 8 SCC 325: 2009 (10) SCR 978 – relied on.
 C

Case Law Reference:

D	2012 (5) SCR 674	relied on	Para 4
	1980 (3) SCR 383	relied on	Para 4
	2009 (10) SCR 978	relied on	Para 4

E CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1862 of 2013.

From the Judgment & Order dated 17.05.2013 of the High Court of Orissa in BLAPL No. 8671 of 2013.

F Aditya C.B., Amarjit Singh Bedi, Avijit Patnaik for the Appellant.

R. Venkat Raman, Shivaji M. Jadhav for the Respondents.

The Judgment of the Court was delivered by

G (SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. The appellant's son – Rajib Das was murdered on 5/1/2009 in a hotel. FIR was lodged in respect thereof on 6/1/2009.

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PS Case No. 4 of 2009 was registered. It is the appellants' case that the police did not investigate the case properly. The appellants ultimately filed a writ petition in the Orissa High Court. Thereafter, the investigation gained momentum. On 3/1/2013, non-bailable warrant was issued against Mr. Sweekar Nayak, who is respondent 2, by the SDJM, Rayagada. Respondent 2 preferred an application for anticipatory bail in the Orissa High Court. The High Court disposed of the said application by the impugned order. We notice that in the impugned order, the High Court has made a categorical observation that considering the nature of the allegations made against respondent 2, it did not think it to be a fit case for grant of anticipatory bail. Surprisingly, however, the High Court gave a direction that in the event respondent 2 surrenders before the learned SDJM, Rayagada within four weeks and moves an application for bail, he shall be released on bail on such terms and conditions as the learned Magistrate deems fit and proper. Pursuant to this direction, respondent 2 surrendered before the learned Magistrate and was released on bail on 11/06/2013.

3. We are surprised at the direction issued by the High Court to the trial court to release respondent 2 on bail. When the High Court rejected the application for anticipatory bail, it was sufficient indication that the High Court thought it fit not to put a fetter on the investigating agency's power to arrest respondent 2. In such a situation, the investigating agency, if it so desired and if it thought that the custodial interrogation of respondent 2 was necessary, could have arrested him. Therefore, after rejecting the prayer for anticipatory bail, the High Court should not have negated its own order by directing that respondent 2 should be released on bail. This is contradiction in terms. It dilutes the order rejecting anticipatory bail. Such order is not legally sound. It overlooks the scope and purport of Sections 438 and 439 of the Code of Criminal Procedure, 1973.

4. In a similar situation in *Rashmi Rekha Thatoi & Anr. v.*

A *State of Orissa & Ors.*,¹ this Court took a strong view of the matter and observed that such orders have no sanctity in law. Relevant observations of this Court could be quoted:

B “33. We have referred to the aforesaid pronouncements to highlight how the Constitution Bench in *Gurbaksh Singh Sibbia v. State of Punjab*,² had analysed and explained the intrinsic underlying concepts under Section 438 of the Code, the nature of orders to be passed while conferring the said privilege, the conditions that are imposable and the discretions to be used by the courts.

C On a reading of the said authoritative pronouncement and the principles that have been culled out in *Savitri Agarwal v. State of Maharashtra*³ there is remotely no indication that the Court of Session or the High Court can pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the learned Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms has expressed the view that it is not inclined to grant anticipatory bail to the petitioner-accused it could not have issued such a direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the statutory provision and in flagrant violation of the dictum laid down in *Gurbaksh Singh Sibbia* and the principles culled out in *Savitri Agarwal*”.

D The operative portion of the order passed in that case reads as follows:

E “Judging on the foundation of aforesaid well-settled

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1. (2012) 5 SCC 690.

2. (1980) 2 SCC 565.

H 3. (2009) 8 SCC 325.

principles, the irresistible conclusion is that the impugned orders directing enlargement of bail of the accused persons, namely, Uttam Das, Abhimanyu Das and Murlidhar Patra by the Magistrate on their surrendering are wholly unsustainable and bound to founder and accordingly the said directions are set aside. Consequently, the bail bonds of the aforementioned accused persons are cancelled and they shall be taken into custody forthwith. It needs no special emphasis to state that they are entitled to move applications for grant of bail under Section 439 of the Code which shall be considered on their own merits."

5. We respectfully agree with these observations. We also feel that such orders put restriction on the power of the trial court to consider the bail application on merits and grant or reject prayer for bail. We are of the opinion that such orders should never be passed.

6. In the circumstances, we set aside the impugned order.

7. We have perused the order passed by the SDJM, Rayagada granting bail to respondent 2 pursuant to the impugned order. Obviously, the SDJM released respondent 2 on bail solely on the ground that the High Court had issued the above mentioned direction. The SDJM had no alternative but to do so. Thus, there is no consideration of the application for bail filed by respondent 2 on merits. We, therefore, quash the consequential order dated 11/6/2013 passed by the SDJM, Rayagada. Ordinarily, we would have directed respondent 2 to surrender today. But, we refrain from giving any such direction. In the circumstances, if respondent 2 appears and surrenders before the SDJM, Rayagada on 29/10/2013 and prefers an application for bail, we direct the SDJM, Rayagada to decide respondent 2's application on merits and in accordance with law. The appellant may remain present in the court and oppose the bail application if he so desires.

A 8. We direct the Registry of this Court to forward a copy of this judgment to the Chief Justice of the Orissa High Court. We request the Chief Justice of Orissa High Court to circulate a copy of this order to the learned Judges of the Orissa High Court.

B 9. The appeal is disposed of in the aforestated terms.

B.B.B.

Appeal disposed of.