

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.46436 of 2013

Arising Out of PS.Case No. -7 Year-2012 Thana -Chakmehsi District- SAMASTIPUR

Gauri Shankar Roy Son of Late Braj Mohan Roy Resident of Village – Namapur,
P.S. – Chakmehsi, District – Samastipur.

.... Petitioner.

Versus

The State of Bihar

.... Opposite Party.

With

Criminal Miscellaneous No. 46437 of 2013

Arising Out of PS.Case No. -7 Year-2012 Thana -Chakmehsi District- SAMASTIPUR

Mamta Devi, W/o Gauri Shankar Roy, Resident of Village – Namapur, P.S. –
Chakmehsi, District – Samastipur.

.... Petitioner

Versus

The State of Bihar

.... Opposite Party

Appearance :

(In Cr.Misc. No.46436 of 2013)

For the Petitioner : Mr. Bijay Bhushan Prasad, Advocate

For the Opposite Party : Mr. Nasim Yahia, APP

(In Cr.Misc. No.46437 of 2013)

For the Petitioner : Mr. Bijay Bhushan Prasad, Advocate

For the Opposite Party : Mr. Nasim Yahia, APP

CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

ORAL JUDGMENT

Date: 04-03-2015

Heard learned counsel for the parties.

Both the above applications have been filed for



modification of order dated 26.11.2012 passed in Cr. Misc. Nos. 31928 and 32638 of 2012 whereby the anticipatory bail applications of the petitioners were disposed of with a direction to the learned court below to consider the regular bail applications of the petitioners in view of the submissions made by the learned counsel for the petitioners that the petitioners were on police bail in connection with Chakmehsi P.S. Case No. 7 of 2012 registered under Sections 379,468 and 353 of the Indian Penal Code. Relevant portion of the earlier order passed in Cr. Misc. No. 31928 of 2012 and its analogous case is as follows:

“It is submitted that subsequent to lodging of the case they have been released on police bail.

In that view, the anticipatory bail applications of the petitioners are not maintainable. Let the learned court below consider regular bail of the petitioners in view of the ratio laid down in the case of Mahendra Prasad Singh Vs. The State of Bihar reported in 2004(3) P.L.J.R. 491 if the petitioners surrender within a period of six weeks from the date of receipt of copy of this order in connection with Chakmehsi P.S. Case No. 07 of 2012 pending in the court of the learned C.J.M. Samastipur.

With this observation, the applications are disposed off.”

Through the present applications under consideration,



modification of the order dated 26.11.2012 has been sought for, on the ground that on the basis of wrong instruction, it was earlier submitted that the petitioners were on police bail rather S.I., Chakmehsi Police Station issued notice on 08.08.2012 under Section 41A of the Cr.P.C., and in compliance of the same the petitioners appeared before the police and gave certain undertaking to the police. Hence, it cannot be treated as police bail. More over, they have never violated the conditions of notice nor any complaint to that effect has ever been made before the Magistrate by the police. Hence, prayer has been made to modify earlier order to the extent of consideration of anticipatory bail and to extend the period of surrender.

The legal issue that arises in the present case is whether an application for anticipatory bail under Section 438 Cr.P.C. is maintainable on behalf of a person who has never been arrested but has been noticed by the police officer under Section 41A (1) and has undertaken to comply with the terms of the notice under Section 41A(2) of the Cr.P.C.

The issue needs to be urgently addressed in view of the increasing tendency among the Sessions Courts of declining to entertain anticipatory bail applications under Section 438 Cr.P.C. on the ground that if any person who has been noticed under Section

41(A)(1) of the Code and/or has undertaken to comply with the terms of notice under Section 41A(2) Cr.P.C. would be deemed to be in police custody and hence, on police bail and precluding them from invoking the jurisdiction under Section 438 Cr.P.C.

For deciding the issue in question, the meaning of words “arrest”, “custody” and “bail” which are not defined in Cr.P.C., have to be understood.

The word ‘arrest’ has neither been defined in Cr.P.C. nor in the I.P.C. and has been derived from the French word ‘Arrester’ 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. The word arrest when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one’s personal liberty. When used in the legal sense in connection 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. ‘Arrest’ has been defined in Black’s Law Dictionary as (i) a seizure or forcible restraint; (ii) the taking or keeping of a person in custody by legal authority, especially in response to a criminal

charge. 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 wherever he pleases.

The word 'custody' is also not defined in the Code. The Oxford Dictionary defines 'custody' as imprisonment, detention, confinement, incarceration, internment, captivity; remand, duress and durance. The Cambridge Dictionary explains 'custody' as the state of being kept in prison, especially while waiting to go to court for trial. Longman Dictionary defines 'custody' as 'when someone is kept in prison until they go to court, because the police think they have committed a crime'. Chambers Dictionary clarifies that custody is 'the condition of being held by the police; arrest or imprisonment; to take someone into custody to arrest them'. Chambers' Thesaurus supplies several synonyms, such as detention, confinement, imprisonment, captivity, arrest, formal incarceration. The Collins Cobuild English Dictionary for Advance Learners states in terms of that some one who is in custody or has been taken into custody or has been arrested and is being kept in prison until they get tried in a court or if someone is being held in a particular type of custody, they are being kept in a place that is similar to a prison. Black's Law Dictionary – 9th Edition defines 'custody' as the care and control of a thing or person. The keeping, guarding,



care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody; the detention of a person by virtue of lawful process or authority.

The term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. The term 'custody' within statute requiring that Petitioner be "in custody" to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison rather is synonymous with restraint or liberty. Accordingly, persons on probation or released on own recognizance have been held to be 'in custody' for purposes of habeas corpus proceedings.

Halsbury's Laws of England - 4th Edition states that 'arrest' consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer.



In the case of Niranjana Singh Vs. Prabhakar Rajaram Kharote (1980) 2 SCC 559 while interpreting the expression 'in custody' within the meaning of Section 439 Cr.P.C., Krishna Iyer, J. speaking for the Bench observed that: "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".

From the above definition of 'custody' and 'arrest', it is apparent that in every arrest there is custody but not vice versa. Both the words 'custody' and 'arrest' are not synonymous terms. Though custody may amount to arrest in certain circumstances but not under all circumstances, as a person may be taken into judicial custody without being arrested after being surrendered before any court. 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.

The word 'bail' remains an undefined term in Cr.P.C. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the state imposing restraints.

Bail: Meaning: Websters 7th New Judicial Dictionary defines bail as follows:

“Bail is a security given for the due appearance of a prisoner in order to obtain his release from imprisonment; a temporary release of a prisoner upon security; one who provides bail”.

Wharton’s Law Lexicon defines bail to mean :

“to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a certain place, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely protected from prison, to which if they have, if they fear his escape, etc., the legal power to deliver him.”

In Stroud’s Judicial Dictionary, 5th Edition, the word bail is defined as follows:

“Baile” is when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law baileable offereth surety to those which have authority to baile him, which sureties are bound for him to the Kings use in a certaine summe of money, or body for body, that he shall appear before the Justices of Goale

delivery at the next Sessions, etc.”

Black's Law Dictionary 7th Edition defines 'bail' as a security such as cash or a bond; specially, security required by a court for the release of prisoner who must appear at a future time.

In both Concise Oxford Dictionary and Chambers 20th Century Dictionary, the meaning of the word 'bail' is a sum of money paid by or for a person who is accused of wrong doing, as security that he will appear at his trial, until which time he is allowed to be free.

Etymologically, the word 'bail' is said to derive from an old French verb Bailor which means to give or to deliver. Another view is the word is derived from the Latine term 'Bajulare' which means 'to bear a burden'. The word 'bail' may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of an accused, and at the same time involves participation of the community in the administration of justice.

According to judicial pronouncements, in the concept of bail a technique is evolved for effecting a synthesis of the two basic concepts of human value, namely, the right of an accused to enjoy his personal freedom and the public interest on which a person's release is conditioned on the surety to produce the accused person

in Court to stand the trial though Section 2A of the Code defines 'bailable offence' which means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and 'non-bailable offence' means any other offence.

Chapter V of Cr.P.C. deals with 'arrest' of persons. Section 41 Cr.P.C. provides for the exigencies and circumstances under which a police officer may arrest any one without warrant. The provisions of Section 41 of the Code are being reproduced for better appreciation of the issue involved. Section 41 reads as follows:

41. When police may arrest without warrant

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely :-

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary –

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the

evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making 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 the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

(ba) against whom credible information has been received that imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence.

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or

detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 365; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition

(2) Subject to the provisions of Section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.”

From perusal of the scheme of Section 41 Cr.P.C. as it stands now after being substituted by Code of Criminal Procedure (Amendment) Act 2008 (5 of 2009), it transpires that the power of arrest available to a police officer in connection with commission of a cognizable offence may be categorized under three heads – (a) under the first head, the Police officer has been conferred a power to arrest any person who has committed a cognizable offence in his presence. This power is without any qualification, exception and prerequisites. The only sine qua non is commission of a cognizable offence in presence of a police officer; (b) the second category of the case have been mentioned under Section 41(1)(b). In this class, those cases are included which are punishable with imprisonment for a term which may be less than seven years or which may extend



to seven years whether with or without fine and the police officer has received a reasonable complaint, or a credible information regarding any one having committed such offence or a reasonable suspicion exists that any one has committed such a cognizable offence. The power to arrest for the offence under this category is, however, not absolute and unqualified. In order to exercise the power of arrest in these category of cases, the police officer must have a reason to believe on the basis of complaint, information or suspicion that any person has committed the said offence and the police officer should be satisfied that such arrest is necessary in terms of any or all of the grounds as mentioned under Section 41(1)(b)(ii)(a,b,c,d,e) of the Code.

To put it straight, the legal position which emerges is that in the events of commission of cognizable offences punishable up to 7 years of the imprisonment, for arresting any person, there has to be a reasonable belief of the police officer coupled with the existence of any one or more of the circumstances rendering the police officer to satisfy himself that such arrest is necessary. The proviso appended to the relevant provision issues a command to the police officer to record his satisfaction in case he decides not to arrest any person in connection with the allegation of commission of the offence.



What emerges from the new scheme of the Code and the amendments to Section 41 is that under both the circumstances i.e. when he decides to arrest or when he decides not to arrest, there has to be a satisfaction of the police officer which satisfaction, of course, is judicially reviewable. In event of arrest, the police officer has to record about what reasons to believe he had for coming to a conclusion that the person has committed the offence and further more he is also required to record as to under what exigencies, the arrest was necessary. The exigencies have been provided under Section 41(1)(b)(ii) (a-e) of the Cr.P.C.

The import and meaning of 'the accused when to be arrested and when not' has been discussed in the case of Shaukin Vs. State of U.P. 2013(1) Crimes 306 (All.). The Division bench of Allahabad High Court considered and explained the import and meaning of amended provision of Section 41(1)(b) and 41A Cr.P.C. where the illustrations have been given where a person could be arrested straightway on lodging of the FIR and where the immediate arrest would not be necessary.

Thus, in the event police officer decides not to arrest any person notwithstanding the fact that there are credible information or suspicion of him having committed such offence, then also the police officer is required to record reasons in writing for not making

the arrest. The further course of action in cases where the police officer decides not to arrest any person has been provided under Section 41A Cr.P.C. which reads as follows:

“41A. Notice of appearance before police officer.-

(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.”



Here it would be relevant to elaborate the objects and reasons and the legislative intent behind the introduction/insertion of Section 41A of the Cr.P.C. (inserted by Act 5 of 2009). After going through the statement of objects and reasons vis-à-vis the insertion of Section 41A of the Cr.P.C., it becomes clear that the legislature intended to make it compulsory for the police to record reasons for making an arrest, as well as for not making an arrest in respect of a cognizable offence for which the maximum punishment is upto seven years, hence Section 41 was amended and proviso to Section 41 was inserted by Act 41 of 2010, whereas Section 41A of Cr.P.C. was inserted to make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under clause (b) of sub-section (1) of the amended Section 41. It was also suggested that the unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41A would be a ground for his arrest.

Hence, under the new provision of Section 41A of Cr.P.C., it is mandated that the police will not arrest the accused for crimes that are punishable with less than 7 years. Instead, the police can issue a notice informing the accused person/persons that he/they should appear at the police station for investigation.

The amendment sounds a death knell on the arbitrariness



of police to make arrests and lays considerable stress on the importance of investigation before an arrest is made or not made. The insertion of Section 41A Cr.P.C., pertaining to issuance of 'Notice of Appearance', is in line with the Right of Life and Liberty of the citizens and seeks to help to bring down the number of arrests, which in turn would decongest the crowded Indian Jails. Simultaneously, the innocents too can feel secure in case they stand a chance of exposure to implication in fake cases.

The amendment provides that the police officer shall, instead of arresting the person concerned, issue a notice of appearance, asking him to cooperate with the police officer in the probe. No arrest will be made in a non-cognizable offence except under a warrant or order of Magistrate. The amendment provides that the reasons for arrest should be sound and recorded in writing by the police officer. Where such a notice is issued to any person, it shall be the duty of that person to comply with it and arrest can be made only if the person fails to do so. Yet, here it is important to remember that mere failure to comply with the terms of the notice is not sufficient ground to arrest a person and the police officer must record reasons, if the need for arrest arises.

The import of the said provision of Section 41A Cr.P.C. is that normally where an accused has been named in the F.I.R.,



credible information has been received or reasonable suspicion exists and the offence is punishable with upto 7 years imprisonment, the arrest of the accused may not be necessary at the initial stage and his attendance may be secured by issuing a notice to him to appear before the police officer. In such cases, it would be advisable to arrest the accused only after sufficient evidence of his involvement in the crime has been collected and the charge sheet needs to be submitted. Under Section 170(1) Cr.P.C., it has been provided that on completion of investigation, if sufficient evidence has been collected, the accused shall be forwarded in custody to the Magistrate concerned, unless he has been released on bail (if the offence was bailable), in which event security may be taken for his appearance before the Magistrate.

With regard to the ambit of provision under Section 41A of the Cr.P.C., the Apex Court, in the case of Arnesh Kumar Vs. The State of Bihar, reported in 2014(3) BBCJ IV 282 has held in paragraph no. 10 in the following words:-

“10. Aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) Cr.P.C., the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an



accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.P.C. has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.”

The inescapable conclusion which emerges from the conjoint reading of Section 41 and 41A of the Code is as follows: In connection with allegation of commission of offence punishable up to 7 years with or without fine, the police officer can arrest – (i) only if he has reasons to believe regarding commission of the offence by the person concerned, coupled with (ii) the existence of one or more of the circumstances provided in the Section rendering arrest necessary.

In case the police officer decides not to arrest, he has to record the reasons to that effect and thereafter is mandatorily required to issue notice to the person concerned under section 41A(1). The notice is required to comply with the terms of the notice and till the time the noticee observes and adheres to the undertaking under the notice, he shall not be arrested unless for the reasons to be recorded, the police officer is of the opinion that he ought to be arrested. The use of word ‘shall’ in Section 41A(1) of

the Code reflects that the provision is mandatory in nature.

Where there is any failure on the part of the noticee to comply with the terms of the notice, it is always incumbent upon the police officer to arrest the noticee subject to such orders as may have been passed by a competent court in this behalf. The use of the term 'subject to such orders' is of significance as the legislature is not expected to waste the words or use them casually without any intention of a specific interpretation being given to them. The term subject to such orders as may have been passed refers to orders relating to grant of anticipatory bail which the noticee may have obtained interregnum the issuance of notice and before actual arrest.

Hence, in view of the above discussion, it is apparent that either in case of police bail or bail under the judicial order under Section 437 or 439 of the Cr.P.C., 'custody' is a pre-condition. The accused can be in custody not merely when the police arrests him, produces him before the Magistrate or gets a remand to a judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and prays for bail, which can be treated to be a constructive custody of the court.

Section 41A of the Cr.P.C. which was inserted by Act 5 of 2009 was made effective from 01.11.2010 and was introduced by the Legislature for purposes of giving notice of appearance to a



person who's arrest is not required under provisions of Section 41(1) of Cr.P.C., directing the person against whom a reasonable complaint has been made or creditable information has been received or reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the Notice.

Under Section 41A (2) of the Code the person concerned to whom the Notice has been issued is duty bound to comply with the terms of notice.

Section 41A (3) stipulates about the person who complies with the Notice, shall not be arrested unless for reasons recorded by the police that he ought to be arrested and one of such contingencies when such person can be arrested as stipulated under Section 41A (4) which prescribes the arrest of such person if he fails to comply the terms of Notice or is unwilling to identify himself, then the police officer subject to such orders as may have been passed by a competent court, may arrest him for the offences mentioned in the Notice.

Hence, a person gets apprehension of being arrested in two situations:- firstly when a 'Notice' is issued to him under Section 41A (1) of the Code and secondly, after complying the terms of 'Notice' the police officer forms an opinion that such

person ought to be arrested or in a situation, such person fails to comply the terms of 'Notice' or is unwilling to 'identify' himself.

In view of this Court, in all the above three situations such person can maintain an anticipatory bail application as Section 41A of the Code does not stipulate the specific condition of notice of appearance. To take a contrary view (police bail) will give a long rope to the police to deprive any person to avail the remedy under Section 438 of the Code.

In the present application, only notice and its reply have been brought on record but there is nothing on record to suggest that the petitioners have ever violated the terms of notice or undertaking though notice contained in Annexure 2 reflects that it was issued under section 41(1) of the Cr.P.C. but the specimen of the notice to be issued under Section 41A(1) has been specified in Justice Kastgir's Code of Criminal Procedure which is as follows:

“Form of Notice to be issued as per section 41(A) Cr.P.C.

Office Address

Notice

In exercise of the powers conferred under sub-section(1) of section 41A of Cr.PC, I hereby inform you that during the investigation of FIR No.....u/sregistered at SV & ACB Police Station,it is revealed that there are reasonable grounds to question you to ascertain facts and circumstances from you. Hence you are directed to appear before me atam/pm

onatPolice Station.

Date:

Signature

Name and Designation
(affix seal)”

In the present case, in pursuance to the notice as contained in Annexure 2 dated 8.8.2012 the petitioners appeared and gave undertaking that they will not threaten any witness or give any allurement to them nor they will tamper any evidence and whenever it is required, they will appear before the Court.

Section 41A of the Code operates in a situation where there is no arrest and prescribes the course of option to be adopted by a police officer in case he decides not to arrest any person. Till the time any person is not arrested, he is entitled to maintain an application for grant of anticipatory bail subject to, of course, the applicability of any other law to the contrary.

Merely appearing before a police officer in compliance of a notice and giving an undertaking to abide by the terms of the notice under Section 41A of the Code would not render any person in a deemed police custody and thereby oust the applicability of Section 438 Cr.P.C.

If the logic of non-maintainability of anticipatory bail application under Section 438 Cr.P.C. on the score is to be accepted, then startling anomaly resulting in serious consequences



would arise and virtually Section 438 of the Cr.P.C. will become otiose because in all cognizable cases either there has to be arrest or there has to be no arrest or there has to be a notice by the police officer. In case there is arrest, jurisdiction under Section 438 Cr.P.C. is automatically ousted and in case of non arrest, the requirement of notice is there and if issuance of notice and appearing in pursuance thereof is deemed to be in police custody, then also Section 438 Cr.P.c. would be ousted. This can certainly never be the legitimate interpretation of the scope of Section 41A Cr.P.C.

The provision for police bail is incorporated in Section 169 under Chapter XII Cr.P.C. which reads as follows:

“169. Release of accused when evidence deficient –

If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient, evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.”



It specifically specifies that when there is no evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties. Hence, the sine qua non for grant of police bail during investigation is that the person concerned must be in custody whereas Section 41A of the Code prescribes a situation when the arrest is not required.

The police, also has the power in a bailable offence on conclusion of the investigation, having sufficient evidence against the accused, of not forwarding the accused to the Magistrate and to release him on taking security or bond, for his appearance before the Magistrate. Section 170 Cr.P.C. reads as follows:

“170. Cases to be sent to Magistrate when evidence is sufficient -(1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before



such Magistrate until otherwise directed(2) When the officer in charge of a police station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the facts and circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused (3) If the Court of the Chief Judicial Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons

(4) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.”

The other provision in which police bail in a non-bailable offence is incorporated is under Section 437(2) in Chapter XXXIII Cr.P.C. Section 437(2) reads as follows:

“437(2). When bail may be taken in case of non-

bailable offence.

(1)

(2) 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 446A 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 for his appearance as hereinafter provided.”

The above provision also stipulates the release after the accused being in custody on executing a bond, but under Section 41A of the Cr.P.C. there is no provision of executing a bond.

In the case of Bishundeo Sahu and Ors. Vs. The State of Bihar and Ors., 2011(1) PLJR 731, a Division Bench of this Court considered the meaning of ‘custody’ and held that once a person surrenders in pursuance to the direction for grant of anticipatory bail and executes a bond, then he is in the constructive custody of the court, the paragraph reads as follows :-

“Thus, if an accused puts himself in the control of the court even after surrendering himself or even, in my opinion, appearing before it for the purposes of



fulfilling formalities of executing a bail bond directed to be executed by him by an order under Section 438 Cr.P.C. then he could be said to have offered himself to the courts' jurisdiction and have further submitted himself to its orders by his physical presence in court....”

Under Section 41A Cr.P.C. it is not the case that a bond is being executed, hence, it cannot be said that if a person complies with the notice under Section 41A, he is deemed to be in constructive custody of the police.

Chapter XXXIII of the Code incorporates the provision for grant of bail by the courts in bailable and non-bailable offences under Sections 436 and 437 Cr.P.C. which deal the grant of bail whereas Section 438 deals with direction for grant of bail to the person apprehending arrest in a non-bailable offence. Under Sections 436 and 437 Cr.P.C. the accused is in custody whereas under Section 438, the direction is given for release of a person in the event of arrest or surrender meaning thereby the provision for bail in all the circumstances is either in the event of arrest or in custody. Since, once the person surrenders before the court, he comes within the constructive custody of the court.

The word bond or bail bond is not defined in the Cr.P.C.



As per the Black's Law Dictionary 7th Edition, "bond" means an obligation – or a promise – A written promise to pay money or to do some act, if certain circumstances occur or certain time elapses – a promise that is defeasible upon condition subsequent.

The fact that an instrument is called bond is not conclusive as to its character. It is necessary to disregard nomenclature and look to the substance of the bond itself. The distinguishing feature of a bond is that it is an obligation to pay a fixed sum of money, at a definite time, with a stated interest, and it makes no difference whether a bond is designated by that name or by some other, if it possesses the characteristic of a bond.

Bail bond has been defined in Black's Law Dictionary 7th Edition, as "a bond given to a Court by a criminal defendant's surety, guaranting that defendant will duly appear in Court in the future; a bond given to obtain a prisoner's release and to secure the prisoner's appearance to answer legal process. The effect of the release on bail bond is to transfer the custody of the prisoner from the officer's of law to the custody of surety on the bail bond, whose undertaking is to re-deliver the defendant to legal custody at the time and place appointed in the bail bond. – Also termed appearance bond.

Chapter XXXIII of the Cr.P.C. deals with provision as to

bail and bonds. Section 440 of the Cr.P.C. deals with amount of bond and reduction thereof. Section 441 deals with the bond of accused and sureties. Section 441 reads as follows:-

441. Bond of accused and sureties –

- (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, think sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.
- (2) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.
- (3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.
- (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.



The conjoint reading of Sections 169, 437(2) and 441 of the Code suggests that the bond is executed for release of an accused in different conditions. Hence, the effect of release on bond is to transfer the custody of the offender from the custody of the Court or the police officer to the custody of surety on execution of bail bond, but under Section 41A, no bond is executed, because there is no question of release of the alleged accused. The condition precedent for application of Section 41A is when the police decides not to arrest an accused whereas under Sections 169, 170, 437(2) the police exercises its discretion to release on bail, under certain conditions, while the accused is in custody. The other purpose of getting the bond executed is to secure the appearance of the concerned accused before the police officer or the Court.

Under Section 170 Cr.P.C. also, in a bailable offence, the police officer is empowered to take security from the accused for appearance before such Magistrate, but in the instant case the undertaking was taken for not committing any offence, not threatening or alluring or making any promise to the witness, nor tampering any evidence and for appearing, as and when required before the Court and in non-compliance of the terms of notice, legal

action was directed to be taken. Hence, as stipulated under Section 41A, the non-compliance of the terms of notice, entails arrest, whereas in case of violation of bond/bail bond, the bail of the concerned accused is cancelled.

Hence, in other words, it can be summed up to conclude and say that Section 41A of the Cr.P.C. defers the arrest until and unless sufficient evidence is collected, so as to produce or forward the accused to the custody of the court. The apprehension of arrest, thus, does not completely vanish away on the issuance of notice of appearance under Section 41A of the Cr.P.C., and hence, the question being raised in maintainability of an application under Section 438 Cr.P.C., during the pendency of notice being issued under Section 41A Cr.P.C. or during the compliance of the terms of such notice, is completely unwarranted and is not in tune with the provisions of law. The apprehension of arrest always does exist even after issuance of notice of appearance under Section 41A Cr.P.C. and under such circumstance the Courts cannot evade to entertain an application under Section 438 Cr.P.C.

In view of the discussions made above, this Court has no option but to hold, and is accordingly held that issuance of notice to appear under Section 41A (1) of the Code or compliance of terms of such notice or undertaking to comply with the terms of notice



would not render any person to be in police custody or police bail disentitling him from invoking the provisions under Section 438 Cr.P.C. Till the time any person is not formally arrested under Section 41 of Cr.P.C., it is always open for him as a matter of right to invoke the statutory remedy and seek anticipatory bail. Rejection of anticipatory bail applications solely on this score, is certainly against the mandate of law and cannot be legally sustained.

In the present case, though the earlier bail applications were disposed of on submission being made that the petitioners were on police bail for consideration of the regular bail by the learned court below in view of the ratio laid down in the case of Mahendra Prasad Singh Vs. State of Bihar, 2004 (3) PLJR 491.

The accusation against the petitioners is that the petitioner Mamta Devi being Sarpanch of Gram Kachahari, Namapur and her husband Gauri Shankar Roy had taken out all the relevant papers and registers of the Gram Kachahari without the consent of the Secretary of Gram Kachahari due to which the functioning of the Gram Kachahari was paralyzed.

In view of the above discussions, there is no doubt that the applications for anticipatory bail of the petitioners are maintainable but considering the nature of accusation, this Court is not inclined to interfere at this stage when the earlier anticipatory

bail applications were disposed of. However, it is submitted that the investigation has already concluded and consequently the order of cognizance has been passed. In the circumstances, the order dated 26.11.2012 passed in Cr. Misc. No. 31928 and 32638 of 2012 is modified to the extent that let the learned Chief Judicial Magistrate, Samastipur or the concerned Magistrate consider the prayer of the petitioners for regular bail, keeping in view that the investigation has already concluded.

These applications are, accordingly, disposed of.

(Dinesh Kumar Singh, J.)

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