

Pranab Rauth Vs. State of Assam

Pranab Rauth Vs. State of Assam

SooperKanoon Citation : sooperkanoon.com/122094

Court : Guwahati

Decided On : Aug-08-2008

Judge : I.A. Ansari, J.

Appellant : Pranab Rauth

Respondent : State of Assam

Prior history : I.A. Ansari, J. 1. This is an application, made under Section 438 Cr.P.C, seeking pre-arrest bail for the accused-petitioner, namely, Sri Pranab Rauth, in connection with CID Police Station Case No. 29/2005 under Sections 419/209/365 IPC. 2. Perused the above application and materials on record including a copy of the order, dated 09.01.2008, passed, in Bail Application No. 4702/2007, whereby the High Court had granted pre-arrest bail to the present petitioner in connection with the case afore

Judgement :

I.A. Ansari, J.

1. This is an application, made under Section 438 Cr.P.C, seeking pre-arrest bail for the accused-petitioner, namely, Sri Pranab Rauth, in connection with CID Police Station Case No. 29/2005 under Sections 419/209/365 IPC.

2. Perused the above application and materials on record including a copy of the order, dated 09.01.2008, passed, in Bail Application No. 4702/2007, whereby the

High Court had granted pre-arrest bail to the present petitioner in connection with the case aforementioned subject to certain conditions. The directions for pre-arrest bail and the conditions, imposed by the Court, were as under:

Accordingly, it is ordered that in the event of his arrest in connection with CID PS Case No. 29/2005 under Sections 419/209 & 365 IPC, he shall be released on bail of Rs. 10,000/- with one local surety of the like amount to the satisfaction of the arresting authority on the following conditions:

1. The petitioner shall make himself available for interrogation by police officer as and when required.
- 2 The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the court or to any polite officer.
3. The petitioner shall not in any way hamper the investigation or tamper with the evidence.
4. The petitioner shall not leave the jurisdiction of the Court of the learned Chief Judicial Magistrate, Kamrup, Guwahati, without the written permission of the learned Chief Judicial Magistrate, Kamrup, Guwahati.
5. This order shall remain in force for a period of three months from today. Thereafter the petitioner shall seek regular bail.

3. A bare perusal of the conditions, subject to which the pre-arrest bail had been granted by the High Court, clearly shows that the said directions for pre-arrest bail were to remain in force for a period of three months and, thereafter, the petitioner was directed to seek regular bail from the appropriate Court if so required. The petitioner did not, however, make any application for regular bail in the Court of the Chief Judicial Magistrate, Kamrup, Guwahati, which is the appropriate Court; rather, the petitioner has, once again, chosen to come to this Court with the help of the present application, made under Section 438 Cr.P.C, seeking directions for pre-arrest bail on the ground that though he had been directed to seek regular bail from the appropriate Court, there is likelihood that the learned Court below may

not allow his application for regular bail.

4. The question, therefore, is this: What is the meaning and scope of 'anticipatory' or 'pre-arrest' bail? Yet another question, which this Bail Application raises, is as to whether it is legally possible for a person to skirt or avoid making of application for regular bail to the court of competent jurisdiction, which has the power to deal with such a regular application for bail, and seek, instead thereof, repeated directions for pre-arrest bail from either the Court of Session or the High Court in exercise of powers under Section 438 Cr.P.C?

5. An effective answer to the questions posed above cannot be had unless one clearly understands the field within which Section 438 Cr.P.C. operates vis-a-vis the areas of application of Sections 437 and 439 of the Code of Criminal Procedure. For a clear understanding of the scope, ambit and distinction lying amongst the three Sections, namely, Sections 437, 438 and 439, the provisions contained therein need to be carefully taken note of. With this object in view, these three Sections are reproduced hereinbelow:

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 Sessions, he may be released on bail, but--

(i) Such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) Such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years.

Provided that the Court may direct that a person referred to in Clause (i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in Clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason.

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this subsection without giving an opportunity of hearing to the Public Prosecutor.

(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 no 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.

(3) 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 of the Indian Penal Code (45 of 1860) or abetment of, or attempt to commit, any such offence, is released on bail under Sub-section (1) the Court shall impose the conditions--

(a) That such person shall attend in accordance with the conditions of the bond executed under this chapter,

(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, and

(c) That such 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 or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under Sub-section (1), or Sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under Sub-section (1), or Sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of any non-bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

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 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 applicant 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.

439. Special powers of High Court or Court of Session regarding bail -- (1)A High Court or Court of Session may direct--

- (a) That any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that Sub-section;
- (b) That any condition imposed by a Magistrate when releasing any person on bail be set aside or modified.

6. A careful reading of the provisions, contained in Section 437 Cr.P.C, makes it clear that 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. The provisions, so contained in Section 437(1), show that not only when a person is arrested or

detained without warrant, but even when he 'appears' or 'is brought' before a Court other than the High Court or Court of Session, Section 437 comes into play. Once a person is brought before Court of a Magistrate, on being arrested or detained, or appears, on apprehensions of his being arrested, in the Court of a Magistrate, seeking to be released on bail, he falls into the custody of the Court, where he makes the application for bail, for, with his appearance in the Court of the Magistrate, when such a person applies for bail, he not only surrenders to the jurisdiction of the Magistrate, but he also surrenders to abide by such order or orders as the Magistrate may, in a given case, pass. The application for bail, under Section 437, cannot be considered by a Magistrate unless the person, accused of, or suspected of, the commission of a non-bailable offence appears and surrenders to the custody of his Court or is brought and placed in his custody or is, otherwise, in the custody of the police without a warrant having been issued in this regard.

7. So far as Section 439 is concerned, an application for bail can be made by, or on behalf of, only that person, who is already in custody. Unless, therefore, a person is already in custody, the question of a Court of Session or High Court entertaining, under Section 439 Cr.P.C, an application for bail by such a person does not arise at all. In *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.* reported in : 1980 CriLJ426 , the Apex Court has made it clear that a High Court or a Court of Session cannot assume jurisdiction, under Section 439, to consider a person's application for bail unless the person, moving the Court for bail, is in custody.

8. A crucial question may, however, arise as to when a person is, or can be said to be, in 'custody' within the meaning of Section 437 or 439 Cr.P.C. As to what 'custody', in Section 439 signifies, has been succinctly described by Krishna Aiyer, J., In *Niranjan Singh (supra)*, at para 7, thus:

7. When is a person 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 court's jurisdiction and submitted to its order 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 quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. 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.

9. In *Niranjan Singh* (supra), the Apex Court, describing the concept of custody' in the context of Section 437 and Section 439, further observed, at para 8 and 9, as follows:

8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) in physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

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. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and may be, enabled the accused persons to circumvent the principle of Section 439 Cr.P.C.

We might have taken a serious view of such a course, indifferent to mandatory provisions, by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail.

(Emphasis is added)

10. From the decision in *Niranjan Singh* (supra), it becomes clear that 'custody', in the context of not only Section 437, but even under Section 439, means physical control or, at least, physical presence of the accused in the Court coupled with his submission to the jurisdiction and orders of the Court. A person can be in custody not merely when the police arrests him without warrant or produces him before the Magistrate or gets a remanded to judicial or other custody. Such a person can be said to be in judicial custody even when he surrenders before the Court of a Magistrate or the Court of Session or the High Court and submit to its directions.

11. Coupled with the above, it is also worth bearing in mind that for invoking the provisions of Section 439, two condition precedents are required to be satisfied, namely, (i) that the person, applying for bail, must be accused of an offence and (ii) that he must be in custody. Hence, when a person, accused of an offence, surrenders in a Court of Session or a High Court, the Court of Session or the High Court, as the case may be, in the light of *Niranjan Singh* (supra), acquires jurisdiction to consider such a person's bail application. Once there is power given to the Court of Session or the High Court to consider and decide such a bail application, it logically follows, as pointed out in *Niranjan Singh* (supra), that the Court of Session or the High Court, as the case may be, can either grant bail to such a person or it can refuse to grant bail and remand such a person to custody. When a person, who has not been arrested by police or who has not appeared and surrendered in a Court of Magistrate, appears in a Court of Session or the High Court, as the case may be, and surrenders to such a Court's jurisdiction, the Court cannot ask such a person to, first, get arrested by police or to appear and surrender before the Court of Magistrate of competent jurisdiction. Thus, once such a person appears and surrenders in the Court of Session or the High Court, as the case may be, the Court would have, if I may reiterate, the jurisdiction to consider such a person's bail application. If such a Court does not allow such person to be released on bail, it has to remand the accused into custody and, thereafter, it is the Court of the Magistrate of the competent jurisdiction, which shall deal with the matter. This is the concept, which *Niranjan Singh* (supra), aims at conveying.

12. Restating to concept of 'custody', as had been laid down in *Niranjan Singh (supra)*, the Apex Court, in *Sunita Devi v. State of Bihar and Anr.* reported in : AIR 2005 SC498 , has observed as under:

14. The crucial question is when is a person in custody, within the meaning of Section 439 of the Code? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the Court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the Court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. The word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law.

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

16. In *Black's Law Dictionary* by Henry Campbell Black, M.A. (6th Edn.), the expression 'custody' has been explained in the following manner:

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

13. From what have been indicated in *Sunita Devi* (supra), it becomes transparent that a person can be said to be in custody, 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.

14. It is, thus, clear that even when a person is in custody of police, an application for bail can be made under Sections 437 or 439 Cr.P.C. Even when a person, who is not formally in the custody of the police, appears in the Court of a Magistrate or in the Court of Session or even in the High Court and makes a regular application for bail, such a person, by virtue of his having made such an application for bail, submits, in effect, to the jurisdiction of the Court and places himself thereby in the custody of the Court. Hence, not only when a person appears in the Court of a Magistrate in connection with a non-bailable case, but even when such a person appears in a Court of Session or High Court and applies for bail under Section 439, he is actually in the custody of the Court to which he applies for bail, for, he, in effect, submits, by his such act, to the jurisdiction and orders of the Court to which he applies for bail. Similarly, even if a person is not arrested or detained or is not brought before a Magistrate, such a person still has a right to appear before the Magistrate, when he comes to know that he is suspected of having committed a non-bailable offence and when such a person appears in the Court of the Magistrate and applies for bail, he really comes into the custody of the Magistrate and unless allowed to go on bail, a Magistrate has no option, but to remand such a person to judicial custody.

15. So far as Section 438 is concerned, it really deals with directions for grant of bail to a person, who apprehends arrest and applies to the Court of Session or the

High Court for an order that in the event of his arrest, he be directed to be released, on bail, by the arresting authority. No wonder, therefore, that in *Balchand Jain v. State of M.P.* reported in : [1977]2SCR52 , the Supreme Court made it clear that the expression 'anticipatory bail' is really a misnomer, because what Section 438 contemplates is not an anticipatory bail, but merely an order directing the release of an accused on bail in the event of his arrest. In short, thus, even in the case of Section 438, the question of granting of bail would arise only when a person is arrested in connection with a non-bailable offence by the police. The basic difference, however, between an order passed under Section 438 Cr PC, on the one hand, and an order, passed under Section 437 and/or 439, on the other, is that the direction for bail is passed, under Section 437 and/or Section 439, by the Court after arrest is made or a person has already surrendered to the custody of the Court; whereas the directions for pre-arrest bail or anticipatory bail are passed in anticipation of arrest and becomes effective at the very moment the person is arrested by the police or by the investigating agency. (See *Gurbaksh Singh Sibbia v. State of Punjab* reported in : 1980 CriLJ1125 .

16. What is, now, of utmost importance to note is that in *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, reported in : 1996 CriLJ1368 , the Apex Court has observed as follows:

Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.

(Emphasis supplied)

17. From a bare reading of what has been observed and laid down in Salauddin Abdulsamad Shaikh (supra), it becomes clear that orders for anticipatory or pre-arrest bail shall be of limited duration and, ordinarily, the Court, granting anticipatory bail, shall leave it to the regular Court to deal with the matter on the basis of the materials, which may come to light.

18. In K.L. Verma v. State reported in : (1998)9SCC348 , the Apex Court, referring to Salauddin Abdulsamad Shaikh (supra), and re-stating the parameters of powers under Section 438, laid down as under:

7. This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration of extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire.

(Emphasis supplied)

19. From the decision, in K.L. Verma (supra), too, it becomes clear that though anticipatory bail is granted in anticipation of arrest in non-bailable case, it does not

mean that the regular court, which has to try the offender, shall be by-passed. Even in K.L. Verma (supra), it was further pointed out that anticipatory bail order should be of limited duration and, ordinarily, on the expiry of the order of anticipatory bail or extended duration, the Court, granting anticipatory bail, should leave to the regular Court to deal with the matter on appreciation of materials, which may come to light after investigation has made progress or charge-sheet is submitted, In fact, in K. L. Verma (supra), what was clearly indicated was that an order of anticipatory bail does not endure till the end of trial, but it must be of limited duration so that the regular Court cannot be bypassed. The limited duration must, however, be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and also to give the regular court sufficient time to determine the bail application.

20. In Sunita Devi (supra), having considered the decisions not only in Salauddin Abdulsamad Shaikh (supra) and K.L. Verma (supra), but also taking into view the case of Nirmal Jeet Kaur v. State of M.P. reported in : (2004)7SCC558 , the Apex Court has made it clear that the protection, given in terms of Section 438, shall be for a limited duration during which the regular Court has to be moved for bail. It has been further pointed out, in Sunita Devi (supra), that if the scope of Section 438 is extended beyond what has been laid down Salauddin (supra), the result will be clear by-passing of what is mandated in Section 439 regarding custody.

21. In fact, in Sunita Devi (supra), the High Court had directed, while exercising its powers under Section 438 Cr.P.C, that in the event of arrest or surrender, the petitioner shall be enlarged on bail on furnishing abail bond of Rs. 10,000/- with two sureties of the like amount to the satisfaction of the Chief Judicial Magistrate concerned. This direction was, eventually, found to be beyond the scope of Section 438 and was accordingly interfered with by the Apex Court.

22. In other words, Salauddin (supra), K. L. Verma (supra) and Sunita Devi (supra) do not permit granting of anticipatory bail for an indefinite period; rather, when a Court decides to grant anticipatory bail, it shall grant such bail only for limited duration and, thereafter, on the expiry of the duration of the period so fixed or extended duration, the Court, granting anticipatory bail, shall leave it to the regular

Court to deal with the matter on appreciation of the materials placed before it after investigation has made progress or charge-sheet has been submitted.

23. It is, at this stage, apposite to pause and take, once again, note of another noticeable feature of the provisions; contained in Section 437. Section 437(1) states--

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....

24. From a cautious, patient and minute reading of what Sub-section (1) of Section 437 states, what transpires is that a Magistrate may release a person, on bail, not only when the person who is accused of, or suspected of commission of any non-bailable offence, 'appears' in the Court of the Magistrate, or, 'is brought', on his being arrested without warrant, before the Court of the Magistrate, but also when he is 'arrested or detained without warrant'. Section 437(1), thus, visualizes three distinct situations, wherein a Magistrate can exercise his powers of granting bail, namely, (i) when a person, accused of, or suspected of, the commission of any non-bailable offence, is arrested or detained, without warrant, by the Officer-in-Charge of a police station; or (ii) when a person, accused of, or suspected of, the commission of any non-bailable offence, appears, in the Court of the Magistrate; or (iii) When a person is brought before the Court of a Magistrate on his being arrested for being accused of, or on being suspected of, commission of any non-bailable offence. Considered in this light, it is, perhaps, possible for a Magistrate to direct release of a person, without his being brought before the Court of the Magistrate, when he is arrested or detained without warrant on being accused of, or on being suspected of, commission of any non-bailable offence. If these situations permit a Magistrate to release a person on bail, it would, as a corollary, follow that it is, perhaps, possible for a Magistrate to enlarge an accused on bail without the accused having been physically produced before the Magistrate. Such an inference, at the first blush, appears to be running contrary to the provisions of Section 167, particularly, the provisions of Sub-sections (1) and (2) thereof.

25. On a minute scrutiny of sub-Sections (1) and (2) of Section 167, what, however, transpires is that Section 167(1) obliges the police to produce, before the nearest Judicial Magistrate, a person, when he is arrested and detained in custody and if it appears that the investigation cannot be completed within the period of 24 hours, as fixed by Section 57. Section 167(1) does not appear to disempower the Magistrate from releasing the person, so arrested, in exercise of the latter's power under Section 437(1) without the accused having been produced before the Magistrate by the police officer, who has arrested the accused or detained him in custody. The provisions with regard to the period, which is prescribed as the period of 60 days or 90 days, as the case may be, beyond which an accused person cannot be detained if the investigation still remains incomplete, would imply that a Magistrate may authorize, for the prescribed period, detention of the person, who comes in the custody of the Magistrate on his being produced before the Magistrate, or, on his appearing before the Magistrate, or when such a person is, otherwise, in the custody of the police without a warrant of arrest having been issued against such a person. The power to keep, in detention, for the periods, as prescribed by Section 167 too, does not take away the Magistrate's power, which a Magistrate, otherwise, has to release an accused, on bail, without his being produced in the Court of the Magistrate, for, it is only when the person is, upon production before a Magistrate, is allowed to be detained in custody, by virtue of the Magistrate's power to authorize such detention, that the prescribed period would start running.

26. This aspect of the matter can be looked into from another angle. Sub-sections (1) and (2) of Section 167, we must bear in mind, aim at protecting the liberty of an individual inasmuch as it gives a person, who is arrested or taken into custody by police or by investigating agency to ensure (i) that he (i.e., the accused) is produced before the nearest Magistrate of competent jurisdiction and (ii) that he (i.e., the accused) be not detained, even under the orders of a Magistrate, beyond the statutory period of sixty days or ninety days, as the case may be, meaning thereby that such a person has a right to be produced before the Magistrate and he also has a right to demand his release on bail if charge-sheet is not submitted against him within the statutory period of sixty or ninety days, as the case may be. Section 167 cannot, therefore, be taken to have, in any way, disempowered a

Magistrate from releasing an accused on bail if such an accused is, otherwise, entitled, under the law, to be released on bail. More importantly, Sub-sections (1) and (2) of Section 167 can, by no stretch of imagination, be construed to have disempowered a Magistrate. Far from this, Sub-sections (1) and (2) of Section 167 aim at empowering the Magistrate to release an accused on bail. When considered in this light, what further transpires is that even when a person is in the custody of the police or investigating agency, a Court of Session or High Court may, in exercise of its powers under Section 439 Cr.P.C, direct release of such a person, on bail, for, what Section 439 requires is that the accused shall be in 'custody' irrespective of the fact as to whether such custody is of the police, or, on being authorized by the Magistrate to be detained in custody in exercise of the Magistrate's powers under Sub-section (2) of Section 167 read with Sub-section (1) of Section 437.

27. What, of course, is imperative to note is that, ordinarily, a Court of Session or High Court will not exercise its powers, under Section 439 Cr.P.C, unless an application for bail has been moved and, expressly or impliedly, rejected by the Magistrate competent to release the accused on bail. It is noteworthy, in this regard, that preponderance of judicial opinion has been that a Court of Session or a High Court shall not, ordinarily, direct a person's release, on bail, in exercise of its powers, under Section 439 Cr.P.C, without the accused having moved any application for bail before a Magistrate and the same having been rejected either expressly or impliedly. Though the Court of Session and the High Court do have the power to direct release of an accused, on bail, without such a person having moved any application for bail in the Court of a Magistrate, convincing reasons must be assigned for choosing the Court of Session or the High Court, without, first, making application for bail before the Magistrate. The accused, in such a case, in order to seek bail, under Section 439 Cr PC, must state the exceptional or special circumstances as to why his prayer for bail shall be entertained by the Court of Session or the High Court without his having moved any application for bail in the Court of the Magistrate. A reference, in this regard, may be made to the case of *Gurcharan Singh and Ors. v. Delhi Administration* reported in : 1978 CriLJ129 , wherein the Apex Court, at para 24, has observed:

Section 439(1), Cr.P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr.P.C, against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1), Cr.P.C. of the new Code. The over-riding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1), Cr.P.C. of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; or repeating the offence; of jeopardizing his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.

(Emphasis is added)

28. The emphasized portions, quoted above, clearly show that it is legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after his prayer for bail has been rejected by the Magistrate. The logical inference from this legitimate supposition is that a Court of Session or a High Court will not, ordinarily, exercise its powers under Section 439, unless the accused makes out a special case for seeking directions for bail, under Section 439, without having filed any application for his bail in the Court of the Magistrate of competent jurisdiction. (See also, in this regard, *Mutum Choba Singh v. State of Manipur* reported in (1985) 1 GLR 286).

29. What surfaces from the discussions held above, as a whole, is that the directions for pre-arrest or anticipatory bail can be passed by the High Court or Court of Session, in exercise of powers under Section 438 Cr.P.C, only in anticipation of arrest and will come into force the moment the arrest is made; but such direction for bail cannot be granted for an unlimited period inasmuch as it is the regular Court, which shall have the power to deal with such cases and it is, therefore, the duty of the High Court or the Court of Session, as the case may be, to grant anticipatory bail for a specified period and leave it, thereafter, to the option of the petitioner to apply for regular bail, if so required, to a Court of competent jurisdiction by taking recourse to either Section 437 or Section 439, as the case may be.

30. Bearing in mind what is indicated above, when I revert to the facts of the present case, what becomes glaringly noticeable is that this Court had passed directions for pre-arrest bail, as already indicated above, for a specified period, i.e., for a period of three months, and the petitioner ought to have, thereafter, sought for, if required, regular bail from the Court of the Chief Judicial Magistrate, Kamrup. The petitioner has, however, with apprehension that he may not be released, on bail, by the Chief Judicial Magistrate, chosen not to appear in the Court of Chief Judicial Magistrate, Kamrup, and, instead thereof, has, once again, come to this Court with the present application made under Section 438 Cr.P.C. The tactics, adopted by the petitioner, to avoid his surrendering to the custody of the Court of competent jurisdiction if he really apprehends arrest, cannot be encouraged, for, doing so would really permit a person to permanently avoid seeking regular bail from the Court of competent jurisdiction, which the decisions in Salauddin (supra), K.L. Verma (supra) and Sunita Devi (supra) aim at discouraging or resisting. In the circumstances as aforesaid, the present application for granting directions for pre-arrest bail cannot be entertained, particularly, when the petitioner has miserably failed to show any legal, logical and convincing reason for not applying for regular bail in terms of the directions, dated 09.01.2008, passed by the High Court.

31. Because of what have been discussed and pointed out above, this Bail Application is hereby rejected. The petitioner is, however, given the liberty, which

he, otherwise, also has, to appear in the Court of the Chief Judicial Magistrate, Kamrup, and apply for regular bail if he really apprehends arrest. If such an application is made, the learned Court below shall consider and dispose of the same in accordance with law without being influenced by the fact that this Court has not entertained the second application for pre-arrest bail, for, this second application for pre-arrest bail has been rejected on account of the scope of the provisions contained in Section 438 Cr.P.C. and not on account of the merit of the case of the petitioner. If the petitioner appears in the Court of the Chief Judicial Magistrate, Kamrup, and applies for regular bail and the learned Court below forms the opinion that it needs to be perused the relevant case diary before final order, granting or not granting of bail, can be passed therein, the learned Court below shall remain at liberty to pass a conditional order fixing the Bail Application, for hearing, after a couple of days, call for, in the meanwhile, the case diary; and, in the interim, allow the petitioner to go on bail with direction to re-appear on the date and at the time, which may be fixed by the Court.

32. If the petitioner follows the conditions, which may be so imposed, the learned Court below shall be free to pass such further order (s) as may be warranted by the facts of the given case.

33. With the above observations and directions, this Bail Application shall stand disposed of.