

## **Criminal Revision**

**PRESENT: The Hon'ble Justice Ashim Kumar Roy**

**Judgment On: 01-02-2010.**

**C.R.R. No. 4262 of 2009  
Kadir Khan @ Kader Khan  
versus  
The State of West Bengal**

### **Point:**

**Bail-** The order for payment of maintenance as a condition of bail whether unwarranted and illegal- Code of Criminal Procedure,1973-Ss.437, 439.

**Fact:** In this criminal revision the petitioner, who was arrested under Sections 498A/323/34 of the Indian Penal Code challenged the order, passed by the Learned Sessions Judge, wherein bail was granted subject to conditions of payment of maintenance to his wife and the order of cancellation of his bail on his failure to comply with such order.

**Held:** The question of liability of the husband to pay maintenance to his wife is a matter to be determined by a competent Court in appropriate proceeding under Section 125 of the Code of Criminal Procedure and it is not at all lawful for a Court to overstep its jurisdiction by making a direction for payment of maintenance, when subject of maintenance is covered by an expressed provisions of the Code. The order for payment of maintenance as a condition of bail is wholly unwarranted and illegal. (Paragraph – 4)

When the Court found that a case for bail has been made out and the Court allowed the accused's prayer for bail still to impose a condition for payment of maintenance to the wife is absolutely illegal and without jurisdiction. (Paragraph – 6)

### **Cases cited:**

1. Mahesh Chandra Vs. State of U.P. & Ors., reported in (2006) 3 SCC (Cri) 23
2. Munish Bhasin & Ors. Vs. State (Government of NCT of Delhi) & Anr., reported in (2009) 2 SCC (Cri) 56
3. Biman Chatterjee Vs. Sanchita Chatterjee & Anr., reported in 2004 SCC (Cri) 814

For Petitioner: Mr. Kallol Mondal  
For State: Mr. Kashem Ali Ahmed

**The Court:**

1. The present petitioner who was arrested in connection with Ratua Police Station Case No. 441/09, under Sections 498A/323/34 of the Indian Penal Code nearly after 15 days of his arrest, was granted bail by the Learned Sessions Judge, Malda subject to the condition amongst other that after release he shall pay a sum of Rs. 1,500/- per month to his wife as her monthly maintenance. The Learned Judge further directed in the event the petitioner fails to pay the maintenance his bail shall be cancelled.

2. In this criminal revision the petitioner challenged the aforesaid order, so far that relates to imposition of condition of payment of maintenance and the order of cancellation of his bail on his failure to comply with such order.

3. The Apex Court as well as this Court, times without number held subjecting an accused to any condition, other than those have been enumerated in Section 439 (1)(a) and Section 437 (3) of the Code of Criminal Procedure, while granting him bail would be beyond jurisdiction of the power conferred on Court under Section 439 (1) of the Code of Criminal Procedure and Court should always be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the condition which are not at all called for.

4. A Court of Sessions while granting bail in exercise of power conferred under Section 439 of the Code may impose any condition those delineated in sub-section (3) of Section 437 of the Code of Criminal Procedure. A plain reading of the said provisions makes it abundantly clear the whole object behind imposition of such condition is to ensure that accused must be available for his trial and must not commit an offence similar to the offence of which he is accused or of which he is suspected, in one word that he must not misuse his liberty. It is also open to the Court to impose such condition to exclude the possibilities of hampering or affecting investigation and interference with the due process of law by the accused. Although the Court can always either grant or refuse a bail to an accused, upon consideration of the materials against him, while exercise its jurisdiction under Section 439 of the Code, but has no right to record a finding as to guilt or innocence of an accused or to determine his liability. In the instant case, while granting bail to the petitioner the Learned Sessions Judge directed him to pay a monthly maintenance to the defactocomplainant/ wife. The question of liability of the husband to pay maintenance to his wife is a matter to be determined by a competent Court in appropriate

proceeding under Section 125 of the Code of Criminal Procedure and it is not at all lawful for a Court to overstep its jurisdiction by making a direction for payment of maintenance, when subject of maintenance is covered by an expressed provisions of the Code. The order for payment of maintenance as a condition of bail is wholly unwarranted and illegal. In the case of Mahesh Chandra Vs. State of U.P. & Ors., reported in (2006) 3 SCC (Cri) 23, the Apex Court held as follows;

“As a condition for grant of anticipatory bail, the High Court has recorded the undertaking of the petitioners to pay to the victim daughter-in-law a sum of Rs. 2000 per month and failure to do so would result in vacation of the order granting bail. We notice that the applicants before the High Court were the jeth and jethani of the victim. We fail to understand how they can be made liable to deposit Rs. 2000 per month for the maintenance of the victim. Moreover, while deciding a bail application, it is not the jurisdiction of the Court to decide civil disputes as between the parties. We, therefore, remit the matter to the High Court to consider the bail application afresh on merit and to pass an appropriate order without imposing any condition of the nature imposed by the impugned order.”

5. In a very recent decision in the case of Munish Bhasin & Ors. Vs. State (Government of NCT of Delhi) & Anr., reported in (2009) 2 SCC (Cri) 56, the

Hon’ble Supreme Court reiterated and reaffirmed its earlier view and held as follows;

“The learned Judge further directed that in the event of arrest of the appellant and his parents, before the next date of hearing, they shall be released on bail on their furnishing personal bond in the sum of Rs. 25,000 each with one surety of the like amount to the satisfaction of the investigating officer/arresting officer concerned, subject however to the condition that the appellant and his parents shall surrender their passports to the investigating officer and shall file affidavits in the Court that they would not leave the country without prior permission of the Court. (para 5)

From the records, it appears that the conciliation proceedings failed and therefore the bail application was taken up for hearing on merits. On representation made by the wife of the appellant, the counsel of the appellant was directed to produce the appellant’s salary slip. Accordingly, the salary slip of the appellant was produced before the Court which indicated that the appellant was drawing gross salary of Rs. 41,598 and after deductions of advance tax, etc. his net salary was Rs. 33,000. (para 6)

The learned Single Judge of the High Court took the notice of the fact that the appellant had the duty to maintain his wife and the child and therefore as a condition for grant of anticipatory bail directed the appellant by the order dated 7-8-2007 to pay a sum of Rs. 12,500 per month by way of maintenance to his wife and child. The learned Single Judge also directed to pay arrears at the rate of Rs. 12,500 per month from August 2005, that is Rs. 3,00,000 within six months. The imposition of these conditions for grant of anticipatory bails is the subject-matter of challenge in the instant appeal. (para From the perusal of the provisions of sub-section (2) of Section 438, it is evident that when the High Court or the Court of Session makes a direction under sub-section (1) to release an accused alleged to have committed non-bailable offence, the court may include such conditions in such direction in the light of the facts of the particular case, as it may think fit, including

“(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;  
(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;  
(iii) a condition that the person shall not leave India without the previous permission of the court;”

and

“(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.” (para 8)

Sub-section (3) of Section 437, inter alia, provides that when a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the court shall impose the following 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”

the court may also impose, in the interest of justice, such other conditions as it considers necessary. (para 9)

It is well settled that while exercising discretion to release an accused under Section 438 of the Code neither the High Court or the Sessions Court would be justified in imposing freakish conditions. There is no manner of doubt that the court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all. (para 10)

The conditions which can be imposed by the court while granting anticipatory bail are enumerated in sub-section (2) of Section 438 and sub-section (3) of Section 437 of the Code. Normally, conditions can be imposed (i) to secure the presence of the accused before the investigating officer or before the court, (ii) to prevent him from fleeing the course of justice, (iii) to prevent him from tampering with the evidence or to prevent him from inducing or intimidating the witnesses so as to dissuade them from disclosing the facts before the police or court, or (iv) restricting the movements of the accused in a particular area or locality or to maintain law and order, etc. To subject an accused to any other condition would be beyond jurisdiction of the power conferred on court under Section 438 of the Code. (para 11)

While imposing conditions on an accused who approaches the court under Section 438 of the Code, the court should be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the conditions which are not called for at all. There is no manner of doubt that the conditions to be imposed under Section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail under Section 438 of the Code. (para 12)

In the instant case, the question before the Court was whether having regard to the averments made by Ms Renuka in her complaint, the appellant and his parents were entitled to bail under Section 438 of the Code. When the High Court had found that a case for grant of bail under Section 438 was made out, it was not open to the Court to direct the appellant to pay Rs. 3,00,000 for past maintenance and a sum of Rs. 12,500 per month as future maintenance to his wife and child. In a proceeding under Section 438 of the Code, the Court would not be justified in awarding maintenance to the wife and child.” (para 13)

6. Thus, as the law stands it is open to a Court to either grant bail or to

refuse bail upon taking into consideration the evidentiary materials collected by the police during investigation but it is not at all permissible for a Court, when a Court found that a case for grant of bail has been made out to allow the accused's prayer for bail by imposing a condition of payment of maintenance or when Court found that no case for granting bail has been made out still to allow the accused's prayer for bail on a condition he shall pay maintenance to the wife. Therefore, when the Court found that a case for bail has been made out and the Court allowed the accused's prayer for bail still to impose a condition for payment of maintenance to the wife is absolutely illegal and without jurisdiction. The Learned Sessions Judge while allowed the petitioner's prayer for bail on condition of payment of maintenance further directed that in the event petitioner fails to pay maintenance his bail shall be cancelled. Since imposition of condition of payment of maintenance has not been contemplated in the relevant provisions of the Code dealing with the matter of bail, the question of cancellation of bail for non-fulfillment of such a condition is completely alien to the grounds for cancellation of bail. In the case of Biman Chatterjee Vs. Sanchita Chatterjee & Anr., reported in 2004 SCC (Cri) 814, the Apex Court held that non-fulfillment of the terms of compromise cannot be the basis of cancelling a bail the grant of bail under the Criminal Procedure is governed by the provisions of Chapter XXXIII of the Code and the provisions therein does not contemplated either grant of a bail on the basis of an assurance of compromise or cancellation of a bail for violation of the terms of such compromise. The Apex Court further held that having granted bail under the provisions of the Code it is not open to the trial Court or the High Court to cancel the same on a ground alien to the grounds mentioned for cancellation of bail in the said provisions of law.

7. For the reasons stated above, the order of granting bail so far that relates to direction of payment of maintenance to the wife stands set aside and this criminal revision stands allowed.

However, this order will not preclude the wife to pray for maintenance by moving appropriate application in accordance with law.

The Criminal Section is directed to communicate this order at once to the Learned Court below and to submit compliance.

Criminal Section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.

**( Ashim Kumar Roy, J. )**