

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.4258 OF 2010
WITH
CRIMINAL APPLICATION NO.511 OF 2010**

Mr. Ishan Vasant Deshmukh ..Applicant
alias Prasad Vasant Kulkarni
Age : 38 years, Occu : Service
Residing at C-404, Pinnac
Sadhiccha, Rambag colony,
Paud road,
Pune 400 038.

Versus

The State of Maharashtra ..Respondent
(At the instance of Inspector
of Police, Swargate Police
Station, Pune)

Mr.A.P.Mundargi, Senior Counsel with
Mr.N.Mundargi, for the Applicant
Mr.Nitin Pradhan with Mr.Subodh Desai, Mr.Manoj
Mohite and Mrs.Vijayalaxmi Kulkarni i/b.Nanu
Hormasjee & Co., Advocate, for the original
Complainant/Intervener
Mrs.P.P.Bhosale, APP, for the Respondent State

CORAM : R.C.CHAVAN, J.

JUDGMENT RESERVED ON : 8TH OCTOBER, 2010

JUDGMENT PRONOUNCED ON : 18TH OCTOBER, 2010

JUDGMENT

. Criminal Application No.4258 of 2010 is for bail by an accused in C.R.No.I-357 of 2009 for the offence punishable under Sections 417, 420, 465, 468, 471 and read with Section 34 of the Indian Penal Code, 1860 at Swargate Police Station, Pune registered upon complaint of M/s.ICICI Prudential Life Insurance Company Limited. Criminal Application No.511 of 2010 is for intervention by the first informant Company.

2. Applicant was licensed agent of the M/s.ICICI Prudential Life Insurance Company Limited. In 2008, applicant had introduced three clients from Doddanavar family for policies in respect of which annual premia were Rs. 1,50,00,000/-, Rs.10,00,000,00/- and Rs. 50,00,000/- . The applicant had received a hefty commission of Rs.80,85,000/- and gift of Rs. 2,69,99,695/- from complainant for introducing

these policies. He transferred Rs.3,00,00,000/- to the account of his wife. Complainant received a request to cancel policies of client Pravin Doddanavar and for refund of premium of Rs. 10,00,00,000/- on 25th October, 2008. On 6th November, 2008, applications from Doddanavars were received for conversion of their policies from one plan to another. On 14th December, 2008, clients complained that they had not requested for any such new policies and that instead of refunding Rs.12,00,00,000/-, in order to earn his commission, applicant had invested the amount in policies. The complainant Company refunded the entire amount to clients and then filed a report on which an offence was registered.

3. Applicant applied for and was granted anticipatory bail by the Additional Sessions Judge, Pune by his order dated 30th July, 2009. The State sought cancellation of this order by filing Criminal Application No.4356 of 2009. This

application was disposed of by an elaborate 22 page order dated 28th June, 2010, whereby the order passed by the Additional Sessions Judge was modified, limiting anticipatory bail till filing of charge sheet and permitting applicant to apply for regular bail before the concerned Court which is seized of the matter .

4. Charge sheet was filed on 24th August, 2010 before Judicial Magistrate First Class, Pune. The applicant applied to the Court of Sessions at Pune for regular bail upon filing of charge sheet. He also mentioned that he had a heart ailment which required him to be bailed out. The learned Additional Sessions Judge rejected this application on 13th September, 2010. The applicant was however not taken in custody. The applicant has, therefore, filed the present Criminal Application No.4258 of 2010 for bail under Section 439 of the Code of Criminal Procedure, 1978.

5. On behalf of intervenor, two objections have been raised to the tenability of this application. The first is that unless the applicant is in custody, he cannot apply for bail either under Section 437 or 439 of the Indian Penal Code. The second objection is that this Court, while disposing of the Criminal Application No.4356 of 2009 by order dated 28th June, 2009, had specifically directed that the present applicant shall apply for regular bail before the concerned Court which is seized of the matter, and that the concerned Court shall deal with such application for regular bail according to law. It was, therefore, submitted that the applicant ought to have approached the concerned Court which is seized of the matter. Consequently, an application should have been made before the Trial Magistrate and not before the Court of Sessions or even before this Court.

6. First, I would deal with the objection to the tenability of applicant on the ground that the applicant is not in custody and therefore, this application should not be entertained. The learned Counsel for intervenor relied on Judgments of the Supreme Court in **SUNITA DEVI Versus STATE OF BIHAR AND ANOTHER**, reported at (2005) 1 Supreme Court Cases 608, **D. K. GANESH BABU Versus P.T.MANOKARAN AND OTHERS**, reported at (2007) 4 Supreme Court Cases 434 and **VAMAN NARAIN GHIYA Versus STATE OF RAJASTHAN**, reported at (2009) 2 Supreme Court Cases 281. It was submitted that the Supreme Court has categorically ruled in these cases that an application for bail would not lie unless the applicant concerned is in custody. In **SUNITA DEVI's** case, the Supreme Court referred to provisions of Sections 438 and 439 of the Code of Criminal Procedure, 1978 and also referred to the Judgment of the Supreme Court in **NIRANJAN SINGH AND ANOTHER Versus PRABHAKAR RAJARAM KHAROTE AND**

OTHERS, reported at **(1980) 2 Supreme Court Cases**

559 and held in para 13 to 15 as under :-

13. In view of the clear language of Section 439 and in view of the decision of this Court in Niranjan Singh v. Prabhakar Rajaram Kharote there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.

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.

7. In para 18 of the Judgment, the Court also referred to the question as to which Court ought to be moved. It was observed that an application under Section 439 of the Code of Criminal Procedure, 1978 must be made in a manner in accordance with law and the accused seeking remedy under Section 439 must ensure that it would be lawful for the Court to deal with this application. Thereafter, in para 20 to 23 of the order the Court held as under :-

20. For making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in Salauddin case the protection in terms of Section 438 is for a limited duration during which the regular court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.

21. If the protective umbrella of Section 438 is extended beyond what was laid down in Salauddin case the result would be clear by

passing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner.

22. These aspects were recently highlighted in Nirmal Jeet Kaur v. State of M.P. Therefore the order of the High Court granting unconditional protection is clearly untenable and is set aside. However, the petitioner is granted a month's time from today to apply for regular bail after surrendering to custody before the court concerned which shall deal with the application in accordance with law. We express no opinion about the merits of the case.

23. Respondent 2 would surrender to custody as required in law so that his application under Section 439 of the Code can be taken for disposal.

8. In **D. K. GANESH BABU Versus P.T.MANOKARAN AND OTHERS**, the Supreme Court again re-iterated the distinction between anticipatory bail and regular bail. It also quoted from Judgment in **Salauddin Abdul Samad Shaikh Vs. State of**

Maharashtra, reported at **1996(1)S.C.C.667** and **K. L. Verma v. State**, reported at **(1998) 9 SCC 348**. The observations in **K. L. Verma's** case to the following effect seem to have been highlighted by the Supreme Court.

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.

9. In para 13 the Court re-iterated that in view of the clear language of the Section 439 and decision in **NIRANJAN SINGH's** case unless a person is in custody, an application under Section 439 would not be maintainable.

10. In **VAMAN NARAIN GHIYA Versus STATE OF RAJASTHAN**, reported at **(2009) 2 Supreme Court**

Cases 281. In para 11 of the Judgment the Court quoted extensively from previous Judgment in **K. L. Verma's case**. In para 13 the Court observed that in view of language of Section 439 and the Judgment in **NIRANJAN SINGH's** case there could be no doubt unless a person is in custody, an application under Section 439 would not be maintainable.

11. In **PARVINDERJIT SINGH AND ANOTHER Versus STATE (UNION TERRITORY CHANDIGARH) AND ANOTHER**, reported at **(2008) 13 Supreme Court Cases 431** the Supreme Court re-iterated that there could be no doubt unless a person is in custody, an application under Section 439 would not be maintainable.

12. The learned Counsel for the applicant submitted that there could be no doubt that a person cannot apply for bail unless he had been

arrested or was in custody. However, the learned Counsel submitted that this does not imply that person must actually be arrested and should be in custody before he could apply for bail. He submitted that a person surrendering before the Court and seeking bail has been held to be a person in custody. He relied on Judgment of the Supreme Court in **NIRANJAN SINGH AND ANOTHER Versus PRABHAKAR RAJARAM KHAROTE AND OTHERS**, reported at **(1980) 2 Supreme Court Cases 559** which has been referred to in all the Judgments on which the learned Counsel for the intervener informant and the learned APP for the State place reliance. The observations of the Supreme Court in para 6 to 9 of the Judgment may be usefully reproduced as under :-

6. Here the respondents were accused of offences but were not in custody, argues the petitioner so no bail, since this basic condition of being in jail is not fulfilled. This submission has been rightly rejected by the courts below. We agree that, in one view, an outlaw cannot ask for

the benefit of law and he who flees justice cannot claim justice. But here the position is different. The accused were not absconding but had appeared and surrendered before the Sessions Judge. Judicial jurisdiction arises only when persons are already in custody and seek the process of the court to be enlarged. We agree that no person accused of an offence can move the court for bail under Section 439 CrPC unless he is in custody.

7. When is a person in custody, within the meaning of Section 439 CrPC ? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory 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.

8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is 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 maybe, enabled the accused persons to circumvent the principle of Section 439 CrPC. 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. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We, therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but, sitting under Article 136, do not feel that we should interfere with a discretion exercised by the two courts below.

13. The learned Counsel, therefore, submitted that when a person surrenders before the Court and

submits to its directions, the person could be said to be in judicial custody. The learned Counsel pointed out that this has been followed by our High Court in **Ritesh Prem Gayal & anr. Versus Senior Inspector of Police & anr**, reported at **2008(2) Bom.C.R.(Cri.)128**. Similar view was taken in Judgment in **CRIMINAL APPLICATION NO.3380 OF 2004** in **Kiran Vasant Achrekar versus State of Maharashtra** decided on **12th October, 2004**.

14. I have carefully considered the arguments advanced by the learned Counsel for the parties.

15. It may be seen that the recent Judgments of the Supreme Courts on which the learned Counsel for the informant intervener places reliance refer to the observations of the Supreme Court in **NIRANJAN SINGH's** case. It is not that subsequent Benches take any different view from the one taken in **NIRANJAN SINGH's** case. They follow the law

laid down in **NIRANJAN SINGH**. Hence, it will not be appropriate to read observations in **NIRANJAN SINGH's** case selectively. There can be no doubt as held in para 6 of the Judgment in **NIRANJAN SINGH's** case that no person accused of an offence can move for bail under Section 439 of the Code of Criminal Procedure, 1978 unless he is in custody. But it is also clarified in para 9 that when a person surrenders before the Court and submits to its directions, he is said to be in judicial custody and therefore, an application for bail would lie. Therefore, as far as challenge to the tenability of the application of this Court is concerned, it has to be rejected. The applicant, by submitting himself to the jurisdiction of this Court must be taken to have submitted himself to the custody of the Court. In fact, the learned Sessions Judge while rejecting the application should have seen this and should have remanded the applicant to custody, if he felt that the

applicant was not entitled to bail. However, it is worthy of note that the learned Sessions Judge has not rejected the application for bail on the ground that the applicant was not in custody but has rejected it on merits. Therefore, if he was rejecting the application for bail, he could have taken the applicant in custody which could have obviated this debate.

16. Next, the learned Counsel for the intervener and the learned APP object to the tenability of the application on the ground that the applicant had been directed by this Court to apply for regular bail before the concerned Court which was seized of the matter, and since the Court which is seized of the matter is that of Judicial Magistrate First Class, Pune, it was incumbent upon the applicant to apply before that Court for bail. He submitted that it was impermissible, in the face of this judicial direction, for the applicant to approach the Court

of Sessions and now this Court.

17. The learned Counsel for the applicant submitted that this Court had directed the applicant to apply for regular bail before the concerned Court. He submitted that since the offence which the applicant is alleged to have committed is one punishable under Section 467 of the Indian Penal Code for which punishment of imprisonment for life is prescribed, a Judicial Magistrate First Class would not at all have been entitled to entertain an application for bail. He submitted that provisions of Section 437 of the Code of Criminal Procedure, 1973 enable a Magistrate to grant bail only in cases other than those in which there are reasonable grounds for believing that the person is guilty of an offence punishable with death or imprisonment for life. He submitted that this Court in **The State of Maharashtra Versus Kaushar Yasin Qureshi and**

another, reported at **1996(5) Bom.C.R.473** had so held. In that case, however, the question was of offence punishable under Section 302 of the Indian Penal Code, for which minimum punishment itself is imprisonment for life.

18. The learned Counsel for the applicant next submitted that in **State of Maharashtra Versus Rajkumar Kunda Swami**, reported at **2002(Supp. 2)Bom.C.R.79**, this Court had again held that a Magistrate was not entitled to grant bail in offence punishable with imprisonment for life. In that case, the offence complained was one punishable under Section 409 of the Indian Penal Code. While so holding the learned Single Judge had placed reliance on the Judgment in **The State of Maharashtra Versus Kaushar Yasin Qureshi and another**, reported at **1996(5) Bom.C.R.473**. The observations of the Court in para 21 of the Judgment may be usefully reproduced as under :-

21. From the facts and circumstances of this case, it is crystal clear that there are reasonable grounds to believe that respondent-accused is involved in the offence specially offence punishable under section 409 of the I.P.C. and apart from that the fact that whether a prima facie case is made out. Some of the factors which are to be borne in mind in deciding the question of grant of bail are the gravity/magnitude of the offence and whether there is any likelihood of the accused person absconding. In the instant case, both the considerations militate against the respondent-accused.

19. The learned Counsel for the applicant therefore, submitted that since the Magistrate does not have jurisdiction to entertain an application for bail, his client was justified in approaching the Court of Sessions, and now this Court, for grant of bail, since irrespective of what orders were passed by this Court in Criminal Application No.4356 of 2009, the applicant could not have been ordered to seek exercise by a Magistrate of jurisdiction which did not vest in

him. He submitted that the jurisdiction cannot be conferred by judicial orders, even if it were to be presumed that this Court had directed the applicant to approach the Court of Judicial Magistrate First Class. The learned Counsel submitted that considering the lack of jurisdiction in the Magistrate to entertain application for bail, since the offence alleged is punishable with imprisonment for life, the reference to concerned Court which was seized of the matter in the order in Criminal Application No.4356 of 2009, must be read as reference to the Court of Sessions which had the jurisdiction to entertain bail application.

20. The learned Counsel for the intervener submitted that another learned Single Judge of this Court had held in **Ambarish Rangshahi Patnigere Vs. State of Maharashtra**, reported at **2010 ALL MR (Cri) 2775** that a Magistrate would have the jurisdiction to grant bail even in

offences punishable under Sections 467 and 409 of the Indian Penal Code, 1860 though the offences are punishable with imprisonment for life or imprisonment for ten years. While deciding this case, the Judgments of the learned Single Judge in **The State of Maharashtra Versus Kaushar Yasin Qureshi and another and State of Maharashtra Versus Rajkumar Kunda Swami** had not been brought to the notice of the learned Single Judge. After considering the relevant provisions the learned Judge observed in para 17 and 18 as under :-

17. It may be noted here that the learned Counsel for intervener contended that the Magistrate did not have jurisdiction to grant bail because the offences under Section 467 and 409, IPC, carry punishment which may be life imprisonment. According to the learned Counsel, if the offence is punishable with sentence of death or life imprisonment, the Magistrate cannot grant bail under Section 437(1), Cr.P.C. unless there are special grounds mentioned therein. He relied upon certain authorities in this respect including **Prahlad Singh**

Bhati Vs. NCT, Delhi & Anr., JT 2001(4) SCC 116. In that case, offence was under Section 302 which is punishable with death sentence or life imprisonment and is exclusively triable by Court of Sessions. The offence under Section 409 is punishable with imprisonment or imprisonment for 10 years and fine. Similarly, the offence under Section 467 is also punishable with imprisonment for life or imprisonment for 10 years and fine. Even though the maximum sentence which may be awarded is life imprisonment, as per Part I of Schedule annexed to Cr.P.C., both these offences are triable by a Magistrate of First Class. It appears that there are several offences including under sec. 326 in the Indian Penal Code wherein sentence, which may be awarded, is imprisonment for life or imprisonment for lesser terms and such offences are triable by Magistrate of the First Class. If the Magistrate is empowered to try the case and pass judgment and order of conviction or acquittal, it is difficult to understand why he cannot pass order granting bail, which is interlocutory in nature, in such cases. In fact, the restriction under Sec. 437(1), Cr.P.C. is in respect of those offences which are punishable with alternative sentence of death or life imprisonment. If the offence is punishable with life imprisonment

or any other lesser sentence and is triable by Magistrate, it cannot be said that Magistrate does not have jurisdiction to consider the bail application. In taking this view, I am supported by the old Judgment of Nagpur Judicial Commissioner's Court in **Tularam & Ors. Vs. Emperor, (1926)27 Cr.L.J.1063** and also by the Judgment of the Kerala High Court in **Satyan Vs. State, 1981 Cr.L.J.1313**. In Satyan, the Kerala High Court considered several earlier Judgments and observed thus in paras 7 and 8 :-

7. According to the learned Magistrate Section 437(1) does not empower him to release a person on bail if there are reasonable grounds for believing that he has committed an offence punishable with death or an offence punishable with imprisonment for life. In other words the learned Magistrate has interpreted the expression offence punishable with death or imprisonment for life in Section 437(1) to include all offences where the punishment extends to imprisonment for life. This reasoning, no doubt, is seen adopted in an old Rangoon Case **H. M. Boudville Vs. Emperor, AIR 1925 Rang. 129 : (1925)26Cri.L.J. 427** while interpreting the phrase an offence punishable with death or transportation for life in

Section 497, Cr.P.C., 1898. But that case was dissented from in Mohammed Eusoof Vs. Emperor, AIR 1926 Rang. 51:(1926)27Cri.L.J. 401). The Rangoon High Court held that the prohibition against granting bail is confined to cases where the sentence is either death or alternative transportation for life. In other words, what the Court held was that the phrase death or transportation of life in Section 497 of the old Code did not extend to offences punishable with transportation for life only, it will be interesting to note the following passage from the above judgment:

It is difficult to see what principle, other than pure empiricism should distinguish offences punishable with transportation for life from offences punishable with long terms of imprisonment; why, for instance, the detenu accused of lurking house trespass with a view to commit theft, for which the punishment is fourteen years imprisonment, should be specially favoured as against the individual who has dishonestly received stolen property, knowing that it was obtained by dacoity, for which the punishment happens to be transportation for life ? It cannot seriously be argued that the comparatively slight difference in decree of possible punishment will render it morally

less likely that the person arrested will put in an appearance in the one case rather than the other. On the other hand the degree of difference is so great as between transportation for life and death as to be immeasurable. A prudent Legislature will, therefore, withdraw from the discretion of the Magistracy cases in which, if guilt is probable, even a man of the greatest fortitude may be willing to pay a material price, however, exorbitant, for life. The above decision has been followed by the Nagpur High Court in the case reported in Tularam Vs. Emperor, AIR 1927 Nag. 53: (1926)27Cr.L.J.1063).

8. The reasoning applies with equal force in interpreting the phrase offence punishable with death or imprisonment for life. So long as an offence under section 326 is triable by a Magistrate of the First Class there is no reason why it should be viewed differently in the matter of granting bail from an offence under Section 420, I.P.C. for which the punishment extends imprisonment for 7 years or any other non-bailable offence for which the punishment is a term of imprisonment.

It would be illogical and incomprehensible to say that the magistrate who can hold the trial and pass judgment of acquittal or

conviction for the offences punishable with sentence of life imprisonment or lesser term of imprisonment, for example in offences under Ss. 326, 409, 467, etc., cannot consider the application for bail in such offences. In fact, it appears that the restriction under Sec. 437(1)(a) is applicable only to those cases which are punishable with death sentence or life imprisonment as alternative sentence. It may be noted that in Prahlad Singh Bhati (supra), in para 6, the Supreme Court held that even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a Court of session, yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Session for the purposes of getting the relief of bail. This may be applicable to many cases, wherein the sentence, which may be awarded, is not even life imprisonment, but the offence is exclusively triable by court of Sessions for example offences punishable under Sections 306, 308, 314, 315, 316, 399, 400 and 450. Taking into consideration the legal position, I did not find any substance in the contention of Mr. Bhatt, learned Counsel for the

intervener that merely because the offence is under Secs.409 and 467, IPC, Magistrate did not have jurisdiction to hear and grant the bail.

18. Even though I find that the learned Magistrate had jurisdiction to consider the bail application and to grant bail, still taking into consideration seriousness and gravity of the matter, it was highly improper on the part of the learned Magistrate to show such haste in considering the application immediately and making endorsements on the bail application minute to minute and refusing reasonable opportunity to the investigating agency to oppose that application, I find that the order passed by the Magistrate granting bail was without application of mind to the facts of the case. By granting bail and refusing police custody of the accused, who were not in police custody even for a day, the learned Magistrate practically prohibited the investigating agency from making proper investigation to the case which, in fact, required in-depth investigation and which could not be possible without the police custody. Therefore, while the order refusing the police custody could be challenged under revisional jurisdiction under sec. 397, the order granting bail

could be cancelled by the superior courts, including the Sessions Court, by virtue of the powers under sec.439(2), Cr.P.C.

21. The learned Counsel therefore submitted that since the learned Judicial Magistrate First Class did have jurisdiction to decide application for bail, in view of specific directions of this Court in Criminal Application No.4356 of 2009, the proper course open to the applicant was to approach the learned Magistrate. The learned Counsel for the complainant submitted that this Court may not entertain an application for bail in the face of these directions, since this Court considering applications for bail on its own merits may result in loss of valuable right to both the parties to question the order of the Magistrate should it go against them.

22. Since both the learned Counsel have sought to rely on Judgments of this Court which take a diametrically opposite view about the powers

of the Magistrate to grant bail in cases where punishment prescribed is one which can extend to imprisonment for life, but is not the minimum prescribed punishment for the offence, the question as to whether a reference to a Division Bench is necessary arose.

23. The learned Counsel for the applicant had also placed reliance on Judgment of the Supreme Court in **Prahlad Singh Bhati Versus N.C.T., Delhi & another**, reported at **2001(5)Bom.C.R.727** where the Supreme Court had held that regular bail under Section 437 could not be granted when accused was found to be involved in graver offence of murder under Section 302 of the Indian Penal Code. In this context, the Supreme Court observed in para 6, 7 and 11 as under :-

6. Even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a Court of Sessions yet it would be proper and appropriate that in

such a case the Magistrate directs the accused person to approach the Court of Session for the purposes of getting the relief of bail. Even in a case where any Magistrate opts to make an adventure of exercising the powers under section 437 of the Code in respect of a person who is suspected of the commission of such an offence, arrested and detained in that connection, such Magistrate has to specifically negate the existence of reasonable ground for believing that such an accused is guilty of an offence punishable with the sentence of death or imprisonment for life. In a case, where the Magistrate has no occasion and in fact does not find, that there were no reasonable grounds to believe that the accused had not committed the offence punishable with death or imprisonment for life, he shall be deemed to be having no jurisdiction to enlarge the accused on bail.

7. Powers of the Magistrate, while dealing with the applications for grant of bail, are regulated by the punishment prescribed for the offence in which the bail is sought. Generally speaking if punishment prescribed is for imprisonment for life and death penalty and the offence is exclusively triable by the Court of Sessions, the Magistrate has no jurisdiction to grant bail unless

the matter is covered by the
provisos attached to section 437
of the Code. The limitations
 circumscribing the jurisdiction of
 the Magistrate are evident and
 apparent. Assumption of
 jurisdiction to entertain the
 application is distinguishable
 from the exercise of the
 jurisdiction.

11. While allowing this appeal and
 setting aside the orders impugned
 we permit the respondent-accused
 to apply for regular bail in the
 trial Court. If any such
 application is filed, the same
 shall be disposed of on its merits
 keeping in view the position of
 law and the observations made
 hereinabove. We would reiterate
 that in cases where the offence is
punishable with death or
imprisonment for life which is
triable exclusively by a Court of
Session, the Magistrate may, in
his wisdom, refrain to exercise
 the powers of granting the bail
 and refer the accused to approach
 the higher Courts unless he is
 fully satisfied that there is no
 reasonable ground for believing
 that the accused has been guilty
 of an offence punishable with
 death or imprisonment for life.

In fact, this Judgment would show that it is not
 that the Magistrate cannot grant bail in cases

where the offence is punishable with imprisonment for life, if the offence is triable by the Magistrate. The observations of the Supreme Court that generally speaking if the punishment prescribed is that of imprisonment for life or death penalty, and the offence is exclusively triable by the Court of Sessions, the Magistrate has no jurisdiction to grant bail, unless the matter is covered by the provisos attached to section 437 of the Code. Thus, merely because an offence is punishable with imprisonment for life, it does not follow a Magistrate would have no jurisdiction to grant bail, unless offence is also exclusively triable by the Court of Sessions. This, implies that the Magistrate would be entitled to grant bail in cases triable by him even though punishment prescribed may extend to imprisonment for life. This Judgment in **Prahlad Singh Bhati's** case had not been cited before Judge, who decided **State of Maharashtra Versus**

Rajkumar Kunda Swami. Had this Judgment been noticed by the Hon'ble Judge deciding that case, the observation that the Magistrate may not decide an application for bail if the offence is punishable with imprisonment for life would possibly would not have been made. In view of the observations of the Supreme Court in Prahlad Singh Bhati's case, it is clear that the view taken by **J.H.Bhatia, J. in Ambarish Rangshahi Patnigere Vs. State of Maharashtra,** reported at **2010 ALL MR (Cri) 2775** is in tune with the Judgment of the Supreme Court and therefore, the Magistrate would have jurisdiction to grant bail.

24. In view of this, there should be no difficulty for the applicant to approach learned Magistrate, as had been directed by this Court, for seeking regular bail since it is the Court of the Magistrate which would be seized of the matter and which would eventually try the case.

25. As held by the Supreme Court in **K. L. Verma v. State**, reported at **(1998) 9 SCC 348**, portion whereof has been quoted in earlier part of the Judgment, though the applicant had approached the wrong Court i.e. Court of Sessions for bail rather than approaching the learned Magistrate who is seized of the matter, in terms of directions of this Court given on 28th June, 2010 in Criminal Application No.4356 of 2009, and though this Court had directed that the anticipatory bail granted would be effective till filing of the charge sheet, the order granting anticipatory bail to the applicant till filing of the charge sheet could be extended for a period of 15 days to enable the applicant to approach the Court of Judicial Magistrate First Class seized of the matter and by a further period of 15 days from the date of order by the Magistrate should it be against the applicant, to enable the applicant to approach Court of Sessions or this Court. If the applicant does not approach the concerned Court within a

period of 15 days, the order would lapse. The learned Judicial Magistrate First Class shall decide the applicant's application, uninfluenced by order passed by the Additional Sessions Judge rejecting applicant's application.

26. Criminal Application is accordingly disposed of.

(R.C.CHAVAN, J.)