

16.05.2024.
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Court no.237
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IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

CRA (SB) 80 of 2024

**Binod Kumar Das @ Binod Das
versus
The State of West Bengal & Ors.**

Mr. Moyukh Mukherjee
Ms. Rupa Singh
Ms. Aishwarya Bazaz
.... for the appellant.

Mr. Anand Keshari
Ms. Anusuya Sinha
..for the State

Mr. Amit Ranjan Pati
Mr. Saikat Mondal
Ms. Swastika Chowdhury
..for the opposite party nos. 3 and 4

1. Heard learned counsel appearing on behalf of the parties.
2. Appeal admitted.
3. This appeal is filed assailing the order passed by the learned Additional Sessions Judge, 1st Court, In-Charge of Additional Special Judge, 6th Court, Paschim Medinipore on 21st January, 2023 in connection with Special Trial Case No. 125 of 2022 wherein learned Special Judge granted anticipatory bail under Section 438 of the Code of Criminal Procedure in favour of the opposite party nos. 3 and

4 namely, Cindrella Mary Louis and Kenneth @ Kedarnath Luis.

4. Learned counsel appearing on behalf of the petitioner has drawn my attention to the fact that on the date when the order was passed the opposite party nos. 3 and 4 surrendered before the Court and in that case Court cannot invoke provisions of Section 438 of Cr.P.C. in granting bail to the opposite party/accused. In support of his contention, he relied on the case reported in (2014) 16 SCC 623 (Sundeep Kumar Bafna Vs. State of Maharashtra & Anr.) wherein Hon'ble Apex Court classified the order passed under Section 437 and 438 of Cr.P.C.
5. Accordingly learned counsel appearing on behalf of the petitioner submitted that the order invoking Section 438 Cr.P.C. is not sustainable in law.
6. On the contrary, learned counsel appearing on behalf of the opposite party nos. 3 and 4 submitted that on that date when the impugned order was passed the opposite party nos. 3 and 4 namely, Cindrella Mary Louis and Kenneth @ Kedarnath Luis surrendered before the Court and made a prayer for bail under Section 437 of Cr.P.C. It is also submitted that the order was passed after

hearing all the parties including the defacto complainant.

7. Learned counsel appearing on behalf of the opposite party nos. 3 and 4 has stated that on behalf of the opposite party nos. 3 and 4 no application under Section 438 of Cr.P.C. was ever filed before the Special Court and it was a mistake on the part of the Court. It is also submitted that on 21.01.2023 the opposite party nos. 3 and 4 filed an application under Section 437 of Cr. P.C. praying for bail.
8. Learned counsel appearing on behalf of the State submitted that Court cannot pass an order granting bail invoking Section 438 of Cr.P.C. while accused surrender before the Court.
9. It is settled law that when an accused surrenders before the Court there is no other option for the Court but to take him into custody and to consider the bail prayer if applied for.
10. Here in this case learned Special Judge came across an incident when accused/opposite party nos. 3 and 4 surrendered before him on 21.01.2023 and on behalf of those accused one bail application was filed under Section 437 of Cr.P.C.
11. Learned Special Judge instead of taking custody of those accused, treated the bail application under

- Section 437 of Cr.P.C. as an application under Section 438 of Cr. P.C. which is unknown to law.
12. Be that as it may, when the accused/opposite party nos. 3 and 4 herein surrendered before the learned Special Judge on 21.01.2023, learned Special Judge cannot pass any order invoking Section 438 of Cr.P.C. On that score only the order is not sustainable in law. The order dated 21.01.2023 stands set aside on the ground mentioned above.
 13. Learned Special Judge is directed to rehear the application under Section 437 of Cr.P.C. filed on 02.12.2022 by the opposite party nos. 3 and 4 namely, Cindrella Mary Louis and Kenneth @ Kedarnath Luis in presence of all the parties to this case within 19th June, 2024. All the parties to this case shall appear before the Special Court on the date fixed by the learned Special Judge.
 14. I make it clear that I have not made any observation on the merit of the case.
 15. The appeal, being CRA(SB) 80 of 2024, stands disposed of.
 16. All parties shall act on the server copy of this order duly downloaded from the official web-site of this Court.

17. Criminal Section is directed to supply a photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Bibhas Ranjan De, J.)