

as in the present case. A reference to the judgment, however, would indicate that the matter was not adequately canvassed before the learned Judge. Consequently there does not appear to be any discussion in depth of the real issue involved. No precedent bearing on the point appears to have been either cited or considered nor has the matter been examined in the light of first principle. It appears to me that the essential issue whether a dismissal for default fell squarely within the definition of an award under section 2(b) seems to have altogether missed from consideration. The learned Judge's attention was diverted more towards procedural provisions of sections 17-A and 19 which pertained to the publication of the award from the date of commencement and the period for which the same would remain in operation. These provisions would come into play only if the essential question whether a dismissal in default amounts to an award is first answered in the affirmative and once it is held to the contrary these provisions cannot be of any aid for determining the essential issue.

(11) With the greatest respect to the learned Judge, I am unable to subscribe to the view expressed by him in *Shree Gopal Paper Mills' case*, and both on authority and principle it appears to me that the same does not lay down the law correctly. I would accordingly overrule the aforesaid decision.

(12) The only point raised in support of the petition having been decided against the petitioner, it is hereby dismissed. The parties, however, would be left to bear their own costs.

N. K. S.

CRIMINAL MISCELLANEOUS

Before O. Chinnappa Reddy, Acting C.J and Surinder Singh, J.

AUTAR SINGH, SON OF BUTA SINGH and another,—
Petitioner,

versus

STATE OF PUNJAB etc.—Respondents.

Criminal Misc. No. 351-M of 1976.

July 9, 1976.

Code of Criminal Procedure (2 of 1974)—Sections 397, 438 and 439—Rejection of an application for anticipatory bail by the Court of Session—Whether bars a fresh application before the High Court.

Autar Singh, son of Buta Singh, etc. v. State of Punjab etc.
(O. Chinnappa Reddy, Acting C.J.)

Held, that section 438(1) of the Code of Criminal Procedure 1973 confers concurrent jurisdiction on the High Court and the Court of Session to grant anticipatory bail. There is nothing in the provision to indicate that if the jurisdiction of one is invoked, the jurisdiction of the other is exhausted. The rejection of an application for anticipatory bail by the Court of Session is not a bar to a fresh application before the High Court. (Para 2).

Case referred by Hon'ble Mr. Justice Gurnam Singh on 6th February, 1976 to a Larger Bench for decision of an important question of law involved in the case. The Division Bench Consisting of Hon'ble the Acting Chief Justice Mr. O. Chinnappa Reddy and Hon'ble Mr. Justice Surinder Singh finally decided the case on 9th July, 1976.

Application under Section 438 of the Code of Criminal Procedure praying that the Hon'ble Court be pleased to grant anticipatory bail to the accused-petitioners with a direction that in the event of their arrest they shall be released on bail in a case under sections 436/440/323/504/506 and 148/149 Indian Penal Code. Their Bail Application No. 377 of 1975 and 76 of 1975 was rejected by Shri Aftab Singh Bakshi, Additional Sessions Judge, Ferozepore on 24th September, 1975.

D. R. Puri, Advocate, for the Petitioner.

Sh. H. S. Brar, Senior Deputy Advocate-General, (Punjab), for respondents.

JUDGMENT

Judgment of the Court was delivered by —

O. Chinnappa Reddy A. C. J.

(1) The applicants in both the petitions seek anticipatory bail under the provisions of section 438 of the Code of Criminal Procedure. Similar applications made to the Sessions Judge were rejected. The State raises a preliminary objection that the applications are barred. It is said that an applicant seeking anticipatory bail under section

438 of the Code of Criminal Procedure may invoke the jurisdiction of either the Sessions Judge or the High Court, but not both. If the jurisdiction of the Sessions Judge is invoked and the application is rejected, he may not invoke the jurisdiction of the High Court. It is argued that if the Sessions Judge rejects an application for anticipatory bail, any application in the High Court for grant of anticipatory bail will tantamount to an application to revise the order of the Sessions Judge. Such an application, it is said, is expressly barred by the provisions of section 397 (2) of the Code of Criminal Procedure. The argument is that an order rejecting an application for anticipatory bail is but an interlocutory order and section 397(2) expressly bars the exercise of revisional powers in relation to interlocutory orders. Such an argument found favour with a Division Bench of the Himachal Pradesh High Court in *Joginder Singh v. State*, (1) and so it apparently did with our learned brother, Gurnam Singh J. who has referred these two applications for decision of a Division Bench, doubting the correctness of a decision of our learned brother Kulwant Singh Tiwana, J. in *Prahlad Singh v. Union Territory*, (2).

(2) We do not agree with the view expressed by the Himachal Pradesh High Court. Section 438 (1) is as follows:—

“When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.”

To our minds, section 438(1) is very clear. It confers concurrent jurisdiction on the High Court and the Court of Session to grant anticipatory bail. There is nothing in the provision to indicate that if the jurisdiction of one is invoked, the jurisdiction of the other is exhausted. This provision is analogous to section 439 of the present Code which confers concurrent jurisdiction on the High Court and the Court of Session to grant bail. It is analogous to the provisions of the previous Code of Criminal Procedure which conferred concurrent revisional powers and concurrent powers to grant bail on the High Court and the Court of Session. Under the old Code, it was

(1) 1975 (2) Cr. Law Times, 264.

(2) 1975 (3) Chandigarh Law Reporter, 607.

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never doubted that the High Court could exercise revisional powers or grant bail where revision applications or applications for bail had been rejected by the Court of Session. A comparison of section 438 with section 397 of the present Code leads us to the same conclusion. Section 397(1) confers revisional powers both on the High Court and the Sessions Judge. Though the powers conferred on the High Court and the Sessions Judge are concurrent, section 397(3) expressly provides that if an application under this section has been made by any person either to the High Court or the Sessions Judge, no further application by the same person shall be entertained by the other of them. There is no provision in section 438 similar to section 397(3). This cannot but lead to the conclusion that the rejection of an application for anticipatory bail by the Court of Session is not a bar to a fresh application before the High Court. We are also unable to see any force in the argument that an order rejecting bail is an interlocutory order, that any fresh application to the High Court for anticipatory bail should be considered to be an application to revise the order of the Court of Session and that a petition to revise an interlocutory order is, therefore, expressly barred by section 397(2). Even assuming that the rejection of an application for anticipatory bail is an interlocutory order, there is no reason why a fresh application to the High Court under section 438 should be treated as an application to revise the order of the Court of Session. When the High Court acts under section 438, it does not act as a Court of revision but as an original authority on whom express power is conferred by the Code of Criminal Procedure to grant anticipatory bail. This power is exercised by the High Court quite independently of its revisional powers. The mere fact that an application to revise an interlocutory order of the Court of Session is barred is no reason to hold that the High Court cannot exercise independent power expressly conferred upon it under section 438 of the Code of Criminal Procedure. Shri Brar suggested that under section 438, an applicant has to make a choice between the High Court and the Court of Session and that he could not invoke the jurisdiction of both. The language of section 438 does not warrant any such interpretation. Shri Brar drew the analogy of Articles 32 and 226 of the Constitution and argued that even as the dismissal of a writ petition under Article 226 by the High Court barred the filing of a petition under Article 32 before the Supreme Court, so it must be held that the dismissal of a petition for anticipatory bail by the Court of Session should be treated as a bar to the filing of such a petition before the High Court. He relied on the decision of the Supreme Court in *Daryao v. State of*

Uttar Pradesh, (3). We do not agree with the submission of Shri Brar. The Supreme Court, in arriving at the conclusion that the dismissal of a petition under Article 226 barred a petition under Article 32, invoked the general rule of *res judicata* which they held was founded on considerations of public policy. We do not think that there is any scope for the application of the principles of *res judicata* in the present case. We, therefore, overrule the preliminary objection and hold that the applications are maintainable.

(3) In the case of Avtar Singh and Bohar Singh, the record discloses that the Magistrate has issued bailable warrants only. That means that as soon as they are arrested or as soon as they appear before the Magistrate, they are entitled to be released on bail. In their case, the application for anticipatory bail is misplaced and is, therefore, dismissed.

N. K. S.

MISCELLANEOUS CIVIL

Before Rajendra Nath Mittal and K. S. Tiwana, JJ.

MESSRS LAMBA INDUSTRIES,—Petitioner.

versus

THE UNION OF INDIA, ETC.,—Respondents.

Civil Writ No. 4709 of 1975.

July 14, 1976.

Constitution of India 1950—Articles 12 and 226—Imports and Exports (Control) Act (XVIII of 1947)—Section 3—Import Trade (Control) Order 1955—Clauses 2(aaaa), 3(i), 5(3) (ii) proviso, 8 and 8-A—Import Trade Control Hand Book of Rules and Procedure—Paragraph 97(3)(c)—Sale of Goods Act (IX of 1930)—Section 39—State Trading Corporation of India, a company registered under the Companies Act—Whether an “authority” and amenable to writ jurisdiction—Disputes arising out of contractual obligations—Aggrieved party—Whether can invoke the jurisdiction under Article

(3) A.I.R. 1961 S.C. 1457.