

*Before Rajbir Sehrawat, J.*

**NAVEEN KUMAR**—*Petitioner*

*versus*

**STATE OF HARYANA**—*Respondent*

**CRM-M No.62048 of 2018 (O&M)**

January 14, 2019

*Criminal Procedure Code, 1973—S.438—Appropriate forum—Power to grant anticipatory bail conferred on High Court and Session Court concurrently—However, in absence of any special or compelling reason application, at first instance, must be moved before Session Court—Valuable right of seeking bail before Sessions Court would be lost on denial of bail by High Court.*

*Anticipatory bail—S. 438—Provisions of pre-arrest bail are not a fundamental right—Provisions provide only remedy to accused and leave extent of right to liberty to be decided by the Courts.*

*Held that* no doubt, the accused as a citizen has a fundamental right to life and liberty. However, that right to life and liberty can very well be curtailed in accordance with the procedure established by law. As per the procedure prescribed for Criminal Administration of Justice, the normal procedure for curtailing the life and liberty of the accused, Cr.P.C. prescribes that the Investigating Officer can arrest an accused even without warrant and without assistance/interference of the Court. However, to ensure that a person is not unduly harassed, at least in those cases, where the circumstances are leading, predominately, towards ex-facie innocence of the accused, the Courts have been given special and extra-ordinary power under Section 438 Cr.P.C. This statutory power of granting pre-arrest bail is so extraordinary that it is not even available in all parts of the country; and even through-out the country qua some offences under special statutes. Hence, right to get anticipatory bail is not any fundamental right. The provision of Section 438 Cr.P.C. provides only a remedy to an accused and leaves the extent of right to liberty to be decided by the Court.

(Para 13)

*Further held that* on the contrary, this Court find itself in agreement with the judgments cited by the counsel for the complainant, which have a common streak running through all these judgments that, but for some special disabling reason, even in case of concurrent

jurisdiction, the accused should be required to go to the Court of first instance. All these judgments relied upon by the counsel for the complainant have categorically held that unless there is some extraordinary or exceptional circumstance, forcing the accused to move directly in the High Court for seeking anticipatory bail, in normal course, he should approach the Court of Sessions Judge. This Court finds these judgments to be more in line with judicial propriety of respecting the hierarchy of the Courts. Section 438 is not conferring any fundamental right upon a person. It is only enabling provision for providing remedy to the accused to move a Court, out of the Courts provided in this section, for consideration of his case for grant of anticipatory bail. However, he has no inalienable right to seek order on merits from any particular Court. So if instead of deciding itself, the High Court requires the accused to move the Sessions Court in the first instance then no right of the petitioner would be violated. On the contrary, if the High Court considers the case itself and decides to decline the accused anticipatory bail, then it would deny the accused an additional opportunity to approach a legal forum; which would have been available to him before High Court, had he moved the Sessions Court first.

(Para 22)

Munish Dev Sharma, AAG, Haryana.

Vivek Goyal, Advocate  
*for the complainant.*

**RAJBIR SEHRAWAT, J. oral**

(1) Prayer in this petition filed under Section 438 of Cr.P.C. is for grant of anticipatory bail in case FIR No.373, dated 29.09.2018 under Sections 406, 420, 506 of IPC, registered at Police Station Nissing, Karnal.

(2) The facts, which have given rise to the present FIR, are that one Rajesh Kumar, complainant; approached the police with the allegations that he was doing business of commission agent. In the normal course of business, the accused had purchased paddy from his firm. However, thereafter, the payments as agreed between the parties were not made by the petitioners. In this process, the complainant has been put to loss of Rs.1,12, 87,500/- . Though there are more details of allegations yet on the basis of these broad allegations, the FIR has been lodged.

(3) Before proceedings further, it is apposite to note that the present petition has been filed under Section 438 Cr.P.C. directly before the High Court, without first approaching the Court of Sessions Judge concerned.

(4) Learned counsel for the complainant, who is present in Court, has raised the objection that unless there were some specific and compelling reasons disclosed by the petitioner, for bye-passing the Court of Sessions Judge, he could not have approached directly to the High Court for seeking anticipatory bail. Still further, it is contended that even if, he has approached this Court directly, then this Court would not intervene in the matter; bye-passing the jurisdiction of Competent Subordinate Court. Learned counsel for the complainant has relied upon the judgments passed by Delhi High Court in *Jasbir Singh Sodhi* versus *UOI and another*<sup>1</sup>, *Karnataka High Court in C.P. Yogeshwara and others* versus *Serious Fraud Investigation Officer., Delhi*<sup>2</sup>, Rajasthan High Court in *Satya Deo Rajpurohit and others* versus *State of Rajasthan and another*<sup>3</sup>.

(5) Before proceedings further upon merits of the case, the question was put up to the counsel for the petitioner as to why he has not approached the Sessions Court of the area concerned, and instead, why he has approached this Court directly for the same relief for which the Sessions Court was competent to grant.

(6) As an answer to the query put up by this Court, the counsel for the petitioner has submitted that the reasons for not approaching the Sessions Court is that the petitioner belongs to Uttar Pradesh, whereas, the case has been got registered in the State of Haryana. It is further contended that all the male members of the family of the petitioner have been made accused in this case, therefore, there is nobody in family to take care of the case of the petitioner. It is further submitted that if he appears before the Sessions Court for filing petition under Section 438 Cr.P.C., then he would be arrested by the police, who are already in connivance with the complainant.

(7) Still further, it is argued by the counsel for the petitioner that there are judgments; including the judgment from the Hon'ble Supreme Court to the effect that since the power conferred under Section 438 Cr.P.C., is the concurrent power, therefore, the petitioner

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<sup>1</sup> 2010 R.C.R. (Cr) 523

<sup>2</sup> 2013 (15) R.C.R. (Cr) 929

<sup>3</sup> 2002(2) Raj.Cri.C 604

has legal right to choose the place for remedy. Hence, if he has straightway approached the High Court for the same relief, for which the Court of Sessions had the concurrent jurisdiction, then the petitioner cannot be asked to go back to the Court of Sessions. It is further contended that once this Court is seized of the matter then there is no reason for sending the petitioner to the Court of Sessions. Learned counsel for the petitioner has relied upon the judgments passed by the Hon'ble Supreme Court in *Barun Chandra Thakur* versus *Central Bureau of Investigation and others*<sup>4</sup>, *Chander Bhan Singh* versus *Central Bureau of Investigation and others*, *Criminal Appeal No.30 of 2019 (Arising out of SLP (Criminal) No.1740 of 2015)*, decided on 08.01.2019 and still another judgment of *Uttarakhand High Court in Mubarik and another* versus *State of Uttarakhand and others in CWP No.2059 of 2018*, decided on 02.11.2018. Counsel for the petitioner has also relied upon the Full Bench judgment of *Himachal Pradesh High Court* rendered in *Mohan Lal and others* versus *Prem Chand and others*<sup>5</sup>; judgment of *Division Bench of Andhra Pradesh High Court* rendered in *Y. Chendrasekhara Rao and others* versus *Y.V. Kamala Kumari and others*<sup>6</sup> Judgment of *Division Bench of Kerala High Court* rendered in *Balan* versus *State of Kerala*<sup>7</sup>.

(8) Before proceeding further in the case, this Court deemed it appropriate to consider whether in view of the concurrent powers conferred upon Sessions Court and the High Court, the petitioner should have approached the Sessions Court for the same relief or not; and further that even if the petitioner has approached this Court, then is the High Court bound to entertain the petition filed by the petitioner or should this Court, require the petitioner to approach the Sessions Court in the first instance for seeking anticipatory bail.

(9) The Hon'ble Supreme Court of India, in case *Anita Kushwaha and others* versus *Pushap Sudan and others*<sup>8</sup> has held that 'Right to access to Justice' is a fundamental right of a citizen, being integral part of right to life and liberty guaranteed by Article 21 of Constitution of India. Hence every individual has to be provided with appropriate forums to access to justice; in case the situation so arises.

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<sup>4</sup> 2018 (5) R.C.R. (Criminal) 49

<sup>5</sup> AIR 1980 H.P 36

<sup>6</sup> 1993 Cr.L.J. 3508

<sup>7</sup> 2004Cr.L.J. 3427

<sup>8</sup> 2016 AIR (SC) 3506

Accordingly, some of these forums are provided in the form of constitutional Courts, i.e. the Supreme Court of India and the High Courts for the respective states. However due to multi-fariousness of the human situations it would neither be appropriate nor possible to restrict the availability of judicial form to Supreme Court and High Court. So other forums have been provided through appropriate legislative instruments like statutes and notifications. Hence a hierarchy of Courts is established besides the Tribunals and the Regulators. Similarly the rights conferred under the Constitution are fructified by legislative and statutory instruments. The substantive law defines the rights of the citizen and the procedural law ensures the availability of remedy to protect the rights. While a right may be claimed as a matter of entitlement; the remedy cannot be claimed; in a particular manner; as a matter of right. Remedy can be regulated, restricted or may not even be indefinitely available. Remedy has to be availed subject to its restrictions and parameters. Even within the specified parameters the remedy is to be availed subject to the regulation through appropriate exercise of discretion by the adjudicating forum like; the Court. If the discretion of the adjudicating forum does not violate and provision regulating the remedy available to the person then it can very well be used to restrict the scope, expense and the extent of the remedy itself. A person has no right to infinite and uncontrolled remedy. Hence the Courts are given ample powers to control the process of remedy available to a person; under the law of evidence and law of procedure. The Courts; with regulated remedies; constitute the system of administration of justice.

(10) For administration of the criminal justice, a completely hierarchy of the Courts is prescribed under law. For a particular State, the High Court is the highest Court of criminal justice. Thereafter, only the Hon'ble Supreme Court is there, which is the Court of special apex jurisdiction. Although keeping in view the unforeseen exigencies; in which an individual citizen can be put, on certain aspects concurrent powers have been given to the High Court as well as to the Court of Sessions, however, same statutory law nowhere mandates that where power is prescribed to be concurrent then the high court is bound to exercise its jurisdiction by entertaining the petition; which has been filed under its concurrent jurisdiction.

(11) At this stage, it is appropriate to have a reference to the provisions as contained in Section 438 Cr.P.C. reproduced as under:-

“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 the 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 application 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.

(1-A) Where the Court grants an interim order under subsection (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice].

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such

conditions in such directions 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;

(iv) such other condition as may be imposed under subsection (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under subsection (1).”

(12) A perusal of the bare provision shows that under this section an individual has been provided the remedy to protect his right to life and liberty by approaching Court. However, the power to protect that right of the petitioner is conferred upon the Courts concurrently. Under this provision the High Court and the Sessions Court have been conferred concurrent jurisdiction. Other significant aspect is that this section uses the words 'Court may' either reject the application forthwith or issue an interim order for protection of accused. If the protection order is to be passed, then Court shall have to take into consideration the factors mentioned in this section. These factors makes the power of Courts under Section 438 Cr.P.C. as a circumscribed power. Still further the operational aspect of an order passed under this section renders such order more in proximity with the place of the trial Court or the Magistrate concerned. In any case, this section does not cast a mandate upon the Court, once approached, to exercise the power in any particular manner. It leaves the matter entirely to the Court.

(13) No doubt, the accused as a citizen has a fundamental right to life and liberty. However, that right to life and liberty can very well be curtailed in accordance with the procedure established by law. As per the procedure prescribed for Criminal Administration of Justice, the normal procedure for curtailing the life and liberty of the accused, Cr.P.C. prescribes that the Investigating Officer can arrest an accused even without warrant and without assistance /interference of the Court. However, to ensure that a person is not unduly harassed, at least in those cases, where the circumstances are leading, predominately, towards ex-facie innocence of the accused, the Courts have been given special and extra-ordinary power under Section 438 Cr.P.C. This statutory power of granting pre-arrest bail is so extraordinary that it is not even available in all parts of the country; and even through-out the country qua some offences under special statutes. Hence, right to get anticipatory bail is not any fundamental right. The provision of Section 438 Cr.P.C. provides only a remedy to an accused and leaves the extent of right to liberty to be decided by the Court.

(14) Learned counsel for the petitioner has relied upon the judgment of Hon'ble the Supreme Court in *Barun Chandra Thakur's* case (supra) in which in para No. 9, the Hon'ble Supreme Court has observed as under:-

“9. Further, we cannot lose sight of the fact that this incident had received wide coverage in the media, both electronic and print. In fact, it can be said that there was a trial by media, therefore, when the private respondents have directly approached the High Court for grant of anticipatory/interim bail under Section 438 of the Code, that too when the High Court has concurrent jurisdiction, we cannot find any fault with the action of the private respondents.”

(15) However, this Court finds that this judgment of the Supreme Court is not a precedent on a point that once there exists a concurrent jurisdiction with the High Court and the Court of Sessions, then the High court would, in all cases, where approached, exercise its power instead of asking the accused to approach the Sessions Court. A bare perusal of the judgment relied upon by the counsel for the petitioner, shows that in that particular case, the Hon'ble Supreme Court had only upheld the power which has already been exercised by the High Court; in particular facts and circumstances of that case. There was a specific reason given by the petitioner in that case, which was considered as



sufficient by the High Court to invoke and exercise the jurisdiction under Section 438 Cr.P.C.

(16) Learned counsel for the petitioner has also relied upon the judgment of Hon'ble the Supreme Court in *Chander Bhan Singh's* case (supra). Counsel for the petitioner has relied upon Paras 7 and 10 of this judgment, to contend that in that case the Hon'ble Supreme Court had directed the High Court to decide the case itself, by setting aside its order directing the petitioner in that case to approach the Court of Sessions. A bare perusal of this judgment also shows that the Hon'ble Supreme Court had asked the High Court itself to decide the case because the case had already remained pending before the High Court for about 2 years and it had also applied his mind. However, on the question of concurrent jurisdiction, the Hon'ble Supreme Court had specifically left the question open without deciding the same. Para 10 of the judgment is quite unequivocal in this regard. Thus in this judgment, the Supreme Court has, by no means, laid down that in case of concurrent jurisdiction; the High Court would be bound to consider and finally decide the case on merits; if the person approaches it, without requiring him to go to Court of competent concurrent jurisdiction at the lower level.

(17) Counsel for the petitioner has further relied upon the judgment of Uttarakhand High Court in *Mubarik and another's* case (supra), which in turn has further relied upon the judgment of Full Bench of Himachal Pradesh High Court in *Mohan Lal's* case (supra), and have said that in case the petition is filed before the High Court then it should consider the same and particularly in para 16, it has been held as under:-

“In view of the aforesaid legal position, we have no hesitation in holding that the High Court and the Court of Session have concurrent jurisdiction under Section 438 of Cr.P.C. It is for the accused to choose the forum and the same cannot be restricted by construing the provision of Section 438 of Cr.P.C. narrowly.”

(18) However, this Court finds itself in respectful disagreement with the Division Bench of Uttarakhand High Court. There is no doubt that the jurisdiction of the Court of Sessions and the High Court is concurrent. However, if the High Court requires the accused to approach the Court of Sessions Judge in the first instance, that by no means restricts the scope of or narrows down the interpretation of Section 438 Cr.P.C., in any manner. The Court of Sessions, qua the

grant or denial of the anticipatory bail, would still be considering the case of the accused in the same scope as would have been considered by the High Court and the parameters of consideration would still be the same. Rather by sending the accused to the Court of Sessions, the High Court would be enlarging the expense of Section 438 Cr.P.C. for the accused; because in case the anticipatory bail filed by the accused before the Court of Sessions is dismissed; he would have remedy of approaching the High Court as well. On the contrary, if an anticipatory bail is rejected by the High Court itself, then he has no scope for going backward in the hierarchy of Courts, to Court of Sessions; for the same cause of action. Therefore, the interpretation put up by the Hon'ble High Court of Uttarkhand, rather, narrows down the scope of remedy made available to accused under Section 438 Cr.P.C. and reduces it to half only.

(19) Learned counsel for the petitioner has re-emphasized the Full Bench judgment of Himachal Pradesh High Court in *Mohan Lal's* case (supra), which has, ultimately, held as under:-

“ 15. Our answers to the questions referred to the Full Bench are that persons can apply for revision or anticipatory bail to the High Court direct without first invoking the jurisdiction of the Sessions Judge.”

(20) However a reading of this judgment also makes it clear that the Hon'ble Full Bench has categorically observed in preceding paras that it is true that where a concurrent jurisdiction was conferred on more than one Court, the inferior Court was expected, as a matter of practice, to be approached first. However, thereafter only on the basis that the concurrent jurisdiction is created by statute itself, but without furnishing any further jurisprudential basis the Hon'ble full Bench has held that in case the accused is required to move the Court of Sessions first, this may result in curtailment of his right. This Court see no reason as to how the right of the accused to get the anticipatory bail would be curtailed if he is asked to move the competent court of concurrent jurisdiction at the lower stage. Conditions to be considered by Sessions Court for deciding upon the anticipatory bail would still be the same as would have been considered by the High Court. So it is obvious that there is a jurisprudential fallacy in this judgment of the Full Bench; because it confuses the 'Remedy' with the 'Right'. What Cr.P.C. provides; by way of concurrent jurisdiction; is the remedy to move the Court and not the right to seek decision in particular manner. As observed above the right of the accused is only 'right to access to

justice' which is conferred upon him by Article 21 of the Constitution of India, and not the 'right to get that justice from a particular Court'. Section 438 is only a remedy, even that a highly circumscribed remedy. Although this remedy is made available to him at two levels of hierarchy of Courts, however, this Court finds no reason to leave the absolute choice to the accused to overlook the hierarchy of Courts. The propriety of the judicial hierarchy demands that unless there are some compelling reason; virtually and effectively depriving or disabling the accused to avail remedy before the Court below, the hierarchy of Courts has to be respected. In case of concurrent jurisdiction; if the High Court does not entertain the petition directly and on the contrary, ask the accused to go to the competent Court of jurisdiction of the first instance having the concurrent power, that by no means would be denial of his right to access to justice. In any case, he would be having his right to access to justice intact.

(21) Counsel further relied upon the *Y. Chendrasekhara Rao's* case (supra). The High Court of Andhra Pradesh have proceeded primarily on the basis that denying the accused to move the High Court directly; for seeking anticipatory bail; would amount to violation of Article 21 of the Constitution of India. However, this Court does not find this to be constitutionally valid reason in view of the various pronouncements of the Supreme Court. As mentioned above, of course, the accused has a fundamental right to access to justice. But, right to move for anticipatory bail under Section 438 Cr.P.C. itself is not any fundamental right. It is only a statutory remedy, which is not even available in some parts of the country qua the offences under general penal law and is not available anywhere in country qua the offences under some special statutes. Hence, this Court does not find itself in agreement with the judgment of the Hon'ble Andhra Pradesh High Court in *Y. Chendrasekhara Rao's* case (supra).

(22) On the contrary, this Court find itself in agreement with the judgments cited by the counsel for the complainant, which have a common streak running through all these judgments that, but for some special disabling reason, even in case of concurrent jurisdiction, the accused should be required to go to the Court of first instance. All these judgments relied upon by the counsel for the complainant have categorically held that unless there is some extraordinary or exceptional circumstance, forcing the accused to move directly in the High Court for seeking anticipatory bail, in normal course, he should approach the Court of Sessions Judge. This Court finds these judgments to be more in line with judicial propriety of respecting the hierarchy of the Courts.

Section 438 is not conferring any fundamental right upon a person. It is only enabling provision for providing remedy to the accused to move a Court, out of the Courts provided in this section, for consideration of his case for grant of anticipatory bail. However, he has no inalienable right to seek order on merits from any particular Court. So if instead of deciding itself, the High Court requires the accused to move the Sessions Court in the first instance then no right of the petitioner would be violated. On the contrary, if the High Court considers the case itself and decides to decline the accused anticipatory bail, then it would deny the accused an additional opportunity to approach a legal forum; which would have been available to him before High Court, had he moved the Sessions Court first.

(23) In the present case, the reasons pointed out by the counsel for the petitioner for directly approaching the High Court for seeking anticipatory bail are that the petitioner is resident of State of Uttar Pradesh, all male members of his family have been involved in the case and that the complainant is hobnobbing with the police for getting the petitioner arrested. Therefore, counsel has expressed his apprehension that in case, the petitioner approached the Sessions Court at Karnal then he could be arrested by the Police. However, this Court finds that this argument of learned counsel for the petitioner is having nothing to do with the aspect; as to which Court is required or would be appropriate to exercise the powers under Section 438 Cr.P.C. None of these factors are disabling factors so as to compel the petitioner not to approach the Court of session, in the first instance; and so to directly approach the High Court. The factors which are mentioned by the counsel for the petitioner as the reasons for not approaching the Sessions Court at Karnal, would be very much applicable in that situation as well; when he is approaching the High Court. Therefore this Court does not find the reason; given by the counsel for the petitioner for not approaching the Court of Sessions in the first instance, to be sufficient to exclude the ordinary concurrent jurisdiction of Court of Sessions.

(24) Counsel for the petitioner has further submitted that the present FIR is a counter blast to the complaint already filed by the petitioner against the complainant and his family members, as well as against the uncle of the complainant. On the basis of those complaints, two FIRs have already been registered against the side of the complainant, through the orders passed by this Court.

(25) However, this Court finds that even this argument is having something to do only with the merits of the case, which this Court is not

even entering into, for the purpose of consideration of the present petition.

(26) In view of the above, this Court finds no exceptional or special circumstances to exercise its concurrent jurisdiction under Section 438 Cr.P.C. and to pass any order on merits of the case.

(27) The petitioner, if he so deems appropriate; may approach the Court of Sessions Judge for the same relief.

(28) With above observations, the present petition is dismissed.

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*Manpreet Sawhney*