

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 171 OF 2017**

Mr. Roy Rosario Fernandes, Major in
age, Businessman, s/o Rosario Khan, r/o
13/4, Xim Vaddo, Bardez-Goa. Petitioner

Versus

1. State of Goa, Through the Public
Prosecutor, High Court, Panaji, Goa.
2. The Police Inspector, Panaji Police
Station, Dist-North Goa, Goa. Respondents

Shri Vibhav Rajiv Amonkar, Advocate for the Petitioner.

Shri S.R. Rivankar, Public Prosecutor for the Respondents.

CORAM:- C.V. BHADANG, J.

DATE:- 26th SEPTEMBER, 2017.

ORAL JUDGMENT:

Rule made returnable forthwith. The learned Public Prosecutor waives service on behalf of the respondents. Heard finally by consent of parties.

2. The petitioner is challenging the order dated 22.09.2017, passed by the learned Sessions Judge, Panaji, directing the petitioner to remain present at the time of hearing of the application for Anticipatory Bail filed by the petitioner. This is on the basis of an application (Exhibit-12) filed by the

State under Section 438 (1B) of the Code of Criminal Procedure, 1973 (Code, for short), praying that the petitioner/applicant be directed to remain present at the time of the passing of the order on the application for anticipatory bail.

3. The only contention raised on behalf of the petitioner is that the application under Section 438 (1B) of the Code was not maintainable, in as much as the said provision, which was introduced by Amendment Act 25 of 2005, has not been brought into force. The learned Counsel for the petitioners has pointed out that Section 438 (1B) of the Code was introduced by Section 38 of the Amendment Act 25 of 2005. The learned Counsel has referred to the Notification dated 23.06.2006, by which all the provisions of the Amendment Act, except the provisions of Sections 16, 25, 28(a), 28(b), 38, 42(a), 42(b), 42(f) (iii) and (iv) and 44(a), have been brought in force. In other words, it is contended that Section 38 of the amending Act has not yet been brought in force.

The learned Counsel has also referred to the decision of the Supreme Court in the case of **Sundeep Kumar Bafna Vs. State of Maharashtra & Another, (2014) 16 SCC 623**, in which, in para 22, the Hon'ble Supreme Court has noticed that the said provision has not been brought into force.

4. It is not in dispute that the ground as raised herein was not raised before the learned Sessions Judge and thus, the learned Sessions Judge had no occasion to consider the said aspect.

5. In view of the above, the learned Public Prosecutor submits that the application can be sent back to the learned Sessions Judge, who can decide the same afresh after hearing the parties.

6. In such circumstances, the following order is passed:

ORDER

- (a) The petition is partly allowed.
- (b) The impugned order is hereby set aside.
- (c) In the event, the prosecution intends to press the application, under Section 438 (1B) of the Code, the same shall be decided by the learned Sessions Judge afresh after hearing the parties.
- (d) The learned Sessions Judge shall decide the application without being influenced by the impugned order.
- (e) Rule is made absolute in the aforesaid terms, with no order as to costs.
- (f) Parties to act on the basis of an authenticated copy of this order.

C. V. BHADANG, J.