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

ANTICIPATORY BAIL APPLICATION NO. 398 OF 2019

Mr. Kamisha Danbhadur Singh @ Munna Singh	..Applicant
Vs	
The State of Maharashtra	..Respondents

Mr. N.P. Dalvi I/b Shweta A. Singh for applicant.
Mr. S.S. Hulke, APP for State.

CORAM : A.S.GADKARI, J.
DATE : 24th April 2019.

P.C.:

1] The present application for pre-arrest bail is filed, impugning the Order dated 4.2.2019 passed below Exh.1 in A.B.A. No.129 of 2019 by the learned Additional Sessions Judge, Kalyan.

2] Perusal of the impugned Order would indicate that, though a crime against the applicant was not registered till the then date, the learned Trial Court after perusing the complaint and notice issued by the Investigating Officer dated 8.1.2019, reached to the prima facie conclusion that, the applicant has committed an offence. The sections invoked and/or applied to the crime have not been mentioned in the entire Order.

3] Perusal of the Order would further indicate that, the application

for pre-arrest bail was zealously contested by the learned APP appearing in the matter without appreciating the basic tenets for deciding an application under Section 438 of Cr.P.C. That, the police also submitted its say in opposition of the said application without there being crime registered against the applicant. It also appears that the concerned APP did not assist the Trial Court in its proper perspective and has ventured into opposing the said application. That, the mandate of law as enumerated by the Constitution bench of the Supreme Court in the case of *Gurbaksh singh Sibbia V/s. State of Punjab*, reported in 1980 SCC(2) 565, has been overlooked by the concerned APP and has failed to assist the Trial Court in fair manner.

3] This Court while granting interim relief by its Order dated 14.2.2019 has observed that, the report filed by police before the Sessions Court stating that inquiry was in progress. However, the report did not indicate that, the first information report is registered against the applicant. The learned APP appearing in the present application therefore had sought time to take instructions, whether a crime has been registered against the applicant or not. On 27th March 2019 a statement was made by the learned APP that, the police have now filed first information report bearing CR

No.76 of 2019 dated 1.2.2019 under section with Kolshewadi Police Station, Kalyan, District Thane and in view thereof this Court granted leave to amend the present application to annexe copy of the first information report.

4] It is a matter of fact that, after lodgment of the crime, the applicant did not get an opportunity to file an application under Section 438 of Cr. P.C before the Sessions Court at first instance. Judicial propriety demands that, the applicant shall at the first instance file an application under section 438 of Cr P.C before the Sessions Court and in the absence of availing such remedy, the applicant will be losing one forum to agitate his grievance.

5] In view of the above, the applicant is permitted to withdraw the present application with liberty to file a fresh application under Section 438 of Cr. P.C. before the Sessions Court at Kalyan.

6] Interim relief granted by this Court by its Order dated 14.2.2019 to remain in force for a period of four weeks from today.

7] At this stage, the learned counsel for the applicant expressed that, the earlier learned Additional Sessions Judge who has decided A.B.A. No.129 of 2019, has without there being lodgment of crime decided the

application on merits by relying on the police report and the arguments of the concerned APP. That the concerned Court has already made and expressed its mind while deciding the said application.

8] As noted hereinabove, the concerned APP has not properly assisted the Trial Court in arriving at proper conclusion. In view thereof, the following Order:

(i) The Principal Judge, Sessions Court, Kalyan is hereby directed to place the application filed under Section 438 of Cr. P.C by the applicant arising out of CR No.76 of 2019 dated 1.2.2019 registered with Kolsewadi Police Station, Kalyan, District Thane, before any other Judge than the one who has decided earlier A.B.A. No.129 of 2019 by its Order dated 4.2.2019.

(ii) The Chief Public Prosecutor attached to Sessions Court at Kayan is hereby directed to assign the case of the applicant to any other APP than the one who appeared in ABA No.129 of 2019.

9] Application is disposed off in the aforesaid terms.

(A.S.GADKARI, J.)