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HIGH COURT OF CHHATTISGARH, BILASPUROrder reserved on 07-10-2020Order passed on 18-11-2020MCRCA No. 234 of 2020

1. Hare Ram Sharma S/o Late Shri Ram Pravesh Sharma, Aged About 61 Years Assistant Statistical Officer, Presently Posted At Department Of Tribal Welfare, Government Of Chhattisgarh, Mantralaya, Indravati Bhawan, New Raipur Chhattisgarh.

---- Applicant

Versus

1. State Of Chhattisgarh Through Superintendent Of Police, Anti Corruption Bureau, Near Rajbhawan, Raipur Chhattisgarh.

---- Respondent

MCRCA No. 362 of 2020

1. T.R. Kunjam S/o Late A.G. Shanker Kunjam Aged About 50 Years Posted As Executive Engineer, Public Works Department, Bilaspur, R/o E/4, Nutan Colony, Sarkanda Bilaspur, Chhattisgarh

---- Applicant

Versus

1. State Of Chhattisgarh Through Station Incharge, Police Station Anti Corruption Bureau, District Raipur Chhattisgarh,

---- Respondent

For respective	Mr. Ramakant Mishra, Mr. Sharad
Applicants	Mishra & Ms Naushina Ali, Advocates
For Respondent /State	Ms Fouzia Mirza, Addl. Adv. General

Proceedings through Video Conferencing

Hon'ble Shri Prashant Kumar Mishra, J.
Hon'ble Shri Gautam Chourdiya, J.

The following order of the Court was passed by
Prashant Kumar Mishra, J.

1. These two bail applications under Section 438 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') have been filed by the applicants directly before the High Court without availing the remedy before the Sessions Court. On 21st August, 2020 when these two bail applications were listed separately, this Court posted the same for hearing on maintainability.
2. On 16th September, 2020 learned counsel appearing for the applicants placed reliance on an order passed by another Single Bench of this Court in ***Ratnesh Singh Chouhan v State of Chhattisgarh***¹ to argue that anticipatory bail applications can be filed directly before the High Court. However, finding that, the Single Bench in ***Ratnesh Singh Chouhan*** (supra) has not specifically dealt with the issue as to whether in each and every case, an application under Section 438 of the Cr.P.C. filed directly before the High Court would be maintainable or

¹ MCRCA No.918 of 2019 [decided on 23-7-2019]

such application can be entertained only in rare or exceptional cases, therefore, to settle the issue the matter was referred to be decided by a larger Bench. Subsequently, these bail applications have been placed before us.

3. Applicant in MCRCA No.234 of 2020 (Hare Ram Sharma) apprehends his arrest in connection with crime No.27/2016 registered by the police of State Economical Offence/Anti Corruption Bureau, Raipur (EOW/ACB, Raipur), for offence punishable under Section 13(2) read with Section 13(1)(e) of the Prevention Corruption Act, 1988 (for short 'the PC Act') whereas the applicant in MCRCA No.362 of 2020 (T.R. Kunjam) apprehends his arrest in connection with crime No.5/2016 registered by the police of Anti Corruption Bureau, District Raipur, for offence punishable under Section 13(1)(e) and 13(2) of the PC Act.
4. Mr. Ramakant Mishra, learned counsel appearing for the applicant in MCRCA No.234 of 2020 and Ms Naushina Ali, learned counsel appearing for the applicant in MCRCA No.362 of 2020, would submit that their respective applicants have been falsely implicated as no material is available against them for proceeding ahead to arrest them in the subject crime. They would submit that in view of the order passed in *Ratnesh Singh Chouhan* (supra) these anticipatory bail applications would be maintainable because the present is a case where there is

no material against the applicants and in the event they are arrested they shall suffer irreparable loss. In substance they would endeavor to carve out a rare or exceptional case by referring to merits of the matter. According to them, if no case is made out against the applicants on the basis of material available in the case diary then an application can be filed directly before the High Court. To buttress their contention, learned counsels would place reliance upon the decision rendered by the Supreme Court in *Barun Chandra Thakur v Central Bureau of Investigation and Others*², Gauhati High Court in *Kwmta Gwra Brahma v State of Assam*³ and Full Bench (a Bench of five Judges) judgment of Allahabad High Court in *Ankit Bharti v State of U.P. and Another*⁴.

5. Ms Fouzia Mirza, learned Addl. Advocate General appearing for the State, *per contra*, would submit that even though the Sessions Court and the High Court have concurrent jurisdiction under Section 438 of the Cr.P.C., an application seeking anticipatory bail is required to be filed before the Sessions Court at the first instance and thereafter before the High Court. In support of her contention, Ms Fouzia Mirza would refer to the judgments rendered by various High Courts in

² (2018) 12 SCC 119

³ (2015) 3 Gauhati Law Reports 453

⁴ Cr.Misc. Anticipation Bail App. u/S 438 Cr.P.C.No.1094 of 2020 [decided on 2-3-2020] and other connected cases

***Hajialisher v The State of Rajasthan*⁵, *K.C. Iyya and etc. v State of Karnataka*⁶, *Rameshchandra Kashiram Vora and etc. v State of Gujarat and another*⁷, *Mohanlal, S/o Nandram Choudhari v State of Maharashtra*⁸, *Mayur Bordoloi v State of Assam*⁹ and *Virender Kumar Mutreja v State (Govt. of NCT of Delhi)*¹⁰.**

6. The provisions for grant of anticipatory bail as provided in Section 438 of the Cr.P.C. reads thus :

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

5 1976 CJ (Raj) 65 : 1976 CriLJ 1658

6 1983 CJ (Kar) 137 : 1985 CriLJ 214

7 1988 CriLJ 210

8 2007 (4) MhLJ 9

9 (2013) 6 Gauhati Law Reports 201

10 2019 SCC OnLine Del 10602

(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.

(1A) Where the Court grants an interim order under Sub-Section (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,

(1B) 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 Sub-Section (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 Sub-Section (1).

(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or

section 376AB or section 376DA or section 376DB of the Indian Penal Code.

7. A plain reading of the provision necessitates an immediate conclusion that the jurisdiction conferred on the High Court and the Sessions Court for entertaining a prayer for anticipatory bail is concurrent in nature. The controversy as to whether the application would be maintainable before the High Court only after exhaustion of the remedy before the Sessions Court has been posed before the different High Courts on 'n' number of occasions.
8. Two different Benches of the Allahabad High Court rendered two different opinions; while one in ***Harendra Singh v State of U.P.***¹¹ held that the bail application filed under Section 438 of the Cr.P.C. is not maintainable before the High Court without exhausting remedy before the Court of Sessions, the one in ***Vinod Kumar v State of U.P. and Another***¹² held that such application can be filed directly before the High Court with a rider that strong, cogent, compelling reasons and special circumstances must necessarily be found to exist in justification of the High Court being approached first and without the avenue as available before the Court of Sessions being exhausted.
9. The issue was thereafter referred to the Full Bench in ***Ankit Bharti*** (supra). The Full Bench eventually

¹¹ 2019 SCC OnLine All 4571

¹² 2019 SCC OnLine All 4821

approved the conclusions recorded by the Single Bench in *Vinod Kumar* (supra), which, *inter alia*, held that bail application can be filed directly before the High Court only in compelling reasons and special circumstances and that the words "exceptional" or "extraordinary" be understood to mean atypical, rare, out of the ordinary, unusual or uncommon and further that it must be left to be gathered by the Judge on a due evaluation of the facts and circumstances as to whether the case is an "exceptional" or "extraordinary" one.

10. In *Hajialisher* (supra) the Rajasthan High Court observed that choice of Court for moving an application under Section 438 of the Cr.P.C. cannot be left completely to the option of the accused as for the decision of this question no distinction can be made between an application under Section 438 and one under Section 439 of the Cr.P.C. and if it is accepted that under Section 438 of the Cr.P.C. an accused person has a right to have his prayer for bail considered in the first instance by the High Court, the same argument can very well be pressed into service with respect to applications under Section 439 of the Cr.P.C. The Court held that it is desirable that the ordinary practice should be that the lower court should be first moved in the matter, though in exceptional cases or special circumstances, the High Court may entertain and decide an application for bail either under Section 438 or u/S 439 of the Cr.P.C. directly before the High Court.

11. In ***K.C. Iyya*** (supra) the Karnataka High Court held thus at paras 8, 9 & 10 :

8. In this connection I would first like to refer to a decision of R.S. Pathak, CJ, (as he then was) of the Himachal Pradesh High Court in Sher Singh v. Singha Singh. That was a case in which the aggrieved party had sought for cancellation of bail granted by the Magistrate. Instead of approaching the Session Judge the parties had approached the High Court directly. Taking note of the fact that the High Court and the Court of Session had concurrent powers in the matter, the learned Judge felt that it was desirable that the parties, in line with the practice prevailing should have first approached the Session Judge. I may usefully extract the following observations of the learned Judge :

"It seems to me that in the circumstances, the petitioner should apply to the learned Sessions Judge in the first instance. That course will be in accordance with the law laid down by this court in Gulam Ali v. The State. Learned counsel for the petitioner has drawn my attention to S. Narayanan v. Kannamma Bhargavi where a Full Bench of the Kerala High Court has observed that there is no legal bar to a party approaching the High Court without first moving the Sessions Judge or the Dist. Magistrate. Reference was made to the practice prevailing in that High Court. There is no doubt that a party is entitled to apply to the High Court even as he is entitled to do so before the learned Sessions Judge. But whenever concurrent jurisdiction is vested by the statute

simultaneously in two Courts, one superior to the other, I consider it appropriate that the party should apply to the inferior Court first. There are a number of reasons persuading me to that conclusion. Firstly, if a party is required to go to the Inferior Court in the first instance the superior Court has the advantage of the opinion of the inferior Court when the occasion arises for the exercise by it of its jurisdiction in the matter. Secondly, the inferior court is generally situated in the same or very near the place where the authority is situate from whose order the revision application is made, and it is more convenient and saves time for the record to be sent from that authority to the inferior Court when the revisional application is filed and upon disposal of the revision application for the record to be returned to the authority for disposal of the case. Thirdly, it provides against the superior Court being flooded with cases which can be more appropriately disposed of by the inferior court. These are reasons which have generally prevailed with the High Courts in holding that where it is a case of concurrent jurisdiction a party should ordinarily apply to the inferior Court in the first instance. The rule is not an absolute rule. It is to be applied ex debito justitiae. There may be a case where the interests of justice may be defeated if a party is required to apply to the inferior Court first before approaching the High Court. The rule must then given way to the interests of justice".

(Para-6)

(Emphasis supplied)

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XXX XXX XXX

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9. Such is not the case here. These are bail matters. Effective relief can be granted by the Sessions Judge. They have the same powers as this Court has. Therefore in dealing with the question referred to above, Sher Singh's case is nearer the point.

10. After the new Code came into force, taking advantage of S. 438, persons apprehending arrest from police of various stations spread all over the State and involving non-bailable offences, many not even of a serious nature, have been directly approaching this Court. In all such cases the State Prosecutor, who has to be heard, will have to get his instructions from the local police, some of whom may be far away. That necessarily consumes lot of public time and energy. Apart from this, anticipatory bail is an urgent matter. If the party approaches the Sessions Judge of the District, can he not get this relief there and would it not be easy for the local Public Prosecutor to get in touch with the police, if need be, so that he can assist the Session Court ? One of the relevant considerations that had weighed with the learned Judge (Pathak, CJ), was that "such a practice would also ease the pressure of the High Court. As otherwise the High court would be flooded with cases which can be more appropriately disposed of by the inferior Court". If that was so, a decade ago, in 1972, is it not very much so now when the dockets of every superior court are full to the brim and when people, who are

aware of their rights, are approaching Courts in larger numbers.

12. The High Court of Gujarat in ***Rameshchandra Kashiram Vora*** (supra) has taken a similar view in following words at paras 10 :

10. I am in respectful agreement with the ratio of these two cases. I am of the opinion that it would be a sound exercise of judicial discretion not to entertain each and every application for anticipatory bail directly by-passing the Court of Session. Ordinarily, the Sessions Court is nearer to the accused and easily accessible and remedy of anticipatory bail is same and under same section and there is no reason to believe that Sessions Court will not act according to law and pass appropriate orders. In a given case, if any accused is grieved, his further remedy to approach the High Court is not barred and he may prefer a substantive application for anticipatory bail under Section 438 or revision application under Section 397 of the Cr.P.C. to the High Court and the High Court would have the benefit of the reasons given by the Sessions Court. It would be only in exceptional cases or special circumstances that the High Court may entertain such an application directly and these exceptional and special circumstances must really be exceptional and should have valid and cogent reasons for by-passing the Sessions Court and approaching the High Court. The High Court may also in exercise of its discretion entertain directly the applications for anticipatory bail where the Public Prosecutor can act without calling the

Investigating Officer. There are cases where anticipatory bail applications can be and are finally granted on the same day. Where the facts are so clear and eloquent that rule can be issued and made absolute on the same day, the High Court may not reject the application and direct the accused to go to the Sessions Court. In other cases where rule is required to be issued and some time is required to be elapsed in order to enable the Public Prosecutor to get in touch with the Investigating Officer and to call him if necessary, during that time, if interim bail is got granted, the application might be frustrated and if interim bail is granted and the arrest delayed, sometimes the investigation may suffer irreparably. In such cases, the choice of avoiding the Sessions Court may also appear to be not bona fide. When the accused has simple and equally efficacious remedy available in the Sessions Court, special and weighty reasons would be required to make out a special and exceptional case for persuading the High Court to entertain such application directly.

13. The Bombay High Court in *Mohanlal* (supra) has also taken a similar view that the choice of choosing the Court, whether Sessions Court or High Court for moving an application under Section 438 of the Cr.P.C. cannot be left to be decided by the accused. Relying on the decision rendered by the High Court of Gujarat in *Rameshchandra Kashiram Vora* (supra) and that of P&H High Court in *Chhajju Ram v State of Haryana*¹³ the Bombay High Court observed thus in para 29 :

¹³ 1978 CriLJ 608

29.....In my opinion, Section 438 of the Code does not confer any right upon an applicant to choose the forum for seeking relief under Section 438 of the Code. Though it cannot be disputed that the application directly filed before the High Court under Section 438 of the Code is maintainable, in my opinion, while exercising jurisdiction under Section 438 of the Code the High Court would be fully justified in insisting upon exceptional reason before dealing with an application filed directly to the High Court seeking anticipatory bail on merits. This Court has consistently followed practice of insisting that an applicant must first approach the Sessions Court before approaching the High Court. Therefore, I hold that though the application for anticipatory bail filed directly to the High Court is maintainable, the High Court would be justified in not entertaining the same on merit unless exceptional reasons exist.

14. Even the decision relied by Shri Ramakant Mishra, learned counsel for the applicant in *Kwmta Gwra Brahma* (supra) would hold thus in para 17 :

17. It is therefore necessary that normally a person/accused should file an anticipatory bail application u/s 438 of the CrPC or a bail application u/s 439 of the CrPC before the Sessions Court and thereafter he can approach the High Court. However, this is not an inviolable rule. In exceptional circumstances a person/accused can directly approach the High Court. The following are the circumstances under which a person/

accused can directly approach the High Court.

(i) When a person/accused from other State has to move an application for grant of anticipatory bail u/s 438 of the Cr.P.C., if it is convenient for him to move such application before the High Court directly, which is nearer from the point of distance, in such a case the application filed before the High Court need not be rejected on the ground that he can approach the Sessions Court unless the Sessions Court is also located in the same place.

(ii) Whenever in a Sessions' jurisdiction a particular incident or crime has attracted a lot of public and media attention with an adverse public opinion having been built up against the person/accused, in such cases the 438 CrPC applications and 439 CrPC applications can be filed directly before the High Court.

(iii) When the Sessions Court has already rejected an application for grant of bail u/s 438/439 of the CrPC where one of the persons/accused is similarly placed it is not necessary that the similarly placed person/accused should approach the Sessions Court for grant of bail, he can file an application before the High Court u/s 438/439 of the CrPC.

15. In ***Barun Chandra Thakur*** (supra), relied by Ms Naushina Ali, learned counsel for the applicant, the application filed directly before the High Court was allowed and the Supreme Court did not interfere,

however, the Supreme Court's refusal to interfere was for the reason that the case has invited wide coverage in the print & electronic media meaning thereby that it was an exceptional case.

16. Thus, the catena of judgments referred to above would follow the common thread that albeit Section 438 of the Cr.P.C. confers concurrent jurisdiction on the High Court and the Sessions Court, an application should ordinarily be filed before the Sessions Court at the first instance and not directly before the High Court. For filing an application directly before the High Court the applicant has to demonstrate and satisfy the High Court that there exists exceptional, rare or unusual reasons for the applicant to approach the High Court directly.
17. Merely for the reason that the accused has a good case on merits cannot be a ground for moving the bail application directly before the High Court for the reason that if the accused has a good case on merits and there is no material available with the police to implicate the accused, there is no reason why the learned Sessions Judge would not be in a position to appreciate the facts and circumstances of the case and apply his judicial mind.
18. We have not dealt with the merits of the present bail applications as we have found that there are no exceptional circumstances in the cases at hand which

would entitle them to move the anticipatory bail applications directly before the High Court. Any observation on merits may effect the applicants' case before the Sessions Court, therefore, while dismissing these two bail applications filed directly before the High Court as not maintainable as they have not been able to demonstrate any exceptional circumstances, we reserve liberty in favour of the applicants to approach the Sessions Court and thereafter to revive the prayer before the High Court if need arises.

19. Since we have held that these two bail applications are not maintainable directly before the High Court we decline the prayer to continue the interim protection granted to the applicants, however, the Sessions Court is directed to decide the anticipatory bail applications at the earliest, as and when the applicants move before the Sessions Court.
20. In the result, both the applications are rejected, as not maintainable, with the observations as stated *supra*.

Sd/-

(Prashant Kumar Mishra)
Judge

Sd/-

(Gautam Chourdiya)
Judge

Gowri

HEAD NOTE

Application for anticipatory bail u/S 438 CrPC should ordinarily be filed before the Sessions Court at the first instance. Such application can be filed directly before the High Court when there exists exceptional, rare or unusual reasons.

