

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.20839 of 2020**

Arising Out of PS. Case No.-118 Year-2016 Thana- MAHILA P.S. District- Araria

1. Deep Prakash @ Divya Prakash Yadav Son of Om Prakash @ Om Prakash Yadav Resident of Village - Oil Tola, Maranga, P.S.- K.Hat, Dist.- Purnea.
2. Priya Prakash Son of Jay Prakash Yadav Resident of Village - Oil Tola, Maranga, P.S.- K.Hat, Dist.- Purnea.

... .. Petitioners

Versus

The State of Bihar

... Opposite Party

Appearance :

For the Petitioners : Mr.Sudhir Kumar Singh, Advocate
For the Opposite Party : Mr.Ansar Ul Haque, Addl Public Prosecutor

CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH

ORAL JUDGMENT

Date : 26-10-2021

Heard learned counsel the petitioners, the State and the informant.

2. The present application has been filed under section 439 of the Code of the Criminal Procedure (herein after referred to as 'the Code') directly before this Court with two fold prayers. Firstly, they may be permitted to surrender in connection with Araria Mahila PS Case No. 118 of 2016/GR No. 4200/2016 and secondly, their case may be considered for grant of bail by the High Court.

3. Stamp reporter has raised objection regarding maintainability of this application as the petitioners have not approached the Court of Sessions at the first instance.

4. Brief facts giving rise to the instant case is that on the



written statement of one Chabidas, Araria Mahila PS Case No. 118 of 2016/GR No. 4200/2016 was registered to the effect that on 19.12.2026 at about 2 pm while she was at the Polytechnic Chauk, Purnea waiting to catch a bus for Farbisganj, suddenly, petitioners and one other unknown person came there on Safari vehicle and offered her lift. She further alleged that as the petitioners were known to her, she boarded their vehicle, whereupon they took her to a lonely place and committed gang rape on her. Police after investigation finding the case to be false, submitted final form. However, the learned Sub Divisional Judicial Magistrate, Araria, after perusal of the materials available on the record, differed with the same, and took cognizance of the offence punishable under section 376D of the Indian Penal Code vide order dated 22.11.2017 (Annexure 4) and issued summons to the accused persons. It appears that these petitioners did not respond to the summons issued by the Magistrate concerned leading to the issuance of non bailable warrant against them and when even these steps proved ineffective these petitioners were declared proclaimed offender under section 82 of the Code only thereafter these petitioners filed anticipatory bail application vide Cr.Misc.No. 41559 of 2018 which was disposed of by a co-ordinate bench



of this Court vide order dated 8.8.2018.

5. Learned counsel for the petitioners submits that the petitioners have directly approached this Court in the light of judgment of the Hon'ble Supreme Court rendered in case of **Sundeep Kumar Bafna Vs. State of Maharashtra and another**, reported in **(2014) 16 Supreme Court Cases 623**. He submits that there is an option and right to the accused to select either the Sessions Court or the High Court for making an application for pleading bail, as such their application is maintainable and it cannot be dismissed on the ground that the petitions have not moved before the Sessions Court at the first instance. On merits, he submits that the petitioners have falsely been implicated in this case on the ground that brother of the informant was an accused in the murder of brother of the petitioner no.1 in which he has been convicted.

6. Learned counsel for the informant as well as the State oppose the prayer of the petitioners. They submit that it is a case of gang rape in which these petitioners and their associate are alleged to have committed rape on the informant. Offence has been committed on 19.12.2016 and anticipatory bail of petitioners was disposed of by a co-ordinate bench of this Court vide order dated 8.8.2018, passed in Cr.Misc.No. 41559



of 2018 with direction to them to surrender and seek regular bail. As the petitioners were evading appearance, nonailable warrant was issued by the court of the Sub Divisional Judicial Magistrate, Araria vide order dated 22.9.2018. Processes of sections 82 and 83 of the Code were also issued by the Court below vide orders dated 28.3.2019 and 14.8.2019 for compelling the attendance of the petitioners. Learned counsel further contended that after lapse of two years of rejection of the anticipatory bail application, petitioners have approached this Court for bail and there is no explanation for the delay in this regard. Moreover, in the entire application no reason has been assigned by these petitioners as to why they have approached this Court directly. As such, this petition is fit to be dismissed.

7. It is not in dispute that the petitioners have an option and right to select either the Sessions Court or the High Court for making an application for pleading bail, in view of the law laid down by the Hon'ble Supreme Court in case of **Sundeep Kumar Bafna (supra)** wherein it was observed and held that since the Sessions Court as well as the High Court, both of which exercised concurrent powers under Section 439 of the Code, person accused of commission of non-bailable offence



punishable by life imprisonment or death, section 439 of the Code can be invoked for pleading for bail before Sessions Court and the High Court in pre-committal stage.

8. In view of the aforesaid pronouncement of law by Hon'ble Supreme Court in the case of **Sundeep Kumar Bafna (supra)**, objection of the Stamp Reporter is overruled holding that the instant petition is maintainable. A person accused of non bailable offence punishable by life imprisonment or death can invoke section 439 of the Code for bail in pre-committal stage directly before High Court.

9. On careful perusal of the materials available on the record, it appears that petitioners have filed this petition for accepting their surrender and grant of regular bail solely on the ground of the judgment of the Hon'ble Supreme Court in case of **Sundeep Kumar Bafna (supra)**. No doubt in exercise of concurrent powers under Section 439 of the Code, person accused of commission of non-bailable offence punishable by the life imprisonment or death, section 439 of the Code can be invoked for pleading for bail in pre-committal stage before Sessions Court and the High Court. Section 439 of the Code gives concurrent powers to both the High Court and to Court of Session and in such a situation it is left to the person to choose



either of the two forums. Further, when the provision is read as a whole, the same does not indicate that the aggrieved person must apply to the court of Session first before coming to the High Court to seek his redress. Still, as per the existing practice, when the accused has simple and efficacious remedy available in Session court, unless there is special reasons or special circumstances compelling the person concerned to approach the High Court at the first instance, the person concerned should approach the Court of Session in order to serve the ends of justice, public interest and also the administration of justice. In the present case, petitioners have not shown as to why they have chosen to by-pass the Court of Session while approaching the High Court directly. Ordinarily, the Sessions Court is nearer to the accused and easily accessible and remedy of 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 the present case, save and except the law laid down by the Hon'ble Supreme Court in case of **Sundeep Kumar Bafna (supra)**, no special reasons or special circumstances have been pleaded or argued which necessitated them to approach the High Court at the first instance by-passing the Sessions Court. Secondly,



petitioners absconded for nearly two years after the rejection of their bail petition by this Court vide order dated 8.8.2018. In normal circumstances, this Court is of the opinion that ordinary practice should be that the aggrieved person should first move to the Sessions Court in the matter, though in exceptional cases or special circumstances, the High Court may entertain and decide an application. I am of the opinion that it would be a sound exercise of judicial discretion not to entertain each and every application for bail directly to the High Court by-passing the Court of Session.

10. In view of the aforesaid discussions, prayer of the petitioners for accepting the surrender and to enlarge them on regular bail, is hereby rejected. Petitioners are directed to surrender and seek regular bail before the Court below within a period of four weeks from today which would be disposed of on its own merit without being prejudiced by the present order.

(Prabhat Kumar Singh, J)

Shashi

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	03.11.2021.
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