

**CRIMINAL MISC. APPLICATION NO.6478 of 2019 (BAIL)**

Harendra Singh @ Harendra Bahadur .... Applicant

Versus

The State of U.P. .... Opposite party

**Hon'ble Chandra Dhari Singh,J.**

1. Heard learned Counsel for the applicant and learned A.G.A.
2. By means of instant application filed under Section 438 of Cr.P.C., the applicant has sought anticipatory bail in Case Crime No.476 of 2019, under Sections 419, 420, 467, 468, 471 IPC lodged at Police Station Kotwali Nagar, District Raebareli.
3. Before adverting to the factual matrix of this case and to ascertain as to whether the applicant is entitled for grant of anticipatory bail or not; a serious legal question has been raised before this Court by the learned A.G.A. that the applicant without exhausting the remedy under Section 438 of Cr.P.C. before the jurisdiction Sessions Court, has directly approached this Court. Therefore, the application is not maintainable and the applicant has to be relegated to the Court of Sessions first and then he can approach this Court. In this background, the legal question that arises for consideration of this Court is that -

*"Whether the application filed under Section 438 of Cr.P.C. is maintainable before the High Court without exhausting remedy under the said provision before the Court of Sessions which has concurrent jurisdiction with that of the High Court?"*

4. Section 438 of Cr.P.C. reads as follows:

***"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 Sessions 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 offences;*
- (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:*

*The rest of the provision is not necessary for the purpose of considering the question raised.*

5. The amended provisions of the Criminal Procedure Code, 1973, in its application to Uttar Pradesh is as follows:

*" No.1058 (2)/ LXXIX-V-1-19-1(ka)-20-2018*

*Dated Lucknow, June 6, 2019*

*In pursuance of the provisions of clause (3) of Article 348 of the Constitution, the governor is pleased to order the publication of the following English translation of the Dand Prakriya Samhita (Uttar Pradesh Sanshodhan) Adhiniyam, 2018 (Uttar Pradesh Adhiniyam Sankhya 4 of 2019) as passed by the Uttar Pradesh Legislature and assented to by the President on June 1, 2019. The Grih (Police) Anubhag-9 is administratively concerned with the said Adhiniyam.*

**THE CODE OF CRIMINAL PROCEDURE  
(UTTAR PRADESH AMENDMENT) ACT, 2018**

*(U.P. Act No.4 of 2019)*

*[As passed by the Uttar Pradesh Legislature]*

*AN*

ACT

*further to amend the Code of Criminal Procedure, 1973 in its application to Uttar Pradesh.*

*It is hereby enacted in the Sixty ninth Year of the Republic of India as follows: -*

*1. This Act may be called the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 2018.*

*2. In the Code of Criminal Procedure, 1973 as amended in its application to Uttar Pradesh, after section 437-A the following section shall be inserted, namely:-*

**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 Sessions 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) .....*

*(ii) .....*

*(iii) ....*

*(iv) .... "*

6. On plain and meaningful reading of the abovesaid provision, it is crystal clear that it confers concurrent jurisdiction on the High Court as well as the Court of Sessions. The wide discretion has been entrusted on the Court of Sessions as well as on the High Court to enlarge such person who comes to the Court, on anticipatory bail. Both the courts have got jurisdiction to enlarge the applicant on anticipatory bail, considering the relevant guidelines in the said provision.

7. As could be seen from the provision itself, there is no embargo or any rider or any condition incorporated under the provision that the person who approaches the High Court must first exhaust the said remedy before the Court of Sessions. In fact, under the provision,

chronologically, High Court is mentioned first and thereafter, Court of Sessions is mentioned.

8. Learned counsel for the applicant in this regard submitted that this Court cannot direct the party to approach the Sessions Court to exhaust the remedy when, it is not contemplated under the provisions itself. He need not establish any extraordinary circumstances to approach the concurrent jurisdiction of the High Court. In this regard, he has relied upon several rulings.

9. Per contra, learned A.G.A. has also relied upon various rulings and submitted that though the High Court has got concurrent jurisdiction under Section 438 of Cr.P.C., but as a matter of practice, the party has to approach the Sessions Court first, for his remedy and then he can approach High Court under Section 438 of Cr.P.C. after exhausting such remedy. He further submits that if a party directly approaches the High Court, he has to establish extraordinary or special reason as to why he wants to bypass the Sessions Court.

10. In this background, now let me consider the various rulings related to the submissions made above.

11. In the case of *Gurubaksh Singh Sibbia Vs. The State of Punjab; AIR 1980 SC 1632* and *Sarbajit Singh and another Vs. The State of Punjab; AIR 2009 SC 2792*, the Apex Court while dealing with the provisions of Section 438 of Cr.P.C. has laid down certain important aspects. The Apex Court after considering the observation of the High Court of Punjab, has laid down certain guidelines as to under what circumstances, the discretion vested under Section 438 of Cr.P.C. can be exercised. The Apex Court has observed in the following manner:

*"12. We find ourselves unable to accept, in their totality, the submissions of the learned Additional Solicitor General or the constraints which the Full Bench of the High Court has engrafted on the Power conferred by S. 438. Cl. (1) Section 438 is couched in terms, broad and*

*unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep-grained in our Criminal Jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by S. 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, in so far as the right to apply for bail is concerned. It had before it two cognate provisions of the Code: S. 437 which deals with the power of Courts other than the Court of Sessions and the High Court of grant bail in non-bailable cases and Section 439 which deals with the "special powers" of the High Court and the Court and the Court of Sessions regarding bail. The whole of Section regarding bail. The whole of Section 437 is riddled and hedged in by restrictions on the power of certain courts to grant bail."*

12. Further, the Apex Court has also observed that Section 438 is a departure Section from 437 and 439 of Cr.P.C. The provisions of Sections 437 and 439 of Cr.P.C. furnish a convenient model for the legislature to copy while enacting Section 438 of Cr.P.C.

*"The provisions of Ss. 437 and 439 furnished a convenient model for the legislature to copy while enacting S.438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully: Advisedly, at least in part, because of the 41st Report of the Law Commission, which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Sessions to grant anticipatory bail, said in Para. 39.9 that it had "considered carefully the question of laying*

*down in the statute certain conditions under which alone anticipatory bail could be granted but had come to the conclusion that the question of granting such bail should be left "to the discretion of the Court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Sessions to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the high courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail."*

13. In the case of ***CBI Vs. State of Gujarat; (2007) 6 SCC 156***, the Hon'ble Apex Court while dealing with the provisions of Section 397 of Cr.P.C. which also gives a concurrent jurisdiction to the Court of Sessions as well as the High Court, held in the following manner:

*"Section 397 of Cr.P.C. - Revision can be preferred directly before the High Court against the order of CJM instead of moving the Sessions Court. There is no bar for High Court to entertain such Revision Petition. Further held that on facts, High Court erred in criticizing CBI."*

14. These case laws also in a straight jacket manner not applicable to the case on hand. The Hon'ble Apex Court mainly concentrated on the criticism made by the High Court on C.B.I but not dealt with the concurrent Jurisdiction, and no law as such has been laid down.

15. Though the Hon'ble Apex Court has made certain observations with regard to the jurisdiction of the High Court but the very question that has been raised before this Court has not been specifically answered. Though in categorical term, the Supreme Court has said that the jurisdiction of the High Court and Sessions Court under Section 438 of Cr.P.C. are concurrent in nature and it is the special powers given to the High Court and the Court of Sessions for grant of

anticipatory bail and there can't be any restrictions on the discretion of the Court which are not engrafted in the section.

16. In a decision reported in 1983(2) KLJ 8 in the case of ***K.C. Iyya Vs. State of Karnataka***, the High Court of Karnataka has observed as follows:

*"7. Since both the Courts, the Court of Sessions and this Court have concurrent powers in the matter, it appears desirable, for more than one reason, that the Sessions Court should be approached first in the matter."*

17. In the case of ***Shivasubramanyam Vs. State of Karnataka and another; 2002 CRL.LJ 1998***, the Karnataka High Court has re-iterated the abovesaid principles and ultimately held that the application filed under Section 438 of Cr.P.C. directly to the High Court is maintainable only under exceptional and under special circumstances, but not as a routine and the party cannot come before the Court as a matter of right.

18. By looking into the abovesaid discussions, I am of the opinion that the party has to approach the Sessions Court first and then he has to approach the High Court which is the normal course. But the courts have also observed that in extraordinary circumstances with special reasons, the party can also approach the High Court. The High Court cannot entertain Section 438 of Cr.P.C. as a matter of routine without examining whether there are any special reasons or special circumstances to entertain the said application.

19. In the case of ***Sri Kwmta Gwra Brahma Vs. State of Assam (Bail No.3024 of 2014)***, The Gauhati High Court has also expressed similar view and held that the party has to approach the Court of Sessions first under Section 438 of Cr.P.C. and he can later approach the High Court.

20. The intention of bringing out Section 438 of Cr.P.C. is enabling each and every person in the country if under extraordinary circumstances under exigencies either to approach the Court of

Sessions or the High Court which can be concurrently exercised by both the courts. Though such remedy, cannot be riddled down by imposing any extraordinary condition but still the Court can refuse to entertain the bail petition and direct the party to approach the Court of Sessions first because Section 438 of Cr.P.C. shall not be exercised as a matter of right by the party, though it can be invoked either before the Sessions Court or before the High Court. It is purely the discretionary power of the Court to exercise power depending upon the facts and circumstances of each case. Therefore, the High Court can direct the party to go first before the Court of Sessions and then come to the High Court though there is no embargo under the statute itself, but the Court can do so on the basis of various factors.

21. It is worth to note here that whenever the concurrent jurisdiction is vested under the statute simultaneously in two courts of one is superior to the other, then it is appropriate that the party should apply to the subordinate Court first, because the higher Court would have the advantage of considering the opinion of the Sessions Court. Moreover, the party will get two opportunities to get the remedy either before the Sessions Court or before the High Court but if once he approaches the High Court, he would run the risk that, the other remedy is not available to him if he failed to get the order in the High Court, he cannot go before the Sessions Court for the same remedy. However, vice versa is possible.

22. It is also to be notable that the Sessions Court will always be nearest and accessible Court to the parties. Moreover, considering the work load of the courts in the country, the superior courts particularly, the High Courts are flooded with heavy pendency of cases. In order to facilitate the other parties who come before the Court with other cases before the High Court (which has got exclusive Jurisdiction) and also in order to provide alternative remedy to the parties, it is just and necessary that the party shall first approach the Sessions Court under

Section 438 of Cr.P.C. so that the High Court can bestow its precious time to deal with other pending cases which requires serious attention and expeditious disposal, where the parties who have come to the High Court after exhausting remedy before the Magistrate Court or the Sessions Court for grant of bail and for other reliefs.

23. The grant of anticipatory bail or regular bail requires appreciation, scrutiny of facts and after going through the entire materials on record. In that context, if the Sessions Court has already applied its mind and passed the appropriate order, it would be easy for the High Court to look into or have a cursory glance of the observation made by the Sessions Court and dispose of the case, with expedition.

24. It is also worth to note here that the Sessions Court and the High Court are concurrently empowered to grant bail under Section 438 of Cr.P.C. The object is that if the party who is residing in the remote area can directly approach the Sessions Court which is easily accessible. In order to obviate the very object and purpose, the party has to explain why he did not go to that Court. Otherwise, it amounts to making that provision redundant, so far as the Sessions Courts are concerned. Even once again re-looking into structure of Section 438 of Cr.P.C., it is purely the discretionary power given to the Court to entertain the Petition. It is the discretion given to the Courts to exercise that power. When discretion vests with Court, the party has to explain why he has come to the High Court directly, for the discretionary relief under the said provision.

25. Therefore, looking to the abovesaid rulings of different High Courts, I do not find any strong reason to deviate from the said view taken by the other High Courts. Hence, I am of the opinion, the point formulated by me noted above has to be answered accordingly.

26. Hence, I answer the point raised as follows:

*"The bail application filed under Section 438 of Cr.P.C. is not maintainable before the High Court without*

*exhausting remedy before the Court of Sessions, which has got concurrent jurisdiction. However, for extraneous or special reasons, the High Court can also exercise such power for grant of the remedy under the said provision."*

27. Having held in such manner, now let me see whether the petitioner has approached this Court with any such extraneous or special reason.

28. Factual matrix of the case is that an FIR was lodged by informant Sri Atul Kumar Singh, Officer In-charge of Police Station Kotwali Nagar, District Raebareli in Case Crime No.476 of 2019, under Sections 419, 420, 467, 468, 471 IPC against the applicant. It is alleged in the FIR that the complainant along with S.I. Pawan Pratap Singh, S.I. Umesh Chandra, S.I. Vivek Tripathi and some police constables were engaged in checking of the vehicles. In the meantime, they received an information through "Mukhbir" that a Bolero vehicle is on the way in which 7-8 persons are seated and they are in possession of *Ganja*. It is also alleged that the Bolero was stopped and five persons were arrested. The arrested persons were disclosed their identity as Jitreya Tarabdar, Radheshyam Viswas, Jayant Sardar, Brojoshish Viswas and Bobby Halder.

29. It has been averred by the applicant in the bail application that he is a member of Gram Sabha and due to difference in opinion between him and the Gram Pradhan, he has been falsely implicated in the present case by the local police. In the earlier occasion also, the son of the applicant, namely, Vikas Kumar was falsely implicated in a case at the instance of the same Gram Pradhan. It is also disclosed in the application that against the present applicant, a criminal case is pending before the court of Additional District Judge VIth, Raebareli arising out of Case Crime No.71 of 2018, under Section 8/20 of N.D.P.S. Act but in the entire application, the applicant has not disclosed the urgency for filing the instant application before this Court directly.

30. In view of the above facts and circumstances the learned Counsel for the applicant also failed to explain as to why he has rushed to this Court directly for seeking said discretionary relief under the provisions of Section 438 of Cr.P.C. He has also failed to disclose any extraneous or special reason.

31. Lastly, learned Counsel for the applicant has sought permission to withdraw the bail application with liberty to approach the concerned Sessions Court.

32. Considering the abovesaid circumstances and the request made by the learned Counsel for the applicant for withdrawing the bail application with liberty to approach the concerned Sessions Court and also in the interest of justice, the instant bail application is *dismissed* as withdrawn with liberty to the applicant to approach the concerned sessions court and file an application under Section 438 of Cr.P.C.

**Order Date :-08.07.2019**  
akverma