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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21st DAY OF JANUARY, 2022

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

CRIMINAL PETITION NO.9975/2021

BETWEEN:

RAMESH

... PETITIONER

(BY SRI DHIRAJ A.K, ADVOCATE)

AND:

STATE THROUGH
DY. RFO, HOSUR SECTION
GAURIBIDANUR RANGE
CHIKKABALLAPURA DISTRICT-562 101.

... RESPONDENT

(BY SRI VINAYAKA V.S, HCGP)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 438 OF CR.P.C PRAYING TO ENLARGE THE PETITIONER ON BAIL IN THE EVENT OF HIS ARREST IN FOC.NO.51/2020-21 (CASE NO.05/2020-21) REGISTERED BY DEPUTY RANGE FOREST OFFICER, GOWRIBIDANUR RANGE, GOWRIBIDANUR NOW PENDING IN PCR. NO.56/2020 ON THE FILE OF THE LEARNED PRL. CIVIL JUDGE AND J.M.F.C., GOWRIBIDANUR FOR THE OFFENCE PUNISHABLE UNDER SECTIONS 2, 9, 50 READ WITH SECTION 51 OF WILD LIFE PROTECTION ACT.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 10.01.2022, '**THROUGH VIDEO CONFERENCE**' THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

This petition is filed under Section 438 of Cr.P.C. praying to enlarge the petitioner/accused on bail in the event of his arrest in FOC No.51/2020-21 (Case No.05/2020-21) registered by Deputy Range Forest Officer, Gauribidanur Range, Gauribidanur now pending in PCR No.56/2020 on the file of Principal Civil Judge & JMFC., Gauribidarnur, for the offences punishable under Sections 2, 9, 50 read with 51 of the Wild Life (Protection) Act, 1972.

2. Heard the learned counsel appearing for the petitioners and the learned High Court Government Pleader appearing for the respondent/State.

3. This matter was heard and reserved on 10.01.2022. Having heard the learned counsel appearing for the petitioner

and the learned High Court Government Pleader appearing for the respondent-State and considering the factual aspects of the case, it is the case of the prosecution that the respondent – Deputy Range Forest Officer, Gauribidanur Range, detected the crime on 08.07.2020 at Hakki-Pikki Colony, Kurudi beat, Hosur Hobli, Gauribidanur Range. The respondent recovered three number monitor lizard and three number gray francolin, in the house of petitioner - Ramesh in the said colony. The respondent being a public servant under Section 59 of the Wild Life (Protection) Act, 1972 has filed a complaint under Section 55(b) read with Section 51 of the Wild Life (Protection) Act, 1972 and the said case is numbered as PCR No.56/2020-21. The Trial Court took the cognizance of the said offence and registered a case and issued summons to the accused vide order dated 15.07.2020 and fixed the date of appearance on 05.10.2020 of this petitioner. The accused was served with summons and appeared through his counsel and also sought for exemption by filing application under Section 205 of Cr.P.C., instead of Section 317 of Cr.P.C., which was allowed by the Trial Court, yet, the accused remained absent on 06.10.2021. Hence, NBW had been

issued against the accused from time to time. Hence, the petitioner has approached this Court by filing the present petition.

4. The main contention of the petitioner before this Court is that no *prima facie* case is made out against the petitioner and the very search conducted by the complainant is not in accordance with Section 50(8) of the Wild Life (Protection) Act, 1972. As per the complaint without a search warrant the complainant based on some information allegedly searched the house of petitioner and conducted seizure under Mahazar and the very seizure itself is doubtful. The learned Magistrate ought not to have issued notice to the petitioner and committed an error in taking cognizance. It is also contended that there is no any direct evidence and also the alleged lizard had kept in the vegetable crate outside the house and not inside the house and the very procedure adopted by the respondent by filing a private complaint based on the seizure done under a Mahazar and without any independent witness creates a doubt about the veracity of the seizure. The Sessions Judge ought to have

admitted the petition filed under Section 438 of Cr.P.C., instead of rejecting the same. Hence, it requires an interference of this Court.

5. *Per contra*, the learned High Court Government Pleader appearing for the State would submit that the very petition itself is not maintainable and the private complaint is filed under Section 200 of Cr.P.C., as envisaged under Section 55(b) of the Wild Life (Protection) Act, 1972 read with Section 51 of the Wild Life (Protection) Act, 1972. The respondent being a public servant under Section 59 of the Wild Life (Protection) Act, 1972 empowered to file a complaint and the complaint is also filed in terms of the special enactment. Learned High Court Government Pleader also would submit that the learned Magistrate having considered the contents of the complaint and looking into the material took the cognizance and issued the summons. The petitioner also appeared through his counsel by filing a necessary application, which was allowed by the Trial Court, but he failed to appear before the Trial Court afterwards. Hence, NBW was issued. Hence, he is not entitled for the relief of

anticipatory bail. Once the accused/petitioner has appeared before the Trial Court through his Counsel and ought to have made an application for recalling the order before the Trial Court instead of invoked Section 438 of Cr.P.C.

6. Having heard the learned counsel appearing for the petitioner and the learned High Court Government Pleader appearing for the State, the points that would arise for the consideration of this Court are:

- (i) Whether Section 438 Cr.P.C., can be invoked once the petitioner appeared through the Counsel and sought for exemption and the same was allowed?
- (ii) What Order?

Point No.(i):

7. Having heard the respective counsel and considering the material available on record, it is not in dispute that a private complaint is filed as envisaged under the special enactment. It is the case of the prosecution that the respondent has seized three number monitor lizard and three number gray francolin, in the house of the petitioner - Ramesh in the said

colony. It is also not in dispute that after issuance of summons, which has been served on the petitioner herein, he had appeared through Counsel and an exemption was sought under Section 205 of Cr.P.C., instead of Section 317 of Cr.P.C., and the same was also allowed by the Trial Court, he remained absent thereafter and NBW was issued against him. It has to be noted that nowhere in the petition has stated that the counsel was engaged before the Trial Court and sought for an exemption and the appearance through counsel has been suppressed by the petitioner.

8. The learned counsel appearing for the petitioner in support of his arguments, he contend that upon even though the petitioner had appeared through his Counsel, he can maintain the petition under Section 438 of Cr.P.C., and engaging the counsel and appearing through the Counsel will not take away the rights of approaching the Court by invoking Section 438 of Cr.P.C.

9. The learned counsel appearing for the petitioner in support of his arguments, he relied upon the judgment of the

Apex Court in the case of **Niranjan Singh and another v. Prabhakar Rajaram Kharote and others** reported in **AIR 1980 SC 785**, wherein, the Apex Court discussed with regard to the custody where the accused had appeared and surrendered before the Sessions Judge, the Judge would have jurisdiction to consider the bail application as the accused would be considered to have been in custody within meaning of Section 439 of Cr.P.C., and no dispute with regard to the fact that once he appeared and surrendered before the Court, it amounts to a custody and he maintain a petition under Section 439 of Cr.P.C., and in the judgment also Apex Court interpreted the word "custody".

10. The learned counsel also relied upon the judgment of the Apex Court in the case of **Directorate of Enforcement v. Deepak Mahajan and another** reported in **AIR 1994 SC 1775**, wherein the words 'arrest', 'custody' and 'powers' under the Act discussed. The Apex Court has also observed that whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his

personal liberty to go wherever he pleases. When used in the legal sense in connection with criminal offences, an 'arrest' consists in the taking into custody of another person under authority empowered by law for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. No doubt, the Apex Court in both the cases discussed with regard to the meaning of custody and the word 'arrest'. But in the case on hand, the Court has to look into the aspect of whether the petitioner can seek an anticipatory bail once he appeared through counsel before the Trial Court and sought for an exemption. The Apex Court in **Niranjan Singh's** case (supra), held that when the accused appeared and surrendered that he has been in custody and hence the judgment will not come to the aid of the petitioner.

11. This Court would like to refer to the judgment of this Court in the case of **S.R. Nagaraj v. State of Karnataka** reported in **2011 SCC OnLine Kar 3301**, wherein, this Court has observed that when a private complaint has been lodged and after investigation charge-sheet has been filed, when the

petitioner after service of summons has appeared before the Court through an Advocate and has filed an exemption application. The petitioner instead of seeking bail before the Trial Court has approached this Court under Section 438 of Cr.P.C., which is not maintainable. The issue involved in the matter before this Court is also similar to the facts of the case. In this case also, the petitioner appeared through counsel and sought for an exemption and the said exemption application was also allowed and permitted to appear him through counsel and once the Trial Court permitted the petitioner to appear through his Counsel and allowed the application, the petitioner cannot invoke Section 438 of Cr.P.C., and can invoke Section 439 of Cr.P.C., if he does not appear before the Court and whether he had appeared through Advocate or physically, is not the question and once availed the benefit before the Trial Court appearing through counsel and sought for an exemption and the same has been entertained, question of invoking Section 438 of Cr.P.C., again does not arise.

12. This Court also would like to refer to the order of this Court in the case of ***K. Somasekhar v. State of Karnataka*** reported in ***2015 SCC OnLine Kar 8412***, wherein also similar circumstances arises. This Court in paragraph No.3 referring to the judgment of this Court in the case of ***Venkatachalaiah and Others v. State of Karnataka, by Kadugodi Police, Bengaluru and others*** reported in ***ILR 2003 KAR 3985***, and the order in ***Criminal Petition No.23/2013***, held that once the accused appeared before the Trial Court and thereafter on account of his absence on any later date warrant is issued by the Court for deliberate absence is concerned, the remedy of anticipatory bail under Section 438 Cr.P.C. is not available to such person. However, liberty is reserved to the petitioner to file necessary application before the Trial Court for recalling the issuance of NBW.

13. This Court also would like to refer to the Division Bench Judgment of this Court in ***Venkatachalaiah's*** case (supra), wherein, discussed with regard to Sections 438(1) and 438(3) of Cr.P.C., and also held that even after filing of charge-

sheet also, the accused can approach the respective Courts invoking Section 438 of Cr.P.C., but categorically held that in paragraph No.27 that in the normal course where warrant is issued in pursuance of filing charge-sheet or issuance of summons and non-appearance of the party, the remedy under Section 438(1) of Cr.P.C., is available. It is further observed that however, we would like to emphasis that where in a criminal proceeding a party has already appeared once or more than one date and thereafter does not appear in the Court, the Court in such circumstances issues non-bailable warrant and the said warrant issued is in view of the defaulting conduct on the part of the accused and in such cases a petitioner cannot invoke the jurisdiction of the Court under Section 438(1) of Cr.P.C. and he is bound to obey the court order or warrant by first appearing before the Court and than by satisfying the Court as to the sufficient cause for his absence, pray for bail under Section 439 of Cr.P.C.

14. But in the case on hand, it is not in dispute that the petitioner had appeared before the Trial Court through an

advocate and also filed an application under Section 205 of Cr.P.C., instead of 317 of Cr.P.C., seeking an exemption for the day. It is also not in dispute that the said application was allowed. Once an application seeking an exemption was allowed, the petitioner again cannot invoke Section 438 of Cr.P.C., and instead of filing an application for recalling the warrant issued by the Court for non-appearance has approached this Court and also the Trial Court. Apart from that, the appearance of the petitioner before the Trial Court has been suppressed before this Court and nowhere in the petition has stated that he had appeared through the Counsel and only on perusal of the order of the Trial Court, it is clear that he had appeared through the Counsel and exemption application was allowed but he did not appear before the Court. Hence, NBW was issued. When such being the factual aspects of the case, once he appeared through the Court, whether it is through Counsel or personally, he cannot seek again anticipatory bail. The very contention of the learned counsel for the petitioner is that the petitioner appeared before the Trial Court through an Advocate is not amount to custody or an arrest, cannot be accepted and he was permitted to appear

through Counsel and once permitted to appear through counsel he cannot contend that he had not appeared physically. The petitioner legally permitted to appear and once he has been permitted to appear legally he cannot contend that he was not appeared before the Trial Court and hence petition under Section 438 of Cr.P.C., is not maintainable.

15. The Apex Court also given interpretation with regard to the custody and for invoking Section 439 of Cr.P.C., and not for Section 438 of Cr.P.C., and also with regard to the meaning of arrest discussed in **Directorate of Enforcement v. Deepak Mahajan and another**'s case (supra), and not the question of arrest before this Court also. In the case on hand when the private complaint was filed, the learned Magistrate took the cognizance and issued the summons. In pursuance of the said summons he appeared through the Counsel before the Trial Court. Once he had appeared before the Trial Court he cannot seek for an anticipatory bail again invoking under Section 438 of Cr.P.C. This Court in **S.R. Nagaraj** and **K. Somasekhar**'s case (supra), and also considering the principles laid down in

Venkatachalaiah's case (supra), categorically held that once an advocate appeared through counsel, he cannot seek for an anticipatory bail again. When such being the interpretation of this Court and also the principle laid down in the judgments referred supra, the petitioner cannot maintain any petition invoking Section 438 of Cr.P.C. Hence, the petition is liable to be dismissed.

16. This Court does not want to consider the matter on merits, whether he is entitled for anticipatory bail or not since the very maintainability is questioned before this Court and this Court comes to the conclusion that the petition under Section 438 of Cr.P.C., is not maintainable and an option is given to the petitioner to approach before the Trial Court by filing necessary application for recalling of the warrant issued against him as held by this Court in **K.Somasekhar's** case (supra), and seek appropriate relief.

Point No.(ii):

17. In view of the discussions made above, I pass the following:

ORDER

- (i) The bail petition is dismissed as not maintainable.
- (ii) The petitioner is given liberty to approach the Trial Court by filing necessary application for recalling the warrant issued against him.

**Sd/-
JUDGE**

cp*