

(1988) 10 CAL CK 0017
In the Calcutta High Court
Case No : Criminal Misc. Case No. 670 of 1988

Diptendu Nayek and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 07-10-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 24

Constitution of India, 1950 — Article 14, 21

Criminal Procedure Code, 1973 (CrPC) — Section 397, 397(1), 397(3), 399, 399(3)

Citation : 93 CWN 119

Hon'ble Judges : L.M. Ghosh, J; Haridas Das, J; A.M. Bhattacharjee, J

Bench : Full Bench

Advocate : Asoke Ganguly, Mr. A. Bag and Mrs. Jayashree Chakraborty, for the Appellant; N.S. Chowdhury, Rashbehari Mahata, Mrs. Krishna Ghosh, Sushil Mahata and Mr. Md. Aslam Khan, for the Respondent

Judgement

A.M. Bhattacharjee, J.—The question that has arisen for the consideration of this Special Bench is as to whether a person can make an application to the High Court for anticipatory bail u/s 438 of the Code of Criminal Procedure, after making a similar application under the same Section to the Court of Sessions without success. Two of our learned Judges sitting in Division have differed on this question, Khastgir, J., holding that such an application is maintainable and that the earlier Division Bench of this Court in *Amiya Kumar Sen v. State* (1979 CLJ 288): to the contrary was wrongly decided, while A.C. Sengupta, J., holding such an application "to be incompetent and that the aforesaid Division Bench, decision laid down the correct law.

2. Section 438 of the Code of Criminal Procedure, 1973, dealing with "direction for grant of bail to person apprehending arrest", generally referred to in common legal parlance as "anticipatory bail", provides that -

(1) When any person has reason to believe that he may be arrested on an 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; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail,

(2) When the High Court or the Court of Session makes a direction under sub-Section (1), it may include such conditions in such direction in the light of the facts of the particular case, as it may think fit, including.....

3. Our attention has been drawn to a Parliamentary Bill being No, 56 of 1988, introduced in the Lok Sabha on 13th May, 1988, Clause 49 where-of seeks to amend Section 438 by inter alia omitting the words "or the Court of Session" both from sub-Sections (1) and (2) of that Section. The Bill, if and when enacted and enforced, would vest the jurisdiction to grant anticipatory bail only and exclusively in the High Court and divest the Court of Session of any such jurisdiction, and in that case, the question for consideration by the Special Bench may lose all relevance. But the Bill being still on the legislative anvil, we would have to resolve the question on the terms of Section 438, as it now stands. After hearing the learned Counsel for the parties and considering the matter with anxious advertence, we have come to the conclusion that both on principle as well as on authority, the question must be answered in the affirmative as proposed by Khastgir, J., thus agreeing further with the learned Judge that the earlier Division Bench decision in *Amiya Kumar Sen* (supra, 1979 CLJ 288) was not correctly decided.

4. To quote Tennyson, "words, like Nature, half reveal and half conceal the soul within" and the principles of interpretation of Statutes have been evolved by the Judges and the Jurists over the years to extract the soul or intention of the letters of the law half-concealed in the words used. But which of the numberless principles of Interpretation would or should apply to a given case has itself become a vexed question of interpretation. As Chandrachud, C.J., once pointed out in the first Judge's "transfer Case (Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another,), "the principles of interpretation, with rules pulling in different directions have become a murky area and just as a case-law Digest can supply an authority or almost any thinkable proposition, so also these principles have collected over the years divergent formulae which can fit in with any interpretation which one may choose to place". To quote from Denning (Discipline of Law - 1979 page 9) "if you and a maxim or rule on your side, your opponent will find one on his side to counteract it."

5. There are divergent rules with precedents in galore indicating where the expression "or" may mean "and" and "and" may also mean "or". But since in our view the text of Section 438 in the context of some of the other relevant Sections of the Code is clear enough to indicate as to whether the word "or" in the expression "the High Court or the Court of Session" is used in the conjunctive or the disjunctive sense, reference to all those rules and the precedents emanating from or clustering round them would not necessary.

6. Section 397 of the Code providing for calling for record for the exercise of powers of revision clearly provides in sub-Section (1) that "the High Court or the Session Judge may call for and examine the record of any proceeding before any inferior Criminal Court" for the purpose of satisfying itself or himself as to the correctness legality, regularity or propriety of such proceeding or the finding, sentence or order recorded or passed therein. Though such power may be exercised by the High Court or the Court of Session suo motu without any application from any party, sub-Section (3) clearly indicates that the jurisdiction can also be invoked by "an application under this. Section" by any party but sub-Section (3), after providing for such an application, proceeds further to provide that "if an application under this Section has been made by a person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them". Sub-Section (3), therefore, demonstrates unmistakably that the word "or" in the expression "the High Court or the Court of Session" in sub-Section (1) is used disjunctively and not conjunctively and that a person can move either the High Court or the Court of Session and not both the Courts in succession one after the other. This has again been manifested in clearer terms in Section 399(3) of the Code which provides that "where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Session Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court".

7. This anxious advertence on the part of the Legislature in sub-Section (3) of Section 397 and also sub-Section (3) of Section 399 to declare repeatedly that even though the expression used in sub-Section (1) of Section 397 is "the High Court or the Court of Session", a person can only move either one Court or the other and not the both one after another, should, in our view, be a clear indication of the mind of the Legislature that, but for these express prohibitions in sub-Section (3) of Sections 397 and 399, a person would have been entitled to move in revision both the Courts in succession one after another. To rule that even without these express prohibitive provisions in Section 397(3) and Section 399(3), a person could move only one Court or the other solely because of the word "or" in the expression "the High Court or the Court of Session" in Section 397(1), would be to rule that the express prohibitive provisions in Section 397(3) and Section 399(3) are redundant surplusage and mere waste of words.

8. Section 438, however, though using the similar expression "the High Court or the Court of Session", does not contain any similar prohibitory provisions as in Section 397(3) or Section 399(3) indicating that under that Section also a person can move only one Court or the other and not both one after another. The same is the position u/s 439 using the expression "a High Court or Court of Session" and empowering those Courts to grant post-arrest bail. If it was intended by the Legislature that under these Sections also a person shall move only one Court or the other and not both one after another, it was only expected that the

Legislature would have inserted some such prohibitory provisions, as it did in the case of Section 397(3) and Section 399(3). As we have already indicated, if such prohibition is still to be implied u/s 438 or Section 439. even without such express prohibitory provisions, then the Legislature would have to be taken to have indulged in redundant superfluity in enacting those express provisions.

9. Human words can not have divine prescience or mathematical precision and, therefore, there can not be any rule of interpretation of universal application and that, as already noted, *Ld. Chandrachud, C.J.*, and also *Denning, L.J.*, to observe that these rules very often pull in different and even opposite directions and that if you are going to apply one rule, there may also be another rule to react to the contrary. It is true that there is a rule of interpretation that the Legislature is deemed not to waste words or to say anything in vain and a construction attributing redundancy to any part of a legislation is not be accepted save for compelling reasons. And according to that rule, the provisions in Section 397(3) and Section 399(3) of the Code providing that out of the two Courts, one can not move the one after moving the other without success, must not be taken to be redundant and that their enactment must be taken to have been necessary to effectuate that prohibition. But there is also a rule indicating that some times specific provisions, even though otherwise not necessary, are often introduced *ex abundanti cautela* and that it is not very uncommon to find special provision in statute which have already been covered by the general provisions. According to this rule, therefore, the special prohibitions in Section 397(3) and Section 399(3) may be treated as provisions of abundant caution and that the position would have been the same even without those provisions.

10. But even accepting *arguendo* that the expression "the High Court or the Court of Session" in Section 397(1) would have, by itself, meant that one can only move the one Court or the other and not both one after another, and that the provisions in Section 397(3) and Section 399(3) were inserted only to clarify *ex majori cautela* what was already there in Section 397(1), it is difficult to appreciate as to why the same caution was not exercised or not deemed necessary to be exercised by the same Legislature in enacting the succeeding Sections in the same Code in Section 438 and Section 439. If we attribute to the Legislature extra carefulness in enacting Section 397(3) and Section 399(3) and to have expressed in specific words what was already implied in the expression "the High Court or the Court of Session" in Section 397(1), we would have to attribute extraordinary carelessness to the same Legislature in not enacting similar provisions in Section 438 and Section. 439, if it was intended that those Sections were also to be subject to the same prohibition. But such a construction implying unjustifiable carelessness on the part of the Legislature must be avoided by the Courts, wherever possible, by adopting the other construction which will negative such carelessness and such a construction in this. case would be that no such prohibition, as in provided in Section 397(3) and Section 399(3), was intended in respect of Section 438 or Section 439. Standing by themselves, it might have been possible to construe Section 397(3) and Section 399(3) as

provisions enacted *ex abundanti cautela* in respect of Section 397(1) using the expression "the High Court or the Court of Session"; but in view of the conspicuous absence of similar provisions staring at the face in respect of Section 438 or Section 439 using similar expressions, we find it difficult to adopt such a construction,.

11. During the course of argument we drew the attention of the learned. Counsel for the parties to the provisions of Section 24 of the Code of Civil Procedure, 1908, wherein the analogous expression "the High Court or the District Court", has been used and it has been provided that "the High Court or the District Court may at any stage" transfer or withdraw any suit, appeal or other proceeding and the settled position in this Court is that a party may apply afresh to the High Court u/s 24 even after moving the District Court without success. As early as in 1909, when it was urged before a Division Bench of this Court in *Hari Nath v. Debendra Nath* (11 CLJ 218) that u/s 24, the High Court and the District Court having concurrent powers, the High Court would have no jurisdiction under that Section where the District Court had already declined the transfer, Sir Ashutosh, speaking for the Bench, repelled the contention (at 219) as having "manifestly no foundation" and rule that u/s 25 of the preceding Code of 1882, corresponding to Section 24 of the present Code, "this Court frequently exercised the power of transfer after an application for transfer made to the District Court had proved infructuous". To the same effect is the later decision of the Patna High Court in *Sheo Nandan Lal and Others Vs. Mangal Chand*, where the Division Bench decision of this Court in *Hari Nath* (supra) was followed. A similar contention appears to have been made in a much later Division Bench decision of this Court in *Gorachand v. Dipali* (1976 2 CLJ 380) and it was urged that the petitioner once having made an application u/s 24 before the District Court and that application having failed, shall not be entitled to move a fresh application u/s 24 before the High Court.: The Division Bench has ruled (at 387) that "on a plain reading of the Section, it can not be said that moving an application before the District Court will preclude the petitioner from moving a fresh application before the High Court" and relied on and followed the Division Bench decision in *Hari Nath* (supra) and the Patna decision in *Sheo Nandan* (supra) for the purpose. As already noted, Section 438 or 439 of the Criminal Procedure Code, 1973, uses similar expression and empowers "the High Court or the Court of Session" to exercise powers thereunder and we have not been able to find any good reason as to why the ratio of these Division Bench decisions of our Court, construing the analogous expression in Section 24 of the Code of Civil Procedure, shall not apply to the construction of Section 438 or Section 439 of the Code of Criminal Procedure, 1973.

12. There is another way of looking into the matter. At any rate, the two Division Bench decisions of this Court in *Hari Nath* (supra) and in *Gorachand* (supra) are authorities weighty enough to indicate that in view of the construction put by them on the expression "the High Court or the District Court" in Section 24 of the Code of Civil Procedure, the view that u/s 438 of the Criminal Procedure Code, a

person may move the High Court after unsuccessfully moving the Court of Session, is also possible. The Full Bench decision of the Himachal Pradesh High Court in Mohan Lal and Others etc. Vs. Prem Chand and Others etc., , referred to by Khastgir, J., is also a very clear authority to show that such a view is also possible. The recent single-Judge decision of the Kerala High Court in Gopinath v. State of Kerala (1986 Cri.LJ 174i2) has also ruled to that effect. A more recent single-Judge decision of the Gujarat High Court in Rameshchandra Kashiram Vora and etc. Vs. State of Gujarat and Another, has also ruled that if any person is aggrieved by an order of the Court of Session refusing anticipatory bail, "his further remedy to approach the High Court is not barred and he may prefer a substantive application for anticipatory bail u/s 438 to the High Court". Whether we would accept that view as the correct or not is a different matter; but, at any rate, the possibility, even if not the acceptability, of that view can not be ruled out. And by the same process of reasoning; since an earlier division Bench decision of this Court in Amiya kumar Sen Vs. State of West Bengal, has taken a contrary view, we would also hold, with due deference to that Bench, that such a view is also possible, even if we ultimately do not accept that view as the correct one. Granting or refusal of bail, whether pre-arrest or post-arrest, is inevitably linked up with the right to Personal Liberty of a person. And we would like to think it to be firmly established in our Criminal Jurisprudence that if two views are possible in respect of a provision of law, one enlarging and the other circumscribing the right to protection of Personal Liberty, the view enlarging the right ought, whenever possible, to be preferred. Khastgir, J., had this principle in mind when the learned Judge was endeavoring to press into service the observations of the Supreme Court in Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, . We would also like to think that it has now been accepted on all hands that after the inauguration of the Constitution it has become the duty of the Court to apply the principles of the Fundamental Rights as well as of the Directive Principles of the Constitution in interpreting not only our Constitution but also all our laws and that those principles, taken together should serve as the Code of interpretation for all our laws.

13. The question in issue before the Supreme Court in Gurubaksh Singh (supra) was, however, somewhat different and the question was (supra, at 1641) "whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the Statute conditions which are not to be found therein". But Khastgir, J., was right in pointing out that in Gurubaksh Singh (supra, at 1646), the Supreme Court made it clear that the law of bail, anticipatory or otherwise, must have a rational and harmonious nexus to the Fundamental Right to Personal Liberty guaranteed under Article 21. In fact, in a series of decisions, e.g., in Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh, , in Moti Ram and Others Vs. State of Madhya Pradesh, , in Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, , the Supreme Court has ruled

that our approach to the question of bail must be informed, guided and inspired by the principles enshrined in Article 21. Even though the question before the Supreme Court in Gurubaksh Singh (supra) was some-what different, the process of interpretation adopted therein goes a long way to support the view we propose to take in this case. Before the Supreme Court, the question was whether the exceptions expressly provided in Section 437 or Section 439 of the Code can and should be read in Section 438 also, which contains no such express provisions. And the Supreme Court held (at 1643) that "if it was intended that the exceptions contained in Section 437(1) should govern the grant of relief u/s 438(1), nothing would have been easier for the Legislature than to introduce into the latter Section a similar provision." We would also accordingly hold that if it was intended that the prohibitions contained in Section 397(3) would also govern Section 438, then nothing would have been easier for the Legislature than to insert similar provisions in Section 438 and having the model before it while enacting Section 397(3) there could have been no reason to do away or depart from that model and, therefore, to quote from Gurubaksh Singh (supra, 1640) again, such departure being thus willful and deliberate, "it would be wrong to refuse to give to the departure its full effect" by assuming that the very same prohibitions were nevertheless implied in Section 438. We would accordingly hold that a person would be entitled to apply afresh to the High Court for anticipatory bail u/s 438 even after a similar application made by him to the Court of Session under the same Section has been refused.

14. It has been, as it has got to be, concerned that even though Section 439 dealing with post-arrest bail uses the similar expression "the High Court or the Court of Session", High Courts do not hesitate to entertain an application thereunder even though a similar application under that Section to the Court of Session has been rejected. Nay, not only that, the High Court very often declines to entertain such applications unless a Court of Session has already been moved without success. If that is the settled view under the succeeding Section 439, we are yet to find any reason not to project the same view and not to adopt the same course under the preceding Section 438 using similar expression "the High Court or the Court of Session". The earlier Division Bench decision in *Amiya kumar Sen Vs. State of West Bengal*, has also taken the view that the expression "or" in Section 437 "has been used in the non-alternative sense equivalent to "and" ". We have not, and this we say with respect, been able to ascertain the rationale behind the view that the word "or" has been used in Section 438 in the alternative sense, but has been used in Section 439 in the non-alternative sense, It may be noted that the decision of the Kerala High Court in *Gopinath v. State of Kerala* (supra) has also dissented from this Division Bench decision on this ground as well.

15. We have examined the ratio of the earlier Division Bench decision in *Amiya Kumar Sen* (supra) with all the respect the same deserves, but have not been able to persuade ourselves to agree with that view for more reasons than one. The earlier Division Bench, if we may say so with respect, adopted a strict

grammarian's approach and, as would be evident from paragraphs 4 and 5 of the judgment, governed itself by the rules of grammar relying heavily on the treatises of Rowe & Webb and of Nesfield. One is only to refer to any modern edition of any of the standard treatises on interpretation of Statutes to realise that a purely literal or grammatical approach has steadily been discarded in favour of what is known as "purposive approach" and we no longer construe a Statute only with a book of Grammar on one hand and a Lexicon on the other. So much so, that Frankfurter, J., of the American Supreme Court went to that length as to observe that there is no surer way to misread a provision than to read it literally and, as Craies has pointed out (Statute Law, 7th Edition, page 65), the words "literal" and "grammatical" are used almost interchangeably.

16. "The Division Bench also did not take into consideration the ex-press provisions in Section 397(3) and their conspicuous omission in Section 438 or Section 439 which, in our view, goes a long way to demonstrate the legislative intent and, as already noted, this view of ours finds a good deal of support from the observations of the Supreme Court in Gurubaksh Singh (supra). The Division Bench also did not at all consider the earlier Division Bench decisions of this Court in Hari Nath (supra) and in Gorachand (supra), construing analogous provision of Section 24 of the Code of Civil Procedure. The Division Bench also did not consider that, as has now been ruled by the Supreme Court, statutory provisions relating to Personal Liberty should whenever possible, be so construed as to advance and enlarge the right to protect the same and the construction that Section 438 would entitle a person to move the High Court afresh even after the Court of Session has turned down a similar application, would enlarge and widen the right of a citizen to prevent the deprivation of his Personal Liberty. For these reasons, we hold, obviously with respect, that the earlier Division Bench decision in *Amiya Kumar Sen Vs. State of West Bengal*, is not to be treated as good law. We have had the advantage of reading the draft of the separate but concurring judgement of his Lordship Ghosh, J., where his lordship has given some more and detailed and cogent reasons as to why it is not possible for us to agree with the ratio adopted by the earlier Division Bench in *Amiya Kumar Sen* (supra) and we are glad to say that the reasons so advanced by his Lordship have our respectful concurrence.

17. The learned Counsel for the parties solely confined their arguments to the question of the maintainability of this application and have not submitted anything as to its merits. We are also accordingly expressing no opinion on that aspect and we also feel that time of this Special Bench should not be consumed in disposing of the application on merits. While Khastgir, J., was pleased to express to some extent her views on the merits also, Sen Gupta, J., did not do so as he thought the application to be not maintainable under the law. We have accordingly decided that, now that we have held the application to be maintainable, let the records be placed before the Division Bench concerned so that the application may now be disposed of on merits. As the matter relates to the question of bail which should be decided as early as possible, we direct that

the office shall forthwith place the records before the Hon"ble Chief Justice for early orders so that the application for bail may be disposed before the commencement of long vacation.

L.M. Ghosh, J.

18. I agree with Mr. Lord Bhattacharjee, J, as to the interpretation of Section 438 of the Code of Criminal Procedure. As a very interesting question and of immense general importance has been raised, I would like to formulate my own reasonings.

19. There was a divergence of judicial opinions in the Division Bench, consisting of Khastgir, J. and A. C. Sen Gupta, J. as to the interpretation and scope of Section 438 of the Code of Criminal Procedure. While Khastgir, J. has held that a person can apply to the High Court for anticipatory bail, even though he unsuccessfully applied for the same purpose before the Sessions Judge, Sen Gupta, J. has been of the opinion that once he has approached the Sessions Court, he cannot again move a petition for anticipatory bail before the High Court. Because of that divergence, the matter has been referred to the Special Bench.

20. Whether a person can approach the High Court u/s 438 of the Code of Criminal Procedure after the similar application was rejected by the Sessions Judge, is the question to be decided by this Special Bench.

21. Mr. Ganguli, the learned Advocate appearing for the petitioners, has contended that the restrictive meaning put by Sen Gupta, J. is not justified, as that would be against the spirit of Section 438 of the Code of Criminal Procedure. He has further argued that Article 21 of the Constitution of India would furnish the guideline for interpreting the scope and amplitude of Section 438, Code of Criminal Procedure. In my view, Article 21 of the Constitution of India has no direct bearing on the point, though that remains the supreme law touching the liberty of a person and any violation. of it cannot be countenanced. If, however, there cannot be any question of violation of Article 21 of the Constitution of India in the circumstances of the present case, that need not be pressed into service on the ground of its supposed violation. Article 21 ensures that no person shall be deprived of his Personal Liberty except according to procedure established by law. As held by the Supreme Court in *Mrs. Maneka Gandhi Vs. Union of India* (UOI) and *Another*, , the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair and not arbitrary, fanciful or oppressive; otherwise it should be no procedure at all. In this case, whatever interpretation we give as to the scope of Section 438, Code of Criminal Procedure, the procedure prescribed by that provision must in any case be a procedure established by law. If it is held that Section 438, Code of Criminal Procedure gives the person concerned only one choice to seek the forum of either the Sessions Judge or the High Court, even in that case Article 21 would be satisfied; the procedure prescribed would even then be according to law and it would also be "right and just and fair".

Entrustment to either the Session Judge or the High Court would be a valid judicial procedure and under any circumstances, that cannot be called arbitrary or fanciful. In Maneka Gandhi's case in connection with the impounding of passports the entrustment to the Central Government even was held valid. Such being the legal position, even if we interpret that Section 438, Code of Criminal Procedure gives the party the choice of a single forum only, that procedure would be sustained by Article 21 of the Constitution of India and would survive. The learned Advocate for the petitioners has referred to *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, . In the context of Article 21 it has been observed thus: "an over generous infusion of constraints and conditions which are not be found in Section 438, Code of Criminal Procedure can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions.... No doubt can linger after the decision in Maneka Gandhi's case that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable". This decision has also been relied upon by Khastgir, J. But the observations of the Supreme Court were made in connection with the conditions for obtaining an order for anticipatory bail. If the conditions are too many and imported from outside, that might have the effect of seriously curtailing or abridging the right itself, so as to make it illusory. In the case in hand, no question of limiting the right itself arises; it is the question which Court can be approached for enforcing that right, without mutating or mutilating the right itself as such. Article 21 of the Constitution of India would remain indifferent or neutral to whatever view we take as to the forum for enforcing the right of anticipatory bail We are, there-fore, to be guided by the provisions of the Code of Criminal Procedure mainly. Section 438 of the Code of Criminal Procedure is to be scrutinised and analysed and the comparable provisions of the same Code are to be considered, for determining the intendment of the specific provision.

22. Broadly speaking, Section 438 of the Code of Criminal Procedure consists of two parts. The first part sets out the conditions under which a person can make an application for anticipatory bail. The second part confers jurisdiction on the High Court or the Court of Session. Thus the second part can be viewed as strictly jurisdictional; the High Court and the Court of Session have concurrent jurisdiction. Once a Court is invested with jurisdiction, that jurisdiction subsists all along unless taken away expressly or by implication. There are no express words in the Section itself, indicating that the jurisdiction is taken away under any circumstances. It does not appear that by implication even the jurisdiction of either of the Courts is taken away or put an end to. Mr. Chowdhury, the learned Additional P.P., has contended that the use of the conjunction "or" in between the High Court and the Court of Session clearly indicates that a party has only one choice of approaching one Court or the other. That was also the view of the Division Bench of the Calcutta High Court in the case of *Amiya kumar Sen Vs. State of West Bengal*, . The learned Judges in that case referred to *Rowe and*

Webb for a grammatical construction. Four uses have been referred to by the learned authors with reference to "or" but for our present purpose, it is sufficient to note that the learned authors themselves have pointed out that "or" is sometimes used in a strongly alternative sense and sometimes in no alternative sense. Similarly, Nesfield's grammar, also quoted by the learned Judges of the Division Bench, refers to different uses of the conjunction "or" sometimes it is used in alternative or exclusive sense, and sometimes in inclusive or non-alternative sense where "or" is merely equivalent to "and". Thus contrary positions may be reached if we confine ourselves to strictly grammatical constructions. The learned Judges of the Division Bench in the case of *Amiya Kumar* have accepted the alternative or exclusive sense with regard to Section 438 of the Code of Criminal Procedure, but with regard to Section 439, Code of Criminal Procedure, they are of the view that "or" has been used in the non-alternative sense equivalent to "and". The reasoning for accepting one meaning in one case and another meaning in another case for the same word "or" appears to be obscure. It seems that there should not be any exclusive concentration on grammar, as thereby we might lose contact with the current of thoughts communicated by the language. It has been shown before that the word "or" is capable of elasticity even according to grammatical constructions. Such being the position, the real attention should be focussed on the intendment of the provision, making a broad reading of the Section itself and placing it in juxtaposition with the other comparable provisions. It seems that the legislators did not intend to exclude the one or the other of the two Courts - the High Court or the Court of Session. Had it been so intended, the legislators would have taken care to express that clearly, as they have done in sub-Section (3) of Section 397 and sub-Section (3) of Section 399 of the Code of Criminal Procedure. Mr. Chowdhury has argued that the word "or" occurring in Section 438 is disjunctive in nature. It seems that has also weighed with A. C. Sen Gupta, J. But the mere fact that it is disjunctive does not mean much in this case. It may be disjunctive, but necessarily not exclusive. This disjunction is merely temporal; it disjoins but does not exclude the other. At any given point of time, one can approach only one Court and not both the Courts simultaneously. That does not mean that the choice of a person to approach the other Court is foreclosed for ever. There are no such words that the choice exercised once would become final, so that afterwards he cannot move another Court having competent jurisdiction. The learned Judges of the Division Bench in the case of *Amiya Kumar* have also observed that the restriction as to the choice of the Court would also be further evidenced from the use of the words "that court may" in the Section indicating singular number. It is not felt how the use of the singular number can connote anything, because, as has been pointed out before, at any point of time, a party can approach a single Court and not two or more Courts simultaneously. In the Full Bench case of the *Himachal Pradesh*, report in *Mohan Lal and Others etc. Vs. Prem Chand and Others etc.*, it has been held that a person can move an application for anticipatory bail in the High Court even though a similar application of his has been rejected by the Sessions Judge, for,

while doing so he does not invoke the revisional jurisdiction of the High Court but applies u/s 438 of the Code of Criminal Procedure. With respect, we agree to the proposition. In the case reported in *Gopinath Vs. State of Kerala*, , a learned single-Judge of the Kerala High Court has laid down the same proposition. It has been observed that Section 438 was not intended to give a restricted forum in the sense that when one forum is chosen the jurisdiction of the other is excluded. It has been further observed that the freedom of applying to the High Court or to the Court of Session need :not necessarily mean that when the Court of Session is moved the option has become final and the approach to the High Court is thereafter barred. We respectfully say that this is the correct law.

23. In the case of *Onkar Nath Asrawal and Others Vs. State*, the Full Bench of the Allahabad High Court seems to have accepted the same view by implication. It has been settled that a bail application u/s 438 may be moved in the High Court without the applicant taking recourse to the Court of Session. The question referred to the Full Bench was whether the application for anticipatory bail u/s 438 of the Code of Criminal Procedure was maintainable in the High Court without such an application having been moved and rejected by the Court of Session. The answer to the question, as indicated earlier, is in the affirmative. So it is implied that an application can be moved in the Court of Sessions Judge, and then after being rejected, in the High Court. We are inclined to accept the ratio of the decisions of the. Himachal Pradesh, Kerala and the Allahabad High Courts. For the reasons mentioned before, we are not inclined to accept the decision of the Division Bench of the Calcutta High Court, reported in *Amiya kumar Sen Vs. State of West Bengal*, .

24. Thus the conclusion is reached that a party, after unsuccessfully moving the Court of Session for anticipatory bail can again approach the High Court for the same purpose, as that is not expressly or by implications barred. The view of Khastgir, J. in the Division Bench out of which this reference arises is the correct view. The matter should now go back to the Division Bench for disposal of the petition on merits.

Haridas Das J.

25. I agree.