

(2023) 11 J&K CK 0040
In the Jammu And Kashmir High Court
Case No : Bail Application No. 223 Of 2023

Khalid Hussain And Ors

APPELLANT

Vs

UT Of J&K

RESPONDENT

Date of Decision : 20-11-2023

Acts Referred:

Indian Penal Code, 1860 — Section 147, 307, 323, 376
Code Of Criminal Procedure, 1973 — Section 438, 438(1)
Code Of Criminal Procedure, 1989 — Section 497A, 498A

Citation : (2023) 11 J&K CK 0040

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Muzaffar Iqbal Khan, Abrar Ahmad, P. D. Singh, S. S. Ahmad, Zulkarnain Chowdhary

Judgement

Sanjeev Kumar, J

1. This application for bail in anticipation of their arrest is filed by eight persons named in FIR No. 250/2023 registered with Police Station Surankote, Poonch on 15-08-2023 for commission of offences under Section 307, 147, 323 IPC. Out of eight applicants, seven have already been enlarged on interim anticipatory bail by this Court vide order dated 06-10-2023.

2. When the case was taken up, the Investigating Officer along with case diaries appeared. Mr. Muzaffar Iqbal Khan, learned counsel appearing for the applicants submitted that in view of the evidence collected by the Investigating officer during the investigation, the involvement of applicant No.1, Khalid Hussain, who has yet not been enlarged on bail, has not been substantiated nor the offence under Section 307 is made out. He, therefore, prayed for grant of anticipatory bail to all the applicants including the applicant No.1- Khalid Hussain.

3. Mr. P. D. Singh, learned Dy. A.G, appearing for the Union Territory of Jammu and Kashmir and Mr. S.S.Ahmed, learned counsel appearing for the complainant oppose the grant of bail on the ground that applicants have not indicated any

special or exceptional circumstances for approaching under Section 438 of Cr.P.C directly to this Court without first exhausting the remedy before the Court of learned Sessions Judge Poonch.

4. Learned counsel appearing for the parties were heard both on the maintainability and merits of the application.

5. Section 438 of Criminal Procedure Code 1973 (Cr.P.C) deals with grant of bail to a person apprehending arrest and 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

(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;"

6. From a bare reading of sub section (1) of Section 438 of the Code of Criminal Procedure, it is manifestly clear that any person who is apprehending his arrest on accusation of his having committed non-bailable offence, is entitled to apply to the High Court or the Court of sessions for a direction that in the event of his arrest, he shall be released on bail. A plain reading of this Section would suggest that it is left to the discretion and convenience of the affected person to apply for anticipatory bail either to the High Court or the Court of Sessions. The word "or" used between "High Court" and "the Court of Sessions" is clearly disjunctive and thereby implying that a person affected may apply either of the two forums. In other words, the jurisdiction for grant of bail in anticipation of arrest conferred by Section 438 on the High Court and the Court of Sessions is concurrent. There is nothing in Section 438 which puts any fetter in discretion of the applicant to necessarily approach the Court of Sessions and if he chooses to approach the High Court skipping the Court of Sessions, he is obliged to show exceptional or special reasons.

7. I am aware that there are judgments of couple of High Courts reading into Section 438 the provision mandating the affected person to first approach the Court of Sessions for grant of anticipatory bail under Section 438 and in case he wants to invoke the jurisdiction of the High Court directly, he will have to spell

out special/exceptional reasons prompting him to approach directly the High Court. There is another line of judgments by various High Courts which is against reading into Section 438 anything which the legislature has not intended.

8. True it is that two later judgments of this Court rendered by two different Single Benches support the former view. In case of Rouf Ahmad Mir vs. SSP and another, (Bail App No. 64/2022, decided on 03.06.2022) a Single Bench of this Court has taken the following view:

"From the analysis of the case law on the subject, it is clear that though Section 438 of 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 exist exceptional, rare and unusual reasons for the applicant to approach the High Court directly".

9. Similarly another Single Bench of this Court in the case of Ali Mohd vs. UT of Jammu and Kashmir and others (Bail App No. 13/2022, decided on 18.04.2022) has taken a similar view. The observations of the Bench made in the penultimate para of the judgment reads thus:

"Ratio of the judgment of "Ankit Bharti's Case" (Supra) make the legal proposition manifestly clear, that special circumstances viz; (A) Where bail, regular or anticipatory, of a co-accused has already been rejected by the Court of Sessions;

(B) Where an accused not residing within the jurisdiction of the concerned Sessions Court faces a threat of arrest; (C) Where circumstances warrant immediate protection and where relegation to the Sessions Court would not subserve justice &

(D) where time or situational constraints warrant immediate intervention, must exist and be established in an application for anticipatory bail which must rest on strong foundation in respect of both the apprehension of arrest as well as in justification for approaching directly to the High Court skipping the jurisdiction of Sessions Court, whereby, the High Court would be held justified in entertaining a petition directly under Section 438 of Code of Criminal Procedure. The "special circumstances" should be reflected in the affidavit and supported by documentary evidence. I respectfully agree with opinion rendered by the full Bench of Allahabad High Court in Ankit Bharti's case (Supra). Applying the ratio of the judgment (Supra) to facts of the case in hand, it is apt to reiterate here, that instant anticipatory bail application as well as the affidavit appended thereto, neither demonstrate special circumstances nor compelling reasons by petitioner/accused to skip the jurisdiction of the court of Pr. Sessions Judge Samba within whose jurisdiction the offence of rape u/s 376 IPC has been registered by police station Bari Brahmana against petitioner/accused and to approach directly before this High Court. In view of the legal position settled

aforesaid, without discussing the merits of the anticipatory bail application of petitioner/accused, I am of the considered view that the anticipatory bail application in hand is legally incompetent, not maintainable before this court and out rightly rejected. As discussed above, petitioner/accused is at liberty to approach the court of Ld. Principal Sessions Judge Samba firstly for availing his right/appropriate remedy as warranted under law.”

10. Interestingly and possibly inadvertently, an earlier judgment of a learned Single Bench of this Court, throwing light on the issue, has not been brought to the notice of both the learned Judges who decided Rouf Ahmad and Ali Mohd (supra). Way back in the year 2003, a Single Bench of this Court had an occasion to consider the same issue, though in a slightly different context, in the case of Diwan Singh vs. State and another, (2004) SLJ 283. The question that squarely fell for consideration before the Single Bench was, whether the second application for grant of anticipatory bail lies before the High Court after the rejection of first application by the learned Special Judge, Anti Corruption (Sessions Court) in view of the fact that the High Court and the Sessions Court have concurrent jurisdiction to grant such bail. While debating the question and interpreting the provisions of Section 498-A of the J&K Code of Criminal Procedure, which are in pari materia with Section 438 of the 1973 Code, the Single Bench held thus:

“Thus the consensus of the judicial opinion on the subject appears that fresh application for anticipatory bail filed by a person whose first application on the same grounds has been rejected by the Session Court, is maintainable under Section 497-A Criminal Procedure Code before the High Court. My view is also the same. Therefore, with respect I say that the view expressed in Zubair Ahmad Bhat's case by the learned Single Judge is per incurrium and cannot be a binding precedent. In my considered opinion, section 497-A of Criminal Procedure Code confers a concurrent jurisdiction in the matter of grant of anticipatory bail on the High Court and the Session Court. The section no doubt, gives a choice to a person to choose between the to High Court or to the Court of Session for filing an application for anticipatory bail but if he moves the Session Court first and his application is rejected, he is not debarred from filing and maintaining a fresh application on the same cause of action and on the same grounds before the High Court but it would not be vice versa because, the Court of Session being a Court subordinate to the High Court and bound by the orders passed by it cannot grant anticipatory bail to such person whose application has been rejected by the High Court. It is so because of the fact of subordination of the Session Court to the High Court and not because Section 497-A Criminal Procedure Code contains any such bar.”

11. Though my personal view on the issue is that in the absence of any expressed or implied bar in Section 438 Cr.P.C, the Court cannot, by entering into interpretative process, read into Section 438 something which the legislature has not provided. I am of the considered opinion that by reading into Section 438

Cr.P.C something which the legislature has not provided, would be tantamount to legislation by the Judiciary, which the doctrine of separation of power, a part of basic structure of the Constitution, clearly prohibits. It is established canon of interpretation of statute that the language of the statute should be read as it is and the intention of the legislation has primarily to be gathered from the language used. If the language of a Statute is clear, unequivocal and unambiguous, there is hardly any need to add or mend and by construction make improvements in the statute. It is contrary to all rules of interpretation of Statutes to read into a statutory provision, unless it is absolutely necessary to do so. Reading of Section 438 would make it evident that there does not exist in the Section a 'casus omissus' and therefore to sustain the Section and to give it meaningful interpretation, it is necessary to supply requisite words. In the absence of such eventuality, if we do so then we would be legislating and not constructing the statute. The legislation in its wisdom has given discretion to the person apprehending his arrest to approach either the High Court or the Court of Sessions, depending upon his convenience, and, therefore, the Courts, by supplying words to Section 438, which, on the face of it, does not put any fetters on such discretion, cannot compel the affected person to necessarily approach the Court of Sessions in the first instance or that affected person will have to spell out special and extraordinary circumstances for justifying his filing the anticipatory bail application directly before the High Court. I am clearly supportive of the view of some of the High Courts that Section 438 Cr.P.C must be read as it is and there is hardly any need to add words to it which the legislation has not intended. I am equally supportive of the view that no practice of the Court, even if followed over a period of time, can supplant the statutory provisions.

12. Since there is cleavage of judicial opinion on the issue and the Hon'ble Supreme Court is already seized of the matter in Gauhati High Court Bar Association vs. State of Assam and others, (2023) Live Law Supreme Court 177, as such it may not be appropriate for me to make reference to the larger Bench for authoritative pronouncement. The issue, which the Supreme Court has framed in Gauhati High Court case supra, reads thus:

"The issue raised in this appeal is whether the High Court exercising jurisdiction under Section 438 of the Code of Criminal Procedure, 1973 has discretion not to entertain such an application on the ground that the applicant must first apply to the Court of Sessions.

In our view, a decision on the aforesaid issue would have wide ramifications."

13. For the aforesaid reasons and awaiting the determination of the issue by Hon'ble the Supreme Court, the consideration of this application needs to be deferred, however, having gone through the CD file and having found that the material evidence so far collected by the Investigating Officer does not suggest prima facie commission of offence under Section 307 IPC, nor is there any material so far on record to indicate direct involvement of the applicant No.1, I

am inclined to grant the interim anticipatory bail to him too, till the matter is considered finally. The other co-accused, who are applicant Nos. 2 to 8, have already been enlarged to bail and there is no complaint from the Investigating Officer that they have not cooperated in the matter.

14. For the foregoing reasons the applicant No.1, Khalid Hussain, is also held entitled to interim anticipatory bail at this stage and it is provided that the police shall, in the event of his arrest in FIR No. 250/2023 registered with Police Station Surankote, release him on bail subject to the following conditions:-

(a) That the applicant-Khalid Hussain shall furnish a personal bond to the tune of Rs. 25,000/- with two sureties of the like amount before the Investigating Officer.

(b) That the applicant No.1 shall not leave the territorial jurisdiction of this Court without prior permission.

(c) That the applicant shall not influence directly or indirectly the prosecution witnesses or tamper with the prosecution evidence by any mode or method.

(d) That the applicant shall co-operate with the investigating agency in the investigation of the case as and when required by the Investigating agency, without any fail.

(e) That the applicant shall deposit his passport, if any, before the

15. The CD File be returned to the Investigating Officer through learned government counsel.

16. Let the application come up for consideration on 22-12-2023.