

(1980) 05 SHI CK 0006

In the High Court Of Himachal Pradesh

Case No : Criminal M.P. (M) No"s. 234 and 235 of 1976

Mohan Lal and Others

APPELLANT

Vs

The State of Himachal Pradesh

RESPONDENT

Date of Decision : 23-05-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 397(2), 397(3), 398, 399

Citation : (1980) 9 ILR HP 117

Hon'ble Judges : V.D. Misra, C.J;T.R. Honda, J;H.S. Thakur, J

Bench : Full Bench

Advocate : K.D. Sood and B.B. Vaid, for the Appellant; J. Dina Nath, for the Respondent

Judgement

V.D. Misra, C.J.—Powers of revision and of granting anticipatory bail have been conferred on the High Court as well as the Court of Session by Sections 397 and 438 of the Code of Criminal Procedure, 1973 (referred to as the "new Code"). Is it incumbent upon an applicant to approach the Court of Session before moving the High Court? This question has been referred to the Full Bench.

Revision:

2. We will first deal with the revisional jurisdiction. Code of Criminal Procedure, 1898 (referred to as the "old Code") also conferred concurrent revisional jurisdiction on the High Court and the Court of Session as well as the District Magistrate.

However, Sub-section (4) of Section 435 of old Code provided that if any application had been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them. But no restriction was placed by the statute on the exercise of revisional jurisdiction by the High Court. An applicant could make an application before the Court of Session and thereafter before the High Court or directly before the High Court. But as a matter of practice the High Courts insisted that an application should be made

before the Court of Session before moving the High Court in revision. Some of the High Courts had even made such a rule. The object was to save time of the High Court and also to have advantage of the opinion of the Court of Session.

3. Though the old Code conferred revisional jurisdiction on the Sessions Judge, his powers to grant relief were limited. He could order further enquiry where a complaint had been dismissed before issuing process to the accused: (Section 436). He could also direct the commitment for trial of an accused wrongly discharged if the trial was exclusively by the Court of Session (Section 437). But the Sessions Judge had no power to alter or reverse any sentence or order. He could only make a recommendation to the High Court for the same: (Section 438).

4. This Court as well as the High Courts of Punjab and Haryana and Delhi have a similar rule compelling an applicant to apply to the Sessions Judge first before invoking the revisional jurisdiction of the High Court. It is Rule 3 of Chapter I-A (b) Vol. V., High Court Rules and Orders. It reads:

"As regards petition u/s 436 and Section 439, Code of Criminal Procedure, the Deputy Registrar will not receive petitions for revision of orders of original courts in non-appealable cases, unless the applicant files with the petition a copy of the order of the Sessions Judge or District Magistrate, as the case may be, to show that he has applied to one or the other and his petition has been referred. The Sessions Judge or District Magistrate can release a prisoner on bail or suspend a sentence pending a reference to the High Court.

5. The new Code has made material changes in respect of the powers of revision of the Sessions Judge. While conferring concurrent revisional jurisdiction on the High Court and the Court of Session, the right of a person to invoke the revisional jurisdiction of the High Court has been taken away in case he has already approached the Sessions Judge in revision. The relevant Section is 397 and is in the following terms:

397. (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement that he be released on bail or in his own bond pending the examination of the record.

Explanation.-All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this Sub-section and of Section 398.

(2) The powers of revision conferred by Sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other

proceeding.

(3) If an application under this section has been made by any 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.

The reason for such a restriction is that Section 399 confers on the Sessions Judge all the powers which the High Court can exercise. This section reads:

399. (1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under Sub-section (1), the provisions of Sub-sections (2), (3), (4) and (5) of Section 401 shall so far as may be, apply to such proceeding and references in the said Sub-sections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions 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.

6. It will be noticed that Sub-section (3) of the aforementioned section prohibits a person from invoking the revisional jurisdiction of more than one court. But in applicant is given liberty to choose the court. If he so desires he may straightaway make an application to the High Court.

7. In view of the changes made by the new Code, Rule 3 of Chapter I-A(b) of Vol. V. of the High Court Rules and Orders so far as it requires an applicant to move the Sessions Judge before making an application before the High Court has become ultra vires. A rule cannot alter, amend or modify the statutory provisions. The right conferred by the new Code cannot be taken away by a rule framed by the High Court. The enforcement of this rule will result in preventing all persons to move the High Court in revision against all orders passed by a Magistrate. Once the statute has given a right to a person to choose between the High Court and the Court of Session it is for him to choose the Court. The Parliament having spoken we cannot be wiser.

8. We find that same view has been taken by various High Courts. A Full Bench of Kerala High Court in *Kesavan Sivan Pillai Vs. Sreedharan Rajamohan and Others*, has held that in view of the bar placed by Sub-section (3) of Section 399 of the new Code the old practice of insisting on a party to approach the Court of Session first cannot be followed since such practice would destroy the right given to a party of choosing any one of the two forums for filing a revision. A Division Bench of the Gujarat High Court in *Brahmchari Satyanarayan Maharaj Vs. Kantilal L. Dave and Others*, has come to the conclusion that the High Court Rules prohibiting a person from approaching the High Court without invoking the

jurisdiction of the Sessions Judge first should be treated as having stood abrogated in the light of the new Code. A Full Bench of the Andhra Pradesh High Court In re; Puritipati Jagga Reddy (AIR 1979 A.P. 147) took a similar view and held that it is for the party to choose the forum.

9. We, therefore, hold that an applicant cannot be asked to apply to the Sessions Judge before making an application in the High Court.

Anticipatory Bail:

10. Section 438 of the new Code makes a specific provision, unlike the old Code, for anticipatory bail. The relevant part of this section reads thus:

"438. (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 event of such arrest, he shall be released on bail...

It is obvious that the High Court as well as the Court of Session have been given concurrent jurisdiction to grant anticipatory bail.

11. A bare reading of the section shows that no restriction, unlike Sections 397(3) and 399(3), has been placed on a person wishing to move the High Court for anticipatory bail. A person is not required to move the Sessions Judge first. It is true that under the old Code wherever a concurrent jurisdiction was conferred on more than one Court, the inferior court was expected, as a matter of practice, to be approached first. However, in the case of anticipatory bail to force a person to move the Sessions Judge first may result in uncalled for curtailment of his right. For various reasons a person may like to move the High Court straightway and may not like to approach the Sessions Judge. Since the section relates to the liberty of a person, we would not like to impose any kind of restriction on his right to move the High Court in the first instance.

12. A Division Bench of this Court in Joginder Singh etc. v. State of Himachal Pradesh (I.L.R. 1975 H.P. 181) held that though a person is at liberty to apply for anticipatory bail to the High Court straightaway he could not approach the High Court if his application had been rejected by the Sessions Judge. The reason for coming to this conclusion was that the order refusing anticipatory bail being interlocutory in character could not be revised because of the bar placed by Sub-section (2) of Section 397 of the new Code. This judgment is by D.B. Lall and Chet Ram Thakur, JJ. But in Vijay Nand v. The State of Himachal Pradesh (I.L.R. 1975 H.P. 556) D.B. Lall, J., held that an order of the High Court granting anticipatory bail will be an order in the exercise of jurisdiction conferred by Section 439, and so the bar of Sub-section (2) of Section 397 did not apply. It was observed that the ratio of Joginder Singh (supra) would not apply since the matter was being decided u/s 439.

13. We have given our earnest consideration to the reason given in Joginder

Singh's case. We are afraid we cannot agree "with that view. When a person makes an application for anticipatory bail in the High Court after a similar application of his has been rejected by the Sessions Judge, he does not invoke the revisional jurisdiction of the High Court but applies u/s 438. Assuming that revisional jurisdiction is invoked, we are not prepared to hold that Sessions Judge's order refusing anticipatory bail is an interlocutory order.

14. A learned single Judge of the Haryana High Court in Chhajju Ram Godara and Others Vs. State of Haryana and Another, held that normally the Court of Session should first be approached u/s 438 before approaching the High Court, though a party would be entitled to make out an adequate case for not approaching the Court of Session. We have perused this judgment. With all respects to the learned Judge we cannot agree with his view. No such restriction has been placed by law nor we would like to place any such restriction.

15. Our answers to the questions referred to the Full Bench are that persons can apply for revision or anticipatory bail to the High Court direct without first invoking the jurisdiction of the Sessions Judge.

16. The matters may now be placed before a single Judge for deciding the petitions.