

(2024) 02 J&K CK 0019
In the Jammu And Kashmir High Court
Case No : Bail Application No. 13 Of 2024

Mohd. Shafi Masi And Others

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 14-02-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 438, 439, 482

Citation : (2024) 02 J&K CK 0019

Hon'ble Judges : Rajesh Sekhri, J

Bench : Single Bench

Advocate : Junaid Rashid

Final Decision : Dismissed

Judgement

Rajesh Sekhri, J

1. Petitioners have straightway approached this Court under Section 438 of the Code of Criminal Procedure, 1989 (for short 'the Code'), for bail, in anticipation of arrest, in FIR No. 06/2024 of Police Station Keller, Shopian.
2. Heard learned Counsel for the Petitioners and perused the record.
3. Mr Junaid Rashid, learned Counsel for the Petitioners, has submitted that since both the High Court and Court of Sessions are vested with concurrent jurisdiction to entertain a plea for anticipatory bail, the option lies with the accused to avail either of the two remedies provided under Section 438 of the Code.
4. Section 438 of the Code contemplates an application to the High Court or Court of Sessions by any person, who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. It is, no doubt, evident from a bare perusal of Section 438 of the Code that both the High Court and Courts of Sessions are not only conferred with concurrent power to entertain a plea for anticipatory bail, but the option lies with the affected person apprehending arrest to move either of the two forums. Therefore, there is no

quarrel to the statutory position of law envisaged under Section 438 of the Code that the High Courts and Courts of Session have been vested with original jurisdiction to entertain a plea for grant of anticipatory bail. However, Section 438 of the Code came up for discussion before various High Courts across the country and, by far, it has been the consistent view that ordinarily an accused should first approach the local jurisdictional Court for anticipatory bail and he should not directly avail remedy in the High Court by eluding the said jurisdiction.

5. Confronted with a similar fact situation, Madhya Pradesh High Court in case titled 'Smt. Manisha Neema v. State of M.P.', reported as '2003 (2) MPLJ 587', has made following observations:

"19. The jurisdiction of High Court and Court of Session under Section 439, Cr.PC being concurrent, as a matter of practice, the bail applicants are required ordinarily to approach the Court of Session in the first instance and if relief is denied they approach the High Court under Section 439, Cr.PC itself, not as a Superior Court sitting in appellate or revisional jurisdiction over the order of the Court of Session, but because the Superior Court can still exercise its own jurisdiction independently, unaffected by the result of exercise by the Court of Session because the latter is an Inferior Court though vested with concurrent jurisdiction. The application seeking bail before the High Court is accompanied by an order of the Court of Session rejecting a similar prayer. The idea is to provide the Superior Court with an advantage of apprising itself with the grounds as considerations which prevailed with the Court of Session in taking the view which it did. It has come to my notice in several cases that the first order of the Court of Session rejecting a prayer for bail is a detailed order and when another application is repeated before the same Court, the subsequent order rejects the application simply by stating that earlier application having been rejected on merits, the Court did not see any reason to take different view of the matter. The latter order is not a detailed one. This subsequent order is filed before the High Court to fulfill the formality but the inevitable consequence is that the High Court is deprived of the opportunity of apprising itself with the reasons which formed foundation for rejection of the prayer by the Sessions Court. The possibility cannot be ruled out that such a course is adopted purposely because the bail applicant does not feel comfortable before the High Court in the presence of a detailed order of the Court of Session rejecting the prayer for bail."

6. A similar view has been expressed by the Karnataka High Court in case titled 'Smt. Savitri Samso v. State of Karnataka', reported as '2001 CriLJ 3164', in the following words:

"6. By looking into analogous provision in the Code it is normally to be presumed that the Court of Sessions would be first approached for grant of bail, unless an adequate case for not approaching that Court has been made out. 7. I am of the opinion that it would be a sound exercise of judicial discretion not to entertain each and every application for either anticipatory or regular bail directly by the High Court bypassing the Court of Sessions.

7. A co-ordinate Bench of this Court in 'Rouf Ahmad Mir v. SSP and Anr.' (Bail App. No. 64 of 2022 decided on 3rd of June, 2022) also declined to entertain an anticipatory bail plea directly preferred in the High Court, relevant excerpt whereof reads as below:

"8. 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."

8. Similar practice has been followed in Chhajju Ram Godara and Ors. v. State of Haryana; 1978 Cr.L.J. 608 (P&H), Hajialisher v. State of Rajasthan; 1976 Cr.L.J. 1658 and K.C. Iyya v. State of Karnatka; 1985 Cr.L.J 214.

9. It is manifest from the principle of law enunciated by different High Courts of the country that though Section 438 of the Code enables an accused to approach the Court of Sessions or the High Court at his option to seek bail in anticipation of arrest, yet it is advisable to first approach the local jurisdictional Court for the relief, as it may serve both the ends of justice and the administration of justice. However, there may be emergent circumstances necessitating the person apprehending arrest to directly approach the High Court, provided the reasons assigned by him to approach the High Court, at the first instance, by evading the remedy of approaching the Sessions Court are found genuine and High Court may exercise the discretion without insisting upon filing the bail plea first before the Sessions Court.

10. It is evident from the case law discussed above that as a matter of practice, ordinarily bail applicants should approach the Court of Sessions in the first instance and if the relief is declined, they can approach the High Court under Section 438 of the Code for the reason that the local Sessions Court, being nearer and easily accessible, it may be convenient for an accused to approach the said Court for his emancipation on bail in anticipation of arrest. It also needs to be appreciated that in case, an accused directly approaches the High Court, without exhausting the remedy available to him for approaching the Court of first instance, he will be deprived of approaching the higher forum, in case his anticipatory bail plea is declined by the Sessions Court. The desirability of approaching the Court of first instance by an accused is also required as the High Court, as a superior Court, in such a case, shall have the benefit of apprising itself with the grounds as also the considerations which prevailed the Sessions Court in declining the plea of the accused as held by the Madhya Pradesh High Court in Smt. Manisha Neema (supra). Therefore, for all these reasons, it shall be advisable and desirable for an accused to first approach the Sessions Court and in case, his anticipatory bail plea is rejected by the said Court, it is open to him to approach the High Court for the same relief. In this view of the matter,

the power vested with the High Court under Section 482 of the Code is to be exercised with circumspection and in exceptional circumstances.

11. Reverting to the present case, there is nothing on the record to suggest that any circumstance or compelling reason exists in favour of the Petitioners to skip over the jurisdiction of Sessions Court, Shopian, within whose jurisdiction the offences are stated to have been committed. Learned Counsel for the Petitioners has admitted that co-accused in the present FIR have been enlarged on bail by learned Sessions Judge, Shopian on 2nd of February, 2024. In the circumstances, it shall be advisable for the Petitioners to claim parity from the same Court and in case their plea does not find favour, they can invoke jurisdiction of this Court under Section 438 of the Code.

12. For what has been observed and discussed hereinabove, the present application is dismissed. However, Petitioners shall be at liberty to approach the concerned Sessions Court to seek their release on bail and learned Sessions Court shall accord consideration to the said plea in accordance with law.