

---

**(1975) 08 SHI CK 0013**

**In the High Court Of Himachal Pradesh**

**Case No :** Criminal M.P. (M) No's. 117 of 1974 and 118 and 119 of 1975

Vijay Nand

APPELLANT

Vs

The State of Himachal Pradesh

RESPONDENT

---

**Date of Decision :** 30-08-1975

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 397, 397(2), 397(3), 435, 437  
Defence and Internal Security of India Act, 1971 — Section 7  
Defence and Internal Security of India Rules, 1971 — Rule 184, 33(3)

**Citation :** (1975) 4 ILR HP 556

**Hon'ble Judges :** D.B. Lal, J

**Bench :** Single Bench

**Advocate :** Chhabil Dass and D.P. Sud, for the Appellant; B. Sita Ram, General, for the Respondent

**Final Decision :** Dismissed

---

## **Judgement**

D.B. Lal, J.—The three bail applications set down for orders raise some of the important questions of law regarding bail and need a detailed consideration. In order to appreciate the points under dispute, a little elucidation of facts will be required. Vijay Nand, Prithi Singh and Jowind Lal were arrested on August 8, 1975, for contravention of Sub-rule (3) of Rule 33 of the Defence and Internal Security of India Rules, 1971. They filed applications before the Chief Judicial Magistrate for granting bail but the same were rejected on August 14, 1975. Thereafter they intended to apply for bail before the Sessions Judge but according to them he was out on tour and hence they could not avail of that opportunity. Now they have appeared before the High Court for grant of bail u/s 439 of the Code of Criminal Procedure (hereinafter to be referred as the Code of 1973).

2. In Joginder Singh v. State of Himachal Pradesh [Cr. M.P. (M) No. 21 of 1974, decided on 20-3-1975 a Division Bench of this Court held that the order granting or refusing bail is an interlocutory order and as such is not revisable u/s 397(2)

of the Code of 1973. The Division Bench was dealing with a case of anticipatory bail u/s 438 and held that a direct application could be presented to the High Court because no sooner an application is presented to a Court subordinate to the High Court, the only mode of interference would be by way of revision against the interlocutory order which is prohibitive u/s 397(2) of the Code of 1973.

3. If the ratio of that case is applied to a case u/s 439 of the Code of Criminal Procedure, 1973, perhaps all these applications will have to be rejected. It will be held that the three petitioner- accused want to invoke the revisional jurisdiction of the High Court u/s 397 for interfering with the order made by the Magistrate refusing them bail. Nonetheless, the learned Counsel submit that the decision in Joginder Singh supra be confined to an application for anticipatory bail u/s 438 and hence that principle should not be extended to a case of granting bail u/s 439 which is a special and independent jurisdiction of the High Court. My intention is not to reconsider Joginder Singh supra nor do I intend to refer that decision to a larger Bench. Rather I consider to confine my observation to a case for granting or refusing bail u/s 439 which is decidedly a separate jurisdiction as compared to Section 438 which is confined to a very narrow stage when investigation is intended and before the person is arrested which is indeed a very small period to be reckoned with for bail.

4. While dealing with Joginder Singh (supra) the Division Bench was faced with another decision of a Division Bench of this Court Gulam Ali v. State 1972 H.L.R. 8. That case related to a revision u/s 435 of the Code of Criminal Procedure, 1898 (hereinafter to be referred as the Code of 1898) and a rule of practice was evolved that a party must exhaust his remedies by approaching the District authorities in the first instance before approaching the High Court in an application for revision under Sections 435/438 of the Code of 1898. It was observed in Joginder Singh (supra) that Gulam. Ali (supra) may not hold the field in view of the restrictions placed upon the power of revision in the Code of 1973, namely, that a revision against interlocutory order is barred under Sub-section (2) of Section 397 and a second revision to High Court is again prohibitive under Sub-Section 3 of Section 397 of the Code of 1973.

5. Apart from the foregoing considerations there has been a Full Bench decision of this Court in Ishwar Chand v. State [Cr. M.P. (M) No. 67 of 1975] and the said decision lays down the power of the High Court u/s 439 to grant or refuse bail despite Rule 184 of the Defence and Internal Security of India Rules, 1971 which is a special provision regarding bail, and despite provisions incorporated in the Defence and Internal Security of India Act, 1971, especially in a situation where special Tribunals are constituted u/s 7 of that Act.

6. The Full Bench has held that the powers of the High Court to grant or refuse bail u/s 439 of the Code of 1973 remain unaffected by Rule 184 (supra) or by any provision of the Defence and Internal Security of India Act, 1971. In fact Rule 184 (supra) does not confer any power to grant or refuse bail but merely

states that no person accused or convicted of a contravention of the said rules or orders be released on bail or on his own bond unless in certain contingencies the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention. Therefore Rule 184 points out the restrictions under which the power granting bail is to be exercised. It says no further and the power to grant bail has to be traced to some other source. Thus Section 439 of the Code of 1973 has been preserved. The High Court may grant or refuse bail even in a case of contravention of Rule or Order as contemplated under Rule 184 (supra) although bail can only be granted in a certain contingency where the Court is satisfied on reasonable grounds that the person is not guilty of such contravention. In this manner the Full Bench has preserved the power of the High Court to grant bail u/s 439 even though Rule 184 starts with a non-obstante clause and prima facie removes the enabling provisions regarding bail contained in the Code of 1898. The ratio of the decision of the Full Bench is that notwithstanding anything contained in the Code of 1898 which may facilitate bail to a person accused or convicted of the contravention of rules and orders, he shall not be granted bail unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention. This is the only meaning up to which the non-obstante clause could have its effect and nothing beyond. Thus the power of the High Court to grant bail under action 439 has been kept intact and there can be no exception to that proposition. However, the question still remains as to the effect of Joginder Singh (supra) because if that case is followed and the principle is imported in Section 439 of the Code of 1973, perhaps if a Magistrate or Sessions Judge refuses bail, the party will be left without any remedy. It is a different question that a fresh application for bail may be moved before that very Court or before another Court but that will have to be based on some new plea than what has been agitated in the previous application. It could not have been the intention of the Legislature to deprive a party of a right of bail simply because he moved an application in the subordinate Court and got an order against him. This is all the more so when the High Court has been given power to grant bail u/s 439 which appears to be special and independent power and perhaps uncontrolled and untrammelled by anything provided for in the order of the subordinate Court.

7 The law regarding bail cannot be static and indeed in a Welfare State it cannot be. It has to dovetail two conflicting demands, namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of Criminal Jurisprudence, viz-, the presumption of innocence of an accused till he is found guilty. These are conflicting equities but will have to be balanced in each case according to the circumstances made out. In the Code of 1973 the power of the High Court to grant bail u/s 439 has not been made subservient to anything stated in Section 437. In the previous law under the Code of 1898, there was a conflict in this regard. Section 497 referred to a Court which included even the High Court and it was stated that a person

shall not be released on bail if there appeared reasonable grounds for believing that he was guilty of an offence punishable with death or imprisonment for life. Although u/s 498 no such consideration was specified, yet a view could be taken that Section 498 was controlled by Section 497 and if the Court has reasons to believe that a person was guilty of an offence punishable with death or imprisonment for life, bail could be refused u/s 498. The other view was that Section 498 was uncontrolled and untrammelled by Section 497 and the High Court exercised independent power to grant or refuse bail under that section. K.N. Joglekar Vs. Emperor Gulam Mohammad Azimuddin and Others Vs. State, and Champalal v. State AIR 1952 MB 189 are a few decisions holding that view. In the last noted Full Bench case it was also held that High Court exercised the power of revision as it could cancel the bail granted by the Sessions Judge. Similarly the High Court could cancel its own order of granting bail u/s 561A of the Code of 1898. It has to be understood that Sub-section (2) of Section 498 of the Code of 1898 was introduced only in 1955 and hence those observations were made by the Full Bench. Similarly bails were granted or refused by the High Court under its revisional powers for which observations were made by the learned Judges in Public Prosecutor, Andhra Pradesh Vs. G. Manikya Rao, Maibam Bidhu Singh and Ors. v. Manipur Administration AIR 1959 Mani 47, R.K. Nabachandra Singh v. Manipur Administration AIR 1964 Mani 39 and Superintendent and Remembrancers of Legal Affairs v. Amiya Kumar Roy Choudhury alias Dadaji 78 CWN 320 . As the revisional powers were not restrictive in the Code of 1898, perhaps the learned Judges could freely utilize the revisional powers of the High Court and made these observations. Now the conditions have changed and in the Code of 1973 the revisional powers are restrictive and if the order refusing bail is interlocutory, which indeed it is, no revision against that order would be maintainable. In a recent case Dhola and Others Vs. The State, it was held that an order refusing bail is an interlocutory order which is not revisable in view of Section 397(2) of the Code of 1973. However, the bail could be cancelled by the High Court under Sub-section (2) of Section 439 and to that extent the revisional power was contemplated and was confined to Sub-section (2) of that section. Dhola and Ors. (supra) lays down the same law as has been laid down by this Court in Joginder Singh (supra) and to this extent that an order refusing bail is an interlocutory order there should not be any dispute. I have then to consider if the High Court can grant bail to these three accused u/s 439.

8. There appears to be no dispute that power to grant or refuse bail u/s 439 is a special or independent power of the High Court. The marginal heading of Section 439 itself says "Special powers of the High Court or Court of Sessions regarding bails". This special power of the High Court is uncontrolled and untrammelled by Section 397. If the Court of Sessions has exercised that power nonetheless the High Court can also exercise the said special power. An order granting or refusing bail will not be in exercise of revisional jurisdiction u/s 397. It will rather be in exercise of independent jurisdiction u/s 439. If that is so then indeed Gulam Ali

(supra) will again be brought in and the salutary principle laid down in that decision must be followed. The then Chief Justice M. H. Beg, C.J. observed in that case:

Similarly, we think that there should be a rule of practice that a party must exhaust his remedies by approaching the District authorities u/s 435/438, Cr.P.C, before it approaches this Court. This Court can, however, in the exercise of its judicial discretion, depart from this rule of the practice in exceptional cases. This seems to me to be the view of my learned brother. I, therefore, respectfully concur entirely with the opinions expressed by him.

The Division Bench was eager to lay down a rule of practice as was the case in other High Court. Being governed by considerations that the High Court should get the advantage of the opinion of the Court of Sessions and that the work at the High Court level should not increase unduly, the said decision was given. It was also held that in extra and exceptional circumstances, however, if a party comes to High Court direct, he may get the relief. All these observations can be applied mutatis mutandis to a case of bail u/s 439.

9. Joginder Singh (supra) will not stand in our way because firstly that was a case for anticipatory bail u/s 438 and not a case of bail u/s 439 and secondly the Division Bench never considered this argument that Section 439 has its application uncontrolled and untrammelled by Section 397 and in fact while exercising powers regarding bail u/s 439 the High Court never sits in revision against any order of the Court of Sessions or of the Magistrate. Rather the High Court exercises its special powers regarding bail under that section. That apart, u/s 438 the contingency of anticipatory bail arises only for a short duration, namely the stage when a person has reasons to believe that he may be arrested of an accusation of having committed a non-bailable offence and his actual arrest which may take place in that connection. Really the duration involved is rather within a short compass and a party can choose his forum either the Sessions Judge or the High Court and can get the relief. u/s 439 the question regarding bail may arise at any stage after arrest and before the termination of the trial. This would be an additional ground for taking the present view, with all due respects to the decision of the Division Bench in Joginder Singh (supra).

10. In the end I have to mention one more case:

In the matter of Sasti Charan Mondal and Ors. (78 C.W.N. 813). It was observed by a Division Bench of that Court that the provisions of Section 439 are not in any way controlled or coloured by the considerations incorporated in Section 437. The provisions of the new Code extend the periphery of the powers of the High Court to grant bail even in a case involving an offence punishable with death or imprisonment for life or imprisonment for term of seven years or more. I may add to the observations made regarding the periphery of power that the High Court can grant bail u/s 439 uncontrolled and uncoloured by any conditions incorporated in Section 397. In fact that will not be the exercise of revisional

power but exercise of a special power regarding bail enumerated in Section 439.

11. In this view of the matter, I think it proper for these petitioners to get the assessment of the situation first made by the Sessions Court. The three petitioner-accused can apply to the Sessions Court for granting them bail. In case they get bail from that Court, that would be the end of the matter. If they do not get bail from that Court, they may file fresh applications in this Court u/s 439 to enable them to get bail according to the merits of their case.

With these observations the three petitions are rejected.

This order is being made in Cr. M.P. (M) No. 117 of 1975 and shall form part of the orders in Cr. M.P. (M) No. 118 of 1975 and No. 119 of 1975.