

(1989) 05 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : A. Bail No. 143 of 1989

Zubair Ahmad Bhat

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 03-05-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 397(3), 435, 438, 497A

Citation : (1990) CriLJ 103

Hon'ble Judges : M.L. Bhat, J

Bench : Single Bench

Advocate : H.M. Sadiq, for the Appellant; Riaz Rasool and N.A. Hakak, for the Respondent

Judgement

M.L. Bhat, J.—Learned counsel for the respondent, Mr. Riaz Rasool has raised an objection to the maintainability of this application. His

submission is that the petitioner has moved for anticipatory bail before the 2nd Addl. Sessions Judge, Srinagar. That bail application was rejected.

He cannot move a fresh bail application on the same grounds u/s 497-A, Cr.P.C. to this court. Reliance is placed on *Amiya kumar Sen Vs. State*

of West Bengal, . The Division Bench of the Calcutta High Court has dealt with this question and it was held that anticipatory bail can be granted

by the High Court or the Sessions Court and the choice is given to the person who seeks bail in anticipation of arrest. Once a person applies to

Sessions Court and the Sessions Court rejects the application fresh application for grant of bail in anticipation cannot be moved before the High

Court on the same grounds.

2. Mr. H. M. Sadiq has controverted this position and has referred to a Full Bench authority of *Mohan Lal and Others etc. Vs. Prem Chand and*

Others etc., . The Full Bench was answering the reference and the question referred to the Full Bench was :

Is it incumbent upon an applicant to approach the Court of Session before moving the High Court for grant of anticipatory bail u/s 438 of the Central Cr. Procedure Code.

While answering this question the Full Bench has taken into consideration the provisions of Section 397, Cr.P.C. which correspond to Section 435

of our Code and they have answered that it is not incumbent on the person to move the Sessions Court first. He can directly move the High Court.

This had become necessary because in an earlier authority of the same High Court titled *Joginder Singh v. State of H. P.* ILR (1975) HP 181 the

Division Bench had taken a view that a bail application for grant of anticipatory bail cannot be moved directly before the High Court without first

moving the Sessions Court. The view expressed by the Division Bench obviously was not in conformity with the provisions of law because for

grant of anticipatory bail Sessions Court and the High Court have concurrent jurisdiction. In that context the Full Bench has said that it is not

necessary for a person to move the Sessions Court first and that he cannot come directly to the High Court for grant of anticipatory bail. The Full

Bench authority referred to above is not authority for the proposition that once the anticipatory bail is rejected by the Sessions Court on the same

grounds High Court can be moved for grant of anticipatory bail. In the observations made by the Full Bench, there may be a passing reference, but

that is only obiter because the Full Bench was not considering that question at all. The limited question before the Himachal Pradesh High Court

was whether it was necessary to approach the Sessions Court before moving the High Court for grant of anticipatory bail and that question is

answered in the negative by the Full Bench.

3. The opinion expressed by the Calcutta High Court *Amiya kumar Sen Vs. State of West Bengal*, referred by Mr. Riaz Rasool is correct and they

appear to have laid down the correctly. Therefore, the application u/s 497A for grant of anticipatory bail when the first application on the similar

grounds was rejected by the Sessions Court will not be maintainable because the court of Sessions and the High Court have concurrent jurisdiction

in the matter.

4. However, the matter would not rest here. If the Sessions Court has refused the bail, High Court in revision against the refusal of bail is not powerless because Sub-section 3 of Section 397, Cr.P.C. as amended in the Central Act does not apply to the State of J. & K. nor is a similar provision contained in our Code which has taken away the power of revision of this Court in such matters nor is an order recorded by the Sessions Judge to be treated as final and beyond the purview of judicial scrutiny of this court. Therefore, the petitioner is well within his power to file a revision petition against the order rejecting the bail in anticipation. Such an order would not be interlocutory because it seeks to take away the liberty of a man and he is to be arrested. Therefore, it affects his rights. Reliance is placed on Madhu Limaye Vs. The State of Maharashtra, for this proposition.

5. At this stage Mr. Hakim Sadiq submits that the petition filed by him u/s 497A, Cr.P.C. be treated as revision petition. 1 order accordingly Registry shall list it as revision petition. Issue notice M/s. Riaz Rasool and N. A. Hakak accept notice. Send for the record of the trial Court. List after the record is recieved. List next week.