

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Bail App. No.64/2022

ROUF AHMAD MIR ...PETITIONER(S)

Through: Mr. Lone Altaf, Advocate.

Vs.

SSP & ANOTHERRESPONDENT(S)

Through: Mr. M. Younis, Adv.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

ORDER(ORAL
03.06.2022

1. The petitioner has filed the instant application seeking bail in anticipation of arrest in FIR No.21/2022 for offences under Section 354, 354C, 498A and 509 of IPC registered with Police Station, Kheerbhawani, Ganderbal.

2. It appears that the petitioner had moved an application for grant of anticipatory bail before the learned Sessions Judge, Ganderbal, and the learned Judge called the report of police without passing an interim protection order in favour of the petitioner. It is

averred in the application that the petitioner thereafter withdrew the bail application and has approached this Court by way of instant application invoking jurisdiction of this Court under Section 438 of Cr. P. C.

3. I have heard learned counsel for the parties and perused the material on record.

4. Although Section 438 of the Cr. P. C gives concurrent jurisdiction to High Court and Sessions Court to consider a bail application of an accused yet, as a matter of ordinary practice, High Court does not entertain application of a person under Section 438 of the Cr. P. C unless the said person has approached and exhausted the remedy before the Court of first instance. It is only in exceptional cases and in special circumstances the High Court may entertain an application under Section 438 of Cr. P. C without insisting upon filing of such application before the Court of Session in the first instance.

5. The issue whether or not an application under Section 438 of Cr. P. C should ordinarily be entertained by High Court without the applicant having exhausted remedy of approaching Sessions Court, has been deliberated upon in several judgments by different High

Courts. In **Smt. Savitri Samso vs. State of Karnataka, 2001 CriLJ 3164**, Karnataka High Court has, while dealing with this issue, observed as under:

“5. In my view and as is the practice although the High Court has concurrent jurisdiction with Sessions Court to grant bail, it is desirable that the ordinary practice should be that the lower Court should be first moved in the matter, though in exceptional case and special circumstances, the High Court may entertain and decide an application for bail either under Section 438 or 439 of the Cr. P.C. This is specially important because any expression of opinion by the superior Court, is likely to prejudice if not frequently, in cases few and far between, the trial in the lower Court. Hence, in my view, it is only in exceptional circumstances that an application for bail should be made directly to the High Court and in the absence of special circumstances the application should not be entertained by the High Court.

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.

8. In my view ordinarily, the Sessions Court is nearer to the accused and easily accessible. It will be more speedy disposal since the investigation reports or case papers also can be summoned immediately. There is no reason to believe that Sessions Court will not act in accordance to law and pass appropriate order. In a given case if any accused is grieved his further remedy would be to approach the High Court. In such case, the High Court will also have the benefit of the reasons given by the Sessions Court. As such, looking at the case from any angle, in my view, simultaneous filing of application for bail in both the Sessions Court and the High Court is impermissible. Hence, in the present case also, this petition before this Court is not maintainable one, in view of the admitted fact that the petitioner has already approached the Sessions Court, Gulbarga, for the same relief and the Sessions Court has yet to decide the same.

6. Madhya Pradesh High Court has, in the case of **Smt. Manisha Neema vs. State of M. P, 2003(2) MPLJ**

587, while dealing with this issue, made the following observations:

“Long back, this Court, in the case of Dainy alias Raju v. State of M.P. (1989 JLJ 232) Hon. Justice R.C. Lahoti (now Judge of the Supreme Court) has held that though under Sections 438 and 439 of the Cr. PC there is concurrent jurisdiction, but the application should be filed first before the Court of Session and on failure before that Court, the application should be filed before the High Court accompanied with the first order of Sessions Court and also mentioning all the relevant facts. His Lordship, in Paras 19, 20 and 21 has given detailed reasons for holding so. For convenience, the same are reproduced below :--

“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.”

7. The afore-quoted observations of the Madhya Pradesh High Court were relied upon by Delhi High Court in **Gopal Goyal vs. State of NCT of Delhi** (Bail Application No.1565/2012 decided on 19th of November, 2012).

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.

9. In the instant case, the petitioner has approached this Court directly without exhausting the remedy before learned Sessions Judge, Ganderbal, and even if petitioner did approach the said Court, yet he abandoned the application midway without actually exhausting the said remedy as the petitioner withdrew the said application. There are no exceptional circumstances in the case in hand which would entitle the petitioner to move the bail

application directly before this Court. Merely because learned Sessions Judge has, on the first date of hearing, called the report from the police without passing an order of interim protection in favour of the petitioner does not entitle him to move this Court by abandoning his earlier application before the Court of Sessions.

10. In view of the aforesaid discussion and without expressing any opinion on the merits of the case, the petition is dismissed with liberty to the petitioner to approach the Court of learned Session Judge, Ganderbal, with an application for grant of bail, if he so desires. If and when such an application is made before the said Court, the same shall be dealt with and disposed of on its own merits in accordance with law.

(Sanjay Dhar)
Judge

Srinagar,
03.06.2022
"Bhat Altaf, PS"

<i>Whether the order is speaking:</i>	<i>Yes/No</i>
<i>Whether the order is reportable:</i>	<i>Yes/No</i>