

**Devidas Raghu Naik Vs. the State**

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**Court :** Mumbai

**Decided On :** Sep-14-1987

**Reported in :** 1988(1)BomCR22

**Judge :** G.F. Couto, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 397, 397(1), 438 and 439

**Appeal No. :** Criminal Misc. Appln. No. 122 of 1987

**Appellant :** Devidas Raghu Naik

**Respondent :** The State

**Judgement :**

ORDER

1. This application under S. 438 Cr.P.C. is filed by one Devidas Raghu Naik on the grounds that it appears that an incident of illegal felling of trees had taken place and therefore, criminal proceeding had been instituted. Some people who are on inimical terms with the applicant had falsely and maliciously implicated him in the said incident and therefore he apprehends that he may be arrested for a non-bailable offence regarding the said cutting of the trees. He further states that he has moved an application for anticipatory bail before the Sessions Court, Margao, but the same was dismissed by Order dated 10th September, 1987.

2. In view of the above statement that a similar application for the same facts had been moved before the Sessions Court Margao and dismissed the question arose whether the present application under S. 438, Cr.P.C. was maintainable.

3. Mr. Bruto D'Costa the learned counsel appearing for the applicant placing reliance on the decision of the Kerala High Court in *Gopinath v. State of Kerala* and of the Supreme Court in '*Gurcharan Singh v. State*' : 1978 CriLJ129 , submitted that the powers for granting anticipatory bail are concurrent and both the High Court and the Sessions Judge have jurisdiction to deal with and dispose such application irrespective of the circumstances of one of them having been moved in the first instance. However, the learned counsel submitted that an account of the decorum of the Courts, if the High Court as first approached and it refused to grant anticipatory bail, the Sessions Judge should always dismiss the application and the proper remedy in such circumstances is to approach the High Court itself for variation of its earlier order

4. In his turn, Mr. Bhohe, the learned Public Prosecutor placing reliance on the decision of the Calcutta High Court in '*Amiya Kumar Sen v. State of West Bengal* urged that the present application is not maintainable.

5. In *Amiya Kumar Sen's* case, a Division Bench of the Calcutta High Court addressed itself to the very same question that falls for my determination. After analysing grammatically the provision of S. 438 and in particular the word 'or' appearing therein observed that the said word has four meanings and it means : (i) a strong alternative; (ii) that it has little or no alternative force; (iii) that it introduces an alternative name of synonym and (iv) that it is used for 'otherwise'. The learned Judges then held the view that the word 'or' occurring in S. 438, Cr.P.C., has the meaning of 'alternative' unlike what happens with similar words that appear in Sections 439 and 397, Cr.P.C. On the basis of this reasoning the Division Bench of the Calcutta High Court held the view that a fresh application under S. 438, Cr.P.C is not maintainable when one similar application had been already disposed of and dismissed either by Sessions or the High Court.

6. A different view was, however, taken by a single Judge of the Kerala High Court in *Gopinath's* case (above). The learned Judge held that the word 'or' occurring in

Section 397, 438 and 439 has always an alternative meaning and that there is no reason whatsoever to hold that the said word means 'and' in Ss. 397 and 439, as held by the Calcutta High Court in the above mentioned authority. Dealing with the said case, the learned Judge of the Kerala High Court observed as under :-

'With due respect to the learned Judge who decided that case I beg to disagree. I do not think that the section was intended to give a restricted forum in the sense that when one forum is chosen the jurisdiction of the other is excluded. There cannot be any dispute that an accused is having the freedom to approach the Court of Session or the High Court under S. 438. But the question is only whether an accused who approached the Court of Session and got defeated is precluded from moving the High Court for the same relief. I am of the view that he is not precluded. The fact that the concerned person is given the freedom of applying to the High Court or the Court of Session need not necessarily mean that when the option has become final and the approach to the High Court is thereafter barred. By the use of the word 'or' in sub-section (1) the legislature has invested the Court of Session and the High Court with concurrent jurisdiction. If the accused makes an application to the Sessions Judge and the same is rejected, nothing in the Code prevents him from making a subsequent application to the High Court. That jurisdiction of the High Court is original and not revisional.'

The learned Judge further observed that identical words are used in other provisions of the Cr.P.C. namely in Sections 397(1), 398 and 439 and that there is no basis for treating the conjunction 'or' in those provision in contradistinction with the same conjunction used in S. 438 and therefore if those conjunctions are used in the non-alternative sense as equivalent to 'and' there is no reason why a different interpretation is necessary in the case of S. 438.

7. The above view of the learned single Judge of the Kerala High Court appears to me to correct. In fact, it is now well settled that there is no bar whatsoever for a party to approach either the High Court or the Session Court with an application for an ordinary bail made under S. 439, Cr.P.C. The power given by. 439 to the High Court or to the Session Court is an independent power and thus, when the High Court acts in the exercise any revisional jurisdiction, but its original special

jurisdiction to grant bail. This being so, it becomes obvious that although under S. 439, Cr.P.C. concurrent jurisdiction is given to the High Court and Session Court, the fact that the Sessions Court has refused a bail under S. 439 does not operate as bar for the High Court entertaining a similar application under S. 439 on the same facts and for the same offence. However, if the choice was made by the party to move first the High Court and The High Court has dismissed the application, then the decorum and the hierarchy of the Courts require that if the Sessions Court is moved with a similar application on the facts, the said application be dismissed. This can be inferred also from the decision of the Supreme Court in Gurcharan Singh's case : 1978 CriLJ129 (above).

8. There is no substantial difference between S. 438 and S. 439 as regards the appreciation of the case as to whether or not a bail is to be granted. The only distinction is that in a case under S. 438 the person who approaches the Court apprehends that he may be arrested without any justification or basis, whereas under S. 439 such person approaches the Court after his arrest. This being so, the principles that govern S. 439 as regards the maintainability of the application are also attracted to an application under S. 438, Cr.P.C.

9. Coming now to the merits of the case, the learned Public Prosecutor placed for my perusal the investigation papers. From the said investigation it appears that there exists a prima facie case implicating the applicant in the theft or the felling of the trees in Government land. In fact, references to him are made by several witnesses and it appears that some logs has been recovered from the saw-mill. However, Mr. Bruto D'Costa produced some documents showing that the applicant has transported the said logs to his saw-mill after obtaining the necessary passes from the authorities. It is his case that he is not in any manner involved in the illegal cutting of trees and in any event, his arrest by the police is not necessary for the purpose of investigation.

10. Admittedly, the logs has been already seized by the police and in the circumstances it appear to me that Mr. B. D'Costa is right when he submits that in the circumstances there is no need whatsoever to arrest the applicant for the purpose of investigation. The same can be done without his arrest provided the

applicant appears before the Police as and when necessary.

11. The result, is that this application is allowed and consequently, the Police Officer investigating the offence of the cutting of the trees in question is directed to release the applicant on bail, in case of his arrest in connection with this case. The applicant to sign a bail bond of Rs. 5,000/- with one surety for the like amount. He should make himself available to the Police as and when necessary for a period of 10 days from today, from 9 a.m. to 6 p.m. everyday. He should no leave the area of Goa without prior permission of this Court.

12. Application allowed.

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