

**Ekkari Ghosh Alias Jitendra Vs. the State**

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**SooperKanoon Citation :** [sooperkanoon.com/866435](http://sooperkanoon.com/866435)

**Court :** Kolkata

**Decided On :** Jul-04-1994

**Reported in :** (1994)2CALLT117(HC),98CWN999

**Judge :** Rabin Bhattacharyya and ;Nure Alam Chowdhury, JJ.

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

**Appellant :** Ekkari Ghosh Alias Jitendra

**Respondent :** The State

**Advocate for Def. :** A. Paul and ;K.J. Ahmed, Advs.

**Advocate for Pet/Ap. :** Milan Mukherjee and ;Subir Ganguly, Advs.

**Judgement :**

**Rabin Bhattacharyya, J.**

1. The petitioner having failed to secure anticipatory bail on 21.2.1994, has again knocked on the door of the Court for anticipatory bail under Section 438 of the Cr. P.C.

2. The pivot of the claim is founded chiefly on twin grounds plus another ground of lessor momentum viz. omission to argue on inordinate delay, pendency of the civil litigation between the parties and the inaccessibility of the petitioner to the case

record depriving him of excavating materials from the FIR of which he was not in possession thereof at the time of hearing the application by the earlier Division Bench.

3. The petitioner was constrained to renew his prayer for anticipatory bail for the emergence of new grounds.

4. The claim has been resisted by the State on the count that a second application is not maintainable and the court is to fold its hand for the relief.

5. To answer the respective claims, it will be much better to take the bull by the horns in the background of the sections viz. sections 438 & 439 respectively of the Cr. P.C.

6. Upon making a close survey of the Section 438, there could be no slim doubt that the words and languages employed in the Section do not even remotely foreshadow that application for anticipatory bail, multiple in number, could be harvested as there could be no revival of 'reasons to believe' of apprehension! of arrest in the subsequent application when the earlier application has suffered rejection.

7. Section 438 clothes a party with a right when he reasonably apprehends! that he may be arrested on an accusation of having, committed a non-bailable offence. This particular accusation, however, the petitioner may say, does not suffer from any (variation from time to time and the new grounds cannot buttress such accusation. This accusation does not occur any change as the direction of the Court will inevitably follow from the accusation which still remains unimpaired. It will be legitimate to hold that the boundary of Section 438 is limited, if analysed with Section 439 which is unlimited in its scope and its: application. It is permissible for an accused to repeat his prayer for bail on new grounds under Section 439 of the Cr. P.C. after rejection of his earlier bail as the language employed in Section 439 are, 'that any person accused of an offence and in custody be released on bail'. This suggest without any slender of doubt or ambiguity that the accused in custody charged with an offence, prima facie, has a legitimate right to repeat his prayer for bail at any time.

8. The legislature in its ample wisdom and dexterity took the note of the structure of Section 439 and while drafting Section 438 of the Cr. P.C. skilfully omitted the expressions as appeared in Section 439.

9. It is trite saying that the legislature does not waste words while drafting the statute. It is also pertinent to mention that Court cannot infer from a statute any language which is meticulously silent. It has got the freedom to analyse and interpret the law. It is denuded of power to legislate the law. It will be apposite to mention that the Court is not the third chamber of of the legislature.

10. In the light of the above, it is predominant that the intention of the legislature is patent and it, therefore, excluded from the operation of Section 438 a second application for the expressions used as indicated above in Section 439. This is one aspect of the matter.

11. The next aspect, if appreciated in the perspective of the claim we are of the view that the Court should be too slow to thrive the second application of a party for anticipatory bail as it will generate immortality of the proceedings and the swelling numbers will over crowd the Court. The object of law, therefore, will be frustrated than achieved. Close on the heels was the decision of our High Court in *Kalidas Mitra v. State*, 1988 (III) Crimes 652, where the Court held that a second application even on new ground is not maintainable. There will be constant death and reinforcement of the claims, if second application is entertained.

12. But where, as here, the informant while she was within her teens and completely bereft of protection fell prey to forgery and cheating of which the petitioners, soliciting anticipatory bail in different applications, were prima facie the architects of the whole show.

13. The main thrust of the allegations in the FIR prima facie evinces that she was stripped of her fortune by the petitioners after the demise of her husband. She was, as submitted by the State, was left forlorn. It was a spring board for the petitioner to build his fortune.

14. More so, it is predominant from the examination of the earlier record along with the record of the instant case that the petitioner prepared xerox copies of the FIR multiple in number. The top of all the FIRs shows that the parties applied for the FIR on sixth of May, 1993, and received the same on 7th of May, 1993, which indubitably suggest the ambition of the petitioner to use the same according to his convenience.

15. The claim for revival of the application on fresh grounds for not being armed with the FIR at the time of hearing of the earlier application, is, therefore, paled into insignificance.

16. It is quite apposite to mention that circumstances are not rare but many about which there is no cleavage of opinion that pendency of a civil litigation cannot operate as an insurmountable bar for the initiation of a criminal proceeding. The instant case prima facie demonstrates forgery and cheating which are secret in their origin where widowhood of the informant in view of her age and state of affairs added fuel to forgery and cheating. Pendency of the Civil litigation and inordinate delay, in the background of the above, cannot snap of the right of the informal when her right was forfeited by the prima facie well concerted machination of the petitioner.

17. In the instant case, an order was passed by the Division Bench on 21.2.94 rejecting the prayer for anticipatory bail. It reveals on perusal of the CD. that the Hon'ble Division Bench of which my learned brother was a party rejected the prayer for anticipatory bail on consideration of the materials disclosed in the CD. There could be no earthly reason nor the canons of law provide that a Division Bench or Bench of Coordinate jurisdiction can sit upon the order of a Division Bench as its being a court of coordinate jurisdiction. The Division Bench is within its power and reach not to agree to the reasonings indicated by an earlier bench of equal strength on a point of law. In such a situation, a subsequent Division Bench of coordinate jurisdiction can analyse the decision of the Division Bench and if it does not agree with the 'ratio decidendi' of the earlier bench of coordinate jurisdiction could legitimately refer the matter to a larger bench for a decision. The instant case does not come within the fold of such point of law for which the matter

should be referred to a larger bench.

18. In the context, repetition of prayer for anticipatory bail after rejection by a bench of coordinate jurisdiction after invoking the power of review of the decision of earlier Division Bench of coordinate jurisdiction may lead to a judicial anarchy about which caution has been sounded by the Supreme Court in *Mahadolal v. Administrator General*, : [1960]3SCR578 :-

'Judicial decoram no less than legal propriety forms the basis of judicial procedure' and 'if one thing is more necessary in law than any other thing it is the quality of certainty' and that 'that quality would totally disappear if Judges of coordinate jurisdiction in the High Court start overruling one another's decisions'. It was observed further that the result would be utter confusion if a 'Judge sitting singly in the High Court is of opinion that the previous decisions of another single-Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger bench' as; 'in such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgement of their own High Court'.

19. We are, therefore, of the opinion and this we say with great respect that there is, no scope for differing from the decision rendered by the Division Bench on 21.2.94 and the view taken by earlier Division Bench in *Kalidas Mitra v. State* (supra).

20. For the foregoing reasons, we hold that a second application for anticipatory bail even on new grounds, unless the investigating agency is guilty of suppression of materials relating to the case is not maintainable and, accordingly, the instant application stands rejected.

This order will govern the case of *Biswa Mohan Chattaraj v. State*.

**Nure Alam Chowdhury, J.**

21. I agree.

