

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE PRANAY VERMA

ON THE 7th OF NOVEMBER, 2022

MISC. CRIMINAL CASE No. 49606 of 2022

BETWEEN:-

**OMPRAKASH PANDEY S/O RAJMANI PANDEY,
AGED ABOUT 44 YEARS, OCCUPATION: BUSINESS
R/O UNITED COMPOUND ICI NEAR PETROL PUMP
DIST. INDORE (MADHYA PRADESH)**

.....APPLICANT

***(BY SHRI VIVEK SINGH, ADVOCATE AND
SHRI GYANENDRA SHARMA, ADVOCATE)***

AND

**THE STATE OF MADHYA PRADESH
STATION HOUSE OFFICER
THROUGH POLICE STATION KSHIPRA
DISTRICT INDORE (MADHYA PRADESH)**

.....RESPONDENT

(BY SHRI GAURAV SINGH CHOUHAN, DY. G.A.)

This application coming on for admission this day, the court passed the following:

ORDER

01. This is second application filed by the applicant under Section 438 of the Code of Criminal Procedure, for grant of anticipatory bail. The applicant is apprehending his arrest in connection with Crime No.208/2021 registered at Police Station Kshipra, District- Indore for an offence punishable under Section 406, 407 of the Indian Penal Code.

02. First application of the applicant bearing M.Cr.C. No.60411 of 2021 was dismissed as withdrawn by order dated 10.12.2021 after being argued at length with liberty for him to surrender and seek regular bail.

03. A preliminary objection has been raised by learned counsel for the respondent/State to the effect that the instant second application under Section 438 of the Cr.P.C. is not maintainable as the earlier application of the applicant was dismissed as withdrawn with liberty for him to surrender and seek regular bail and was not dismissed on merits or dismissed as withdrawn simpliciter hence the only remedy for the applicant is now to act in terms of the previous order and he cannot renew his prayer for grant of anticipatory bail.

04. Learned counsel for the applicant submits that second application under Section 438 of the Cr.P.C. is maintainable despite the earlier application having been dismissed as withdrawn. In support of his contentions he has placed reliance on the Division Bench decision of the Principal Seat of this Court in **M.Cr.C. No.648 of 1995 decided on 09.02.1996 [Amritlal Vishwakarma and others vs. State of MP]**, of the **Supreme Court in Criminal Appeal No.615 of 2017 decided on 30.03.2017 [Rani Dudeja and State of Haryana]** and order dated 29-09-2022 of this Court in **M.Cr.C. No. 44198 of 2022 [Nilesh Gupta Vs. State of MP]**. It is hence submitted that the instant application be considered on merits.

05. I have heard the learned counsel for the parties and have perused the record.

06. In **Amritlal Vishwakarma and others (supra)** it was held by Division Bench of this Court that even if first application filed under Section 438 of the Cr.P.C. is rejected a fresh application under Section 438 can be filed. Second application would be maintainable in case the earlier application was withdrawn and was rejected having been not pressed. It has to be considered on merits even if the earlier application was rejected on its merits.

It was held that second consideration of an application for anticipatory bail on rejection of the first one as permissible. The rejection of earlier application is not conclusive.

07. In **Rani Dudeja (supra)** the Supreme Court held that on change of circumstances when application under Section 438 of the Cr.P.C. is filed the High Court should consider the same on merits when the first application was dismissed as withdrawn without inviting the Court to consider the same on merits. It was held in paragraph No.4 as under:

"We are afraid, the stand taken by the High Court cannot be appreciated. The petition was for anticipatory bail and the one which had been filed earlier might have been withdrawn in a given situation, without inviting the Court to consider the same on merits. On change of circumstances, when another application under Section 438 of the Cr.P.C. was filed, the High Court should have considered the same on merits. The principle of *re judicate* could not have operated in an application for bail."

08. Thus the settled position that emerges is that when an application under Section 438 of the Cr.P.C. is dismissed on merits or is dismissed as withdrawn, a second application, if the same is based upon change of circumstances is maintainable.

09. However, in the present case the first application of the applicant was not dismissed as withdrawn simpliciter but was dismissed as withdrawn after being argued at length with liberty for the applicant to surrender and seek regular bail. In my considered opinion, once the applicant had argued his first application at length and had then withdrawn the same by reserving specific liberty of surrendering and seeking regular bail, then the only course open for him is to avail such liberty. He is now precluded from filing a subsequent application under Section 438 of the Cr.P.C as the effect of withdrawal of his first application with liberty to surrender and seek regular bail would be that

he had given up his rights to avail the remedy under Section 438 of the Cr.P.C. altogether since he desired to avail the remedy as sought for by him. Had it been a case of the first application having been dismissed as withdrawn simpliciter or having been rejected on merits, second application on ground of change in circumstances would have very much been maintainable but that is not the case here.

10. The decision in the case of **Imratlal Vishwakarma and others (Supra)** is hence distinguishable on facts. In **Rani Dudeja (Supra)** the first anticipatory bail application was not considered on merits whereas in the present case the same was argued at length before being withdrawn. In **Nilesh (Supra)** also the first anticipatory bail application was dismissed as withdrawn after being argued for a while. The judgments relied upon by learned counsel for the applicant hence do not help him in any manner.

11. Thus, in view of the aforesaid discussion, this second repeat application under Section 438 of the Cr.P.C. filed after the earlier application being dismissed as withdrawn after being argued at length with liberty for the applicant to surrender and seek regular bail is held to be not maintainable and is accordingly dismissed and such.

(PRANAY VERMA)
JUDGE

jyoti