

Court No. - 92

Case :- APPLICATION U/S 482 No. - 30784 of 2023

Applicant :- Karam Allahi

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Anurag Vajpeyi, Aushim Luthra, Sr. Advocate

Counsel for Opposite Party :- G.A.

Hon'ble Anish Kumar Gupta, J.

1. Heard Sri Manish Tiwari, learned Senior Counsel assisted by Sri Aushim Luthra and Sri Anurag Vajpeyi, learned counsel for the applicant and Sri Pankaj Srivastava, learned A.G.A. for the State.

2. By way of the instant application u/S 482 Cr.P.C.(hereinafter referred as '*the Code*'), the applicant has prayed for setting-aside the order dated 19.07.2023, passed by the Court of Civil Judge, Sr. Division, Fast Track Court, Additional Judicial Magistrate, Gautam Buddh Nagar, in Case No. 6781 of 2021 (State of U.P. vs. Karam Allahi and others), arising out of the Case Crime No. 129 of 2021 u/S 420, 467, 648, 471, 120-B I.P.C. and 4/20/21/25 of Indian Telegraph Act, P.S.- Phase-3 Noida, District- Gautam Buddh Nagar.

3. Learned Senior Counsel appearing for the applicant submits that in the instant case, the applicant herein was arrested on 10.02.2021. Since then, he is in custody. His earlier bail application was initially rejected on 09.07.2021 and the second bail application moved by the applicant was rejected by a detailed order dated 18.11.2022. The instant application has been filed by the applicant herein u/S 437(6) of the Code, which provides that if in a case triable by a Magistrate, if the trial of a person accused of any non-bailable offence is not concluded within a period of 60 days from the first date fixed for taking evidence, such

person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for the reasons to be recorded in writing, the Magistrate otherwise directs.

4. Learned Senior Counsel further submits that in the instant case, the charges were framed on 25.04.2023 and the first date for evidence was fixed as 19.05.2023. The period of 60 days from the first date fixed for taking evidence has expired on 19.07.2023. Thereafter, the applicant herein had moved an application u/S 437(6) of the Code on 19.07.2023, which has been rejected by the learned Magistrate on the same day. The only reason recorded for the rejection of the said application is the matter relates to grievous nature. Learned Senior Counsel further submits that provisions of Section 437(6) of the Code, are mandatory and the learned Magistrate while rejecting the bail application is required to record its reason in writing.

5. Learned Senior Counsel has further submits that all other co-accused persons have already been released on bail. Learned Senior Counsel for the applicant submits that the provisions of Sub-section (6) of Section 437 of the Code, are in the nature of safeguard provided to the accused persons and while rejecting the bail application moved by the applicant herein under the provisions of Sub-section (6) of Section 437 of the Code, the learned Magistrate has not assigned any reason as was required nor has adverted to the provisions of the said Section. Therefore, learned Senior Counsel prays for setting-aside the said order passed by the learned Magistrate and grant bail in terms of Sub-section (6) of Section 437 of the Code.

6. Sri Pankaj Srivastava, learned A.G.A. for the State submits that while rejecting the application, the learned Magistrate has categorically recorded his reason stating that since the matter is of grievous nature and the earlier bail applications have already been rejected by the Sessions Court as well as by the High Court, therefore, the said application has been rejected. Therefore, learned counsel for the State

submits that reasons aforesaid have already been assigned in the order, there is no illegality in the order.

7. Having heard the rival submissions made by learned counsel for the parties, this Court has carefully perused the record of the case.

8. Provisions of Sub-section (6) of Section 437 of the Code, reads as under:

"(6) If, in any case triable by a Magistrate, the trial of a person accused of any non- bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs."

9. From the plain reading of the said Sub-section, the following ingredients are required to be looked into:

(i) Whether the case is triable by the Magistrate and the offence involved is of a non-bailable offence;

(ii) Whether the period of 60 days has expired from first date fixed for taking evidence in the case; and

(iii) the accused is in custody during the whole of the said period. Unless there are some compelling reasons which are required to be recorded in writing the bail has to be granted under the said provisions.

10. With regard to nature of right of the accused to be released on bail u/S 437(6) of the Code, there are divergent views of different High Courts and no direct judgement of the Apex Court is available with regard to the right of the accused to be released on bail u/S 437(6) of the Code. Though, there is a reference to the provisions of Section 437(6) of the Code, in a judgement of the Apex Court in ***Chandraswami and Others vs. Central Bureau of Investigation : (1996) 6 SCC 715***, wherein the argument was raised with regard to the

entitlement of the accused persons for bail u/S 437(6) of the Code. However, the Hon'ble Apex Court had considered the grant of bail, looking at the totality of the facts and circumstances of the case, without going into the question of interpretation or applicability of Section 437(6) of the Code.

11. The first judgement which is available is that of the Odisha High Court, on the issue in ***Chhabi vs. State of Orissa : 1995(2) Crimes 622***, wherein Justice Pasayat, J., has held under:

"3. A Magistrate while dealing with a case under sub-section (6) of section 437 of the Code has to record reasons for making an exception. The said provision deals with cases where the trial of a person accused of any non-bailable offence is not concluded within a period of a sixty days from the first day fixed for taking evidence in the case, and it provides that such person shall, if he is in custody during the whole of the said period be released on bail unless for reasons to be recorded in writing the Magistrate otherwise directs. It is the right of an accused person to demand that the charge against him should be tried without any unreasonable delay and such delay entitles the accused to get bail. That right is statutorily recognised and puts a time limit. In a case falling under this sub-section if the Magistrate for reasons to be recorded, holds that the accused shall not be released, then the accused will not be released on bail. It is stated that merits of the case should not be considered at that stage. There is no force in this place. An overall view cannot be equated with prejudging the case. The Court is not precluded from considering the nature of allegations, while dealing with a case under sub-section (6) of section 437 of the Code. "

12. The next judgement available on the point is that of the Gwalior Bench of Madhya Pradesh High Court in ***Ram Kumar @ Raj Kumar Rathore vs. State of M.P. : 2000 (3) Crimes 388***, wherein Justice Dr. Maithli Sharan, J., has observed as under:

"5. Looking to the provision referred to above it is but clear that it is mandatory in nature, and the mandate is that if the Magistrate is trying a case in which the accused has been charged for a non-bailable offence and the trial has not concluded within a period of sixty days from the first date of recording the evidence in the case and that the accused had remained in custody during the whole of such period of sixty days, then he becomes entitled to be released on bail, provided of course, the Magistrate does not reject the same recording in writing his reasons therefor. Circumscribing the undisputed factual circumstances in the ambit of the provisions of section 437(6) of the Code of Criminal Procedure, 1973 it is apparent that they hold the field and apply here from all fur corners. In rejecting the bail application of the petitioner the learned trial Magistrate and the learned Fourth Additional Sessions Judge, Gwalior, have no doubt given their reasoning as required under the above provisions of the Code of Criminal Procedure but they are simply to the effect that if the petitioner were to be released then it is doubtful that he would be

attending the Court on each and every date fixed by the Magistrate. These reasoning's indicating the apprehension of the learned Courts below, by no stretch of imagination, could be termed as judicious, and therefore, they are not of such a nature as to thwart and wash off the mandatory character of the provisions of section 437(6) of the Code of Criminal Procedure, 1973. I am of the considered view that the statutory right given to the accused by the above provisions cannot be taken away in such a fashion. Since the petitioner had although remained in custody during the said period of more than sixty days from the first date fixed for recording the evidence, he would be deemed to have been clothed with the right to be released on bail. The rejection of his application under section 437(6) of the Code of Criminal Procedure, 1973 by the learned trial Magistrate and later the dismissal of his revision petition by the learned Fourth Additional Sessions Judge, Gwalior, was nothing but the abuse of the process of Court and had given rise to the miscarriage of justice."

13. The other judgement of the Madhya Pradesh High Court in **Rajendra Rajaram Pal vs. State of M.P. : (2002) 4 MPHT 186**, wherein Justice S.L. Kochar, has observed as under:

*"9. This Provision is showing that if the trial is not completed within a period of 60 days from the date fixed for recording evidence then the accused, who is in custody, is entitled to be released on bail. If the Court is of the opinion that the accused is not entitled for bail then it is obligatory on the part of the Court to assign reason for refusing the bail. In view of **mandatory** Provision of Section 437 Sub-section (6), Criminal Procedure Code, the applicant is entitled to be released on bail. There is no special reason on the basis of which his prayer may be refused. Similar view has been taken in the case of Saritadevi v. State of Himachal Pradesh [2000 (2) Crimes 543] and in the case of Mohd. Abdul v. State of West Bengal [1991 (2) Crimes 741]."*

14. The next judgement is that of the High Court of Kerala in **Re: 122 Prisoners : 2007 CriLJ 3241**, wherein Justice K. Hema, has observed as under:

*"10. It is also relevant to make reference to Section 437(6) of the Code, in this context. As per sub-section (6) of Section 437 of the Code, in any case triable by a Magistrate, if the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs. So, the normal rule is to release a prisoner on bail, who has completed such sixty days of detention as specified above unless the court otherwise directs. **The rule is mandatory in nature, as indicated by the expression "shall" in the provision itself.***

11. But, if any such prisoner is to be detained any further in prison, it shall be done only as per a specific order passed by the Magistrate in writing, recording reasons for the continued detention. Thus, it follows that if any prisoner is detained in any of the prisons in the State for more than the period stated in section 437(6) of the code, without any reasoned order in writing for the continued detention,

such detention is unauthorised and illegal. Such prisoner deserves immediate release from prison, subject to what has been laid down in Section 437(6) of the Code."

15. In case of ***Lakki Chakhbeer Singh vs. State : 2006 CRI.L.J. (NOC) 95 (RAJ.)***, Justice Narendra Kumar Jain, speaking for the Rajasthan High Court, has observed as under:

"4. A bare perusal of Sub-section (6) of Section 437, Cr.P.C. will show that it is not necessary that in each and every case, an accused in a case triable by Magistrate has to be released on bail if trial is not concluded within a period of sixty days from the first date fixed for taking evidence in the case. A Magistrate is required to record the reasons in writing for refusal of the bail. "

16. In the case of ***Didar Singh vs. State of Jharkhand : 2006(1) J.C.R. 283 : 2006 CriLJ 1594***, the Jharkhand High Court has held that the right of the accused u/S 437(6) of the Code and has compared with the right of the accused u/S 167(2) of the Code and has held that u/S 167(2) of the Code the accused has absolute right to be released on bail, in default of submissions of charge-sheet within time prescribed in the said sections and held that the right of the accused to be released on bail u/S 437(6) of the Code, is not an absolute right and the learned Magistrate has power to deny the bail for the reasons to be recorded. Justice Amareshwar Sayay has held as under:

"10. From plain reading of the aforesaid quoted provision, it appears that the intention of the legislature is to speed up trial without unnecessarily detaining a person as an under-trial prisoner. This provision applies only to a case triable by a Magistrate and not to a case committed to the Sessions for trial. The intention behind the provision is that the trial should be concluded within period of sixty days from the first date fixed for evidence.

11. The contention advanced on behalf of the petitioner that if the trial Court is not concluded within a period of sixty days from fixed date for evidence then accused who is in custody has to be released on bail cannot be accepted as from the plain reading of the aforesaid provision. It is clear that the said provision under Section 437(6) is not mandatory in nature as Section 167(2) of the Criminal Procedure Code which provides that if the investigation is not completed within a period of ninety days or sixty days as the case may be then the accused is entitled to be released on bail mandatorily irrespectively of the merit of the case. Under Section 167(2) Criminal Procedure Code, the right to be released on bail is absolute under the provision of Section 437(6) of the Criminal Procedure Code which is not mandatory in nature, the entitlement of the accused to be released on bail is dependent upon the reasons to be recorded in writing by the Magistrate for refusal to release him on bail. The reasons may be several, therefore, it is the discretion of the

trial Court either to release or not to release an accused under the aforesaid provision for the reasons to be recorded in writing. There is no doubt that discretion of the trial Court has to be exercised judicially and not arbitrarily. It is found that the trial Court has exercised its discretion either refusing or granting bail in exercise of power under Section 437(6) of the Criminal Procedure Code is justifiable in the facts and circumstances of a particular case then such exercise of discretion is not liable to be interfered with unless it is found that discretion so exercised by the trial Court is wholly improper, unjustified and arbitrary. The Division Bench of Delhi High Court in the case of Robert Lendy (1987 Cri LJ 55) (supra) has held that the procedural law is essentially meant to safeguard the interest of justice. **The twin objects, namely, to reject the delay in trial and to achieve the ends of justice are necessarily, to be harmonized.** It is in that context, one has to find out whether the discretion exercised by the Magistrate in withholding bail after sixty days, has been properly and judicially exercised.

12. It is further held in the aforesaid decision of the Delhi High Court that the considerations for refusing bail under this provision can be the reasons which are generally invoked and understood in law as the grounds for refusing bail. All that is required of a Magistrate is that if he decides to decline to grant bail, he must record his reason in writing. The decision of Supreme Court cited by the learned counsel for the petitioner in the case of Chandra Swami (AIR 1997 Supreme Court 2576) (supra) is of no avail for this case, as it appears that the Supreme Court did not go into question of interpretation or applicability of Section 437(6), Criminal Procedure Code.

13. In the decision in the case of Ram Kumar alias Raj Kumar Rathore (supra), the Madhya Pradesh High Court has held that the provisions of Section 437(6), Criminal Procedure Code is mandatory in nature and after the expiry of sixty days from the first date fixed for recording evidence, the accused acquires statutory right of being released on bail, if the trial is not concluded within the said period. With all due respect, I differ with the view of the Single Judge of Madhya Pradesh High Court, because in my view the provisions of Section 437(6) is not mandatory in nature and the accused does not get absolute right to be released on bail under Section 437(6) of the Criminal Procedure Code, if the period of sixty days expires from the first date fixed for recording evidence and the trial is not concluded within the said period.

14. In the case of Nageshwar Bhagat v. State of Jharkhand reported in (2004 (4) JLJR 3) it appears that the learned single Judge of this Court has not laid down any law nor has interpreted Section 437(6), Criminal Procedure Code but has only held that rejection of bail by High Court at an earlier stage cannot be a ground for not invoking the power as vested in Section 437, Clause (6), Criminal Procedure Code. It further appears that in the said case, not a single witness was examined on behalf of the prosecution within a period of sixty days from the first date for recording evidence, therefore, the aforesaid decision of this Court cited on behalf of the petitioner is not applicable in the facts and circumstances of the case. "

17. In the case of **Bhikhaji Chaturji Thakore vs. State of Gujarat : 2007 0 CrLJ 3433**, the Gujarat High Court has held that by holding that the provisions of section 437(6) of the Code are mandatory, has held as under:

"(23) SECTION 437 (6) provides that if, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded, within a period of sixty days from the first date fixed for taking the evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the magistrate otherwise directs. Sub-section (6) clearly uses the mandatory word "shall" because the scheme of the Act is that if you cannot conclude the trial at least within sixty days from the date of starting of the recording of the evidence, then, such an apathy shown by the Court or by the prosecution would pave the path of the accused to walk out of the jail. The mandate under the law is to release the accused on bail. The rejection is an exception and for such rejection, the Court is required to record the reasons in writing. The word "shall" is to be read as "shall" and not as "may". If it is read as "may", then, there would be reason to give reasons for rejection. When the liberty of a person is involved the mandate of law cannot be diluted by reading the word "shall" as "may".

18. In **Application u/S 482 No. 5136 of 2013 (Suresh vs. State of U.P. and Another)**, the Co-ordinate Bench of this Court has held that the provisions of Section 437(6) of the Code, are mandatory in nature without discussing the said provisions in detail.

19. From the aforesaid judgements, the proposition of law emerges is that the provisions of Section 437(6) of the Code, are mandatory in nature but are not absolute as the provisions of Section 167(2) of the Code is. The right of the accused to be released on bail u/S 437(6) of the Code, is in the nature of a statutory protection granted under the Code. However, such protection is not an absolute protection. Looking at the facts and circumstances of each case, the Magistrate has a discretion to reject such application by recording the reason. Therefore, from the discretion of Magistrate while exercising the bail applications u/S 437(6) of the Code, if it is compared with the discretion of the Magistrate to grant bail u/S 437(1) of the Code, then while rejecting the the bail Application u/S 437(6) of the Code, the learned Magistrate has very limited discretion to reject the bail application and it should be

exercised in exceptional cases. In the normal course, when the Magistrate is trying a case where the accused has been charged for a non-bailable offence and the trial has not been concluded within a period of 60 days from the first date fixed for recording the evidence, then, normally the learned Magistrate is required to grant bail. It is only in exceptional cases where the exceptional reasons are to be recorded in writing when such bail Applications u/S 437(6) of the Code, can be rejected by the learned Magistrate.

20. Having considered the position of law as enumerated from the aforesaid judgements, if we test the impugned order passed by the learned Magistrate, rejecting the bail application, the learned Magistrate has rejected the instant bail application recording the reason that in the instant case the charges against the applicant herein is of very serious in nature, where the applicant herein has been charged for running an international telephone exchange, which is a threat to the national security of the country. Therefore, the said offence was of a serious nature. Therefore, the learned Magistrate has rejected the bail application of the applicant herein.

21. Looking at the nature of allegations against the applicant herein, which are serious in nature and the *modus operandi* of the applicant was to cause a huge loss to the Government exchequer and the accused gain advantage for themselves dishonestly through the fraudulent means and such type of international calls pose a great threat to the national security as the international calls remain unmonitored by the law enforcement agencies and the public at large is affected by such calls and which are mostly used for cheating the public at large and such calls are often involved in illegal activities and anti-national activities and thus, this is a serious threat to the national security. Therefore, in the considered view of this Court, the instant case is of an exceptional nature, where, though this Court has granted bail to the other co-accused persons, has rejected the bail applications of the

applicant herein twice as the case against the applicant herein was found distinguishable with the other co-accused persons.

22. Therefore, in the considered view of this case, the learned Magistrate is justified in rejecting the bail application filed by the applicant u/S 437(6) of the Code, considering the exceptional circumstances involved in the case against the applicant herein. Therefore, there is no illegality in the impugned order dated 19.07.2022, passed by the learned Magistrate. Therefore, the application is devoid of merits and is hereby **dismissed**.

Order Date :- 12.10.2023

Shubham Arya