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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON : 28th FEBRUARY, 2017

+ **CRL.M.C. 663/2017**

DEEPAK KHOSLA Petitioner

Through : Petitioner in person.

VERSUS

STATE OF NCT OF DELHI & ORS. Respondents

Through : Ms.Meenakshi Dahiya, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J. (Oral)

1. Present petition under Section 439(2) read with Section 482 Cr.P.C., read with Articles 226 & 227 of the Constitution of India has been preferred by the petitioner to challenge the legality and correctness of an order dated 01.02.2017 of learned Addl. Sessions Judge by which order dated 03.01.2017 of learned Addl. Chief Metropolitan Magistrate, Delhi in C.C. No.463927/2016 granting bail to the respondents No.2 to 4 (hereinafter referred as 'respondents') was upheld.

2. I have heard the petitioner and have examined the file.

3. The petitioner urged to declare the impugned order dated 03.01.2017 whereby bail was granted to respondents without moving any written application by them to be a nullity in law. He further urged that

order dated 01.02.2017 can't be sustained as the learned Addl. Sessions Judge was of erroneous view that only High Court had jurisdiction to cancel bail under Section 439(2) Cr.P.C.

4. Respondents were admittedly summoned to face trial for commission of bailable offences under Sections 499/500 IPC. The petitioner urged that under Section 436 Cr.P.C. grant of bail in bailable offences is not mandatory but directory; it is not a matter of undeniable right but is a matter of judicial discretion. Adjudicating of a prayer for bail not a 'ministerial' act but requires application of mind. He further urged that in bailable offences ordinarily grant of bail though a matter of right is subject to caveat of FTTR Rule i.e. the accused shall not flee; shall not temper; shall not threaten and shall not repeat. In the instant case, the petitioner had shown material before the Trial Court that by hosting the very defamatory article on their website even on the day of grant of bail, the respondents were repeating the 'act' for which they were summoned to face trial. Since the respondents did not take steps to undo the 'continuing act' of defamation after grant of bail, second complaint regarding the said article carried on the internet was filed on 27.01.2017 and cognizance has been taken on 28.01.2017 by the Court. The respondents did not demonstrate if they were prepared to give bail; no written application or submissions were made in that regard. Order dated 03.01.2017 is nullity in law as the Magistrate had no jurisdiction to forcibly thrust a bail order even when it was not asked for.

5. The petitioner further urged that order dated 03.01.2017 cannot be sustained as it is in effect, a "review" of the order taking cognizance and summoning of the respondents.

6. During arguments, the petitioner vehemently emphasized that the learned Trial Court was not competent to grant suo moto bail to the respondents in the absence of any such prayer being made by them. The circumstances brought to the notice of the Trial Court regarding repetition of the offence were sufficient to decline bail to the respondents under FTTR Rule. He further urged that this Court has inherent powers under Section 482 Cr.P.C. to cancel the bail due to violation of FTTR Rule by not removing the defamatory article on the website even after grant of bail.

7. Reliance has been placed on '*Talab Haji Hussain vs. Madhukar Purshottam Mondkar & Anr.*', AIR 1958 SC 376 (1); '*Janardan Yadav & Anr. Vs. State of Bihar & Anr.*', 1978 Cr.L.J. 1318; '*Ratilal Bhanji Mithani vs. Asstt. Collector of Customs, Bombay*', 1967 (3) SCR 926; '*Rasiklal vs. Kishore Khanchand Wadhwani*', AIR 2009 SC 1341 & '*Ram Govind Upadhyay vs. Sudarshan Singh & Ors.*', 2002 (3) SCC 598.

8. Undisputedly, the respondents have been summoned to face trial in a Complaint Case No.463927/2016 for commission of bailable offences punishable under Sections 499/500 IPC. Grant of bail to a person accused of bailable offence is governed by the provisions of Section 436 of the Code of Criminal Procedure, 1973. Bail in such cases is compulsory and a person accused of a bailable offence if prepared to furnish bail has the right to be released on bail and the Court has no discretion to deny bail. In such cases, the accused is ordinarily to be at liberty and it is only if he is unable to furnish such security, he should remain in detention. Section 436 is imperative and under its provisions the Magistrate is bound to release the person on bail or recognizance.

9. The question as to whether a person accused of bailable offence is entitled to grant of bail as a matter of right stands authoritatively concluded by the decision of the Supreme Court in the case of ‘*Rasiklal vs. Kishore Khanchand Wadhwani*’, 2009 (4) SCC 446, in which it has been clearly held that in bailable offence, the right of the accused to get bail is absolute and indefeasible right and the Courts have no discretion in granting bail, Their Lordships held as under :-

“....There is no doubt that under Section 436 of the Code of Criminal Procedure a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police officer or the court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such person on his executing a bond as provided in the Section instead of taking bail from him. The position of persons accused of non-bailable offence is entirely different. The right to claim bail granted by Section 436 of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences there is no question of discretion in granting bail as the words of Section 436 are imperative. The only choice available to the officer or the court is as between taking a simple recognizance of the accused and demanding security with surety. The persons contemplated by Section 436 cannot be taken into custody unless they are unable or

willing to offer bail or to execute personal bonds. There is no manner of doubt that bail in a bailable offence can be claimed by accused as of right and the officer or the court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on him.”

10. The basic characteristic feature of a bailable offence is that bail is a matter of right. In fact, it is the duty of the learned Magistrate to inform the accused involved in a bailable offence that he is entitled to go on bail and elicit whether he is ready to offer bail. Law does not require him to move any application to seek bail. Even the complainant is not required to be heard before grant of bail. The Court has no jurisdiction when granting bail under Section 436 Cr.P.C., even to impose any condition except demanding of security. Observations of the Hon’ble Supreme Court in ‘*Vaman Narain Ghiya vs. State of Rajasthan*’, 2009 (2) SCC 281 are relevant to note :-

“17. Chapter XXXIII consists of Sections 436 to 450. Sections 436 and 437 provide for the granting of bail to accused persons before trial and conviction. For the purposes of bail, offences are classified into two categories, that is, (i) bailable, (ii) non-bailable. Section 436 provides for granting bail in bailable cases and Section 437 in non bailable cases. A person accused of a bailable offence is entitled to be released on bail pending his trial. In case of such offences, a police officer has no discretion to refuse bail if the accused is prepared to furnish surety. The Magistrate gets

jurisdiction to grant bail during the course of investigation when the accused is produced before him. In bailable offence there is no question of discretion for granting bail. The only choice for the Court is as between taking a simple recognizance of the principal offender or demanding security with surety. Persons contemplated by this Section cannot be taken in custody unless they are unable or unwilling to offer bail or to execute personal bonds. The Court has no discretion, when granting bail under this section, even to impose any condition except the demanding of security with sureties.”

11. Since Sections 499/500 IPC were bailable offences, the learned Addl. Chief Metropolitan Magistrate committed no error to grant bail to the respondents under Section 436 Cr.P.C.

12. I do not subscribe to the petitioner’s contention that at the time of grant of bail under Section 436 Cr.P.C., the Court was under legal obligation to consider FTTR Rule. Even if the circumstances as depicted in hypothetical examples detailed in para 14 of the petition existed, the learned Metropolitan Magistrate had no jurisdiction whatsoever to deny bail to the respondents.

13. Regarding cancellation of bail in bailable offences, the position has been made clear in ‘*Rasiklal vs. Kishore Khanchand Wadhwani*’ (Supra). The Supreme Court observed :-

“There is no express provision in the Code prohibiting the court from re-arresting an accused released on bail under Section 436 of the Code. However, the settled judicial

trend is that the High Court can cancel the bail bond while exercising inherent powers under Section 482 of the Code. According to this Court, a person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail if his conduct subsequent to his release is found of prejudicial to a fair trial. And this forfeiture can be made effective by invoking the inherent powers of the High Court under Section 482 of the Code.”

(Emphasis given)

14. Para 8 further reads :-

“8. It may be noticed that Sub-section (2) of Section 436 of the 1973 Code empowers any court to refuse bail without prejudice to action under Section 446 where a person fails to comply with the conditions of bail bond giving effect to the view expressed by this Court in the above mentioned case. However, it is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity, (2) interferes with the course of investigation, (3) attempts to tamper with evidence of witnesses, (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (5) attempts to flee to another country, (6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (7) attempts to place himself beyond the reach

of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or the court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a court while exercising powers under Section 436 of the Code is not bound to issue notice to the complainant and hear him.”

15. In ‘*Ratilal Bhanji Mithani vs. Asstt. Collector of Customs*’, AIR 1967 SC 1939, the Supreme Court had recognised the power to cancel the bail granted under Section 436 Cr.P.C. in exercise of the inherent powers of the High Court. It observed that if at any ***subsequent stage of the proceedings***, it is found that any person accused of a bailable offence is intimidating, bribing or tempering with the prosecution witnesses or is attempting to abscond, the High Court has the power to cause him to be arrested and to commit him to custody for such period as it thinks fit. This jurisdiction springs from the overriding inherent powers of the High Court and can be invoked in exceptional cases only when it is satisfied that the ends of justice will be defeated unless the accused is committed to custody.

16. In the instant case, the said ‘subsequent’ stage has yet not arrived warranting cancellation of bail as urged. The petitioner even before

grant of bail to the respondents had moved unsuccessfully an application to deny bail to them. The circumstances referred in '*Rasiklal vs. Kishore Khanchand Wadhwani*' (Supra) to exercise powers under Section 482 Cr.P.C. do not exist at present. Nothing is on record to show if the liberty so granted by the Trial Court has been misused subsequent to the grant of bail. Observation of the Trial Court in the impugned order that at the time of summoning the respondents under Sections 499/500 IPC only prime view was taken can't be faulted. A man is presumed to be innocent till his guilt is proved to the hilt. Merely because an individual is involved in a criminal case, he is not denude of his statutory rights provided under Section 436 Cr.P.C.

17. '*Talab Haji Hussain vs. Madhukar Purshottam Mondkar & Anr.*', AIR 1958 SC 376 (1), relied upon by the petitioner itself records :-

"10. It would now be relevant to enquire whether, on principle, a distinction can be made betweenailable and non-ailable offences in regard to the effect of the prejudicial conduct of accused persons subsequent to their release on bail. As we have already observed, if a fair trial is the main objective of the criminal procedure, any threat to the continuance of a fair trial must be immediately arrested and the smooth progress of a fair trial must be ensured; and this can be done, if necessary, by the exercise of inherent power. The classification of offences intoailable and non-ailable on which are based the deferent provisions as to the grant of bail would not, in our opinion, have any material bearing in dealing with the effect of the

subsequent conduct of accused persons on the continuance of fair trial itself. If an accused person, by his conduct, puts the fair trial into jeopardy, by his the primary and paramount duty of criminal courts to ensure that the risk to the fair trial is removed and criminal courts are allowed to proceed with the trial smoothly and without any interruption or obstruction; and this would be equally true in cases of both bailable as well as non-bailable offences. We, therefore, feel no difficulty in holding that, if, by his subsequent conduct, a person accused of a bailable offence forfeits his right to be released on bail, that forfeiture must be made effective by invoking the inherent power of the High Court under s. 561A. Omission of legislature to make a specific provision in that behalf is clearly due to oversight or inadvertence and cannot be regarded as deliberate.

(Emphasis given)

18. Resultantly, the present petition is dismissed.
19. Observations in the impugned order shall have no impact on the merits of the case.

**(S.P.GARG)
JUDGE**

FEBRUARY 28, 2017 / tr