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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.REF. 1/2017

COURT ON ITS OWN MOTION

..... Petitioner

Through: Mr. Dayan Krishnan, Sr. Advocate
(Amicus Curiae) with Mr. Trideep
Pais, Mr. Akhand Pratap, Mr. Sanjeevi
and Ms. Aakash Lodha, Advs.

versus

STATE

..... Respondent

Through: Mr. Rahul Mehra, Standing Counsel
(Crl.) for State with Ms. Kusum
Dhalla, APP for State

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

ORDER
24.10.2017

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Dr. S. Muralidhar, J.:

1. The present reference to this Court under Section 395 (2) of the Code of Criminal Procedure, 1973 (Cr PC) was made by the learned Metropolitan Magistrate (MM), Karkardooma Courts, Delhi by an order dated 1st March, 2017. The order making the reference is in two parts. In the first part, the learned MM *inter alia* has noted as under:

“On factual score, the counsel wanted to project his defence theory to suggest that no case was made out. This apparently cannot be appreciated at the investigation stage. Prima facie, **I am satisfied that there is no reason to believe that no case for an offence punishable with life imprisonment is made out. As such, the situation falls**

within the ambit of bar created by Section 437 Cr PC regarding life imprisonment cases”. (emphasis supplied)

2. It may be noted that under Section 395 (2) Cr PC, the learned MM could refer a question of law to this Court as long as such question arose “in any case pending before the Court.” Further such question of law should arise in “the hearing of such case”. From the above extracted passage of the order of the learned MM, it is plain that the question referred to this Court did not arise from the facts of the case. The reference was therefore not in conformity with the requirement of Section 395 (2) Cr PC. In the facts and circumstances of the case, it was unnecessary.

3. Nevertheless, the learned MM proceeded to refer to this Court the following question for consideration:

“Whether the Magistrate has power to grant bail in a case punishable with life imprisonment, but triable by a Magistrate?”

4. By order dated 20th April 2017, Mr. Dayan Krishnan, Senior Advocate, was appointed as *amicus curiae*. He has filed a written note of submissions. Mr. Krishnan points out that on a plain reading of Section 437 Cr PC, it is evident that the learned MM would have the power to grant bail, but unlike the High Court or a Court of Sessions, such power is circumscribed by conditions stipulated under Section 437 (1) Cr PC itself.

5. Section 437 (1) Cr PC reads as under:

“Section 437 (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.”

6. Mr. Krishnan is right in pointing out that even a plain reading of Section 437 (1) Cr PC makes it clear that the learned MM does have the power to release on bail a person accused of commission of a non-bailable offence subject however, to the conditions in sub-clauses (i) and (ii) of sub-section (1) of Section 437 Cr PC. Under sub-clause (i) for instance, such person shall not be released on bail if it appears to the Magistrate that there are reasonable grounds of believing that he is guilty of an offence punishable with death or life imprisonment.

7. It is trite that each case turns on its own facts. As already noted, in the present case, as far as the factual aspect is concerned, the learned MM has

himself in the order making the reference recorded his *prima facie* satisfaction that “there is no reason to believe that no case for an offence punishable with life imprisonment is made out”. Since the bar clause (i) of Section 437 (1) Cr PC stood attracted according to the learned MM, that by itself was sufficient to reject the bail application.

8. Whether in some other fact situation the learned MM could have exercised the power of granting bail under Section 437 (1) Cr PC is best left open to be decided in an appropriate case.

9. The Supreme Court in ***Prahlad Singh Bhati v. NCT of Delhi (2001) 4 SCC 280*** explained that the MM has the power to grant bail but subject to the conditions specified in Section 437 (1) Cr PC being satisfied. The relevant passages of the said decision read thus:

“5. Chapter XXXIII relates to the provisions as to bails and bonds. Section 436 provides that when any person accused of a bailable offence is arrested or detained without warrant by an officer incharge of the police station, or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person shall be released on bail. Under Section 437 of the Code when a person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, he may be released on bail by a court other than the High Court and Sessions subject to the conditions that he does not reasonably appear to have been guilty of an offence punishable with death or imprisonment for life. The condition of not releasing the person on bail charged with an offence punishable with death or imprisonment for life shall not be applicable if such person is under the age of 16 years or is a woman or is sick or infirm, subject to such conditions as may be imposed. It does not, however, mean that persons specified in the first proviso to sub-section (1) of Section 437 should necessarily be released on bail. The proviso is an enabling provision which confers jurisdiction upon a court, other than

the High Court and the court of Sessions, to release a person on bail despite the fact that there appears reasonable ground for believing that such person has been guilty of an offence punishable with death or imprisonment for life. There is no gainsaying that the discretion conferred by the Code has to be exercised judicially. Section 438 of the Code empowers the High Court and the Court of Sessions to grant anticipatory bail to a person who apprehends his arrest, subject to the conditions specified under sub-section (2) thereof.

6. Even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a court of Sessions yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Sessions for the purposes of getting the relief of bail. Even in a case where any Magistrate opts to make an adventure of exercising the powers under Section 437 of the Code in respect of a person who is, suspected of the commission of such an offence, arrested and detained in that connection, such Magistrate has to specifically negotiate the existence of reasonable ground for believing that such accused is guilty of an offence punishable with the sentence of death or imprisonment for life. In a case, where the Magistrate has no occasion and in fact does not find, that there were no reasonable grounds to believe that the accused had not committed the offence punishable with death or imprisonment for life, he shall be deemed to be having no jurisdiction to enlarge the accused on bail”

10. Again in ***Sundeeep Kumar Bafna v. State of Maharashtra (2014) 16 SCC 623*** the legal position was explained by the Supreme Court as under:

“8. Some poignant particulars of Section 437 Cr PC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being “brought before a Court”, the present provision postulates the accused being “brought before a Court other than the High Court or a Court of Session” in respect of the commission of any non-bailable offence. As observed in ***Gurcharan Singh vs State (1978) 1 SCC 118***, there is no provision in the Cr PC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of

Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the Cr PC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in *State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335*, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. **The Cr PC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered.** It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the Cr PC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the Cr PC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the Cr PC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazoned by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and,

therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severely curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the Cr PC." (emphasis supplied)

11. The question referred to the Court is accordingly answered in the affirmative with the caveat that neither bar under sub-clause (i) or (ii) of Section 437 (1) Cr PC, subject to the provisos thereto, should stand attracted. The reference is disposed of.

S.MURALIDHAR, J.

I. S. MEHTA, J.

OCTOBER 24, 2017

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