

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRM-M No. 29702 of 2018 (O&M)

Date of decision : 19.12.2018

Vinod Kumar

.....Petitioner

Versus

State of Haryana

...Respondent

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present : Mr. P. S. Poonia, Advocate for the petitioner.

Ms. R. S. Doon, AAG, Haryana.

* * *

DAYA CHAUDHARY, J.

CRM No.42568 of 2018

This application is for placing on record Annexure A-1 (Colly).

Application is allowed and Annexure A-1 (Colly) annexed with
the application is taken on record.

CRM-M No. 29702 of 2018

Petitioner Vinod Kumar has filed the present petition under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the “Code”) for grant of regular bail to him in case FIR No.269 dated 02.04.2016 under Sections 406, 420, 467, 468, 471, 120-B of the Indian Penal Code, 1860 registered at Police Station – City, Hisar, during pendency of the trial.

Learned counsel for the petitioner submits that the petitioner has falsely been implicated in the case, whereas he has no concern with

the alleged offence in any manner. Even a single penny has not been received by him from the bank. He is not the beneficiary of the loan amount disbursed by the complainant company and no recovery, whatsoever, has been effected from him by the police. Learned counsel also submits that the only role attributed to him is that he was presented by co-accused Rajesh alias Sonu and Ashish Bansal before Sub Registrar as well as before financial company as Ram Naryan without his knowledge and by keeping him in dark. The investigation has been completed and no incriminating evidence has been collected by the investigating agency against him. At the end, learned counsel for the petitioner submits that the petitioner is in custody since 27.03.2018. There is no progress in the trial as only the challan has been presented, still the trial may take long time to conclude and the petitioner is entitled for bail under the statutory provisions of Section 437 (6) of the Code. In support of his arguments, he has also placed reliance upon judgment of this Court in case ***Sukhdev Singh Vs. State of Punjab 2009 (3) R.C.R. (Criminal) 291.***

Learned State counsel has opposed the submissions made by learned counsel for the petitioner on the ground that the petitioner has not moved any application for grant of benefit of the provision as envisaged under Section 437(6) of the Code and without moving any such application, he cannot take such benefit from this Court. However, the custody period undergone by the petitioner has not been disputed.

Heard arguments of learned counsel for the parties and have also perused the *zimni* orders as well as other documents available on the

record.

Section 437 (6) of the Code is relevant for resolving the controversy in the case in hand, which is reproduced as under : -

“437. When bail may be taken in case of non-bailable offence.

(1) xx xx xx

(2) xx xx xx

(3) xx xx xx

(4) xx xx xx

(5) xx xx xx

(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.

(7) xx xx xx”

The above said provision mandates that in case of non-bailable offence, which is being tried by a Magistrate and the trial has not been concluded within a period of sixty days from the first date fixed for taking evidence in the case and the accused has remained in custody during whole of the said period, he becomes entitled to be released on bail. However, the Magistrate can decline the benefit of aforesaid provisions by recording reasons in writing.

On perusal of the *zimni* orders, which have been placed on record by moving separate application by learned counsel for the petitioner, which have not been disputed by learned State counsel, it is evident that the trial has not been concluded within a period of sixty days from the date of

framing of the charge or the first date fixed for recording statement of the prosecution witnesses and the accused remained in custody during that period.

Undisputedly, the delay has not occurred because of the fault on the part of the petitioner and the bail has not been granted to him, whereas he is entitled for bail in view of provisions of Section 437 (6) of the Code.

It is not disputed that the petitioner has remained in custody during said period of more than sixty days from the first date for recording the evidence and no delay has been attributed to him. The reasons given by learned State counsel or by the Court below cannot be sustained and as such the petitioner is entitled for the concession of bail as envisaged under Section 437 (6) of the Code.

In *Sukhdev Singh's* case (supra) as well as in *Amit Sharma Vs. State of Haryana 2015 (2) PLJ (Criminal) 164*, the accused was held entitled to bail by granting benefit of Section 437(6) of the Code.

In the present case, the petitioner is in custody since 27.03.2018, the first date of recording of statement of prosecution witnesses was 21.07.2018. The issue is as to whether the provisions of sub-section 6 of Section 437 of the Code are mandatory or not. Gujarat High Court in the case of *Mukeshkumar Ravishankar Dave Vs. State of Gujrat 2011(6) R.C.R. (Criminal) 2650* and in the case of *Riza Abdul Razak Zunzunia Vs. State of Gujarat 2009 Cri.L.J. 4766* held that the provision of sub-section 6 of Section 437 Cr. P.C. is not mandatory. Similarly, Chhattisgarh High

Court in the case of ***Gulab Singh Banjare & Ors. Vs. State of Chhattisgarh 2011(6) R.C.R. (Criminal) 966*** and ***Atul Bagga Vs. State of Chhattisgarh 2010 Cri.L.J. 508*** held that the said provision is not mandatory.

Madhya Pradesh High Court (Gwalior Bench) in case of ***Ram Kumar @ Ram Kumar Rathore Vs. State of M. P. 2000(3) R.C.R. (Criminal) 126*** held that sub-section 6 of Section 437 of the Code is mandatory.

In ***Sukhdev Singh's*** case (supra), a Single Judge Bench of this Court held that accused becomes entitled to be released on bail, but this Court also held that the Magistrate can decline bail by recording reasons in writing.

In case of ***Smt. Bachchan Devi & Anr. Vs. Nagar Nigam, Gorakhpur & Anr. AIR 2008 SC 1282***, Hon'ble the Apex Court had to say thus:-

“11. The delicate question that remains to be examined is what is the position in law when both the expression “shall” and “may” are used in the same provision.

12. Mere use of word ‘may’ or ‘shall’ is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the

issue.

28. *The use of the word 'shall' in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding would be invalid. on the other hand, it is not always correct to say that when the word 'may' has been used, the statute is only permissible or directory in the sense that non-compliance with those provisions will not render the proceeding invalid.*

29. *Words are the skin of the language. The language is the medium of expressing the intention and the object that particular provision or the Act seeks to achieve. Therefore, it is necessary to ascertain the intention. The word 'shall' is not always decisive. Regard must be had to the context, subject-matter and object of the statutory provision in question in determining whether the same is mandatory or directory. No universal principle of law could be laid in that behalf as to whether a particular provision or enactment shall be considered mandatory or directory. It is the duty of the court to try to get at the real intention of the legislature by carefully analysing the whole scope of the statute or section or a phrase under consideration. ... The word 'shall', though prima facie gives impression of being of mandatory character, it requires to be considered in the light of the intention of the legislature by carefully attending to the scope of the statute, its nature and design and the consequences that would flow from the construction thereof one way or the other. In that behalf, the court is required to keep in view the impact on the profession, necessity of its compliance; whether the statute, if it is avoided, provides for any contingency for non-compliance; if the word 'shall' is construed as having mandatory character, the mischief that would ensue by such construction; whether the public convenience would be subserved or public inconvenience or the general inconvenience that may ensue if it is held mandatory and all other relevant circumstances are required to be taken into consideration in construing whether the provision*

would be mandatory or directory.

30. The question, whether a particular provision of a statute, which, on the face of it, appears mandatory inasmuch as it used the word “shall”, or is merely directory, cannot be resolved by laying down any general rule, but depends upon the facts of each case particularly on a consideration of the purpose and object of the enactment in making the provision. To ascertain the intention, the court has to examine carefully the object of the statute, consequence that may follow from insisting on a strict observance of the particular provision and, above all, the general scheme of the other provisions of which it forms a part. The purpose for which the provision has been made, the object to be attained, the intention of the legislature in making the provision, the serious inconvenience or injustice which may result in treating the provision one way or the other, the relation of the provision to other consideration which may arise on the facts of any particular case, have all to be taken into account in arriving at the conclusion whether the provision is mandatory or directory. Two main considerations for regarding a rule as directory are: (i) absence of any provision for the contingency of any particular rule not being complied with or followed, and (ii) serious general inconvenience and prejudice to the general public would result if the act in question is declared invalid for non-compliance with the particular rule.

31. It is well settled that the use of the word “may” in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word “may” as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word “may”, the court has to consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well settled that where the word “may” involves a discretion coupled with an obligation or where it confers a positive benefit to a

general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words directory significance would defeat the very object of the Act, the word “may” should be interpreted to convey a mandatory force. As a general rule, the word “may” is permissive and operative to confer discretion and especially so, where it is used in juxtaposition to the word “shall”, which ordinarily is imperative as it imposes a duty. Cases, however, are not wanting where the words “may”, “shall” and “must” are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances. The distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect. The distinction reflected in the use of the word ‘shall’ or ‘may’ depends on conferment of power.”

In the case of ***Sharif-ud-Din Vs. Abdul Gani Lone AIR 1980***

SC 303, the Apex Court had to say thus:-

“9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: The fact that the statute uses the word “shall” while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as

mandatory.”

By considering the test to be determined the mandatory or directive nature of said provision as formulated above by Hon'ble the Apex Court and on having glance at sub-section 6 of Section 437 of the Code, the use of word “shall” in sub-section 6 of Section 437 of the Code is not conclusive. In view of said provision that the Magistrate has been asked to give reasons to be recorded in writing for not releasing the person on bail, if the trial is not concluded within a period of sixty days from the date of first date fixed for evidence in the case, the provisions of sub-section 6 of Section 437 of the Code cannot be held to be mandatory.

Judgement of Gujarat High Court in ***Mukeshkumar Ravishankar Dave's*** case (supra) is relevant. The relevant portion of Para-17 of said judgment is reproduced as under:-

“17. Therefore, if the provisions of section 437(6) of the Code are closely considered, it appears that enough care has been taken by the legislature. There is an inbuilt exception provided leaving it to the discretion of the magistrate or the court when the words used are “unless for reasons to be recorded in writing.” These words carve out an exception to the general proposition or the rule which is provided in sec. 437(6) of Cr. P.C. Therefore, on the one hand, when this provision has been made enabling the court to exercise the discretion, the exception is also carved out that while exercising such discretion or considering such application, if such application is turned down, the magistrate is obliged to record reasons for that. In other words, this itself would suggest that when the discretion is left with the Magistrate as per the language of section 437(6) itself, it cannot be said to be mandatory as sought to be canvassed.”

From the above discussion and after going through the provisions of Section 437(6) of the Code, it cannot be held to be mandatory and the Magistrate for the reasons to be recorded in writing is entitled to refuse to release the accused on bail.

In a number of decisions including the decision of case Lal Sahu Vs. State of Chhattisgarh, Haricharan Ramteke Vs. State of Chhattisgarh, Godawari Bai and others Vs. State of Chhattisgarh and decisions of other High Courts, the scope and ambit of provision contained under Section 437 (6) of the Code has been considered. Broadly speaking while considering application for grant of bail under Section 437 (6) of the Code, the considerations are those which have been laid down in Para No.11 of Lal Sahu's case (supra), which is reproduced as under :-

"11. The question that arises for determination is as to what factors should weigh with the Magistrate while refusing grant of bail under sub-section (6) of Section 437 of the Code. In my considered opinion, apart from the gravity of offence and the quantum of punishment, one or more of the following factors, among others may weigh with the Magistrate while refusing bail:-

- (a) the overall impact of the offence and the release of the person accused of such offence on the society,*
- (b) the possibility of tampering of evidence by the accused,*
- (c) the possibility of the accused absconding if released on bail, and*
lastly,
- (d) the delay in conclusion of the trial within a period of 60 days if attributable to the accused."*

After discussing the orders passed by different High Courts and on perusal of provisions of Section 437 of the Code and apart from other grounds sub-section 6 of Section 437 of the Code envisages 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 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”. The above provision intends to expedite the trial without unnecessarily detaining a person as an under trial prisoner. The same applies only to a case triable by a Magistrate and the underlying intention behind the above provision of sub-section 6 is that a criminal trial should be concluded within sixty days from the first date fixed for taking evidence and if it is not possible to conclude the case within that time, the accused, if in custody, shall be released on bail unless the Magistrate for reasons to be recorded otherwise directs. Similar provision has been made in the Code for the investigation stage.

As per the provision of Section 167(2) of the Code proviso sub (a) if the investigation is not concluded within ninety days or sixty days, 'as the case may be, from the date of the arrest of the accused, then he is entitled for release on bail. Therefore, these provisions are mandatory and incorporated in the Code in order to ensure the speedy trial so that the accused persons should not languish in jail or police custody for indefinite period without any fault on their part. Similarly, sub-section (7) of Section 437 envisages that if after conclusion of the trial of a person accused of non-bailable offence and the judgment is not delivered and the Court is of the opinion that there are reasonable grounds for believing that the accused

is not guilty of an offence, it shall release the accused, if he is in custody. Therefore, further provision has also been made to ensure that on conclusion of the trial and before judgment is delivered, if the Magistrate is of the opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, in that case also the accused should be released on bail. Therefore, the above provisions are incorporated by the Legislature to ensure that the accused persons are not kept in jail for indefinite period and these provisions are mandatory in nature. The Court is obliged to release the accused on bail if the conditions mentioned in the above sections are otherwise satisfied.

The same issue was there before the Division Bench of Delhi High Court in case of ***Robert Lendi Vs. The Collector of Customs & Anr.*** ***1987 Cri.L.J. 55***, wherein the Division Bench answered this question, in the following words:

“21. The next question that arises for consideration is whether while refusing bail under sub-section (6) of Section 437 of the Code the Magistrate can only refuse bail on the limited reasoning germane to the cause of delay and whether the bail can be refused on the general grounds recognized as good for refusal to grant bail. Undoubtedly, the object of sub-section (6) of Section 437 of the Code is to eradicate delay in trial. To us, it appears that it is equally important that the ends of justice do not suffer. The procedural laws are essentially meant to safeguard the interest of justice. The twin objections namely to eradicate 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. We find nothing in the provision to support

the assertion of Mr. Mehta that the reasons for declining the bail under this provision should be only those, which are germane to the cause of delay. There is no reason to give such a restricted meaning to the provision. The expression used in the provision is unless for reasons to be recorded in writing, the Magistrate otherwise directs. A plain reading of the expression shows that the Legislature has put no fetters on the powers of the Magistrate that under this provision bail can only be refused for reasons germane to the cause of delay. If that were so, the Legislature would have certainly made it clear. To us it appears that the consideration 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 the Magistrate is that should he decide to decline to grant bail, he must record his reasons in writing. There are no fetters placed on the exercise of this discretion.”

By following the aforesaid decision of the Division Bench of Delhi High Court, the Jharkhand High Court is also answered this question in the matter of ***Didar Singh Vs. State Jharkhand 2006 Cri.L.J. 1594***, in which it was held as under:

“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 Cr. P. C. 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) Cr. P. C. the right to be released on bail is absolute under the provision of Section 437(6) of the Cr. P. C. 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 Cr. P. C. 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. L.J.55) (Supre) 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.”

The same issue was there before the Division Bench of Madhya Pradesh High Court in case of ***Devraj Maratha @ Dillu Vs. State of M. P., M.Cr.C. No.2668 of 2018*** decided on 16.03.2018, wherein it has been held as under:-

“16. The use of word “may” or “shall” is not conclusive. Whether the provision is merely directory or mandatory, was examined by Hon'ble the Supreme Court in a judgment reported as (2007) 8 SCC 338 (Dhampur Sugar Mills Ltd. vs. State of U.P.), wherein it has been held that whether the provision is directory or mandatory is required to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the provision is clothed. The Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to

ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue. The relevant extract from the judgment reads thus :

“35. Reading the substantive provisions in the Act as also subordinate legislation by way of the Rules, there is no doubt in our minds that the submission of the learned counsel for the writ petitioner that such a Committee ought to have been constituted by the State is well- founded and must be upheld. The High Court dealt with the submission of the writ petitioner but did not accept it observing that the Legislature had used the expression “may” and not “shall” in Section 3 of the Act. The Court ruled that the provision was merely directory and not mandatory.

36. We are unable to subscribe to the above view. In our judgment, mere use of word “may” or “shall” is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue.

37. Several statutes confer power on authorities and officers to be exercised by them at their discretion. The power is in permissive language, such as, “it may be lawful”, “it may be permissible”, “it may be open to do”, etc. In certain circumstances, however, such power is “coupled with duty” and must be exercised.

38. Before more than a century in Baker, Re, Nicholas v.

Baker, (1890) 44 Ch D 262(CA), Cotton, L.J. Stated;

“I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning; but it gives a power, and then it may be question in what cases, where a Judge has a power given by him by the word 'may', it becomes his duty to exercise it.

(emphasis supplied)

39. *In leading case of Julius v. Lord Bishop of Oxford, (1880) 5 AC 214 : 49 LJ QB 577 : (1874- 80) All ER Rep 43 (HL), the Bishop was empowered to issue commission of inquiry in case of alleged misconduct by a clergyman, either on an application by someone or suo motu. The question was whether the Bishop had right to refuse commission when an application was made. The House of Lords held that the Bishop had discretion to act pursuant to the complaint and no mandatory duty was imposed on him.*

40. *Earl Cairns, L.C., however, made the following remarkable and oft-quoted observations :*

(All ER p. 47 H-I) “The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the condition under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to

do so.”

(Emphasis supplied)

41. *Explaining the doctrine of power coupled with duty, De Smith, (Judicial Review of Administrative Action, 1995, pp.300-01) states:*

“Sometimes the question before a court is whether words which apparently confer a discretion are instead to be interpreted as imposing duty. Such words as 'may' and 'it shall be lawful' are prima facie to be construed as permissive, not imperative. Exceptionally, however, they may be construed as imposing a duty to act, and even a duty to act in one particular manner.”

(Emphasis supplied)

42. *Wade also says (Wade & Forsyth, Administrative Law, 9th Edn.) : p.233) :*

“The hallmark of discretionary power is permissive language using words such as 'may' or 'it shall be lawful', as opposed to obligatory language such as 'shall'. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances, prescribed by the Act, coupled with a duty to exercise it in a proper case.”

(Emphasis supplied)

43. *In the leading case of Padfield v. Minister of Agriculture, Fisheries & Food, 1968 AC 997 : (1968) 2 WLR 924 (HL), the relevant Act provided for the reference of a complaint to a committee of investigation “if the Minister so directs”. The Minister refused to act on a complaint. It was held that the Minister was required to act on a complaint in*

absence of good and relevant reasons to the contrary.”

17. *In another judgment reported as (2008) 12 SCC 372, Bachahan Devi vs. Nagar Nigam, Gorakhpur, the Court held that the use of the words “may” and “shall” may help the courts in ascertaining the legislative intent without giving to either a controlling or a determinating effect. The relevant extract from the judgment reads thus :*

“21. The ultimate rule in construing auxiliary verbs like “may” and “shall” is to discover the legislative intent; and the use of words “may” and “shall” is not decisive of its discretion or mandates. The use of the words “may” and “shall” may help the courts in ascertaining the legislative intent without giving to either a controlling or a determinating effect. The courts have further to consider the subject matter, the purpose of the provisions, the object intended to be secured by the statute which is of prime importance, as also the actual words employed.”

18. *Similar is the view reiterated in the judgment reported as (2015) 8 SCC 744 (D.K. Basu vs. State of W.B.), wherein it was held to the following effect :*

“13. A long line of decisions of this Court starting with Sardar Govindrao v. State of M.P., AIR 1965 SC 1222 have followed the above line of reasoning and authoritatively held that the use of the words “may” or “shall” by themselves does not necessarily suggest that one is directory and the other mandatory, but, the context in which the said expressions have been used as also the scheme and the purpose underlying the legislation will determine whether the legislative intent really was to simply confer the power or such conferment was accompanied by the duty to exercise the same.”

19. *On a plain reading of the provision of Section 437(6) of the Code it is graphically clear that it is mandatory in the sense that a person should not be kept in jail ordinarily if a trial for nonbailable*

offence which is triable by the Magistrate, is not concluded within a period of sixty days from the date fixed for evidence. Provided, it is proved that the concerned person was in jail for a period of sixty or ninety days, as the case may be. However, passing of an order under Section 437(6) of the Code appears to be mandatory, but not grant of bail. Sub-section (6) of Section 437 of the Code per se show that if there be any reason for refusing the bail, the Magistrate has to record reasons in writing. Thus, recording of reasons in writing is also mandatory and the reasons would be justiciable in an appropriate criminal or extraordinary jurisdiction under Section 482 of the Code. No fetters have been put on the Magistrate to exercise jurisdiction under Section 437(6) of the Code and bail can be refused for the reasons to be recorded in writing. Magistrate has full power to take into consideration - (i) the nature of allegations; (ii) whether the delay is attributable to the accused or to the criminal prosecution; and (iii) criminal antecedents of the accused or any other justiciable reason.

20. *In view of delineation of facts and law elaborated in a greater detail herein-above, we hold that the law laid down in the cases of Ram Kumar @ Raj Kumar Rathore vs. State of M.P., 2000(2) MPLJ 43; Rajendra son of Rajaram Pal vs. State of M.P., 2002(5) MPLJ 301; and Damodar Singh Chouhan vs. State of M.P., 2005 (II) MPWN 138 wherein it has been held that the provisions of Section 437(6) of the Code are mandatory in nature and the accused is entitled for bail, if the trial is not concluded by the Magistrate within the statutory period and the Magistrate will not have any discretion to refuse bail is not a good law and the law laid down in the case of Asit @ Nakta vs. State of M.P. (supra) and Manoj Agrawal vs. State of M.P. (supra) is approved.”*

In the present case, there is no progress in the trial and delay is not on the part of the accused. The prosecution witnesses are not coming forward to get their statements recorded. In case such order is allowed to

exist, then it would be a failure of justice and accordingly to secure ends of justice and looking to the provision of Section 437(6) of the Code, I am of the considered opinion that inherent powers as envisaged under Section 482 of the Code needs to be exercised. However, the inherent powers are exercised in rare cases and very sparingly, but where the Court reaches to the conclusion that if the power is not exercised then it will amount to abuse of process of the Court and failure of the justice.

The accused is in custody since 27.03.2018 and there are no chance that the trial is likely to be concluded in near future, therefore, I am of the considered view that there is no fault on the part of the accused to delay the proceedings.

Accordingly, this petition is allowed and the petitioner is directed to be released on bail on furnishing adequate bail/surety bonds to the satisfaction of the trial Court/Duty Magistrate. However, the accused should give an undertaking that he will appear before the trial Court on each and every date of hearing given by the Court.

19.12.2018

sunil yadav

**(DAYA CHAUDHARY)
JUDGE**

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No