

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MCRC No. 8523 of 2016**

Order Reserved On : 01/11/2018

Order Passed On : 05/04/2019

- Tejram Nagrachi Juvenile S/o Mohanlal Nagrachi Aged About 16 Years Wrongly Mentioned As Nagarachi In The Rejection Order Of The Court Below, Through His Legal/ Natural Guardian Father Mohanlal Nagrachi, S/o Dashru Ram Nagrachi, Aged About 46 Years, R/o Village Bhendra, Mahaveer Para, Post Office, Police Station And Tahsil-Bhakhara, District Dhamtari, Chhattisgarh.

---- Applicant

Versus

- State Of Chhattisgarh Through The Station House Officer, Police Station Bhakhara, District Dhamtari, Chhattisgarh.

---- Non-Applicant

MCRC No. 6724 of 2016

- Jayant Kumar Sinha S/o Late Khemnath Sinha Aged About 17 Years R/o - Village Sibdi, Tehsil Gunderdehi Police Station Suregaon District Balod Chhattisgarh, Chhattisgarh

---- Applicant

Versus

- State Of Chhattisgarh Through District Magistrate District - Balod Chhattisgarh

---- Non-Applicant

For Applicant : Shri Kapil Maini and Shri Shivendu Pandya, Advocates.
For Non-Applicant : Shri Y.S. Thakur, Additional Advocate General.
As Amicus Curiae : Shri Sunil Otwani, Advocate.

Hon'ble Shri Prashant Kumar Mishra, Ag.C.J. &
Hon'ble Smt. Vimla Singh Kapoor, J

C A V Order

The following Order of the Court was passed by **Prashant Kumar Mishra, Acting Chief Justice -**

1. These two bail applications under Section 439 of the Code of Criminal Procedure (for short 'the Code') have been placed before us for answering the reference made by the learned Single Judge while deferring with the view taken by the coordinate Bench in the matters of **Mohan Vs. State of CG** {2005 Cri L J 3271 : 2005 SCC OnLine Chh 126} followed in **Subhash Kumar @ Sonu Vs. State of Chhattisgarh** {MCrC No.5651/2014, order dated 28.11.2014}. While the view in **Mohan** and **Subhash Kumar @ Sonu** was that despite the provisions contained in Section 12 of the Juvenile Justice (Care and Protection of the Children) Act, 2000, which is *pari materia* to the Juvenile Justice (Care and Protection of Children) Act, 2015 (henceforth 'the Act of 2015'), the bail application under Section 439 of the Code is maintainable before the Sessions Court and the High Court, correctness of the view has been doubted by the learned Single Judge and the following question has been referred for decision by a Bench of Two Judges:-

“Whether in view of non obstante clause contained in Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015, provisions under Section 437 and 439 of Cr.P.C. are applicable for being invoked for grant of bail by a child in conflict with law as defined under the Juvenile Justice (Care and Protection of Children) Act, 2015.”

2. In **Mohan** (Supra), it is held in para-13 that the Act does not take away the power and jurisdiction of the High Court or Court of Session regarding bail as provided under Sections 438 and 439 of the Code. Similar view was

taken by another coordinate Bench in the matter of **Subhash Kumar @**

Sonu, referred to above, holding thus at para-12:-

“12.Thus, taking into consideration the provisions contained in sub-section (2) of Section 6 of the Act, 2000, it is quite vivid that power conferred to the Juvenile Justice Board under the Act, 2000 can also be exercised by the High Court and the Court of Session either in appeal or revision or otherwise and the word “otherwise” also includes proceeding under Section 439 Cr.P.C. Thus, I hold that this bail application under Section 439 of the Cr.P.C., by the juvenile on refusal to grant bail by the Court of Session, is maintainable under law and it is held accordingly.”

3. Taking contrary view, the learned Single Judge would conclude thus at para-18 of the Reference Order:-

“18.Analyzed as above, the Juvenile Justice (Care and Protection of Children) Act, 2015 contains provision for grant of bail which is different from the scheme of grant of bail under Section 437 or 439 of Cr.P.C. as both operate on different considerations, though some of the considerations like consideration that grant of bail is likely to defeat the ends of justice could be relevant in both the cases. Therefore, it is vividly clear that the two schemes for grant of bail, one with regard to post arrest bail found under Section 437 & 439 of Cr.P.C. and other found under Section 12 of the Act of 2015 are inconsistent with each other and there is a great degree of repugnancy between them. While considering application for grant of bail under Section 439 Cr.P.C., mere gravity of allegations by itself may be ground for rejecting the bail but that considerations may not apply while considering grant of bail to a juvenile. Similarly, the Juvenile Justice Board shall have to reject the application for grant of bail of juvenile, if there appears to be reasonable ground for believing that release may expose the juvenile to moral, physical or psychological danger, which may not be relevant while considering application for grant of bail under Section 437 or 439 of Cr.P.C. Therefore, a comparative reading of the scheme for grant post arrest bail under general law and the special law reveals that the two schemes are inconsistent with each other. If this kind of conflict, inconsistency or repugnancy exists, non-obstante clause would operate to exclude the applicability of general provisions relating to bail contained under the Code of Criminal Procedure to the extent, it is inconsistent with the scheme of grant of post arrest bail under Section 12 of the Act of 2015. It is equally settled proposition of

law that where there is no special provision made in special law and it is silent on a particular aspect, the provisions of general law will hold field and would be applicable.”

4. To answer the reference, it would be necessary to refer to the relevant provisions under the Code and the Act of 2015. Sections 437 and 439 of the Code are, therefore, reproduced hereunder for ready reference:-

437. When bail may be taken in case of non- bailable offence- (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 cognizable offence punishable with imprisonment for three years or more but not less than seven years.:

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.]

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the public prosecutor.

- (2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no

reasonable grounds for believing that the accused has committed a non- bailable offence, but that there are sufficient grounds for further inquiry into his guilt the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail] or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub- section (1), the Court shall impose the conditions -

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence,

and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under sub-section (1) or sub- section (2), shall record in writing his or its reasons or special reasons] for so doing.

(5) Any Court which has released a person on bail under sub- section (1) or sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(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) If, at any time after the conclusion of the trial of a person accused of a non- bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

439. Special powers of High Court or Court of Session regarding bail.

(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub- section;

(b) that any condition imposed by a Magistrate when releasing an person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.”

5. Similarly, certain provisions contained in Section 2 of the Act of 2015 defining the 'child', 'child in conflict with law' and 'juvenile' are relevant for our purpose, therefore, they are reproduced hereunder:-

“2 (12). “child” means a person who has not completed eighteen years of age;

2(13). “child in conflict with law” means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;

2 (35). “juvenile” means a child below the age of eighteen years;.”

6. Sections 8, 10 & 12 of the Act, 2015 would also require to be referred, therefore, they are also reproduced hereunder for ready reference:-

“8. Powers, functions and responsibilities of the Board. -
(1) Notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, the Board constituted for any district shall have the power to deal exclusively with all the

proceedings under this Act, relating to children in conflict with law, in the area of jurisdiction of such Board.

- (2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Children's Court, when the proceedings come before them under section 19 or in appeal, revision or otherwise.
- (3) The functions and responsibilities of the Board shall include--
 - (a) ensuring the informed participation of the child and the parent or guardian, in every step of the process;
 - (b) ensuring that the child's rights are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation;
 - (c) ensuring availability of legal aid for the child through the legal services institutions;
 - (d) wherever necessary the Board shall provide an interpreter or translator, having such qualifications, experience, and on payment of such fees as may be prescribed, to the child if he fails to understand the language used in the proceedings;
 - (e) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed;
 - (f) adjudicate and dispose of cases of children in conflict with law in accordance with the process of inquiry specified in section 14;
 - (g) transferring to the Committee, matters concerning the child alleged to be in conflict with law, stated to be in need of care and protection at any stage, thereby recognising that a child in conflict with law can also be a child in need of care simultaneously and there is a need for the Committee and the Board to be both involved;
 - (h) disposing of the matter and passing a final order that includes an individual care plan for the child's rehabilitation, including follow up by the Probation Officer or the District Child Protection Unit or a member of a non-governmental organisation, as may be required;
 - (i) conducting inquiry for declaring fit persons regarding care of children in conflict with law;
 - (j) conducting at least one inspection visit every month of residential facilities for children in conflict with law and recommend action for improvement in quality of services to the District Child Protection Unit and the State Government;
 - (k) order the police for registration of first information report for offences committed against any child in conflict with

law, under this Act or any other law for the time being in force, on a complaint made in this regard;

- (l) order the police for registration of first information report for offences committed against any child in need of care and protection, under this Act or any other law for the time being in force, on a written complaint by a Committee in this regard;
- (m) conducting regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer of such a child to the observation home; and
- (n) any other function as may be prescribed.

10. Apprehension of child alleged to be in conflict with law.

(1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail.

(2) The State Government shall make rules consistent with this Act,--

- (i) to provide for persons through whom (including registered voluntary or nongovernmental organisations) any child alleged to be in conflict with law may be produced before the Board;
- (ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.

12. Bail to a person who is apparently a child alleged to be in conflict with law.-

(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known

criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.”

7. A conjoint analysis of the provisions contained in Sections 437 and 439 of the Code viz a viz Sections 8, 10 and 12 of the Act, 2015 would discern that while there are certain general guidelines under Sections 437 & 439 of the Code, power in respect of grant of bail to a juvenile is more liberal in the nature of command under Section 12 (1) that whenever an apparent juvenile alleged to have committed a bailable or non-bailable offence is detained by the police or appears or brought before a Board, such person **shall**, notwithstanding anything contained in the Code or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person. The only rider for not releasing the apparent juvenile is that whenever there appears reasonable grounds for believing that the release is likely to bring that person (Juvenile) into association with any known criminal or expose the said person to moral, physical or psychological danger or his release would defeat the ends of justice, the Board shall record

the reasons for denying the bail and circumstances that led to such a decision. This rider as contained in proviso to Section 12 (1) requires the Board to record reasons for denying the bail. It would mean that ordinarily the bail is to be allowed to a juvenile. The denial being exceptional on certain reasons to be recorded by the Board as provided in the proviso. This special provision is not contained under Section 439 of the Code.

8. In the matters of **Mohan** and **Subhash Kumar @ Sonu** (Supra), the coordinate Benches have based their decision over the use of the word “otherwise” in sub-section (2) of Section 6 of the Juvenile Justice (Care and Protection of Children) Act, 2000, which is *pari materia* to Section 8 (2) of the Act of 2015. However, the said provision does not deal with the powers of the Board to grant bail which is specifically contained under Section 12 of the Act, of 2015. While there is no denial of the fact that when the Court of Sessions exercises appellate power under Section 101 (2) and the High Court exercises revisional power under Section 102 of the Act of 2015, it shall exercise power of the Board provided under Section 8(2), but this power of the Board would also be available to the Court of Sessions or to the High Court when it proceeds to examine the plea of juvenile for grant of bail whenever such occasion arises on account of bail application of juvenile being rejected under Section 12 of the Act of 2015. Therefore, by use of the term “otherwise” in Section 8(2), jurisdiction under Section 439 of the Code would not be attracted which is otherwise excluded by use of the term “notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force”, as occurring in Section 12 (1).

9. It is also to notice that under the statutory scheme of the Act of 2015, a comprehensive provision has been made as to how a child in conflict with law has to be dealt with when he is apprehended and not released on bail. The said provisions are contained under sub-sections (2), (3) & (4) of Section 12 of the Act of 2015. Under the said provision, on denial of bail, such person (Juvenile) has to be kept in observation home in the manner prescribed until he is brought before the Board. It is also provided that when a child in conflict with law is unable to fulfill the conditions of bail within 7 days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.
10. The provisions *pari materia* to this are not available under Section 439 of the Code, therefore, on denial of bail under Section 439 of the Code or when the bail is allowed but the juvenile is not able to satisfy the conditions of bail, it is not mandated under the Code that such child shall be produced before the Board for modification of the conditions of bail. In the absence of this provision either in case of denial of bail or even when the bail is allowed under Section 439 of the Code, but the conditions of bail are not satisfied, the juvenile would be deprived of his statutory right under Section 12 (2), (3) & (4) of the Act of 2015. It is precisely for this reason Section 12 of the Act of 2015 provides for overriding effect due to use of non-obstante clause, therefore, the post arrest bail of juvenile in conflict with law is required to be dealt with under the special provision contained in Section 12 of the Act of 2015 and to the said extent it will exclude operation of Section 437 and/or Section 439 of the Code.
11. While concluding above, we have kept in our mind the statement of objects

and reasons for enacting the Act of 2015, which are reproduced hereunder for ready reference:-

“Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Articles 39 (e) and (f), 45 and 47 further makes the State responsible for ensuring that all needs of children are met and their basic human rights are protected.

2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate measures in case of a child alleged as, or accused of, violating any penal law, including (a) treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth (b) reinforcing the child's respect for the human rights and fundamental freedoms of others (c) taking into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

3. The Juvenile Justice (Care and Protection of Children) Act was enacted in 2000 to provide for the protection of children. The Act was amended twice in 2006 and 2011 to address gaps in its implementation and make the law more child-friendly. During the course of the implementation of the Act, several issues arose such as increasing incidents of abuse of children in institutions, inadequate facilities, quality of care and rehabilitation measures in Homes, high Pendency of cases, delays in adoption due to faulty and incomplete processing, lack of clarity regarding roles, responsibilities and accountability of institutions and, inadequate provisions to counter offences against children such as corporal punishment, sale of children for adoption purposes, etc. have highlighted the need to review the existing law.

4. Further, increasing cases of crimes committed by children in the age group of 16-18 years in recent years makes it evident that the current provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000, are ill equipped to tackle child offenders in this age group. The data collected by the National Crime Records Bureau establishes that crimes by children in the age group of 16-18 years have increased especially in certain categories of heinous offences.

5. Numerous changes are required in the existing Juvenile Justice (Care and Protection of Children) Act, 2000 to address the above mentioned issues and therefore, it is proposed to repeal existing Juvenile Justice (Care and

Protection of Children) Act, 2000 and re-enact a comprehensive legislation inter alia to provide for general principles of care and protection of children, procedures in case of children in need of care and protection and children in conflict with law, rehabilitation and social re-integration measures for such children, adoption of orphan, abandoned and surrendered children, and offences committed against children. This legislation would thus ensure proper care, protection, development, treatment and social re-integration of children in difficult circumstance by adopting a child-friendly approach keeping in view the best interest of the child in mind.

6. The notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives.”

12. It is thus significant to note that treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth coupled with reinforcing the child's respect for the human rights and fundamental freedoms of others as also the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in the society are the stated objects and reasons for enacting the Act of 2015, which includes the special provision for grant of bail under Section 12 of the Act of 2015 which are apparently more beneficial to the child.

13. In **Vaishali Abhimanyu Joshi Vs. Nanasaheb Gopal Joshi** {(2017) 14 SCC 373}, the Supreme Court has held that the purpose for enacting a provision has to be given full effect.

14. In respect of non obstante clause, the Supreme Court in the matter of **Union of India Vs. G.M. Kokil** {1984 Supp SCC 196} has laid down in para-11 as below:-

“11.....It is well known that a non obstante clause is a legislation device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment

or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Thus the non obstante clause in Section 70, namely, “notwithstanding anything contained in that Act” must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act.....”

15. Therefore, Section 12 of the Act of 2015 having included 'notwithstanding anything contained in the Code or in any other law for the time being in force, the provisions as contained in the Code in respect of grant of bail under Sections 437 and 439 of the Code has to be excluded and shall not apply while considering the juvenile's right to be enlarged on bail for which a specific provision has been made under Section 12 and thereafter the appellate and revisional powers of the Court of Sessions and the High Court as contained in Sections 101 and 102 of the Act of 2015, as the case may be.
16. To sum up, we hold that grant of bail to a juvenile is required to be dealt with under Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and not under Sections 437 or 439 of the Code of Criminal Procedure. Hence, these applications for grant of bail are not maintainable.
17. In M.Cr.C. No.6724/2016 (Jayant Kumar Sinha Vs. State of Chhattisgarh) there is interim order releasing him on bail. The said applicant being a juvenile, we are not canceling the bail allowed to him treating the same to have been allowed by the High Court in exercise of powers under Section 102 of the Act of 2015. The interim bail is made absolute.
18. In other bail application viz. MCrc No.8523/2016 (Tejram Nagrachi Vs. State of Chhattisgarh), it is informed that the trial is over, therefore, the bail application has been rendered infructuous.

19. Thus, while answering the reference in the manner mentioned above, we dispose of both the bail applications.

Sd/-
(Prashant Kumar Mishra)
Acting Chief Justice

Sd/-
(Vimla Singh Kapoor)
Judge

Barve

HEADLINES

Bail application of a juvenile is maintainable only under Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and not under Section 437 or 439 of the CrPC.