

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.380 OF 2017

Gurram Narasimhaswami Siddidram] .. Petitioner

Versus

- 1) Dr.G. Harikishan]
700, A Deepmala, 1st Floor,]
4th Road, Parsi Colony,]
Dadar, Mumbai - 400 014.]
- 2) Bhoga Sahadev Gangadhar,]
R.at.34/651, Adarsh Nagar,]
Prabhadevi, Worli Colony,]
Mumbai - 400 030.]
- 3) Yeligeti Rajkumar,]
R/at.127/5, Ganesh Kripa,]
Standard Mill Lane,]
New Prabhadevi Road,]
Mumbai - 400 025.]
- 4) Tatikonda Bhumeswar,]
R/at.Flat No.24, 3rd Floor,]
Prabhadevi Western Apartments]
Near Kismat Cinema,]
Prabhadevi, Mumbai - 400 025.]
- 5) Lekharaju Venkateswara Rao]
R/at.65/103 Parijat, Rising Sun CHS,]
Shivrushti, Kurla East,]
Mumbai - 400 024.]
- 6) Moola Sidda Reddy,]
R/at.204, Sanskruthi Apartment,]
Plot No.21, Sector - 42,]
Nerul (W), Navi Mumbai - 400 025.]

- | | | |
|----|-------------------------------------|-------------------|
| 7) | Pothu Gajaraj Rajaram, |] |
| | R/at.Shree Sai Comple, |] |
| | Building No.5, 'J' - Wing, |] |
| | Flat No.202, 2 nd floor, |] |
| | Prabhadevi, Mumbai - 400 025. |] |
| 8) | Gajam Sudarshan V. |] |
| | R/at.63A, Kharas Building, |] |
| | Near G-South Ward Office, |] .. Respondents |
| | N.M. Joshi Marg, Mumbai-400 013. |] (Orig. accused) |
| 9) | The State of Maharashtra |] .. Respondent |

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Dr.B.K. Subberao a/w. K.H. Kamble i/b. Mr.S.S. Redekar, Advocate for the Petitioner.

Mr.Vivek S. Babar, Advocate for Respondent Nos.1 to 7.

Mr.Sanjay M. Yegurwar, Advocate for Respondent No.8.

Mr.P.H. Gaikwad, APP for the Respondent-State.

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CORAM : PRAKASH D. NAIK, J.

RESERVED ON : JULY 26, 2018.

PRONOUNCED ON : JUNE 7 2019.

JUDGMENT :

The petitioner has challenged order dated 3rd September, 2016, passed below Bail Application of accused nos.1 to 7 at Exhibit-16 in CC No.45/SW/2013, granting bail to accused nos.1 to 7. The petitioner has also challenged order dated 17th September, 2016, passed below bail application of accused no.8 at Exhibit - 27 in CC No.44/SW/2013, granting bail to accused no.8 and the order dated 17th September, 2016, passed by learned Metropolitan Magistrate 61st Court, Kurla, Mumbai, rejecting application Exhibit - 25 preferred by the petitioner.

2 Petitioner filed a private complaint before the Court of Metropolitan Magistrate 51st Court at Kurla, Mumbai, alleging offences under Sections 406, 409, 420, 506, 506 Part-II, 120B of Indian Penal Code ("IPC", for short), on 14th March, 2013, Respondent Nos.1 to 3 were arraigned as accused in the said complaint.

3 Learned Metropolitan Magistrate directed investigation vide Section 156(3) of Code of Criminal Procedure ("Cr.P.C.", for short). In pursuant to that Matunga Police Station registered offence vide M.E.C.R.No.3 of 2013. According to petitioner during the course of investigation, there were attempts to threaten the witnesses and tampering and fabricating evidence. The petitioner filed application dated 30th August, 2013, for issuing necessary directions to the investigating agency for taking preventive measures to stop accused from tampering with the witnesses and evidence. Learned Magistrate by order dated 30th October, 2013, directed concerned investigating officer of Matunga Police Station to take steps against accused persons for stopping them from tampering witnesses and evidence. The petitioner contends that the investigating officer submitted final report on 28th November, 2013, before the Court for classifying the complaint as "C" Summary. The petitioner filed his protest petition. The petitioner submitted note of submissions dated 13th March, 2014 and written submissions dated 18th

March, 2014 and submitted that the Court may examine all the legal evidence and pass appropriate orders to issue process against all the accused and other persons. Learned Magistrate by order dated 2nd April, 2014, directed the complainant to lead evidence of his own or any other witnesses under Section 200 of Cr.P.C. for taking cognizance.

4 The complainant led evidence and produced documents on record. The petitioner filed written submission (Exhibit-13) through his advocate on 29th June, 2016, contending that process be issued against accused. The learned Magistrate by order dated 1st July, 2016, issued process against accused nos.1 to 3 for the offences punishable under Sections 120-B, 406, 408 of IPC and against L.V. Rao, Siddha Reddy, T. Bhumeswar, Potu Rajaram and Gajam Sudarshan, for the offences punishable under Sections 120-B, 468, 471, 420, 201, 406 and 408 of IPC. The Court also issued summons to all the accused returnable on 6th August, 2016.

5 Petitioner contends that in pursuance to the summon issued by the Court, accused nos.1 to 7 appeared along with their advocate before the trial Court on 6th August, 2016. The Court was on leave and hence the case was adjourned to 3rd September, 2016. Accused nos.1 to 7 appeared in person along with their advocate and filed application for bail

at Exhibit-16. Whereas, accused no.8 filed an application seeking his exemption from personal appearance and sought time to furnish surety vide Exhibit-14 and also submitted an undertaking to keep accused no.8 present and file his Vakalatnama on the next date (vide Exhibit-15). Learned counsel for the petitioner urged before the Court to hear him before passing any order on the bail application of respondents/accused nos.1 to 7 and sought copy of bail application for filing say of the petitioner. The Court was pleased to direct counsel for the petitioner to file an application to that effect and inform him that he had already decided to pass an order granting bail to respondents/accused nos.1 to 7, and, there is no provisions to hear the complainant. The Court passed order granting bail to respondent nos.1 to 7. Thereafter, petitioner filed an application on 3rd September, 2012, for remanding the accused to custody vide Exhibit - 25 and to grant hearing on their bail application by relying upon a note which was already prepared by him for opposing bail application and certain authorities referred to therein. It is contended that the Court took the said application on record and directed that the copy be furnished to the accused. Petitioner's counsel pleaded that since the copy of bail application was denied to be given to the petitioner, the copy and the petitioner's application need not be given to the respondents advocate for obtaining their say. It is contended that the Court proceeded to direct the advocate for respondents/original accused to furnish his say

and obtain say on the application at Exhibit-25. The Court also directed the advocate for the petitioner to give say on the exemption application Exhibit-14, preferred by respondent/accused no.8. The application Exhibit-25 was heard and it was adjourned to 17th September, 2016, for orders with liberty to the petitioner's counsel to file further authorities on the right of the petitioner to be heard on the bail application in case of a private complaint. It is further contended that respondent no.8 appeared in Court on 17th September, 2016, and preferred bail application Exhibit-27, which was granted by the Court without hearing the petitioner or learned APP. On 17th September, 2016, after hearing the further submissions of the petitioner on application Exhibit-25, and taking on record further written submissions and authorities in support of his contention, learned Magistrate rejected application Exhibit-25.

6 Learned counsel appearing for the petitioner contends that order dated 3rd September, 2016, passed below Exhibit-16 and order dated 17th September, 2016, passed below Exhibit-27, contravenes provisions of Section 437 of Cr.P.C. It is contended that first proviso to Sub-section (1) of Section 437, reads as *under*:

“ *Provided that the Court may direct that a person referred to in clause (I) or clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any*

other special reasons". In the present case which relates to non-bailable offences with punishment upto seven years. One of the accused is under the age of sixteen years or is a woman or sick or infirm. The fourth proviso to sub-section of Section 437(1) reads as under:

"Provided also that no person shall if offence alleged to have been committed by him is punishable with death, imprisonment of 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."

The present case relating to non-bailable offences punishable upto seven years, the Court granted bail without giving any opportunity of hearing to the public prosecutor or to the complainant. It is submitted that Sub-section 3 of Section 437, which reads as,

"(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 or the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offences, is released on bail under Sub-section (1), the Court shall impose the conditions, -"

It is submitted that this case containing non bailable offences, punishable upto seven years, the learned Magistrate granted bail to the accused without imposing any condition. It is further submitted that there was evidence on record showing that the accused have threatened witnesses and tampered with the evidence. Hence, the orders granting bail are in contravention of Section 437 of Cr.P.C.. Section 437(4) mandates,

“(4) Any 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.”

It is submitted that in this case, learned Magistrate granted bail to the accused without recording any reason, which is in violation of the said provision.

7 Learned counsel for the petitioner further submitted that the Court ought to have called for the say of prosecutor and to offer an opportunity of hearing to the petitioner, as he was directed to lead evidence of his own or any other witness under Section 200 of Cr.P.C., for taking cognizance and thereby the petitioner has been allowed to conduct the prosecution and upon hearing the advocate for the petitioner, the

Court had issued process under Section 204 of Cr.P.C., which is in pursuance of the provisions of Section 302 of Cr.P.C., which enables the learned Magistrate to permit any person to conduct the prosecution, personally or through his pleader with a rider that the Magistrate cannot give such permission to a police officer below the rank of inspector. Hence, the learned Metropolitan Magistrate ought to have held that in the present case which is yet to reach the stage of Section 244 of Cr.P.C., and when the bail application of the accused in non-bailable offence is under consideration, the fourth proviso to sub-section (1) of Section 437 of Cr.P.C., which mandates opportunity of hearing to the public prosecutor, would necessarily mean opportunity of hearing to the complainant and his advocate, as the learned APP in the present case was not present in the Court, when the applications were heard. The learned Magistrate ought to have strictly followed the mandatory statutory provisions of Sub-section (3) and (4) of Section 437 of Cr.P.C., while passing the impugned order dated 3rd September, 2016. The order dated 17th September, 2016, passed by the learned Magistrate rejecting petitioner's application for granting opportunity of being heard is contrary to law.

8 The petitioner has also tendered written submission in support of the petition. Reference is made to several decisions, which were relied upon in support of his submission. It is submitted that in

Bimla Devi Vs. State of Bihar¹, the Court had disproved the method and manner in which the Magistrate granted bail to the accused in non-bailable case. It is submitted that in ***D.K. Rajepadhare Vs. State of Maharashtra***² this Court dealt with petition filed by former Joint Civil Judge and Judicial Magistrate, who had challenged orders passed by the Government of Maharashtra for compulsorily retiring him after a disciplinary enquiry and recommendation of the High Court. It is submitted that while approving the compulsory retirement, this Court has observed in paragraph 14 of his judgment that as far as Section 437 of Cr.P.C. is concerned, bail in the non-bailable offences cannot be granted by a Court other than the High Court or a Court of Sessions. The first proviso in Section 437(1) is the only provision which contains the exceptions, namely, that such a Court may grant bail if a person is under the age of 16 years or is a woman or is sick or infirm. These are the only grounds which are available. These grounds were not available in the said case. Said order was passed without jurisdiction. Learned counsel further submitted that in the case of ***Hanuman Vishwanath Nehare Vs. State of Maharashtra & Ors.***³. This Court in paragraph no.9 has observed that the principles relating to cancellation of bail are well settled. If the bail is granted illegally or by a court having no jurisdiction or the grant of bail shows arbitrariness in granting the same, such bail can be cancelled.

1 1994 SCC (2) 8

2 2005(4) Mah.L.J. 1067

3 2001 (5) Bom CR 879

Learned counsel further contends that in case of ***State of Maharashtra Vs. Khodya Alias Khodidas Sonabhai***⁴, it was observed in paragraph 42 that the provisions contained in Section 437(1), (2) and (5) remain active and in force all throughout whereby all the considerations for release of the accused on bail under Sub-section (1) with the prohibition from such a release as contemplated by the proviso thereto and also the necessity of cancellation of bail under Sub-section (5) could remain in existence, and thus those cannot be allowed to be over-shadowed by the provisions of Section 167(2). In case of ***Ram Govind Upadhyay Vs. Sudarshan Singh & Ors.***⁵, the Supreme Court has observed that in case of ***Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan & Anr.***⁶, it was observed that, "Had the Court granted time to the complainant for filing counter-affidavit correct facts would have been placed before the Court and it could have been pointed out that apart from the inherent danger of tampering with or intimidating witnesses and aborting the case." Prosecution is entitled to place corrects facts before the Court. In Shahjad Hasan Khan's case (Supra), it ws also observed that liberty is to be secured through process of law. One of the salutary principle for granting bail is that Court should be satisfied that the accused being enlarged on bail will not be in a position to tamper with the evidence when allegation of tampering are made, it is the duty of Court to satisfy itself whether

4 1983 (2) Bom CR 100

5 Appeal (Cri.) 381-382 of 2002

6 1987 (2) SCC 684

those allegations have basis (they can seldom be proved by concrete evidence) and if the allegations are not found to be concocted, it would not be a proper exercise of jurisdiction in enlarging the accused on bail. Learned counsel submitted that the orders passed by the trial Court are completely contrary to Section 437 of Cr.P.C. and the principles laid down by the Apex Court in several decisions. Reliance is placed on decision of Supreme Court in the case of ***Shivkumar Vs. Hukum Chand and Anr.***⁷ and submitted that, the interpretation of Section 302 of Cr.P.C. has been ignored by learned Magistrate.

9 Learned counsel for respondent nos.1 to 7 and the advocate representing respondent no.8 contended that the submissions advanced by the counsel for the petitioner are devoid of merits. There is no violation of Section 437 of Cr.P.C. The decisions relied upon by the petitioner are totally out of context, as the same are not applicable in the present case. There is no error of law in the impugned orders dated 3rd September, 2016 and 17th September, 2016. It is submitted that the Court was dealing with the private complaint, in which the process was issued. It is submitted that it was not necessary to call upon the say of the complainant or the prosecutor. Learned Magistrate has rightly granted

7 1999 7 SCC 467

bail to the accused and rejected the application preferred by the complainant vide Exhibit-25 by assigning cogent reasons. It is submitted in the complaint case where process is issued, the person appearing before the Court has to be dealt with in accordance with procedure laid down under Section 88 of Cr.P.C. The practice of moving the application by surrender, taking the applicant in custody, applying for bail, is contrary to the said provisions. It is submitted that if the decisions relied upon by the counsel for the petitioner that the accused was involved in serious cases, like murder and they were in custody, and, therefore, the question of applicability of Section 437 of Cr.P.C. had arisen. However, the said principle cannot be applied to a private complaint, where summons is issued to the accused for appearance. On remaining present, the accused are required to execute the bond in accordance with the provisions of law. Thus, reliance on the decisions put forth by the petitioner was misplaced. Learned counsel relied upon the decision of the Allahabad High Court delivered in the case of ***Vishwa Nath Jiloka & Ors. Vs. Ist Munsif Lower Criminal Court, Bahraich & Anr.***⁸ and another decision in the case of ***Sardar Jaspal Singh Vs. State***⁹.

10 I have perused the documents on record. The petitioner filed a private complaint before the Court of learned Magistrate. The Court

8 1989 CRI. L.J. 2082

9 1990 0 SCC (ALL) 450

directed investigation in accordance with Section 156(3) of Cr.P.C. Investigating machinery submitted report for applying "C" summary to the proceedings. The petitioner has alleged that the accused have committed offences under Section 120-B, 406, 408, 420, 506 and 506 Part II of IPC. The petitioner filed protest petition. Note of submission and written submissions were tendered and prayed for issuance of process. Learned Magistrate by order dated 2nd April, 2014, directed the complainant to lead evidence under Section 200 of Cr.P.C. evidence was led. Petitioner tendered written submission dated 29th June, 2016, it was prayed that process be issued against the accused. Learned Magistrate by order dated 1st July, 2016, issued process by rejecting "C" summary report. Trial Court directed issuance of process under Sections 120-B, 406 and 408 of IPC against accused nos.1 to 3 (respondent nos.1 to 3) and also directed that process be issued for the offences punishable under Section 120-B, 201, 406 and 408 of IPC against respondent nos.4 to 8. It is pertinent to note that the said private complaint was filed against respondent nos. 1 to 3. The respondent nos.1 to 3 appeared before the trial Court. On behalf of respondent no.8, an application was preferred for exemption. Respondent nos. 1 to 7 preferred an application for bail. Learned Magistrate by order dated 3rd September, 2016, granted bail to the said accused. Respondent no.8 was granted bail on 17th September, 2016. Order dated 3rd September, 2016, reads as follows:

“Perused the application. Heard the learned advocate for the accused. Accused are appearing on today. They are ready and willing to furnish bail. Hence, the accused be released on bail on executing P.R.Bond of Rs.10,000/-, each and to furnish surety in the like amount.”

Similar order was also passed on 17th September, 2016, granting bail to accused no.8. The respondents while preferring the application Exhibit-16 and Exhibit-27 had stated that the process was issued against the accused for their appearance before the Court. They may be granted bail, as they have permanent place of residence in Mumbai, and the documents are annexed along with the application. They are ready to attend the Court as and when required to face the trial. All the offences are triable by the said Court, they have clear record.

11 Petitioner preferred application Exhibit-25 on 3rd September, 2016. In the said application, it was stated that the Court had issued process against the accused. Without affording opportunity to the counsel appearing for the complainant of being heard, the Court had granted bail to the accused. The Court also directed the petitioner to file an application on that day itself when it was requested that the procedure laid down under Section 437 of Cr.P.C may be followed. It was submitted

that the offences are non-bailable and Section 437 of Cr.P.C. places restriction upon learned Magistrate while considering bail application for non-bailable offences. When there is evidence on record that the accused are jointly and severally threatened the witnesses and tampered with the evidence and fabricated false evidence during investigation, law laid down by the Supreme Court as presented in the "Note", is required to be taken into consideration and to send the accused to judicial custody and to consider the bail application upon hearing both the sides. On perusal of the said application, it is apparent that the learned Magistrate had granted bail to respondent nos.1 to 7 on 3rd September, 2016 and on the same day, the application was preferred for sending the accused for judicial custody. The accused had filed their say to application Exhibit - 25 that the application is not maintainable in law and deserves to be dismissed. The judgment annexed along with the application are not applicable. Therefore, the application be rejected. The learned Magistrate by order dated 17th September, 2016, rejected the said application. The Court took into consideration the judgments relied upon by the counsel for the petitioner and considering the principle laid down in the said decisions, it was observed that the present complaint is filed for the offences punishable under Sections 120-B, 406, 409, 420, 506 and 506 Part II of IPC. The Court was pleased to call for report under section 156(3) of Cr.P.C. Police filed "C" summary report. The court took

cognizance of the complaint. Process was issued. Summons were issued to the accused. No warrant was issued against the accused. As the accused appeared on summons and were ready and willing to furnish bail, bail was granted to them. In the rulings relied upon by the petitioner, the cases were instituted on a police report. There was no private complaint. There is no provisions in the Code of Criminal Procedure to obtain say of the complainant on bail application of the accused. Therefore, it was not necessary for the Court to obtain say of the complainant, and, therefore, the say was not obtained. The Court released the accused on bail as they appeared before the Court on a summons. No warrant was issued against them. Thus, the Court has not committed any illegality. Hence, the application was rejected.

12 On scrutiny of documents, the impugned orders dated 3rd September, 2016, the reasons assigned by the trial Court in the order dated 17th September, 2016, the principle enunciated in several decisions placed for consideration by the counsel for the petitioner and the counsel for respondents, the effect of Section 437 of Cr.P.C., principles relating to cancellation of bail, I am of the opinion that there is no infirmity in the impugned orders passed by the Court below.

13 As stated above, private complaint was filed. Trial Court

rejected the summary report and directed the complainant to lead evidence. After examining the witnesses on oath, the learned Magistrate took cognizance of the complaint under Section 204 of Cr.P.C. *Chapter XVI* of Cr.P.C. relates to commencement of proceedings before Magistrate. The order issuing process in the present case indicate issuance of summons to the accused. Section 204 of Cr.P.C. stipulates that if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceedings, and the case appears to be a summons case, he shall issue his summons for attendance of the accused or if it is a warrant case, he may issue a warrant or, if he thinks fit, a summons for causing the accused to be brought or to appear at a certain time before the Court. In pursuant to the order issuing summons, respondent nos.1 to 7 appeared before the Court on 3rd September, 2016. Respondent no.8 preferred an application for exemption. He appeared before the Court on 17th September, 2016. The complainant was represented by his advocate. His grievance is that he was not heard before passing order granting bail and that the statutory provisions of Section 437 of Cr.P.C. has not be complied by the trial Court. His application for sending the accused to custody has been erroneously rejected by the Court. It is pertinent to note that the complainant and his advocate were present in Court on 3rd September, 2016 and on the same day application Exhibit - 25 was preferred. There was no provision in law for entertaining application

Exhibit-25. The court took cognizance of the complaint and issued a process under Section 204 of Cr.P.C. The summons was served upon the accused. They appeared before the Court and showed their willingness to execute bail bond for their appearances. It is pertinent to note that summons were issued for their appearance before the Court. While preferring an application for bail, the grounds raised therein enumerated their availability and willingness to execute the bail bond. In the circumstances, I do not find any illegality of the order passed by learned Magistrate granting bail and order rejecting application Exhibit - 25. No case of cancellation of bail granted to the accused is made out. The judicial pronouncement relied upon by the counsel for the petitioner are not applicable in those cases. There is no dispute about the principles to be followed in consonance with Section 437 of Cr.P.C. and the limitation for granting bail by the learned Magistrate. In the case of ***Bimla Devi (Supra)***, the accused was prosecuted for an offence under Section 302 read with 34 of IPC. Two earlier applications for bail preferred by the accused were successively rejected by the High Court. The Judicial Magistrate granted bail to the accused. Subsequently, the Magistrate cancelled the bail. The Court, therefore, deprecated the approach of the trial Court by observing that the course adopted by the learned Magistrate is not only contrary to the settled principles of judicial discipline or propriety, but also contrary to the statutory provisions. In the

decision delivered by this court in case of ***D.K. Rajepandhare (Supra)***. The accused were charged for offences under Sections 302, 498-A of IPC. One of them, who was mother-in-law of deceased applied for bail before Judicial Magistrate. Bail was granted by the Court on the ground that she was an old lady. The other accused, who was the husband of deceased preferred bail application before Sessions Court, which was rejected. He preferred second application before Sessions Court. During pendency of the application, the said accused preferred application for bail before aforesaid Magistrate, and the application before Sessions Court was withdrawn. The Magistrate granted bail in the ground that the alleged offences are triable by Court of Sessions, but, that does not mean unnecessarily the accused should be detained in jail. In these circumstances, it was observed that as far as Section 437 of Cr.P.C. is concerned, bail in the non-bailable offences cannot be granted by a Court other than the High Court or a Court of Sessions. The first proviso in Section 437(1) is the only provision which contains the exceptions, namely, that such a Court may grant bail if a person is under the age of 16 years or is a woman or is sick or infirm. These are the only grounds which are available. None of the grounds were made out in this case and at the Court who did not have jurisdiction to grant bail, had granted bail, is clearly outside his jurisdiction. In the case of ***Hanuman Vishwanath Nehare Vs. State of Maharashtra & Ors. (Supra)***, the applicant

sought cancellation of time granted by the Judicial Magistrate First Class to the respondents-accused. The respondents – accused were arrested in connection with attempt to commit murder under section 307 of IPC. They were ordered to be released on bail even though APP was not available in the Court. The victim died subsequently and Section 302 of IPC was attracted. Charge-sheet was filed under Section 302 of IPC. In paragraph 9 of the said decision, this Court has observed that the principles relating to cancellation of bail are now well settled. If the bail is granted illegally or by a Court having no jurisdiction or grant of bail shows arbitrariness in granting the same, such bail can be cancelled. In ***Shiv Kumar Vs. Hukam Chand & Anr.***¹⁰, appellant was aggrieved because counsel appointed by him was not allowed to conduct prosecution inspite of obtaining a consent from the public prosecutor. The Court considered the effect of Section 302 of Cr.P.C., which relates to permission to conduct prosecution was initiated on a private complaint, hearing ought to have been given to him. In the present case, trial Court has dealt with the said contention and the prayer for sending the accused in judicial custody and rejected the application for the reasons stated therein. In the case of ***State of Maharashtra Vs. Khodya Alias Khodidas Sonabhai (Supra)***, Court had considered the powers to grant bail under Section 167(2) of Cr.P.C. and provisions of Section 437(1), (2), (5) of Cr.P.C. In case of ***Ram***

¹⁰ (1999) 7 SCC 467

Govind Upadhyay Vs. Sudarshan Singh & Ors.(Supra), Supreme Court has observed that while liberty of an individual is precious and there should always be an all round effort on the part of Law Courts to protect such liberties of individuals but this protection can be made available to the deserving persons only. The Court cancelled bail granted to accused by High Court. The facts of the case would indicate that FIR was lodged for offence under Section 302 of IPC. Witnesses were threatened and assaulted. FIR was lodged under Sections 323 and 504 of IPC. High Court granted bail. Application for cancellation of bail was rejected, hence, appeal was preferred before Supreme Court. In the case of ***Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan & Anr. (Supra)***, bail was granted by High Court in peculiar facts of the case on the ground that trial could not be commenced and concluded or directed by Court. Time was sought by complainant to place the facts before Court by filing counter affidavit. Prayer was rejected. The accused had obtained adjournments before trial Court. In these circumstances, it was observed that Court ought to have granted time to the complainant for filing affidavit. The Hon'ble Supreme Court cancelled bail granted by High Court. The petitioner had contended that the trial Court had directed that appropriate action be initiated about tampering of witnesses. Stopping them from tampering witnesses and evidence. The said order was passed on 30th October, 2013. The report seeking classification of the complaint

as “C” Summary was submitted on 28th November, 2013. Thereafter, the evidence was adduced and the process was issued. The ratio laid down in the decisions referred to hereinabove, was in the context of the factual matrix of the said cases, where the accused were arrested for heinous crimes and they were in custody and bail was granted. The petitioner contends that the offences for which process was issued contain non-bailable offences and, therefore, Section 437 would be applicable. In the factual aspects of the present case, the submissions cannot be accepted.

14 In the case of ***Vishwa Nath Jiloka & Ors. Vs. Ist Munsif Lower Criminal Court, Bahraich & Anr. (Supra)***, the Allahabad High Court has dealt with the situation wherein the Court has considered the provisions of Section 88 of Cr.P.C. In the said case, the opposite party filed a criminal complaint for the offences punishable under Sections 420 and 406 of IPC. Statement was recorded under Section 200 of Cr.P.C. and 202 of Cr.P.C. Learned Magistrate found *prima facie* case under Section 420 of IPC and summons was issued to the accused for their appearance before the Court. One of the petitioner was served with Non-bailable Warrant and he was arrested. He was granted bail by the trial Court. Other accused did not surrender. It was contended that one of the accused was arrested and they apprehended similar humiliation and harassment. The Court referred to Section 204 of Cr.P.C. and observed that, “It is evident

from Clauses (a) and (b) of sub-Section (1) that a summons or warrant to the opposite party or the accused of a complaint case is issued only for his attendance before the Magistrate or for him being brought or to appear before the Magistrate. Even if warrant is issued to the accused or opposite party in a complaint case, it is not a direction for investigation and so the Magistrate cannot grant judicial remand under Section 167 of Cr.P.C. All that the accused or the opposite party of a complaint case has to do in response of a summon or a warrant issued, under Section 204, is to attend the Court of the Magistrate or to appear before him. It was further observed that it is evident from Clause (b) of Sub-section (1) that before issuing a warrant in a complaint case, which may be warrant case, a Magistrate himself should pause and think if the issue of summons should be more reasonable. The Magistrate should note that issue of warrant in a complaint case is to be governed by Sub-section (5) of Section 204 of Cr.P.C. and for that there must be compliance of section 87 of Cr.P.C. When contingency for issuing a warrant as laid down in Section 87 has not arisen, the Magistrate should invariably think of issuing summons. While issuing summons, the Magistrate should bear in mind Section 205 of Cr.P.C., which empowers the Magistrate to dispense with the personal attendance of the accused and to permit him to appear by his pleader. The Magistrate may at any stage of the proceedings, even though he has earlier exempted personal attendance of the accused,

order the accused to be personally present. Where the accused in a complaint case are of different districts or State, the Magistrate should invariably issue a summons to the accused dispensing his personal attendance and permitting him to appear through pleader. This will automatically minimize mischievous and vexatious complaints simplified for causing harassment and humiliation to the accused. Even when the personal attendance of the accused in a criminal case has not been exempted or when a warrant is issued to the accused in a complaint case under Section 204(1)(b) and the accused after being served with summons or warrant or having come to know of the same appears before the Magistrate, it is not at all legal for the Magistrate to take him into custody and then grant judicial remand necessitating a bail application and a bail order under Section 437 of Cr.P.C., when a person appears or is brought before a Magistrate or court in response of summons or warrant, the proper procedure to be followed is laid down in Section 88 of Cr.P.C. In case of breach of bonds furnished under Section 88 of Cr.P.C., action can be taken for enforcing the bonds and further for arrest under Section 89 of Cr.P.C. It would be relevant to quote observations in the said decision in paragraph 11 of the said decision, which reads as follows:

“11 It is thus obvious that practice followed in the courts of Magistrate by even some members of the bar, namely, moving an application for surrender of the accused in a

complaint case and then after the accused is taken in the custody applying for bail is contrary to provisions of Cr. P.C. and is altogether unwarranted. It should be immediately given up and the accused of the complaint cases should be assured that they will be honourably dealt with in the courts of the Magistrates. In complaint cases when the accused appear before the Magistrate in response to summonses or warrants, the Magistrates should themselves note the appearance of the accused in the proceeding and should thereafter pass appropriate order for bonds with or without sureties as required under Section 88 Cr. P.C. If members of the bar want to place on the record that certain accused of (Sic) adjournment of the enquiry or trial should be only for reasons to be recorded; remand under this sub-section should not exceed 15 days at a time; when witnesses are in attendance no adjournment or postponement should be granted without examining them, except for special reasons to be recorded in writing and that no adjournment should be granted for purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him. Then the explanations of the sub-section make it clear that there must be reasonable cause for a remand and adjournment or postponement. If sufficient evidence has been obtained to raise a suspicion that accused may have committed an offence, and it appears likely that further evidence may be obtained by remand, it should, be treated as reasonable cause for a remand. Terms on

which an adjournment or postponement may be granted to include, in appropriate cases, payment of costs by the prosecution or the accused. It is thus obvious that the Parliament intended that there should be minimum restriction to the fundamental right of liberty guaranteed under the Constitution. When an equally efficacious procedure is available for securing attendance of the accused in a complaint case, namely, obtaining bond with or without sureties under Section 88 Cr. P.C., power of judicial remand under Section 309(2) should not be used, otherwise there would be unnecessary infringement of the fundamental right of liberty. Perusal of Section 88, 89 and 309(2) Cr. P.C., however, make it clear that in cases where accused of complaint case commits default and absents himself from the court entailing his arrest on a warrant issue under Section 89 Cr. P.C. and is unable to offer sufficient cause for his absence, power of judicial remand under Section 309(2) can be used.”

15 In the present case, as discussed hereinabove, the trial Court took cognizance of the complaint and issued process. It was also directed that summons be issued to the respondents – accused. The Court did not opt for issuance of warrant. In this circumstances the question of taking the accused into custody or applying rigors of Section 437 does not arise. The Court was dealing with the private complaint where the process was issued vide Section 204 of Cr.P.C. Sections 87 and 88 of Cr.P.C. can be adverted, which reads as follows:

87. *Issue of warrant in lieu of, or in addition to, summons. - A court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest-*

(a) *if either before the issue of summons, or after the issue of the same but before time fixed for his appearance, the court sees reason to believe that he has absconded or will not obey the summons; or*

(b) *if, at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.*

88. Power to take bond for appearance.

When any person for whose appearance or arrest the officer presiding in any court is empowered to issue a summons or warrant, is present in such court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court, or any other court to which the case may be transferred for trial."

16 In the circumstances, there is no infirmity in the orders passed by the trial Court below. No case of setting aside the impugned

order is made out. The reasons assigned by the Court while rejecting application Exhibit-25 do not call for any interference. The complainant was present in Court on 3rd September, 2016. He preferred an application Exhibit-25. There is no illegality in the orders passed by trial Court. The ratio laid down in the aforesaid decisions delivered by Allahabad High Court needs to be taken into consideration. In another decision of the Allahabad High Court placed into service by the learned counsel for the respondents in the case of ***Sardar Jaspal Singh Vs. State (Supra)***, it was observed that in cases of private complaints, Magistrate should not take opposite parties (accused) in custody under Section 309 (2), but, should, in all cases where the parties concerned voluntarily appear, to resort to Section 88 of Cr.P.C and require the parties concerned only to furnish bonds with or without securities, for appearance or future dates and where the opposite party of a complaint case resides at along distance as in this case, the Magistrate should exempt personal attendance of the opposite party of the complaint case and allow them to appear through counsel under Section 205 of Cr.P.C.

17 In the light of the aforesaid discussion and the provisions under Sections 87 and 88 of Cr.P.C., and considering the fact that the subject proceedings which are arisen out of a private complaint where the process and the summons has been issued to the accused, I am of the

considered opinion that the orders were not violative of any statutory provisions of law and that the judicial pronouncement relied upon by the counsel for the petitioner are not applicable in this case and hence this petition is required to be dismissed.

18 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Writ Petition No.380 of 2017, is dismissed.

(PRAKASH D. NAIK, J.)