

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

BAIL APPLICATION NO.1914 OF 2019

Harshad Purshottam Mehta ... Applicant
Vs
The State of Maharashtra ... Respondents
...

Mr. Manoj Mohite, Sr. Adv. With Ms. Sonal Parab with Mr. Kiran Varma i/by Rajeev Sawant and Associates for the Applicant.

Mr. Ajay Patil , APP for the Respondent-State.

CORAM : SANDEEP K. SHINDE J.
DATE : MARCH 12, 2020

P.C. :

Heard.

2 The applicant is seeking his enlargement on bail in FIR/Crime No.258 of 2014 registered at Amboli Police Station subsequently transferred to Economic Offences Wing for the offences punishable under Sections 406, 409, 420, 465, 467, 468, 471, 477(a),120-B read with Section 34 of the Indian Penal Code, 1860 ('**IPC**' for short).

3 It may be stated that the applicant had filed multiple applications before the learned Magistrate and also before the learned Sessions Court, which were rejected on merits, principally, on the ground, the crime being economic offence, bail therein, is to be treated differently as it constitutes class apart and is to be visited with a different approach. It is not in dispute that in this case offence alleged against the applicant are economic offences and, therefore, before adverting to the arguments of the learned counsel for the applicant, it may be stated that the Apex Court in the case of **Y.S.Jagan Mohan Reddy v. Central Bureau of Investigation AIR 2013 SC 1933** has held thus, *“While granting bail, the Court has to keep in mind nature of accusation, nature of evidence in support thereof and that the economic offences having deep rooted conspiracies and involving huge loss of public monies are to be viewed seriously with different*

approach.”

4 In this case, the complaint was filed by Mr. Tejpal Shah, Director of M/s. Red Eye Production Private Ltd.. This company was holding shares of M/s. Ashtavinayak Cinevision Limited (Hereinafter called as the '**Said Company**') of which, the son of the applicant is the Chairman and Managing Director of the said Company. The complainant and the directors of the said company were engaged in the business of producing and distributing feature films for which finance was provided by the complainant. In 2011, dispute arose between the complainant and the said Company over distribution of rights of feature film 'Rockstar'. A suit was subsequently filed by the complainant, which then culminated into arbitration proceedings wherein the Consent Terms were filed whereby the said Company was directed to pay Rs.41 Crores to the complainant. Pursuantly, twelve Post

2019.odt

dated cheques were issued, however, barring cheques for the value of Rs.4.73 Crores, rest were dishonoured upon presentation. Subsequently, the complainant has filed proceedings under Section 138 of the Negotiable Instruments Act. Thereafter, it appears, the complainant and other 154 shareholders of the said Company also filed a petition before the Company Law Board whereby the proceedings disclosed that the Managing Director of the said Company, Mr. Dhilin Mehta had incorporated various sham companies, entered into bogus agreements and then transferred funds to overseas subsidiary companies, which were found misappropriated to the tune of Rs.824.68 Crores and had thereby cheated shareholders. It is alleged that during the period April, 2007 till March, 2012, the said Company had raised Rs.134.97 Crores by issuing foreign currency convertible bonds; Rs.336.95 Crores by issue of Equity shares; Rs.474.12 Crores from the banks, financial institutions and private parties. It is

2019.odt

complainant's case that Chairman of the said Company had entered into agreements with bogus companies namely 1) Suryojit Enterprises Pvt. Ltd. 2) M/s. V.K.Entertainment 3) E Force India Pvt. Ltd. 4) M/s. Armaan Entertainment Private Ltd. and 5) M/s. Century Pictures and had paid an aggregate amount of Rs.296.25 Crores. Agreements entered into with these companies for producing feature films in the regional languages were sham and bogus. The subscribers and the directors of five companies were alleged to be close relatives, associates and/or former employees of the said Company. It is further alleged in the year 2008, a subsidiary company named Shri Ashtavinayak Cinevision FZE was incorporated in Dubai and as per the financial reports of the said Company for the year 2010-2011, an amount of Rs.444.53 Crores was transferred by the said Company to the said subsidiary company by way of loan. The said amount was further paid by subsidiary company to five entities for

producing feature film. However, investigation shows, these agreements were also sham and bogus. It is the prosecution's case that feature films for which agreements were entered into were neither produced nor were the funds returned by the said subsidiary companies. The sum and substance is, bogus agreements, which were executed were intended to siphon off the funds of the said company. Investigation further revealed that from the bank accounts of the said company, funds were transferred to the accounts of 24 individuals and their Demat accounts were opened by Mr. Vipul Simaria on the instructions of the applicant and the money was used for rigging share price of the said Company. Statement of the D-Mat account holders recorded under Section 164 of the Code of Criminal Procedure, 1973 ('**Cr.P.C.**' in short), were, found infact needy and poor people. Prosecution has placed on record summary of such Demat

accounts and the amount transferred to these accounts to the tune of Rs.663,53,10,992/-.

5 In short, since the offence registered against the applicant and the co-accused constitute deep rooted conspiracies involving huge funds, Mr. Mohite, the learned Senior Counsel, therefore, did not address this Court on the merits for seeking bail, but made following two submissions:

(1) All the offences are triable by the learned Magistrate and except offence under Section 409 of the IPC, all other offences are punishable with imprisonment of either description for the term which may extend to seven years and fine;

(2) that offence under Section 409 of the IPC is punishable with imprisonment for life or imprisonment of either description for a term, which may extend to 10 years but for want of power even if the applicant is convicted, the learned Magistrate cannot inflict

sentence of imprisonment, exceeding seven years.

6 It is, therefore, submitted that since the applicant is in jail since four years and ten months, i.e., upto one-half of the maximum period of imprisonment, which he may suffer on conviction, applicant is entitled to seek his release on bail in terms of Section 436A of the Cr.P.C. Mr. Mohite, the learned Senior Counsel for the applicant while interpreting the provisions of Section 436A of the Cr.P.C., has relied upon the judgment of the Apex Court in the case of **Sanjay Chandra v. Central Bureau of Investigation (2012) 1 Supreme Court Cases 40** and particularly paragraph 39 thereof. Drawing cue from the observations in paragraph 39, Mr. Mohite submitted that for seeking benefit of release under Section 436A though the nature of charge may be relevant (which in this case is under Section 409 of the IPC) but at the same time, *the punishment to which the*

party may be liable, if convicted, also bears upon the issue (emphasis supplied). It is, therefore, submitted that in determining whether to grant bail, both the seriousness of the charge and severity of the punishment should be taken into consideration. Mr. Mohite, thus, further elaborated on his argument and submitted that though the applicant is charged with an offence punishable under Section 409 of the IPC, which is punishable with imprisonment for life or with imprisonment of either description, which may extend to ten years but the fact remains since this offence is triable by the Magistrate, even if the applicant is convicted, sentence cannot exceed seven years. It is, therefore, applicant's case that since the applicant has already undergone sentence of four years and ten months as under-trial prisoner which is more than half sentence which he may be liable after conviction, he may be released on bail.

7 The learned APP has opposed the application and contended that, provisions of Section 436A of the Cr.P.C. are not mandatory and also relied on the Law Commission Report and the guide-lines issued by the Ministry of Home Affairs, Government of India. The learned APP further submitted that in terms of first proviso to Section 436A, even if the undertrial prisoner has undergone detention for period exceeding half of the maximum period of imprisonment specified for that offence under that law, the Court is empowered to order to continue detention of such person for a period more than half of the said period by recording the reasons.

8 It is, therefore, submitted that subject offence being “economic offence”, it constitutes a class apart and need to be visited with different approach in the matters of bail. A strong reliance has been placed

on the judgment of the Apex Court in the **Y.S.Jagan Mohan Reddy (Supra)** and **Nimmagadda Prasad v. Central Bureau of Investigation AIR 2013 SC 2821.**

. Additionally while opposing the application, the learned APP contended that in terms of the provisions of Section 323 of the Cr.P.C., Magistrate at any stage of enquiry into an offence or trial but before signing of the judgment, can commit the case to the court of Sessions if he is of the opinion that it “ought to be tried by it”. Therefore, it is submitted that the likely sentence on conviction would not be seven years as contended by the applicant, but it may extend to life imprisonment or to ten years. It is, therefore, submitted that offence under Section 409 of IPC, being punishable with imprisonment for life, provisions of Section 436A of the Cr.P.C. are not applicable to the facts of the case and benefit thereof cannot be extended to him.

9 In the present case, charge is that of criminal breach of trust by the agent and punishment prescribed for this offence is imprisonment for a term, which may extend to imprisonment for life or imprisonment for either description, which may be extend to ten years.

10 In this case, the applicant is seeking his release on bail by taking recourse to the provisions of Section 436A of the Cr.P.C. on the ground that he has already undergone detention for a period of 4 years and 10 months. Section 436A reads as under:

"Section 436A Maximum period for which an under trial prisoner can be detained.-

Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided *that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in*

2019.odt

writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation – In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.”

11 In the context of the facts of the case and arguments advanced, it may be stated that the Apex Court in the case of ***Supreme Court Legal Aid Committee*** representing under-trial prisoner had held that unduly long periods of under-trial incarceration violates Articles 14 and 21 of the Constitution of India and thus, directed that if the accused person has served half the maximum sentence specified for the offence for which he has been charged, he should be released on bail, subject to fulfilling conditions of bail imposed on him. This standard was incorporated in the

Cr.P.C. through an amendment in 2005, by which Section 436A was added to the Code. This Section provides that if the accused has undergone detention for half the maximum period of imprisonment specified for the offence that he has been charged with, such an accused shall be released by the Court on personal bond with or without sureties. Persons charged with the offences with death do not get the benefit of this provision. The proviso to the Section states that the Court, upon hearing the Public Prosecutor, may order the continued detention of the accused person for a term longer than the half of the said period or release the person accused of an offence on bail instead of personal bond with or without sureties.

12 In this case, accused has been charged with offence punishable under Section 409 of the IPC. The First Schedule of the Code of Criminal Procedure classifies this offence triable by the Court of Magistrate

of the First Class. Section 29 of the Cr.P.C. deals with powers of the Court to inflict punishment. Chapter III of the Cr.P.C. deals with power of the Court to inflict punishment while Section 29 thereof limits power of the Chief Judicial Magistrate, Magistrate of the First Class and Magistrate of the Second Class. In this regard, thus, the Court of Chief Judicial Magistrate may pass any sentence except sentence of death or imprisonment for life or imprisonment for a term exceeding seven years. Power of the Court of Magistrate of the First Class has been limited to the passing sentence of imprisonment for a term not exceeding three years and similarly Magistrate of the Second Class's power has been limited to the sentence of imprisonment not exceeding one year.

13 Thus, the question is;

“When Magistrate cannot inflict punishment of imprisonment, exceeding 7 years, while

2019.odt

trying the offence under Section 409 of IPC, whether undertrial prisoner can claim bail and seek release in terms of Section 436A of the Cr.P.C. once had undergone detention for a period one half of seven years, likely punishment, on his conviction under Section 409 of the IPC ?”

14 To appreciate arguments of the respective counsel, I think it appropriate to re-produce the provisions of Section 323 of the Cr.P.C. which reads thus;

“323. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.-If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provision of Chapter XVIII shall apply to the commitment so made.”

15 This section confers in general term wide and comprehensive powers on the Magistrate to commit the case to the Sessions at any time before signing the judgment, if it appears to him that the case is one, which ought to be tried by the Court of Sessions. Words “Ought to be tried by the Court of Sessions” gives very wide powers to the Magistrate and gives powers to commit case to the Sessions though not exclusively triable by the Sessions and thereupon provisions of Chapter XXVIII shall apply to the commitments so made. When maximum sentence provided in law is imprisonment for life or with imprisonment for either description, which may extend to 10 years, the expression “Ought to be tried” used in Section 323 of the Code is to be interpreted to mean that when the Magistrate is of the opinion that the punishment provided under the law can neither be inflicted by him or by the Chief Judicial Magistrate but the allegations

justify higher punishment, he is obliged to commit the case to the Court of Sessions. In the case of **Krishnaji Prabhakar Khadilkar AIR 1929 Bombay 313**, it is held that in committing the case, Magistrate has to bear in mind, not only, fact whether he could pass adequate sentence but also to pay regard to the gravity of offence and public importance of the offence. In the cited case, accused was charged with sedition. Therefore, powers under Section 323 are wide enough, which empowers the Magistrate to commit the accused not only, in the cases where Magistrate was not competent to try or which in his opinion could not be adequately punished. Thus, in view of the provisions of Section 323, Magistrate is also empowered to commit cases to the Court of Sessions other than which are exclusively triable by the Court of Sessions under the First Schedule to the Code. So far as the offences triable by the Court of Sessions as enumerated in the First Schedule of the Code, Code has not given any

discretion in this regard to the Magistrate. Therefore, other than the offences triable by the Court of Sessions in the light of the First Schedule, Magistrate has been given discretion to commit the case to the Court, which in his opinion 'Ought to be tried' by the Court of Sessions.

16 In the case of **Subhojit Datta v. State of Bihar [2008 Cri LJ 872]**, the Division Bench of the Patna High Court has held in paragraph 10 as under:

“There may be a case like the present one in which the maximum sentence provided in law is imprisonment for life or with imprisonment for either description for a term which may extend to ten years. The legislature has provided punishment for the aforesaid offence and many other offences although triable by a Magistrate of the First Class more than what a Magistrate of the First Class could inflict. In case the expression “ought to be tried” in Section 323 of the Code is read to mean offences exclusively triable by a Court of Session, in no case maximum punishment provided under Section 409 of the Indian Penal Code can possibly be inflicted. Thus, in my opinion, a case in which the Magistrate is of the opinion that the punishment provided under the law can neither be inflicted by him or by the Chief Judicial

2019.odt

Magistrate but the allegations justify higher punishment, he is obliged to commit the case to the Court of Session. This power can be exercised at any stage of the proceeding before signing judgment. On such commitment the provision of Chapter XVII, which deals with trial before a Court of Session shall apply. The view which I have taken finds support from a judgment of this Court in the case of Emperor v. Deo Narain Mullick (AIR 1928 Pat 551): (1928(29)CriLJ 612) in which it has been held as follows:

"The offence in this case is not exclusively triable by the Court of Session. Therefore the Magistrate could only commit the accused to the Court of Session if he had been of the opinion that the case ought to be tried by that Court. He must give reasons for his entertaining that opinion, for the order of commitment is judicial order."

17 It may be noted that similar view has been taken by the Division Bench of the Andhra Pradesh High Court in the case of the **State v. Rajkumar Satthi and Ors. [1980 CriLJ 1355]** wherein in paragraph 7, the Division Bench has held as under:

"7. Section 323 is a general provision. It applies to all cases tried under the Code. It corresponds to Section 347 of the old Code except that the words "or High Court" in Section 347 are deleted in Section 323. The Section confers in general terms a wide and comprehensive power on a Magistrate to commit a case to the Court of Session at any stage of the enquiry or trial before signing the judgment if only it appears to him that the case is one which

ought to be tried by a Court of Session. If the case appears to be one which is exclusively triable by a Court of Session, the Magistrate has no alternative but to commit the case to a Court of Session as required under section 209, Cr.P.C. It is only a case which appears to the Magistrate to be one which ought to be tried by the Court of Session that the Magistrate can act under this section. The words "if it appears to him" contemplate the formulation of a judicial opinion. Though the discretion to commit is wide under this section, the discretion has to be exercised judicially and no hard and fast rule can be enunciated as to in what cases committal should be made under this section and in what other cases it should not be made. It all depends on the facts and circumstances of each case."

18 Therefore, drawing cue from the aforesaid judgments, the contention of the applicant that, even if the applicant is convicted, the Magistrate cannot inflict sentence of imprisonment exceeding seven years cannot be accepted since, in this case though the offence is triable by the Magistrate, he is empowered to commit the case to the Court of Sessions if he forms an opinion that the case is "ought to be tried" by it. It is in these circumstances that, if the Magistrate exercises power and commits the case to the Court of Sessions then in such a situation, the Court of Sessions may

inflict punishment exceeding seven years or even impose punishment of life imprisonment.

19 That for the reasons stated hereinabove, facts of the case in hand do not admit application of the provisions of Section 436A of the Cr.P.C.

20 Besides, in the context of the facts of the case, it may be stated that the first proviso of Section 436A enables the Court to refuse to release the applicant on bail though he had undergone detention for the period extending upto one-half of the period of sentence specified for that offence under the law. In the case in hand, offence charged against the applicant is one under Section 409 of the IPC for which punishment prescribed is punishment for life or imprisonment which may extend to 10 years. The Ministry of Home Affairs, Government of India on 27th September, 2014 issued guide-lines on reckoning half-

life of the time spent in judicial custody of under-trial prisoners under Section 436A of the Cr.P.C. in terms whereof it is stated that where the maximum period is life imprisonment for an offence committed by the undertrial prisoner then under Section 57 of the IPC, life imprisonment should be considered to be 20 years imprisonment for which half-life would be 10 years under Section 436A of the Cr.P.C.

21 Even otherwise, it may be stated that in investigation, it is revealed that apart from equity shares, foreign currency convertible bonds, global depository receipts, the said Company had also raised a finance of Rs.663 Crores and the said loan amounts have been siphoned off to the bogus companies and thereafter to bogus Demat accounts for inflating shares of the said company. After artificially inflating value of shares, the said Company obtained huge loans against inflated value of its shares, fully knowing that the value

of shares were dishonestly inflated. It appears, the loan raised to the sum of Rs.132,15,29,611/- were subsequent to fraudulent transfer to the bank accounts of the bogus company. Thus, in consideration of the facts of the case and the evidence available on record and admittedly, case being one classified as economic offences, in my view, applicant is not entitled to seek benefit of provisions of Section 436A of the Cr.P.C. Thus, after going through the final report, I am of the considered view that the evidence brought on record against the applicant justifies continuation of his detention in the judicial custody for the period longer than he had already undergone.

22 That for the reasons stated hereinabove, application is rejected.

(SANDEEP K. SHINDE, J.)