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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.09.2023

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BAIL APPLN. 2088/2021 & CRL.M.A. 4610/2022, CRL.M.A.
2976/2023, CRL.M.A. 2977/2023

ANIL KUMAR SHARMA

..... Petitioner

Through: Mr. Pramod Kumar Dubey, Sr.
Adv. with Mr. Amit Sinha, Mr.
Manoj Kumar Singh, Ms. Aditi,
Mr. Satyam Sharma and Mr.
Saurav Kumar Sohi, Advs.

Versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Richa Dhawan, APP for
State.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J. (ORAL)

1. The present application has been filed under Section 439 CrPC read with Section 482 CrPC seeking regular bail in FIR No.201/2016 registered at Police Station EOW under Sections 409/406/420/120B IPC.
2. It is not in dispute that the charge sheet in this case was filed under Sections 406/409/420/120B IPC, but the charges have been framed only under Sections 420/120B IPC.
3. The aforesaid FIR was registered on the complaint of Sh.



Anubhav Jain who bought 26 flats in Tower G-1 of petitioner's companies project "Amrapali Silicon City" proposed to be developed at Plot No. GH-1A, Sector-76, Noida. During the course of investigation, it has been found that Tower G-1 in the aforesaid project was never sanctioned by the Noida Authority and in furtherance of criminal conspiracy, the petitioner sold/allotted 26 flats to the complainant in the said tower and being induced by the accused persons, the complainant agreed to invest in the said project and made full and final payment of Rs. 6.60 crores against the said flats in November, 2011.

4. Subsequently, on 28.02.2019, the petitioner along with two other co-accused namely Shiv Priya and Ajay Kumar were arrested in the present case.

5. The learned Senior Counsel for the petitioner submits that the maximum sentence for the offence under Section 420 IPC with which the petitioner has been charged is 7 years whereas the petitioner is in custody for more than 3 years and 6 months.

6. He submits that in view of the mandatory provisions of Section 436A CrPC, the petitioner is entitled to statutory bail after having undergone detention for more than one-half of the maximum period of imprisonment specified for the offence under Section 420 IPC.

7. He further submits that the prosecution has cited as many as 50 witnesses and the conclusion of trial is likely to take long time. He, therefore, urges the court to grant regular bail to the petitioner.

8. Per contra, the learned APP has argued on the lines of the Status Report, she submits that it is a multi-victim scam, therefore, the



benefit of Section 436A should not be extended to the petitioner in view of the first proviso to Section 436A CrPC. She urges for the dismissal of the petitioner's bail application.

9. I have heard the learned Senior Counsel for the petitioner, as well as, the learned APP for the State and have perused the record.

10. The learned Trial Court *vide* order dated 17.11.2022 has concluded that the present petitioner and other co-accused are liable to be prosecuted for the offence punishable under Section 420 IPC read with Section 120B IPC. The maximum punishment for the offence under Section 420 IPC is imprisonment of either description for a term which extends to 7 years and fine.

11. Undisputedly, the petitioner in the present case has undergone detention for a period in excess of one-half of the maximum period of imprisonment specified for the offence under Section 420 IPC.

12. Since the submission of the learned Senior Counsel for the petitioner is premised on Section 436A CrPC, apt would it be to reproduce the said provision, which reads thus:-

“[436A. Maximum period for which an undertrial 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 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.]”

13. In the backdrop of above factual matrix, a short question which arises in the present case is that whether the petitioner after having undergone detention for a period extending upto one-half of the maximum period of imprisonment specified for the offence alleged, is entitled to be released on bail.

14. The answer to the above question is not far to seek. The Hon’ble Supreme Court in **“Satender Kumar Antil vs. CBI”(2022) 10 SCC 51**, while construing the provision of Section 436A CrPC has observed that it is mandatory to comply with the said provision and there is not even a need for a bail application. With reference to the first proviso, the Hon’ble Supreme Court observed that the Court can order continuation of detention of the accused for a period longer than one-half of the maximum period of imprisonment specified for the offence invoked after hearing the learned APP for the State and for reasons to be recorded by it in writing. However, such an exercise of power is expected to be undertaken sparingly being an exception to the general rule. The Supreme Court also reiterated the principle that “Bail is the rule and jail is an exception”. The relevant part of the



decision reads as under:-

*“...64. Under this provision, when a person has undergone detention for a period extending to one-half of the maximum period of imprisonment specified for that offence, he shall be released by the court on his personal bond with or without sureties. The word “shall” clearly denotes the mandatory compliance of this provision. We do feel that there is not even a need for a bail application in a case of this nature particularly when the reasons for delay are not attributable against the accused. We are also conscious of the fact that while taking a decision the Public Prosecutor is to be heard, and the court, if it is of the view that there is a need for continued detention longer than one-half of the said period, has to do so. However, such an exercise of power is expected to be undertaken sparingly being an exception to the general rule. Once again, we have to reiterate that “bail is the rule and jail is an exception” coupled with the principle governing the presumption of innocence. We have no doubt in our mind that this provision is a substantive one, facilitating liberty, being the core intendment of Article 21. The only caveat as furnished under the Explanation being the delay in the proceeding caused on account of the accused to be excluded. This Court in *Bhim Singh v. Union of India* [*Bhim Singh v. Union of India*, (2015) 13 SCC 605 : (2016) 1 SCC (Cri) 663], while dealing with the aforesaid provision, has directed that : (SCC pp. 606-07, paras 5-6)*

“5. Having given our thoughtful consideration to the legislative policy engrafted in Section 436-A and large number of undertrial prisoners housed in the prisons, we are of the considered view that some order deserves to be passed by us so that the undertrial prisoners do not continue to be detained in prison beyond the maximum period provided under Section 436-A.

6. We, accordingly, direct that jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall hold one sitting in a week in each jail/prison for two months commencing from 1-10-2014 for the purposes of effective implementation of Section



436-A of the Code of Criminal Procedure. In its sittings in jail, the above judicial officers shall identify the undertrial prisoners who have completed half period of the maximum period or maximum period of imprisonment provided for the said offence under the law and after complying with the procedure prescribed under Section 436-A pass an appropriate order in jail itself for release of such undertrial prisoners who fulfil the requirement of Section 436-A for their release immediately. Such jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall submit the report of each of such sittings to the Registrar General of the High Court and at the end of two months, the Registrar General of each High Court shall submit the report to the Secretary General of this Court without any delay. To facilitate compliance with the above order, we direct the Jail Superintendent of each jail/prison to provide all necessary facilities for holding the court sitting by the above judicial officers. A copy of this order shall be sent to the Registrar General of each High Court, who in turn will communicate the copy of the order to all Sessions Judges within his State for necessary compliance.”

65. The aforesaid directions issued by this Court if not complied fully, are expected to be complied with in order to prevent the unnecessary incarceration of undertrials, and to uphold the inviolable principle of presumption of innocence until proven guilty.

(emphasis supplied)

15. Likewise, in ***Vijay Madanlal Choudhary and Ors. Vs. Union of India and Ors., (2022) SCC OnLine SC 929***, the Supreme Court while considering the application of Section 436A, CrPC to a case under PMLA where the rigors of Section 45 of Prevention of Money Laundering Act (PMLA) will apply, observed that Section 436A is an exception carved out to the strict compliance of twin conditions under Section 45 of the PMLA Act. It was also observed that Section 436A needs to be construed as a statutory bail provision and akin to Section



167 of 1973 Code. The relevant part of the decision reads as under:-

413. There is, however, an exception carved out to the strict compliance of the twin conditions in the form of Section 436A of the 1973 Code, which has come into being on 23.6.2006 vide Act 25 of 2005. This, being the subsequent law enacted by the Parliament, must prevail. Section 436A of the 1973 Code reads as under:.....

414. In the Statement of Objects and Reasons, it was stated thus:

*“There had been instances, where under-trial prisoners were detained in jail for periods beyond the maximum period of imprisonment provided for the alleged offence. As remedial measure section 436A has been inserted to provide that where an under-trial prisoner other than the one accused of an offence for which death has been prescribed as one of the punishments, has been under detention for a period extending to one-half of the maximum period of imprisonment provided for the alleged offence, he should be released on his personal bond, with or without sureties. It has also been provided that **in no case will an under-trial prisoner be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offence.**”*

*415. In Hussainara Khatoon v. Home Secretary, State of Bihar, Patna (1980) (1) SCC 108, this Court stated that the right to speedy trial is one of the facets of Article 21 and recognized the right to speedy trial as a fundamental right. This dictum has been consistently followed by this Court in several cases. **The Parliament in its wisdom inserted Section 436A under the 1973 Code recognizing the deteriorating state of undertrial prisoners so as to provide them with a remedy in case of unjustified detention.** In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India (1994) 6 SCC 731, the Court, relying on Hussainara Khatoon (supra), directed the release of prisoners charged under the Narcotic Drugs and*



Psychotropic Act after completion of one-half of the maximum term prescribed under the Act. The Court issued such direction after taking into account the non obstante provision of Section 37 of the NDPS Act, which imposed the rigors of twin conditions for release on bail. It was observed:

*“15.We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh v. State of Punjab(1994) 3 SCC 569. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak (1992) 1 SCC 225, release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, **we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right** recognizes by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. ...”*



416. *The Union of India also recognized the right to speedy trial and access to justice as fundamental right in their written submissions and, thus, submitted that in a limited situation right of bail can be granted in case of violation of Article 21 of the Constitution. Further, it is to be noted that the Section 436A of the 1973 Code was inserted after the enactment of the 2002 Act. Thus, it would not be appropriate to deny the relief of Section 436A of the 1973 Code which is a wholesome provision beneficial to a person accused under the 2002 Act. However, Section 436A of the 1973 Code, does not provide for an absolute right of bail as in the case of default bail under Section 167 of the 1973 Code. For, in the fact situation of a case, the Court may still deny the relief owing to ground, such as where the trial was delayed at the instance of accused himself.*

417. *Be that as it may, in our opinion, this provision is comparable with the statutory bail provision or, so to say, the default bail, to be granted in terms of Section 167 of the 1973 Code consequent to failure of the investigating agency to file the chargesheet within the statutory period and, in the context of the 2002 Act, complaint within the specified period after arrest of the person concerned. In the case of Section 167 of the 1973 Code, an indefeasible right is triggered in favour of the accused the moment the investigating agency commits default in filing the chargesheet/complaint within the statutory period. The provision in the form of Section 436A of the 1973 Code, as has now come into being is in recognition of the constitutional right of the accused regarding speedy trial under Article 21 of the Constitution. For, it is a sanguine hope of every accused, who is in custody in particular, that he/she should be tried expeditiously — so as to uphold the tenets of speedy justice. If the trial cannot proceed even after the accused has undergone one-half of the maximum period of imprisonment provided by law, there is no reason to deny him this lesser relief of considering his prayer for release on bail or bond, as the case may be, with appropriate conditions, including to secure his/her presence during the trial.*

418. *Learned Solicitor General was at pains to persuade us that*



*this view would impact the objectives of the 2002 Act and is in the nature of super imposition of Section 436A of the 1973 Code over Section 45 of the 2002 Act. He has also expressed concern that the same logic may be invoked in respect of other serious offences, including terrorist offences which would be counterproductive. So be it. We are not impressed by this submission. For, it is the constitutional obligation of the State to ensure that trials are concluded expeditiously and at least within a reasonable time where strict bail provisions apply. **If a person is detained for a period extending up to one-half of the maximum period of imprisonment specified by law and is still facing trial, it is nothing short of failure of the State in upholding the constitutional rights of the citizens, including person accused of an offence.***

419. Section 436A of the 1973 Code, is a wholesome beneficial provision, which is for effectuating the right of speedy trial guaranteed by Article 21 of the Constitution and which merely specifies the outer limits within which the trial is expected to be concluded, failing which, the accused ought not to be detained further. Indeed, Section 436A of the 1973 Code also contemplates that the relief under this provision cannot be granted mechanically. It is still within the discretion of the Court, unlike the default bail under Section 167 of the 1973 Code. Under Section 436A of the 1973 Code, however, the Court is required to consider the relief on case-to-case basis. As the proviso therein itself recognizes that, in a given case, the detention can be continued by the Court even longer than one-half of the period, for which, reasons are to be recorded by it in writing and also by imposing such terms and conditions so as to ensure that after release, the accused makes himself/herself available for expeditious completion of the trial.

420. However, that does not mean that the principle enunciated by this Court in Supreme Court Legal Aid Committee Representing Undertrial Prisoners (supra), to ameliorate the agony and pain of persons kept in jail for unreasonably long time, even without trial, can be whittled down on such specious plea of the State. If the



Parliament/Legislature provides for stringent provision of no bail, unless the stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable time, at least before the accused undergoes detention for a period extending up to one-half of the maximum period of imprisonment specified for the concerned offence by law. [Be it noted, this provision (Section 436A of the 1973 Code) is not available to accused who is facing trial for offences punishable with death sentence].

421. In our opinion, therefore, Section 436A needs to be construed as a statutory bail provision and akin to Section 167 of the 1973 Code. Notably, learned Solicitor General has fairly accepted during the arguments and also restated in the written notes that the mandate of Section 167 of the 1973 Code would apply with full force even to cases falling under Section 3 of the 2002 Act, regarding money-laundering offences. On the same logic, we must hold that Section 436A of the 1973 Code could be invoked by accused arrested for offence punishable under the 2002 Act, being a statutory bail.”....

(emphasis supplied)

16. Keeping the law laid down by the Supreme Court in perspective and considering the fact that the petitioner has already undergone one-half of the maximum period of imprisonment specified for the offence under Section 420 IPC, I am of the view that the petitioner is entitled to the benefit of Section 436A CrPC which has been held to be a mandatory provision by the Hon'ble Supreme Court.

17. The allegation against the petitioner may be serious but they do not warrant the invocation of an exception carved in the first proviso to Section 436A CrPC, to continue the detention of the petitioner for a period longer than one-half of the maximum period of imprisonment specified for Section 420 IPC, when notably it is not a case of the



prosecution that the petitioner has in any way been responsible for the delay of trial.

18. At this stage, it may also be apt to refer to the decision of Hon'ble Supreme Court in "***Vinod Bhandari vs. State of Madhya Pradesh***" (2015) 11 SCC 502.

"...12. It is well settled that at pre-conviction stage, there is presumption of innocence. The object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be passed. The detention is not supposed to be punitive or preventive. Seriousness of the allegation or the availability of material in support thereof are not the only considerations for declining bail. Delay in commencement and conclusion of trial is a factor to be taken into account and the accused cannot be kept in custody for indefinite period if trial is not likely to be concluded within reasonable time. Reference may be made to decisions of this Court in Kalyan Chandra Sarkar v. Rajesh Ranjan [Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 2 SCC 42 : 2005 SCC (Cri) 489] , State of U.P. v. Amarmani Tripathi [State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] , State of Kerala v. Raneef [State of Kerala v. Raneef, (2011) 1 SCC 784 : (2011) 1 SCC (Cri) 409] and Sanjay Chandra v. CBI [Sanjay Chandra v. CBI, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397] ."....

19. A perusal of the charge sheet reveals that as many as 50 witnesses have been cited by the prosecution. Evidently, it is going to be a protracted trial. Therefore, no useful purpose will be served in keeping the petitioner in judicial custody.

20. In view of the aforesaid discussion, the petitioner has made out a case of grant of regular bail. Accordingly, the petitioner is admitted to bail subject to his furnishing a Personal Bond in the sum of Rs.1 lac



and two Surety Bonds of the like amount subject to the satisfaction of the learned Trial Court/CMM/Duty Magistrate, further subject to the following conditions:-

- a) Appellant/applicant will not leave the city without prior permission of the Court.
 - b) Appellant/applicant shall appear before the Court as and when the matter is taken up for hearing.
 - c) Appellant/applicant shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the Investigating Officer concerned. The mobile location be kept on at all times.
 - d) Appellant/applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with the victim/complainant or any family members of the victim/complainant.
21. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance and information.
 22. The application stands disposed of.
 23. Order *dasti* under signatures of the Court Master.
 24. Order be uploaded on the website of this court.

VIKAS MAHAJAN, J

SEPTEMBER 1, 2023/dss