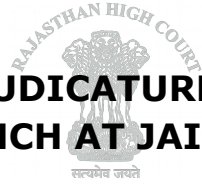




**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



S.B. Criminal Miscellaneous III Bail Application No. 12925/2023

Vikas Kumar

----Petitioner

Versus

1. State of Rajasthan, through PP
2. Sundarmal

----Respondents

For Petitioner(s) : Mr. Kapil Prakash Mathur
Mr. Sukhdev Singh Solanki
For Respondent(s) : Mr. Babulal Nasuna, PP

HON'BLE MR. JUSTICE ANIL KUMAR UPMAN

ORDER

Date of Pronouncement :- 29/11/2023

(REPORTABLE)

1. This is a third bail application filed under Section 439 Cr.P.C. on behalf of the accused-petitioner who is in custody since 08.06.2020 in connection with FIR No.01/2020 registered at Police Station Special Police Station Rajasthan, Jaipur (CID Security), for offences under Sections 3 and 3/9 of the Official Secrets Act 1923 and Section 120-B IPC.

2. The previous bail application (No.2919/2022) filed on behalf of the accused petitioner was dismissed as withdrawn by this Court vide order dated 08.08.2023 with liberty to file fresh bail application before the learned trial court under the provisions of



Section 437(6) Cr.P.C. After passing of the order dated 08.08.2023, the petitioner preferred a bail application under Section 439 Cr.P.C. read with Section 437(6) Cr.P.C. before the learned trial magistrate. However, the learned trial magistrate dismissed the application of the accused petitioner. Thereafter, the petitioner preferred bail application under Section 439 Cr.P.C. read with Section 437(6) Cr.P.C. before the learned Sessions Court, Jaipur Metropolitan-I from where it was transferred to the court of learned Addl Sessions Judge No.8, Jaipur Metropolitan-I. However, the bail application of the accused petitioner was also dismissed by the learned Sessions Court vide order dated 18.09.2023. Hence, this third bail application.

3. Brief facts of the case are that on the basis of a typed report submitted by Sundermal, Police Inspector, CID Zone Ganganagar, an FIR No.01/2020 was registered at PS Special Police Station, CID Security against Vikas Kumar, petitioner herein and Chimanlal for offences under Section 3/9 of Official Secrets Act and Section 120-B IPC. It was alleged in the FIR that a secret information has been received to the Technical Cell of the Department that the accused petitioner, working in Gangapur Army Area is in contact with the Pakistani Intelligence through social media and he is providing military related confidential information to them, which is a threat to national security. It is also alleged that one Chiman Lal, working in Mahajan Firing Range is also indulged in such act with the accused petitioner.

4. It is contended by learned counsel for the petitioner that the accused petitioner has falsely been implicated in this case. He is in



custody since 08.06.2020 and till date, he has suffered incarceration of nearly three years and six months and thus, his right to life and personal liberty, as guaranteed under Article 21 of the Constitution of India is being seriously infringed. Counsel further submits that while rejecting the second bail application, this Court gave liberty to the petitioner to move fresh bail application under the provisions of Section 437 (6) Cr.P.C. before the learned trial court. The petitioner filed an application under Section 439 Cr.P.C. read with Section 437(6) Cr.P.C before the learned magistrate. The learned Magistrate dismissed the bail application of the accused petitioner by observing that the provisions of Section 437(6) Cr.P.C. are not mandatory in nature and bonafide efforts are being made to conclude the trial. Thereafter, the petitioner moved bail application before the learned Sessions Court who also dismissed the bail application of the accused petitioner while showing his agreement with the observation of learned magistrate.

5. Learned counsel submits that while rejecting the bail application, the learned Sessions Court observed that perusal of the order-sheets of the learned magistrate court revealed that bonafide and serious efforts are being made to conclude the trial. He submits that after recording pre-charge evidence, on 17.04.2023, charges were framed against the accused petitioner and the matter was posted for 01.05.2023 for prosecution evidence. Till date, statements of only two prosecution witnesses i.e., Sundar (PW.1) and Omprakash (PW.2) have been recorded whereas there are 37 cited witnesses in the list of the prosecution



witnesses. He argues that Section 437(6) provides that if in any case triable by 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. Learned counsel representing the petitioner submits the provision under Section 437 (6) Cr.P.C. was enacted to constitute legal right for a person and for speedy trial so learned Magistrate court as well as learned Sessions Court have committed wrong in not extending benefit of bail to the petitioner. He contends that the provisions of Section 437(6) CrPC are mandatory in nature and since trial has not been concluded within 60 days from the first date fixed in this matter for recording prosecution evidence for the reasons not attributable to the accused petitioner, and no specific reason has been assigned by the magistrate for the said delay, the petitioner deserves to be enlarged on bail. Learned counsel also contends that the petitioner has already served half of the maximum sentence which can be awarded to him by the learned court below and thus, the provision of Section 436A Cr.P.C. also favours the case of the petitioner. He thus, prays that the instant bail application may be accepted and the petitioner may be released on bail. He contends that period of custody is always a relevant consideration for grant of bail. Learned counsel for the petitioner places reliance on the following judgments:-



- (i). Ashim @ Ashim Kumar Haranath Bhattacharya @ Asim Harinath Bhattacharya @ Aseem Kumar Bhattacharya vs National Investigation Agency : reported in 2022 1 SCC 695
- (ii). Union of India vs K.A. Najeeb : reported in 2021 3 SCC 713
- (iii). Iqbal Ahmed Kabir Ahmed vs State of Maharashtra : MANU/MH/2082/2021

6. Per contra, learned Public Prosecutor vehemently and fervently opposes the bail application. He submits that there is a serious allegation against the petitioner that he provided confidential information related to military to Pakistan intelligence. He further submits that the provision of sub-section (6) of Section 437 Cr.P.C. confers discretionary power on the Magistrate to refuse the bail after recording reasons and, therefore, release of the accused on bail when the trial is not concluded within a period of sixty days from the first date even for taking evidence, cannot be held to be mandatory. He thus, submits that rejection of the bail application under Section 439 Cr.P.C. read with Section 437(6) Cr.P.C. is just and proper and does not call for any interference by this Court. In support of his arguments, he placed reliance on the following judgments:-

- i). Subhojit Datta vs State of Bihar : 2007 SCC OnLine Pat 159
- ii). Mahesh Kumar Sharma @ Mahesh Khandal vs State of Rajasthan (S.B. Criminal Misc. Second Bail Application No.6511/2014, decided on 01.10.2014)



iii). Arjun Singh vs State of Rajasthan (S.B. Criminal Misc. Bail No.3636/2019, decided on 03.04.2019)

7. I have heard and considered the arguments advanced at bar and have gone through the material available on record.

8. Admittedly, on 07.09.2020, a complaint was filed against the petitioner before the learned Magistrate. Thereafter, pre-charge evidence was recorded and on 17.04.2023, charges were framed against the petitioner and the case was ordered to be posted for 01.05.2023 for recording prosecution evidence. Thus, 60 days have already been passed from the first date fixed for recording/taking prosecution evidence. Moreso, the trial is still pending and statements of only two witnesses out of 37 cited witnesses have been recorded and the delay in conclusion of trial are not attributable to the accused petitioner. This lethargic attitude of the prosecution is seriously violating the fundamental right of the speedy trial of the petitioner as guaranteed under Article 21 of the Constitution of India and in such a situation, the conditional liberty must override the statutory embargo. In the case of **Jahir Hak vs State of Rajasthan : (2022) 0 AIR (SC) 3047**, indulgence of bail was extended to the accused therein by the Hon'ble Apex Court by considering the following observations made in the case of **Union of India vs K.A. Najeeb (2021) (3) SCC 713:-**

“12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the NDPS Act”) which too have somewhat rigorous conditions for grant of bail, this Court in Paramjit Singh v. State (NCT of



Delhi) [Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 : 1999 SCC (Cri) 1156], Babba v. State of Maharashtra [Babba v. State of Maharashtra, (2005) 11 SCC 569 : (2006) 2 SCC (Cri) 118] and Umarmia v. State of Gujarat [Umarmia v. State of Gujarat, (2017) 2 SCC 731 : (2017) 2 SCC (Cri) 114] enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.

19. Yet another reason which persuades us to enlarge the respondent on bail is that Section 43- D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS Act. Unlike the NDPS Act where the competent court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such precondition under UAPA. Instead, Section 43-D(5) of the UAPA merely provides another possible ground for the competent court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by abscission, etc."

9. In the case of **Mehmood Mohammed Sayeed vs State of Maharashtra reported in 2001 (7) SRJ 336**, the Hon'ble Apex Court while considering the fact that the trial may take long time, disposed of the appeal of the appellant and released him on bail with certain conditions. The same is reproduced hereinbelow for the sake of ready-reference:-

"1. Leave granted.

Though learned Counsel for the State of Maharashtra opposed appellant to be released on bail we have taken note





of the fact that appellant is remaining in custody from 18-1-2000 onwards. The offences alleged against him include Sections 463, 467, 461, 419 read with Section 120 of the Indian Penal Code. Investigation is completed and the charge-sheet has been laid. What remains is only the trial. We do not know how long the trial will take, particularly, seeing the condition of the trial Courts in Maharashtra.

2. When learned Counsel for the State noticed that we are disposed to release the appellant on bail he alternatively pleaded that stringent conditions may be imposed on him because of the allegations that he has some links with the international terrorists gang. We, therefore, impose the following conditions on him :

1. He shall report to the Worli Police Station, Mumbai on every Monday between 4.00 p.m. and 6.00 p.m. until further orders: and
2. If, he is to leave the limits of Mumbai City Corporation he shall take permission from the trial Court.
3. If he is prepared to abide the above conditions he shall be released on bail on his executing a bond of Rs. 2 lacs with two solvent sureties to the satisfaction of the trial Court.

This appeal is disposed of accordingly."

10. Thus, it is admitted position on record that the trial has not completed within the prescribed time period and it will take long time in its conclusion. At this stage, it is apposite to refer the provision of Sub-Section (6) of Section 437 Cr.P.C. For the sake of ready-reference, same is reproduced hereinbelow:-

"Section 437. When bail may be taken in case of non-bailable offence:-



(1) xxx

(2) xxx

(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"

11. It is in two parts. In the first part, it says that if in any case triable by a Magistrate, the alleged offence is non-bailable and the trial is not concluded within a period of sixty days from the first date fixed for taking evidence, in case such person shall be released on bail to the satisfaction of the Magistrate and in second part, discretion has been conferred to the Magistrate to record his satisfaction and after recording reasons in writing, the Magistrate can refuse the bail.

12. In the case of **Haricharan Ramteke vs State of Chhattisgarh, reported in 2002 (3) CRJ 118**, while dealing with the provisions of Section 437 (6) CrPC, it was held that the said Section is enabling provision which confers powers upon court and cloths accused with right to apply and obtain bail. The relevant paragraphs are reproduced hereinbelow for the sake of ready-reference:-

"6. A perusal of Sub-section (6) of Section 437 would make it clear that it is mandatory in nature but gives a small discretion to the Court that for the special reasons to be recorded in writing the Court before whom the application for release is made may reject the application. The Courts below





have simply observed that the Courts are loaded with work and as the summons have been issued time and again and the witnesses present in the Court could not be examined because of the non-availability of the report of the expert, therefore, the applicants are not entitled to be released on bail.

7. In the opinion of this Court these grounds are not germane for rejecting the application. If a Court is loaded with the work then too it has to discharge its judicial functions. A Judge cannot sit and say that because he is loaded with the work or he is being crushed under the pressure of the work he would not work. People repose their confidence in the judiciary, judges and the judicial system. No Judge howsoever low or high he is cannot say that because of the pressure of the work he is unable to dispose of the matters and therefore he would cause further prejudice to an accused by rejecting his application. Section 437 in fact, is an enabling provision which confers powers upon the Court and cloths the accused with the right to apply and obtain bail. Such applications cannot be rejected mechanically but the Court must record a reason that for a particular reason the accused is not entitled to be released.

8. In cases where the offences are triable by the Court of Sessions when the trials are not concluded then on the ground of delay the Court of Sessions so also the High Court direct release of the accused persons on bail. That is a discretion given to the Sessions Court and the High Court, but when the Magistrate is conferred specific powers under Section 437 (6) Cr.P.C. he cannot reject the application for some lapses either on the part of the prosecution or the police agency or reasons which can be assigned to the lapses of the Court. The two Courts, in the opinion of this Court, were absolutely perverse in their approach and failed in appreciating that an accused cannot be kept in jail



indefinitely. After all liberty of a person is not only to be respected by the people who are working on the roads but is also to be respected by the people who are discharging their functions as the Judges of the Courts. Both the petitions are allowed."

13. From plain reading of the aforesaid provision and the observation made in the case of Haricharan Ramteke (supra), it is clear that the provisions of Section 437 (6) Cr.P.C. are mandatory in nature and a very little discretion is available with the learned magistrate to refuse the bail of an under-trial prisoner subject to recording his reasons for rejecting such bail application in writing which primarily may be possibility of tampering the evidence by the accused, the possibility of the accused absconding if released on bail, the delay in conclusion of the trial within a period of 60 days if attributable to the accused and lastly if it appears that there are reasonable grounds for believing that releasing the accused on bail would defeat the ends of justice.

14. Section 436-A Cr.P.C. provides for maximum punishment for which an undertrial prisoner can be detained. The same has been enacted considering the period of incarceration suffered by an accused for grant of bail which reads under:-

"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."

15. Admittedly, in the present case, the petitioner is facing trial before the magistrate court and in any case, he cannot be awarded sentence of more than seven years. The petitioner is in custody since 08.06.2020 and thus, he has already undergone one-half of the maximum sentence which can be awarded in case of conviction and till date, out of 37 cited witnesses, only two witnesses have been examined for the last six months since the first date i.e., 01.05.2023 fixed for prosecution witnesses.

16. Thus, considering the overall facts and circumstances of the case and in view of the foregoing discussion, I am of the considered opinion that the instant application deserves to be and is hereby allowed and it is directed that accused petitioner Vikas Kumar S/o Shri Indraj Singh arrested in connection with FIR No.01/2020 registered at Police Station Special Police Station, Rajasthan Jaipur (CID Security) shall be released on bail provided he furnishes a personal bond in the sum of Rs.1,00,000/- (Rupees One Lac only) together with two sound and solvent sureties in the sum of Rs.50,000/- (Rupees Fifty Thousand only) each to the satisfaction of the learned trial court with the stipulation that he



shall appear before that Court and any court to which the matter is transferred, on all subsequent dates of hearing and as and when called upon to do so.

17. The petitioner shall report to the concerned police station on first monday of every month till trial is not concluded. He shall not involve in similar offence during currency of the bail. In case, breach of this condition is reported or come to the notice of the Court, the trial court can cancel the bail granted to him by this Court.

(ANIL KUMAR UPMAN),J

Sudhir Asopa/