2014 Legal Eagle (SC) 488

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 2014 (3) JCC 1529 : 2014 (3) JLJR 313 : 2014 (7) JT 527 : 2014 (9) JT 55 : 2014 (4) KarLJ 177 : 2014 (3) KerLJ 330 : 2014 (3) KHC 69 : 2014 (3) KLT 143 : 2014 (3) Law Herald(SC) 1793 : 2014 (3) Law Herald(SC) 2289 : 2014 (2) MadWN(Cri) 501 : 2014 (4) Mh.L.J.(Cri.) 47 : 2014 (3) MLJ(Cri) 353 : 2014 (4) MPHT 81 : 2014 (4) MPJR 55 : 2014 (58) OCR 999 : 2014 (2) OLR 562 : 2014 (3) PLJR 314 : 2014 (2) RajCriC 653 : 2014 (3) RCR(Criminal) 527 : 2014 (4) Recent Apex Judgments(RAJ) 186 : 2014 (3) RLW 2171 : 2014 (8) Scale 250 : 2014 (8) SCC 273 : 2014 (3) SCC(Cri) 449 : 2014 SCR 2542 : 2014 (5) SLT 582 : 2014 (5) Supreme 324 : 2014 (3) WLN 28 : 2014 (86) ACrC 568 : 2014 (140) AIC 118 : 2014 (3) AICLR 623 : 2014 AIOL 411 : 2014 AIR(SC) 2756 : 2014 AIR(SCW) 3930 : 2014 (2) ALD(Cri)(SC) 779 : 2014 (2) Apex Court Judgments(SC) 385 : 2014 (3) B.L. Jud. 108 : 2014 (3) BBCJ 282 : 2014 (3) Bom.C.R.(Cri.) 362 : 2014 (4) CalHCN 73 : 2014 (3) CCR 144 : 2014 (3) Cri.CC 1 : 2014 (3) Crimes 40 : 2014 (3) Crimes 206 : 2014 CrLJ 3707 : 2014 CrLR 721 : 2014 (2) CrLR 457 : 2014 (Supp.2) CutLT(Cri) 871 : 2014 (210) DLT 599 : 2014 (2) DMC 546 : 2014 (3) ECrC 379 : 2014 (2) GLH 547 : 2014 (2) GLR 1848 : 2014 (3) GLT 102 : 2014 (3) ILR(Ker) 165 : 2014 (3) JBCJ 352 : 2014 (8) SCR 128

[Before : Chandramauli Kr. Prasad, Pinaki Chandra Ghose]

Arnesh Kumar

versus

State of Bihar & Anr.

Case No. : Criminal Appeal No. 1277 of 2014 (@ Special Leave Petition (Crl.) No. 9127 of 2013), Date of Decision : 02/07/2014

(A) Anticipatory Bail -- Indian Penal Code, 1860 -- Section 498-A -- Dowry demand -- Anticipation of arrest in case of demand of dowry -- Directions to prevent unnecessary arrest given -- To police officers along with the Magistrates -- Held; that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. Directions given by Hon'ble Court to ensure the prevention of unnecessary arrest by police officers -- Directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine. Appeal allowed -- Dowry Prohibition Act, 1961 -- Section 4 -- Code of Criminal Procedure, 1973 -- Sections 41, 41(1)(b) & 167 -- Constitution of India, 1950 -- Article 22(2).

(B) Harassment/Arrest of husband & Relatives -- Section 498, I.P.C. -- The provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision.

(C) Arrest -- Powers of police officers to arrest -- Apart from power to arrest, the police officers must be able to justify the reasons thereof -- No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person -- It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation.

(D) Code of Criminal Procedure, 1973 -- Sections 41, 41(1)(b) & 167 -- Powers of magistrate to authorize detention -- Conditions precedents for arrest to be satisfied by police officer -- When an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest under Section 41 Cr. PC has been satisfied and it is only thereafter that he will authorise the detention of an accused -- Magistrate is duty bound not to authorise his further detention and release the accused -- The Magistrate before authorising detention will record its own satisfaction, may be in brief but the said satisfaction must reflect from its order -- It shall never be based upon the ipse dixit of the police officer -- Those reasons shall be perused by the Magistrate while authorising the detention and only after recording its satisfaction in writing that the Magistrate will authorise the detention of the accused -- Condition precedent for arrest as envisaged under Section 41 Cr. PC has to be complied and shall be subject to the same scrutiny by the Magistrate -- Held; that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically -- Directions given by Hon'ble Court to ensure the unnecessary arrest by police officers.

Advocates Appeared :

For the Appellant : Rakesh Kumar and Kaushal Yadav, Advocates.

For the Respondents : Rudreshwar Singh, Samir Ali Khan Ms. Aparna Jha, Braj K. Mishra and Abhishek Yadav, Advocates.

Statutes Referred :

1. Indian Penal Code -- S.498A 2. Indian Penal Code -- S.498A 3. Code of Criminal Procedure -- S.41 4. Code of Criminal Procedure -- S.41(1)(b) 5. Code of Criminal Procedure -- S.167 6. Code of Criminal Procedure -- S.167 7. Code of Criminal

Procedure -- S.41(1)(b) 8. Code of Criminal Procedure -- S.41 9. Dowry Prohibition Act -- S.4 10. Dowry Prohibition Act -- S.4 11. Constitution of India -- Art.22(2) 12. Constitution of India -- Art.22(2)

JUDGMENT/ORDER:
Chandramauli Kr. Prasad, J.:--

1. The petitioner apprehends his arrest in a case under Section 498-A of the Indian Penal Code, 1860 (hereinafter called as IPC) and Section 4 of the Dowry Prohibition Act, 1961. The maximum sentence provided under Section 498-A IPC is imprisonment for a term which may extend to three years and fine whereas the maximum sentence provided under Section 4 of the Dowry Prohibition Act is two years and with fine.

2. Petitioner happens to be the husband of respondent No. 2 Sweta Kiran. The marriage between them was solemnized on 1st July, 2007. His attempt to secure anticipatory bail has failed and hence he has knocked the door of this Court by way of this Special Leave Petition.

3. Leave granted.

4. In sum and substance, allegation levelled by the wife against the appellant is that demand of Rupees eight lacs, a maruti car, an air-conditioner, television set etc. was made by her mother-in-law and father-in-law and when this fact was brought to the appellant's notice, he supported his mother and threatened to marry another woman. It has been alleged that she was driven out of the matrimonial home due to non- fulfilment of the demand of dowry.

5. Denying these allegations, the appellant preferred an application for anticipatory bail which was earlier rejected by the learned Sessions Judge and thereafter by the High Court.

6. There is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested. "Crime in India 2012 Statistics" published by National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for offence under Section 498-A of the IPC, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47,951 which depicts that mothers and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under Indian Penal Code. It accounts for 4.5% of total crimes committed under different sections of penal code, more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases under Section 498A, IPC is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads. As many as 3,72,706 cases are pending trial of which on current estimate, nearly 3,17,000 are likely to result in acquittal.

7. Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Cr.PC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

8. Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the Legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short 'Cr.PC), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest. As the offence with which we are concerned in the present appeal, provides for a maximum punishment of imprisonment which may extend to seven years and fine, Section 41(1)(b), Cr.PC which is relevant for the purpose reads as follows:

"41. When police may arrest without warrant. -- (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person --

(a) x x x x x x

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists

that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:-

(i) x x x x x

(ii) the police officer is satisfied that such arrest is necessary --

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

X x x x x x

From a plain reading of the aforesaid provision, it is evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence punishable as aforesaid. Police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. Law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest. In pith and core, the police office before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 of Cr.PC.

9. An accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India and Section 57, Cr.PC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power under Section 167 Cr.PC. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner. Before a Magistrate authorises detention under Section 167, Cr.PC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest under Section 41 Cr.PC has been satisfied and it is only thereafter that he will authorise the detention of an accused. The Magistrate before authorising detention will record its own satisfaction, may be in brief but the said satisfaction must reflect from its order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement etc., the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording its satisfaction in writing that the Magistrate will authorise the detention of the accused. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant and secondly a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

10. Another provision i.e. Section 41A Cr.PC aimed to avoid unnecessary arrest or threat of arrest looming large on accused requires to be vitalised. Section 41A as inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008(Act 5 of 2009), which is relevant in the context reads as follows:

"41A. Notice of appearance before police officer. -- (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

11. Aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1), Cr.PC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police office is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.PC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

12. We are of the opinion that if the provisions of Section 41, Cr.PC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr.PC for effecting arrest be discouraged and discontinued.

13. Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

(1) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;

(2) All police officers be provided with a check list containing specified sub- clauses under Section 41(1)(b)(ii);

(3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

(4) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

(5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

(6) Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

(7) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

(8) Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

14. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

15. We direct that a copy of this judgment be forwarded to the Chief Secretaries as also the Director Generals of Police of all the State Governments and the Union Territories and the Registrar General of all the High Courts for onward transmission and ensuring its compliance.

16. By order dated 31st of October, 2013, this Court had granted provisional bail to the appellant on certain conditions. We make this order absolute.

17. In the result, we allow this appeal, making our aforesaid order dated 31st October, 2013 absolute; with the directions aforesaid.

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2014 Legal Eagle (SC) 4755

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 2014 (5) Law Herald(SC) 3559 : 2014 (4) RCR(Criminal) 234 : 2014 (5) Recent Apex Judgments(RAJ) 309 : 2014 (10) Scale 290 : 2015 (13) SCC 605 : 2016 (1) SCC(Cri) 663

[Before : R.M. Lodha; CJI, Kurian Joseph, Rohinton Fali Nariman]

Bhim Singh

versus

Union of India and others

Case No. : Writ Petition (Criminal) No. 310 of 2005 with W.P. (C) No. 341 of 2004 and W.P.(Crl.) No. 175 of 2005, Date of Decision : 05/09/2014

Advocates Appeared :

For the Appearing Parties : Prof. Bhim Singh, Senior Advocate (In person), Mr. M.N. Krishnamani, Senior Advocate, Mr. Manjit Singh, Senior Advocate/AAG, Mr. P.V. Yogeswaran, Mr. Prashant Bhushan, Mr. Rohit Kumar Singh, Mr. Govind Jee, Mr. Mukul Rohatgi, Attorney General, Mr. Ranjit Kumar, Solicitor General, Mr. N.K. Kaul, ASG, Ms. Indra Sawhney, Mr. Chetan Chawla, Ms. Charul Sarin, Ms. Asha G. Nair, Ms. Sunita Rani Singh, Ms. Binu Tamta, Mr. Vikas Bansal, Ms. Atreyi Chatterjee, Mr. Arif Sikandar Mir, Ms. Sushma Suri, Mr. Tapesh Kr. Singh, Mr. Mohd. Waquas, Mr. S. Wasim A. Qadri, Mr. P.K. Dey, Mr. Zaid Ali, Mr. Shadman Ali, Mr. V. Bansal, Mr. D.S. Mahra, Mr. Vibhu Tiwari, Mr. R.P. Mehrotra, Mr. Vikas Bansal, Mr. Utkarsh Sharma, Ms. Pragati Neekhra, Mr. Mukesh K. Giri, AAG, Ms. Alka Sinha, Mr. V. Madhukar, AAG, Ms. Anvita Cowshish, Mr. Mohit Nain, Mr. Kuldip Singh, Mr. Nupur Choudhary, Ms. Vivekta Singh, Mr. Pragyan Sharma, Mr. Heshu Kayina, Mr. P.V. Yogeswaran, Mr. Sapam Biswajit, Mr. Ashok Kr. Singh, Mr. Navnit Kumar, Advocate, for Corporate Law Group, Mr. Soumitra G. Chaudhuri, Mr. Anip Sachthey, Mr. Mohit Paul, Mr. Saakaar Sardana, Ms. Aruna Mathur, Mr. Yusuf Khan, Mr. Gopal Singh, Mr. Rituraj Biswas, Ms. K. Enatoli Sema, Mr. Amit Kumar Singh, Mr. Balaji Srinivasan, Ms. Bina Madhavan, Mr. Anil Shrivastav, Mr. Rituraj Biswas, Ms. Archana Pathak Dave, Mr. Milind Kumar, Mr. Ranjan Mukherjee, Advocate (NP), Mr. Rudreshwar Singh, Mr. Samir Ali Khan, Mr. Divya Jyoti Jaippuriar, For Ms. Jyoti Mendiratta, Mr. Anil K. Jha, Mr. Ardhendumauli Kumar Prasad, Mr. Arun K. Sinha, Mr. Javed Mahmud Rao, Mr. Milind Kumar, Mr. Pradeep Misra, Mr. Praveen Swarup, Mr. Ratan Kumar Choudhuri, Mrs. Anil Katiyar, Mr. Satish Vig, Mr. Sunil Fernandes, Mr. Vipin Kumar Jai, Ms. Kamini Jaiswal, Mr. Anuvrat Sharma, Mr. Ashok Kumar Singh, Mr. Ashok Mathur, Advocate (NP), Mr. Balaji Srinvasan, Mr. C.D. Singh, Mr. P.V. Yogeshwaran, Mr. Sibo Sankar Mishra, Ms. Bina Madhavan, Mr. Kamlendra Mishra and Mr. Ratan Kuamr Choudhuri, Advocates.

JUDGMENT/ORDER:

1. On 01.08.2014, whereby we wanted to know from the learned Attorney General about Government of India's plan in fast-tracking criminal justice in the country, learned Attorney General on that day took time to have a comprehensive look at the problem and come out with a concrete proposal in this regard within four weeks.

2. Mr. Mukul Rohatgi, learned Attorney General submits that process of consultation with the State Governments for fast-tracking criminal justice has been commenced by the Central Government but the blueprint/road-map for fast-tracking of criminal cases shall take some time. He prays for time to place the same by way of an affidavit within three months.

3. We reiterate that it is high time, positive steps are taken by the Central Government in consultation with the State Governments in fast tracking all types of criminal cases so that criminal justice is delivered timely and expeditiously.

4. Learned Attorney General informs us that more than 50% of the prisoners in various jails are under-trial prisoners. Even many of them may have served maximum sentence prescribed under the law for the offences they have been charged with. The Parliament by Act 25 of 2005 amended Code of Criminal Procedure, 1973 providing for maximum period for which an under-trial prisoner can be detained under any law not being an offence for which the punishment of death has been specified as one of the punishments. Section 436A reads as follows :-

> "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.]"

5. Having given our thoughtful consideration to the legislative policy engrafted in Section 436A and large number of under-trial prisoners housed in the prisons, we are of the considered view that some order deserves to be passed by us so that the under-trial

prisoners do not continue to be detained in prison beyond the maximum period provided under Section 436A.

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 1st October, 2014 for the purposes of effective implementation of 436A of the Code of Criminal Procedure. In its sittings in jail, the above judicial officers shall identify the under-trial 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 436A pass an appropriate order in jail itself for release of such under-trial prisoners who fulfill the requirement of Section 436A for their release immediately. Such jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall submit the report of each of such sitting 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.

7. To facilitate the compliance of 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.

8. 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.

W.P.(Crl.) No. 310 of 2005

9. Mr. Mukul Rohtagi, learned Attorney General placed before us status of 25 foreign nationals covered under the order dated 10.11.2008 passed by this Court.

10. As regards the status of the detenue-Hamid Numain Bhat s/o Mohd Iqbal Bhat (mentioned at serial No. 1), it appears that he is lodged in Central Jail, Srinagar. He has been discharged in the case in which he was arrested by the Additional Sessions Judge, Srinagar. It is stated that having regard to legal and factual position, Government of Jammu and Kashmir is now processing his case of deportation, but so far 'No Objection' from the State has not been received, although, his nationality has been confirmed by Pakistan High Commission.

11. In light of the above, we direct the Home Secretary, Government of Jammu and Kashmir to take immediate steps in respect of forwarding 'No Objection' by the State Government to the Central Government for deportation of the prisoner-Hamid Numain Bhat, if it has decided not to challenge the discharge order. In that event, the 'No Objection' shall be positively sent within four weeks. On receipt of 'No Objection', if any, from the Government of Jammu and Kashmir, the Central Government shall take steps for his deportation as early as possible and in no case not later than four weeks from the date of receipt of the 'No Objection.

12. Professor Bhim Singh, petitioner-in-person, invited our attention to the affidavit dated 16th July, 2013 filed on behalf of the Government of India by Mr. Vikas Srivastava in compliance of Order dated 08.05.2013.

13. Learned Attorney General prays for time to look into that affidavit and put forward the Central Government's view in that regard.

14. Mr. Divya Jyoti Jaippuriar, learned counsel has placed before us status of Pakistani fishermen detainees in Indian jails/prisons, which is taken on record. A copy thereof has been given to the learned Attorney General.

15. He prays for time to seek instructions in this regard and respond appropriately on the next date.

List all the matters on 08th December, 2014.

2019 Legal Eagle (SC) 971

IN THE SUPREME COURT OF INDIA

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[Before : R. Banumathi, A.S. Bopanna]

P. Chidambaram

versus

Directorate of Enforcement

Case No. : Criminal Appeal No. 1340/2019 (Arising out of SLP(Crl.) No.7523 of 2019) , Date of Decision : 05/09/2019

INX Media Case:

(A) Code of Criminal Procedure, 1973 -- Sections 438 r/w Section 161, 172, 172(2), 172(3), 173 & 482 -- Criminal procedure -- Anticipatory bail -- Prosecution under Prevention of Money Laundering Act -- Allegations against Appellant-former Finance Minister, Mr. P. Chidambaram, pertained to irregularities in Foreign Investment Promotion Board (FIPB) clearance given to the INX Media for receiving foreign investment to the tune of Rs. 305 crores against approved inflow of Rs. 4.62 crores -- Delhi High Court had already rejected appellant's plea for anticipatory Bail in case registered by CBI against him u/Section 20-B r/w Section 420, IPC, Section 8 and Section 13(2) r/w Section 13(1)(d) of P.C. Act -- By impugned order, High Court had also rejected appellant's plea for Anticipatory Bail in case registered by ED u/Sections 3 and 4 of Prevention of Money Laundering Act -- FIR was registered u/ Section 8 of P.C. Act also which was then in Part A of PMLA -- There are allegations of laundering the proceeds of the crime -- ED claims to have certain specific inputs from various sources, including overseas banks -- Letter rogatory is also said to have been issued and some response have been received by the department -- Having regard to the nature of allegations and the stage of the investigation, investigating agency has to be given sufficient freedom in the process of investigation -- Though, the Court did not endorse the approach of Single Judge in extracting the note produced by ED, yet it did not find any ground warranting interference with the impugned order -- Bail plea rejected -- Appellant workout his remedy, otherwise - Appeal dismissed -- Indian Penal Code, 1860 -- Section 120-B r/w Section 420 -- Prevention of Corruption Act, 1988 -- Section 8 & Section 13(2) r/w Section 13(1)(d) -- Constitution of India, 1950 -- Articles 14, 20(1), 20(3) & 21 -- Code of Criminal Procedure, 1973 -- Sections 161, 172, 172(2), 172(3) & 173 -- Prevention of Money-Laundering Act, 2002 -- Sections 3 & 4 -- Indian Evidence Act, 1872 -- Section 145;

(B) Constitution of India, 1950 -- Article 20(1) -- Constitutional Law -- Fundamental right -- Prosecution u/PMLA etc. -- Violation of Article 20(1) -- Under Article 20(1), no person shall be convicted of any offence except for violation of law in force at the time of commission of that act charged as an offence -- In this case, FIR for the predicate offence has been registered by CBI under Section 120-B IPC, 420 IPC and Section 13 of PC Act and also under Section 8 of the P.C. Act -- Earlier, Section 120-B IPC and Section 420 IPC were included in Part A of the Schedule only by Amendment Act 21 of 2009 w.e.f. 01.06.2009 -- Section 13 of PC Act was included therein by Amendment Act 16 of 2018 w.e.f. 26.07.2018 -- Section 8 of PC Act is punishable with imprisonment extending upto seven years -- Said Section 8 was very much available in Part A of the Schedule of PMLA at the time of alleged commission of offence in 2007-2008 - Thus. It is not that, appellant is proceeded against in violation of Article 20(1) for the alleged commission of the acts which was not an offence as per law then in existence -- Merits of the plea that said Section 8 cannot be the predicate offence qua the appellant, cannot be gone into at this stage when the Court is only considering the prayer for anticipatory bail.

(C) Economic offences -- Money laundering -- Prosecution u/PMLA -- Anticipatory bail for lack of minimum threshold for ED to acquire jurisdiction -- Plea that, minimum threshold for the Enforcement Directorate to acquire jurisdiction at the relevant time was Rs. 30 lakhs whereas, in this case, there is no material to show any payment apart from the sum of Rs. 10 lakhs (approximately) allegedly paid by INX Media to ASCPL with which the appellant is said to be having no connection whatsoever -- Merits of the plea that Section 8 of PC Act (then included in Schedule A of the PMLA in 2007-08) whether attracted or not and whether the ED had the threshold to acquire jurisdiction under PMLA cannot be considered at this stage while the Court is considering only the prayer for anticipatory bail -- Prevention of Corruption Act, 1988 -- Section 8 -- Prevention of Money-Laundering Act, 2002 -- Sections 3 & 4.

(D) Code of Criminal Procedure, 1973 -- Second Schedule -- Criminal procedure -- Classification of offences -- Section 4 of PMLA and Section 8 of PC Act -- Registration of FIR -- Legality -- Section 4 of PMLA r/w Second Schedule of the Code makes it clear that the offences under the PMLA are cognizable offences -- Section 8 of PC Act was then found a mention in Part 'A' of the Schedule (Paragraph 8) and is punishable for a term extending to seven years -- Thus, the essential requirement of Section 45 of PMLA "accused of an offence punishable for a term of imprisonment of more than three years under Part 'A' of the Schedule" is satisfied making the offence under PMLA -- Court thus rejected the plea that very registration of the FIR against the appellant under PMLA is not maintainable -- Prevention of Corruption Act, 1988 --

Section 8 -- Prevention of Money-Laundering Act, 2002 -- Section 4 r/w Section 45; Part A.

(E) Code of Criminal procedure, 1973 -- Section 172(2) & (3) r/w Section 161 -- Criminal Procedure -- Anticipatory bail -- Consideration of documents/material collected during investigation, i.e. use of Case Diary -- Permissibility -- Sub-section (2) of Section 172 Cr. P.C. permits any court to send for case diary to use them in the trial. Section 172(3) Cr. P.C. specifically provides that neither the accused nor his agents shall be entitled to call for case diary nor shall he or they be entitled to see them merely because they are referred to by the court -- But if they are used by the police officer who made them to refresh his memory or if the court uses them for the purpose of contradicting the such police officer, the provisions of Section 161 Crl. P.C. or the provision of Section 145 of the Evidence Act shall be complied with -- Solicitor General relied upon Balakram v. State of Uttarakhand and others, (2017) 7 SCC 668 , wherein it was held that the confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand -- Various judgments show that on several instances, court always received and perused the case diaries/materials collected by the prosecution during investigation to satisfy itself as to whether the investigation is proceeding in the right direction or for consideration of the question of grant of bail etc. -- At the same time, court avoided to dilate on the factual position emerging therefrom on the ground that any observation made thereon might cause prejudice to the accused or to the prosecution in any manner -- Accused can use case diaries only in aforesaid two eventualities, in the manner provided u/ Section 145 Evidence Act -- But, Court had wide powers to call for Case Diaries, even prior to commencement of Trial to satisfy itself that, the Investigation is proceeding in right direction or has been conducted in right lines or a case for bail/anticipatory bail is made out or not, or to judge correctness of decision of High Court or Trial Court etc. -- In the initial stages of investigation, Court may not extract or verbatim refer to the materials which the Court has perused (as has been done in this case by the learned Single Judge) and make observations which might cause serious prejudice to the accused in trial and other proceedings resulting in miscarriage of justice -- Court thus consciously refrained from opening the sealed covers containing materials collected, which are produced by ED and received by the Court -- Though, the approach adopted by Single Judge in extracting the notes produced by ED/CBI during the course of application for anticipatory bail, found not to be correct, yet, on consideration of all other aspects of the matter, refusal to grant anticipatory bail found to be un-exceptionable -- Indian Evidence Act, 1872 -- Section145.

(F) Anticipatory Bail -- Scope of enquiry—Scrutiny into questions put to and answers given by accused during interrogation by ED/CBI -- Plea that, the court will have to scrutinise the questions put to the accused during interrogation and answers given by the him, in order to satisfy itself whether the answers were "evasive or not", would amount to conducting "mini trial" and substituting court's view over the view of the investigating agency about the "cooperation" or "evasiveness" of the accused and thereafter, the court to decide the questions of grant of anticipatory bail -- Such a plea being far-fetched, rejected --Investigating Agencies are right in submitting that, if the accused are to be confronted with the materials which were collected by the prosecution/Enforcement Directorate with huge efforts, it would lead to devastating consequences and would defeat the very purpose of the investigation into crimes, in particular, white collar offences -- If appellant's plea is to be accepted, the investigating agency will have to question each and every accused such materials collected during investigation and in this process, the investigating agency would be exposing the evidence collected by them with huge efforts using their men and resources and this would give a chance to the accused to tamper with the evidence and to destroy the money trail apart from paving the way for the accused to influence the witnesses -- If the appellant-accused will have to be questioned with the materials and the investigating agency has to satisfy the court that the accused was "evasive" during interrogation, the court will have to undertake a "mini trial" of scrutinizing the matter at intermediary stages of investigation like interrogation of the accused and the answers elicited from the accused and to find out whether the answers given by the accused are 'evasive' or whether they are 'satisfactory' or not -- This could have never been the intention of the legislature either under PMLA or any other statute -- Such aspects are within the domain of Investigating Agency and Court cannot substitute its views at this stage -- Court cannot also direct investigation Agency to produce transcripts of the question put to accused and answers given by him -- Constitution of India, 1950 -- Article 20(3).

(G) Code of Criminal Procedure, 1973 -- Section 482 -- Criminal procedure -- Inherent powers -- Scope of exercise -- Directions to Investigating Agency -- Investigation of a cognizable offence and the various stages thereon including the interrogation of the accused is exclusively reserved for the investigating agency whose powers are unfettered so long as the investigating officer exercises his investigating powers well within the provisions of the law and the legal bounds -- In exercise of its inherent power under Section 482 Cr. P.C., the court can interfere and issue appropriate direction only when the court is convinced that the power of the investigating officer is exercised mala fide or where there is abuse of power and non-compliance of the provisions of Code of Criminal Procedure -- However, this power of invoking inherent jurisdiction to issue direction and interfering with the investigation is exercised only in rare cases where there is abuse of process or non-compliance of the provisions of Cr. P. C. -- In the initial stages of investigation where the court is considering the question of grant of regular bail or pre-arrest bail, it is not for the court to enter into the demarcated function of the investigation and collection of evidence/materials for establishing the offence and interrogation of the accused and the witnesses.

(H) Code of Criminal Procedure, 1973 -- Chapter XII r/w Section 482 -- Criminal Procedure -- Police Investigation and Interrogation of accused -- Interference of or monitoring by Court -- As held by the Supreme Court in a catena of judgments that there is a well-defined and demarcated function in the field of investigation and its subsequent adjudication -- It is not for the court to monitor the investigation process so long as the investigation does not violate any provision of law -- It must be left to the discretion of the investigating agency to decide the course of investigation -- If the court is to interfere in each and every stage of the investigation and the interrogation of the accused, it would affect the normal course of investigation -- It must be left to the investigating agency to proceed in its own manner in interrogation of the accused, nature of questions put to him and the manner of interrogation of the accused.

(I) Code of Criminal Procedure, 1973 -- Section 438 -- Anticipatory Bail -- Grant or refusal -- Exercise of discretion by Court -- Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes -- Power under Section 438 Cr. P.C. is an extraordinary power and the same has to be exercised sparingly -- Judicial discretion has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors -- Anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant -- It is not a matter of rule, an exceptional remedy.

(J) Constitution of India, 1950 -- Article 21 -- Fundamental -- Right to personal liberty -- Anticipatory bail, whether a facet of Article 21 -- Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law -- However, the power conferred by Article 21 is not unfettered and is qualified by the later part of the Article i.e. "…except according to a procedure prescribed by law." -- True, legislative intent behind the introduction of Section 438 Cr. P.C. is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody -- However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake -- Thus, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of an individual and the societal interest -- It is not that, refusal to grant anticipatory bail would amount to denial of the rights of appellant under Article 21 -- Code of Criminal Procedure, 1973 -- Section 438;

(K) Prevention of Money-Laundering Act, 2002(PMLA) -- Section 19 r/w Sections 3 & 4 -- Money Laundering -- Arrest and custodial interrogation vis a vis Pre-arrest bail -- In-built safeguards u/Section 19, PMLA -- Relying upon State Rep. By The CBI v. Anil Sharma (1997) 7 SCC 187 ; Sudhir v. State of Maharashtra and Another (2016) 1 SCC 146 ; and Assistant Director, Directorate of Enforcement v. Hassan Ali Khan (2011) 12 SCC, Solicitor General contended that, custodial interrogation is a recognised mode of interrogation which is not only permissible but has been held to be more effective -- Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes -- In a given case, accused may provide information leading to discovery of material facts and relevant information -- Grant of anticipatory bail may hamper the investigation -- Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information.

(L) Code of Criminal Procedure, 1973 -- Section 438 -- Economic offences -- Anticipatory bail -- Power under Section 438 Cr. P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences -- Economic offences stand as a different class as they affect the economic fabric of the society -- As has been already held in cited case, economic offence is committed with deliberate design with an eye on personal profit regardless to the consequence to the community -- In view of the Supreme Court, Observing that economic offences constitute a class apart and need to be visited with different approach in the matter of bail -- In a case of money-laundering where it involves many stages of "placement", "layering i.e. funds moved to other institutions to conceal origin" and "interrogation i.e. funds used to acquire various assets", it requires systematic and analysed investigation which would be of great advantage. As held in Anil Sharma, success in such interrogation would elude if the accused knows that he is protected by a pre-arrest bail order. Section 438 Cr. P.C. is to be invoked only in exceptional cases where the case alleged is frivolous or groundless.

(M) Prevention of Money-Laundering Act, 2002(PMLA) -- Section 5 r/w Sections 3 & 4 -- Economic offence -- Prosecution u/PMLA -- Arrest of offender and attachment of property -- Safeguards -- So far attachment of property is concerned, sufficient safeguards are provided under the provisions of PMLA -- Under Section 5 of PMLA, the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes Section 5 who passed the impugned order is required to have "reason to believe" that the properties sought to be attached would be transferred or dealt with in a manner which would frustrate the proceedings relating to confiscation of such properties -- Further, the officer who passed the order of attachment is required to record the reasons for such belief -- Provisions of the PMLA and the Rules also provide for manner of forwarding a copy of the order of provisional attachment of property along with material under sub-section (2) of Section 5 of PMLA to the Adjudicating Authority -- Similarly, there are sufficient safeguards with regard to arrest of an offender under the Act, viz. (i) only the specified officers are authorised to arrest; (ii) based on "reasons to believe" that an offence punishable under the Act has been committed; (iii) the reasons for such belief to be recorded in writing; (iv) evidence and the material submitted to the Adjudicating Authority in sealed envelope in the manner as may be prescribed ensuring the safeguards in maintaining the confidentiality; and (v) every person arrested under PMLA to be produced before the Judicial Magistrate or Metropolitan Magistrate within 24 hours. Section 19 of PMLA provides for the power to arrest to the specified officer on the basis of material in his possession and has "reason to believe" and the "reasons for such belief to be recorded in writing" that any person has been guilty of an offence punishable under PMLA -- The statutory power has been vested upon the specified officers of higher rank to arrest the person whom the officer has "reason to believe" that such person has been guilty of an offence punishable under PMLA -- In cases of PMLA, in exercising the power to grant anticipatory bail would be to scuttle the statutory power of the specified officers to arrest which is enshrined in the statute with sufficient safeguards -- The Prevention of Money-Laundering (The Manner of Forwarding a Copy of the Order of Provisional Attachment of Property along with the Material, and Copy of the Reasons along with the Material in respect of Survey, to the Adjudicating Authority and its period of Retention) Rules, 2005 -- Rule 3 -- The Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the period of Retention) Rules, 2005 -- Prevention of Money-Laundering Act, 2002(PMLA) -- Chapter II; Sections 2 (1) (p), 2 (1) (ra)

and 2 (1) (y) r/w Sections 3 and 4; Sections 17 and 19; Sections 55 to 61; Sections 71 & 73; Schedules, Part A, Part B and Part C.

(N) Prevention of Money-Laundering Act, 2002(PMLA) -- Sections 3, 4 & 5 r/w Section 71 & 45 -- Legislation -- Law relating to Economic offences -- Provisions of PMLA vis a vis Other Enactments -- Relative scope and prevalence -- Section 71 of PMLA gives overriding effect to the provisions of PMLA -- Section 71 of PMLA states that the provisions of the Act would have overriding effect on the provisions of all other Acts applicable -- The provisions of PMLA shall prevail over the contrary provisions of the other Acts. Section 65 of PMLA states that the provisions of Code of Criminal Procedure, 1973 shall apply to the provisions under the Act insofar as they are not inconsistent with the provisions of PMLA.

(O) Prevention of Money-Laundering Act, 2002(PMLA) -- Section 45 r/w Sections 3, 4, 5, 71 & 45 -- Money Laundering -- Anticipatory Bail -- Conditions precedent u/Section 45, PMLA -- Section 45 of PMLA starts with non-obstante clause -- It imposes two conditions for grant of bail to any person accused of any offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule of the Act viz., (i) that the prosecutor must be given an opportunity to oppose the application for such bail; (ii) that the court must be satisfied that there are reasonable grounds for believing that the accused persons is not guilty of such offence and that he is not likely to commit any offence while on bail -- Initially, twin conditions under Section 45(1) for the offences classified thereunder in Part-A of the Schedule was held arbitrary and discriminatory and invalid in Nikesh Tarachand Shah v. Union of India and another (2018) 11 SCC 1 -- Insofar as the twin conditions for release of accused on bail under Section 45 of the Act, the Supreme Court held the same to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India -- Subsequently, Section 45 has been amended by Amendment Act 13 of 2008, thereby, substituting the words 'imprisonment for a term of imprisonment of more than three years under Part-A of the Schedule' stood substitute with 'accused of an offence under this Act....' -- Post Nikesh Tarachand Shah (supra), the position stands altered -- Amendment Act 21 of 2009 w.e.f. 01.06.2009 -- Amendment Act 2 of 2013 w.e.f. 15.02.2013 -- Amendment Act 16 of 2018 w.e.f. 26.07.2018.

Statutes Referred :

1. Indian Penal Code -- S.120B 2. Indian Penal Code -- S.420 3. Indian Penal Code -- S.26 4. Indian Penal Code -- S.26 5. Indian Penal Code -- S.420 6. Indian Penal Code -- S.26 7. Indian Penal Code -- S.120B 8. Indian Penal Code -- S.420 9. Indian Penal Code -- S.120B 10. Code of Criminal Procedure -- S.438 11. Code of Criminal Procedure -- S.172(2) 12. Code of Criminal Procedure -- S.161 13. Code of Criminal Procedure -- S.172 14. Code of Criminal Procedure -- S.172(2) 15. Code of Criminal Procedure -- S.172 16. Code of Criminal Procedure -- S.173 17. Code of Criminal Procedure -- S.482 18. Code of Criminal Procedure -- S.161 19. Code of Criminal Procedure -- S.172(3) 20. Code of Criminal Procedure -- S.173 21. Code of Criminal Procedure -- S.438 22. Code of Criminal Procedure -- S.482 23. Code of Criminal Procedure -- S.172(3) 24. Code of Criminal Procedure -- S.161 25. Code of Criminal Procedure -- S.172 26. Code of Criminal Procedure -- S.172(2) 27. Code of Criminal Procedure -- S.172(3) 28. Code of Criminal Procedure -- S.173 29. Code of Criminal Procedure -- S.438 30. Code of Criminal Procedure -- S.482 31. Prevention of Corruption Act -- S.13(2) 32. Prevention of Corruption Act -- S.13 33. Prevention of Money Laundering Act -- S.3 34. Prevention of Money Laundering Act -- S.4 35. Prevention of Corruption Act -- S.8 36. Prevention of Corruption Act -- S.13(1)(d) 37. Prevention of Corruption Act -- S.13(2) 38. Prevention of Corruption Act -- S.8 39. Prevention of Corruption Act -- S.13(1)(d) 40. Prevention of Money Laundering Act -- S.4 41. Prevention of Corruption Act -- S.13 42. Prevention of Money Laundering Act -- S.3 43. Prevention of Corruption Act -- S.13(1)(d) 44. Prevention of Corruption Act -- S.13(2) 45. Prevention of Corruption Act -- S.8 46. Evidence Act -- S.145 47. Evidence Act -- S.145 48. Evidence Act -- S.145 49. Constitution of India -- Art.21 50. Constitution of India -- Art.14 51. Constitution of India -- Art.20(1) 52. Constitution of India -- Art.21 53. Constitution of India -- Art.20(3) 54. Constitution of India -- Art.21 55. Constitution of India -- Art.20(3) 56. Constitution of India -- Art.20(3) 57. Constitution of India -- Art.20(1) 58. Constitution of India -- Art.14 59. Constitution of India -- Art.14 60. Constitution of India -- Art.20(1) 61. Prevention of Corruption Act -- S.13 62. Prevention of Money Laundering Act -- S.4 63. Prevention of Money Laundering Act -- S.3

Cases Referred :

1. Abhinandan Jha and others v. Dinesh Mishra AIR 1968 SC117 [Para 62]
2. Additional District Magistrate, Jabalpur v. Shivakant Shukla (1976) 2 SCC 521 [Para 16]
3. Adri Dharan Das v. State of W.B. (2005) 4 SCC 303 [Para 73]
4. Assistant Director, Directorate of Enforcement v. Hassan Ali Khan (2011) 12 SCC 684 [Para 71]
5. Balakram v. State of Uttarakhand and others (2017) 7 SCC 668 [Para 49]
6. D.K. Ganesh Babu v. P.T. Manokaran (2007) 4 SCC 434 [Para 75]
7. Directorate of Enforcement and another v. P.V. Prabhakar Rao (1997) 6 SCC 647 [Paras 20 & 51]
8. Directorate of Enforcement v. Ashok Kumar Jain (1998) 2 SCC 105 [Para 76]
9. Divine Retreat Centre v. State of Kerala and Others (2008) 3 SCC 542 [Para 62]
10. Dukhishyam Benupani, Assistant Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria (1998) 1 SCC 52 [Paras 62, 63 & 80]
11. Enforcement Officer, Ted, Bombay v. Bher Chand Tikaji Bora and others (1999) 5 SCC 720 [Para 80]
12. Gurbaksh Singh Sibbia and others v. State of Punjab (1980) 2 SCC 565 [Para 3]
13. Jai Prakash Singh v. State of Bihar and another (2012) 4 SCC 379 [Paras 20 & 75]
14. King-Emperor v. Khwaja Nazir Ahmad AIR 1945 PC18 : 1944 SCC Online PC 29 [Paras 61 & 62]
15. M.C. Abraham and Another v. State of Maharashtra and Others (2003) 2 SCC 649 [Para 62]
16. Malkiat Singh and others v. State of Punjab (1991) 4 SCC 341 [Para 50]
17. Mukund Lal v. Union of India and another 1989 Supp. (1) SCC 622 [Para 51]
18. Naresh Kumar Yadav v. Ravindra Kumar and others (2008) 1 SCC 632 [Para 50]
19. Nikesh Tarachand Shah v. Union of India and another (2018) 11 SCC 1 [Para 37]

20. R.K. Krishna Kumar v. State of Assam and others (1998) 1 SCC 474 [Para 51]
21. Rao Shiv Bahadur Singh and another v. State of Vindhya Pradesh AIR 1953 SC394 [Para 16]
22. Romila Thapar and Others v. Union of India and Others (2018) 10 SCC 753 [Paras 20 & 51]
23. Santosh s/o Dwarkadas Fafat v. State of Maharashtra (2017) 9 SCC 714 [Para 17]
24. Siddharam Satlingappa Mhetre v. State of Maharashtra and Others (2011) 1 SCC 694 [Para 74]
25. Sidharth and others v. State of Bihar (2005) 12 SCC 545 [Para 50]
26. State of Bihar and another v. J.A.C. Saldanha and others (1980) 1 SCC 554 [Para 62]
27. State of Bihar and another v. P.P. Sharma, IAS and another 1992 Supp. (1) 222 [Para 63]
28. State of Gujarat v. Mohanlal Jitamalji Porwal and others (1987) 2 SCC 364 [Para 78]
29. State of M.P. and another v. Ram Kishna Balothia and another (1995) 3 SCC 221 [Para 69]
30. State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain (2008) 1 SCC 213 [Para 75]
31. State Rep. By The CBI v. Anil Sharma (1997) 7 SCC 187 [Paras 71, 72]
32. Subramanian Swamy v. Director, Central Bureau of Investigation and another (2014) 8 SCC 682 [Para 62]
33. Sudhir v. State of Maharashtra and Another (2016) 1 SCC 146 [Para 71]
34. Union of India v. Padam Narain Aggarwal (2008) 13 SCC 305 [Para 75]
35. Y.S. Jagan Mohan Reddy v. CBI (2013) 7 SCC 439 [Para 79]

JUDGMENT/ORDER:

R. Banumathi, J.:--

Leave granted.

2. This appeal relates to the alleged irregularities in Foreign Investment Promotion Board (FIPB) clearance given to the INX Media for receiving foreign investment to the tune of Rs.305 crores against approved inflow of Rs.4.62 crores. The High Court of Delhi rejected the appellant's plea for anticipatory bail in the case registered by Central Bureau of Investigation (CBI) being RC No.220/2017-E-0011 under Section 120B IPC read with Section 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. By the impugned order dated 20.08.2019, the High Court also refused to grant anticipatory bail in the case registered by the Enforcement Directorate in ECIR No.07/HIU/2017 punishable under Sections 3 and 4 of the Prevention of Money-Laundering Act, 2002.

3. Grievance of the appellant is that against the impugned order of the High Court, the appellant tried to get the matter listed in the Supreme Court on 21.08.2019; but the appellant could not get an urgent hearing in the Supreme Court seeking stay of the impugned order of the High Court. The appellant was arrested by the CBI on the night of 21.08.2019. Since the appellant was arrested and remanded to custody in CBI case, in view of the judgment of the Constitution Bench in ***Shri Gurbaksh Singh Sibbia and others v. State of Punjab (1980) 2 SCC 565*** , the appellant cannot seek anticipatory bail after he is arrested. Accordingly, SLP(Crl.) No.7525 of 2019 preferred by the appellant qua the CBI case was dismissed as infructuous vide order dated 26.08.2019 on the ground that the appellant has already been arrested and remanded to custody. This Court granted liberty to the appellant to work out his remedy in accordance with law.

4. On 15.05.2017, CBI registered FIR in RC No.220/2017-E-0011 under Section 120B IPC read with Section 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against the accused viz. (i) INX Media through its Director Indrani Mukherjea; (ii) INX News through its Director Sh. Pratim Mukherjea @ Peter Mukherjea and others; (iii) Sh. Karti P. Chidambaram; (iv) Chess Management Services through its Director Sh. Karti P. Chidambaram and others; (v) Advantage Strategic Consulting through its Director Ms. Padma Vishwanathan @ Padma Bhaskararaman and others; (vi) unknown officers/officials of Ministry of Finance, Govt. of India; and (vii) other unknown persons for the alleged irregularities in giving FIPB's clearance to INX Media to receive overseas funds of Rs.305 crores against approved Foreign Direct Investment (FDI) of Rs.4.62 crores.

5. Case of the prosecution in the predicate offence is that in 2007, INX Media Pvt. Ltd. approached ***Foreign Investment Promotion Board (FIPB)*** seeking approval for FDI upto 46.216 per cent of the issued equity capital. While sending the proposal by INX Media to be placed before the FIPB, INX Media had clearly mentioned in it the inflow of FDI to the extent of Rs.4,62,16,000/- taking the proposed issue at its face value. The FIPB in its meeting held on 18.05.2007 recommended the proposal of INX Media subject to the approval of the Finance Minister-the appellant. In the meeting, the Board did not approve the downstream investment by INX Media in INX News. In violation of the conditions of the approval, the recommendation of FIPB:- (i) INX Media deliberately made a downstream investment to the extent of 26% in the capital of INX News Ltd. without specific approval of FIPB which included indirect foreign investment by the same Foreign Investors; (ii) generated more than Rs.305 crores FDI in INX Media which is in clear violation of the approved foreign flow of Rs.4.62 crores by issuing shares to the foreign investors at a premium of more than Rs.800/- per share.

6. Upon receipt of a complaint on the basis of a cheque for an amount of Rs.10,00,000/- made in favour of M/s Advantage Strategic Consulting Private Limited (ASCPL) by INX Media, the investigation wing of the Income Tax Department proceeded to investigate the matter and the relevant information was sought from the FIPB, which in turn, vide its letter dated 26.05.2008 sought clarification from the INX Media which justified its action saying that the downstream investment has been authorised and that the same was made in accordance with the approval of FIPB. It is alleged by the prosecution that in order to get out of the situation without any penal provision, INX Media entered into a criminal conspiracy with Sh. Karti Chidambaram, Promoter Director, Chess Management Services Pvt. Ltd. and the appellant-the then Finance Minister of India. INX Media through the letter dated 26.06.2008 tried to justify their action stating that the downstream investment has been approved and the same was made in accordance with approval.

7. The FIR further alleges that for the services rendered by Sh. Karti Chidambaram to INX Media through Chess Management Services in getting the issues scuttled by influencing the public servants of FIPB unit of the Ministry of Finance, consideration in the form of payments were received against invoices raised on INX Media by ASCPL. It is alleged in the FIR that the very reason for getting the invoices raised in the name of ASCPL for the services rendered by Chess Management Services was with a view to conceal the identity of Sh. Karti Chidambaram inasmuch as on the day when the invoices were raised and payment was received. It is stated that Sh. Karti Chidambaram was the Promoter, Director of Chess Management Services whereas ASCPL was being

controlled by him indirectly. It is alleged that the invoices approximately for an amount of Rs.3.50 crores were falsely got raised in favour of INX Media in the name of other companies in which Sh. Karti Chidambaram was having sustainable interest either directly or indirectly. It is alleged that such invoices were falsely got raised for creation of acquisition of media content, consultancy in respect of market research, acquisition of content of various genre of Audio- Video etc. It is alleged that INX Media Group in his record has clearly mentioned the purpose of payment of Rs.10,00,000/- to ASCPL as towards "management consultancy charges towards FIPB notification and clarification". Alleging that the above acts of omission and commission prima facie disclose commission of offence, CBI has registered FIR in RC No.220/2017-E-0011 on 15.05.2017 under Section 120B read with Section 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against the aforesaid accused.

8. On the basis of the said FIR registered by CBI, the Enforcement Directorate registered a case in ECIR No.07/HIU/2017 against the aforesaid accused persons for allegedly committing the offence punishable under Sections 3 and 4 of the Prevention of Money-Laundering Act, 2002 (PMLA). Ever since the registration of the cases in 2017, there were various proceedings seeking bail and number of other proceedings pending filed by Sh. Karti Chidambaram and other accused. Finally, the Delhi High Court granted bail to Sh. Karti Chidambaram in INX Media case filed by CBI on 23.03.2018. Thereafter, the appellant moved Delhi High Court seeking anticipatory bail both in CBI case and also in money-laundering case filed by Enforcement Directorate. On 25.07.2018, the Delhi High Court granted the appellant interim protection from arrest in both the cases and the same was extended till 20.08.2019 – the date on which the High Court dismissed the appellant's petition refusing to grant anticipatory bail.

9. The High Court dismissed the application refusing to grant anticipatory bail to the appellant by holding that "*it is a classic case of money-laundering*". The High Court observed that "*it is a clear case of money-laundering*". The learned Single Judge dismissed the application for anticipatory bail by holding "*that the alleged irregularities committed by the appellant makes out a prima facie case for refusing pre-arrest bail to the appellant*". The learned Single Judge also held that "*considering the gravity of the offence and the evasive reply given by the appellant to the questions put to him while he was under the protective cover extended to him by the court are the twin factors which weigh to deny the pre-arrest bail to the appellant*". Being aggrieved, the appellant has preferred this appeal.

10. Lengthy arguments were heard on number of hearings stretched over for long time. Learned Senior counsel appearing for the appellant Mr. Kapil Sibal and Mr. Abhishek Manu Singhvi made meticulous submissions on the concept of life and liberty enshrined in Article 21 of the Constitution of India to urge that the appellant is entitled to the privilege of anticipatory bail. Arguments were also advanced on various aspects – whether the court can look into the materials produced by the respondent-Enforcement Directorate to seek custody of the appellant when the appellant was not confronted with those documents on the three dates of interrogation of the appellant conducted on 19.12.2018, 01.01.2019 and 21.01.2019. Interlocutory application was filed by the appellant to produce the transcripts of the questions put to the appellant and the answers given by the appellant, recorded by Enforcement Directorate. Countering the above submissions, Mr. Tushar Mehta, learned Solicitor General made the submissions that grant of anticipatory bail is not part of Article 21 of the Constitution of India. Mr. Tushar Mehta urged that having regard to the materials collected by the respondent-Enforcement Directorate and the specific inputs and in view of the provisions of the special enactment- PMLA, custodial interrogation of the appellant is required and the appellant is not entitled to the privilege of anticipatory bail.

Contention of Mr. Kapil Sibal, learned Senior counsel:-

11. Mr. Kapil Sibal, learned Senior counsel appearing on behalf of the appellant submitted that the clearance for INX FDI was approved by Foreign Investment Promotion Board (FIPB) consisting of six Secretaries and the appellant as the then Finance Minister granted approval in the normal course of official business. The learned Senior counsel submitted that the crux of the allegation is that the appellant's son Sh. Karti Chidambaram tried to influence the officials of FIPB for granting ex-post facto approval for downstream investment by INX Media to INX News; whereas neither the Board members of FIPB nor the officials of FIPB have stated anything about the appellant's son Sh. Karti Chidambaram that he approached and influenced them for ex-post facto approval. The learned Senior counsel contended that the entire case alleges about money paid to ASCPL and Sh. Karti Chidambaram is neither the share-holder nor a Director in the said ASCPL; but the Enforcement Directorate has falsely alleged that Sh. Karti Chidambaram has been controlling the company-ASCPL. It was submitted that the appellant has nothing to do with the said ASCPL to whom money has been paid by INX Media.

12. Taking us through the impugned judgment and the note said to have been submitted by the Enforcement Directorate before the High Court, the learned Senior counsel submitted that the learned Single Judge has "copied and pasted" paragraphs after paragraphs of the note given by the respondent in the court. It was urged that there was no basis for the allegations contained in the said note to substantiate the alleged transactions/transfer of money as stated in the tabular column given in the impugned order.

13. So far as the sealed cover containing the materials sought to be handed over by the Enforcement Directorate, the learned Senior counsel raised strong objections and submitted that the Enforcement Directorate cannot randomly produce the documents in the court "behind the back" of the appellant for seeking custody of the appellant. Strong objections were raised for the plea of Enforcement Directorate requesting the court to receive the sealed cover and for looking into the documents/material collected during the investigation allegedly showing the trail of money in the name of companies and the money-laundering.

14. The appellant was interrogated by the respondent on three dates viz. 19.12.2018, 01.01.2019 and 21.01.2019. So far as the observation of the High Court that the appellant was "evasive" during interrogation, the learned Senior counsel submitted that the appellant has well cooperated with the respondent and the respondent cannot allege that the appellant was "non-cooperative". On behalf of the appellant, an application has also been filed seeking direction to the respondent to produce the transcripts of the questioning conducted on 19.12.2018, 01.01.2019 and 21.01.2019. The learned Senior counsel submitted that the transcripts will show whether the appellant was "evasive" or not during his questioning as alleged by the respondent.

15. Learned Senior counsel submitted that the provision for anticipatory bail i.e. Section 438 Cr.P.C. has to be interpreted in a fair and reasonable manner and while so, the High Court has mechanically rejected the anticipatory bail. It was further submitted that in case of offences of the nature alleged, everything is borne out by the records and there is no question of the appellant being "evasive". The learned Senior counsel also submitted that co-accused Sh. Karti Chidambaram and Padma Bhaskararaman were granted bail and the other accused Indrani Mukherjea and Sh. Pratim Mukherjea @ Peter Mukherjea are on statutory bail and the

appellant is entitled to bail on parity also.

Contention of Mr. Abhishek Manu Singhvi, learned Senior counsel:-

16. Reiterating the submission of Mr. Kapil Sibal, Mr. Abhishek Manu Singhvi, learned Senior counsel submitted that the Enforcement Directorate cannot say that the appellant was "non-cooperative" and "evasive". Mr. Singhvi also urged for production of transcripts i.e. questions put to the appellant and the answers which would show whether the appellant has properly responded to the questions or not. Placing reliance upon ***Additional District Magistrate, Jabalpur v. Shivakant Shukla*** ***(1976) 2 SCC 521*** , the learned Senior counsel submitted that the respondent cannot rely upon the documents without furnishing those documents to the appellant or without questioning the appellant about the materials collected during the investigation. Reiterating the submission of Mr. Sibal, Mr. Singhvi contended that the High Court has denied anticipatory bail to the appellant on the basis of materials produced by the respondent in the cover before the court which were never shown to the appellant nor was the appellant confronted with the same. The learned Senior counsel submitted that the alleged occurrence was of the year 2007-08 and Sections 420 IPC and 120B IPC and Section 13 of the Prevention of Corruption Act were not part of the "scheduled offence" of Prevention of Money-Laundering Act in 2008 and were introduced by a notification dated 01.06.2009 and in view of the protection given under Article 20(1) of the Constitution of India, there can never be a retrospective operation of a criminal/penal statute. Placing reliance upon ***Rao Shiv Bahadur Singh and another v. State of Vindhya Pradesh*** ***AIR 1953 SC 394*** , it was contended that the appellant has to substantiate the contention that the acts charged as offences were offences "at the time of commission of the offence". The learned Senior counsel urged that in 2007-2008 when the alleged acts of commission and omission were committed, they were not "scheduled offences" and hence prosecution under Prevention of Money-Laundering Act, 2002 is not maintainable.

17. The learned Senior counsel has taken strong exception to the two factors stated by the High Court in the impugned order for denying pre-arrest bail i.e. (i) gravity of the offence; and (ii) the appellant was "evasive" to deny the anticipatory bail. The learned Senior counsel submitted that the "gravity of the offence" cannot be the perception of the individual or the court and the test for "gravity of the offence" should be the punishment prescribed by the statute for the offence committed. Insofar as the finding of the High Court that "the appellant was evasive to the questions", the learned Senior counsel submitted that the investigating agency-Enforcement Directorate cannot expect an accused to give answers in the manner they want and that the accused is entitled to protection under Article 20(3) of the Constitution of India. Reliance was placed upon ***Santosh s/o Dwarkadas Fafat v. State of Maharashtra*** ***(2017) 9 SCC 714*** **.**

Contention of Mr. Tushar Mehta, learned Solicitor General:-

18. Taking us through the *Statement of Objects and Reasons* and salient features of the PMLA, the learned Solicitor General submitted that India is a part of the global community having responsibility to crackdown on money-laundering with an effective legislation and PMLA is a result of the joint initiatives taken by several nations. Taking us through the various provisions of the PMLA, the learned Solicitor General submitted that money-laundering poses a serious threat to the financial system and financial integrity of the nation and has to be sternly dealt with. It was submitted that PMLA offence has two dimensions – predicate offence and money-laundering. Money-laundering is a separate and independent offence punishable under Section 4 read with Section 3 of the PMLA.

19. Learned Solicitor General submitted that under Section 19 of PMLA, specified officers, on the basis of material in possession, having reason to believe which is to be recorded in writing that the person has been guilty of the offence under the Act, have power to arrest. It was urged that the power to arrest and necessary safeguards are enshrined under Section 19 of the Act. It was submitted that since respondent has collected cogent materials to show that it is a case of money-laundering and the Enforcement Directorate has issued Letter rogatory and if the Court intervenes by granting anticipatory bail, the authority cannot exercise the statutory right of arrest and interrogate the appellant.

20. The learned Solicitor General submitted that they have obtained specific inputs from overseas banks and also about the companies and properties and it is a clear case of money-laundering. The learned Solicitor General submitted that the Court has power to look into the materials so collected by the Enforcement Directorate and the same cannot be shared with the appellant at this initial stage when the Court is considering the matter for grant of pre-arrest bail. Relying upon number of judgments, the learned Solicitor General has submitted that as a matter of practice, Courts have always perused the case diaries produced by the prosecution and receive and peruse the materials/documents to satisfy its judicial conscience. In support of his contention, learned Solicitor General placed reliance upon ***Romila Thapar and Others v. Union of India and Others*** ***(2018) 10 SCC 753*** **,** ***Jai Prakash Singh v. State of Bihar and Another*** ***(2012) 4 SCC 379*** and ***Directorate of Enforcement and Another v. P.V. Prabhakar Rao*** ***(1997) 6 SCC 647*** and other judgments and requested the Court to peruse the materials produced by the Enforcement Directorate in the sealed cover.

21. Opposing the grant of anticipatory bail, the learned Solicitor General submitted that the Enforcement Directorate has cogent evidence to prove that it is a case of money-laundering and there is a need of custodial interrogation of the appellant. The learned Solicitor General submitted that the economic offences stand as a class apart and custodial interrogation is required for the Enforcement Directorate to trace the trail of money and prayed for dismissal of the appeal.

22. As noted earlier, the predicate offences are under Sections 120B IPC and 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act. Case is registered against the appellant and others under Sections 3 and 4 of PMLA. The main point falling for consideration is whether the appellant is entitled to the privilege of anticipatory bail. In order to consider whether the appellant is to be granted the privilege of anticipatory bail, it is necessary to consider the salient features of the special enactment – Prevention of Money-Laundering Act, 2002.

23. **Prevention of Money-laundering Act, 2002 – Special Enactment:-** Money-laundering is the process of concealing illicit sources of money and the launderer transforming the money proceeds derived from criminal activity into funds and moved to other institution or transformed into legitimate asset. It is realised world around that money laundering poses a serious threat not only to the financial systems of the countries but also to their integrity and sovereignty. The Prevention of Money-laundering Act, 2002 was enacted in pursuance of the Political Declaration adopted by the Special Session of the United Nations General Assembly held in June 1998, calling upon the Member States to adopt national money-laundering legislation and programme, primarily with a view to meet out the serious threat posed by money laundering to the financial system of the countries and to their integrity and sovereignty.

24. **Statement of Objects and Reasons** to the Prevention of Money-laundering Act, 2002 recognises that money laundering poses a serious threat not only to the financial systems of the countries but also to their integrity and sovereignty. PMLA is a special enactment containing the provisions with adequate safeguards with a view to prevent money-laundering. The Preamble to the Prevention of Money-Laundering Act, 2002 states that "*An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.*"

25. Chapter II of PMLA contains provisions relating to the offences of money-laundering. Section 2(1)(p) of PMLA defines "**money-laundering**" that it has the same meaning assigned to it in Section 3; Section 2(1)(ra) of PMLA defines "offence of cross border implications". To prevent offences of "cross border implications", PMLA contains Sections 55 to 61 dealing with reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property between the contracting States with regard to the offences of money-laundering and predicate offences. Section 2(1)(y) of PMLA defines "scheduled offence" which reads as under:-

> "**2. Definitions –**
>
> (1)……
>
> (y) "scheduled offence" means –
>
> (i) the offences specified under Part A of the Scheduled; or
>
> (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or
>
> (iii) the offences specified under Part C of the Schedule."

"Scheduled Offence" is a *sine qua non* for the offence of money-laundering which would generate the money that is being laundered. PMLA contains Schedules which originally contained three parts namely Part A, Part B and Part C. Part A contains various paragraphs which enumerate offences under the Indian Penal Code, Narcotic Drugs and Psychotropic Substances Act, 1985, offences under the Explosives Substances Act, 1908 and the offences under the Prevention of Corruption Act, 1988 **(paragraph 8)** etc. The Schedule was amended by Act 21 of 2009 (w.e.f. 01.06.2009). Section 13 of Prevention of Corruption Act was inserted in the Part A of the Schedule to PMLA by the Amendment Act, 16 of 2018 (w.e.f. 26.07.2018).

26. Section 3 of PMLA stipulates "money-laundering" to be an offence. Section 3 of PMLA states that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of the crime and projecting it as untainted property shall be guilty of the offences of money laundering. The provisions of the PMLA including Section 3 have undergone various amendments. The words in Section 3 "*with the proceeds of crime and projecting*" has been amended as "*proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming*" by the Amendment Act 2 of 2013 (w.e.f. 15.02.2013).

27. Section 4 of PMLA deals with punishment for money laundering. Prior to Amendment Act 2 of 2013, Section 4 provided punishment with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and the fine which may extend to Rs.5,00,000/-. By Amendment Act 2 of 2013, Section 4 is amended w.e.f. 15.02.2013 vide S.O. 343(E) dated 08.02.2013. Now, the punishment prescribed under Section 4 of PMLA to the offender is rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and the offender is also liable to pay fine. The limit of fine has been done away with and now after the amendment, appropriate fine even above Rs.5,00,000/- can be imposed against the offender.

28. Section 5 of PMLA which provides for attachment of property involved in money laundering, states that where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this Section, has "**reason to believe**" (**the reason for such belief to be recorded in writing**), on the basis of material in his possession, that (a) any person is in possession of any proceeds of crime; and (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and fifty days from the date of the order, in such manner as may be prescribed. Section 5 provides that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be.

29. The term "**reason to believe**" is not defined in PMLA. The expression "**reason to believe**" has been defined in Section 26 of IPC. As per the definition in Section 26 IPC, a person is said to have "**reason to believe**" a thing, if he has sufficient cause to believe that thing but not otherwise. The specified officer must have "**reason to believe**" on the basis of material in his possession that the property sought to be attached is likely to be concealed, transferred or dealt with in a manner which may result in frustrating any proceedings for confiscation of their property under the Act. It is stated that in the present case, exercising power under Section 5 of the PMLA, the Adjudicating Authority had attached some of the properties of the appellant. Challenging the attachment, the appellant and others are said to have preferred appeal before the Appellate Tribunal and stay has been granted by the Appellate Authority and the said appeal is stated to be pending.

30. As rightly submitted by the learned Solicitor General, sufficient safeguards are provided under the provisions of PMLA. Under Section 5 of PMLA, the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of Section 5 who passed the impugned order is required to have "**reason to believe**" that the properties sought to be attached would be transferred or dealt with in a manner which would frustrate the proceedings relating to confiscation of such properties. Further, the officer who passed the order of attachment is required to record the reasons for such belief. The provisions of the PMLA and the Rules also provide for manner of forwarding a copy of the order of provisional attachment of property along with material under sub-section (2) of Section 5 of PMLA to the Adjudicating Authority.

31. In order to ensure the safeguards, in exercise of power under Section 73 of PMLA, the Central Government has framed *"The Prevention of Money-Laundering (The Manner of Forwarding a Copy of the Order of Provisional Attachment of Property along with the Material, and Copy of the Reasons along with the Material in respect of Survey, to the Adjudicating Authority and its*

period of Retention) Rules, 2005". Rule 3 of the said Rules provides for manner of forwarding a copy of the order of provisional attachment of property along with the material under sub-section (2) of Section 5 of the Act to the Adjudicating Authority. Rule 3 stipulates various safeguards as to the confidentiality of the sealed envelope sent to the Adjudicating Authority.

32. Section 17 of PMLA deals with the search and seizure. Section 17 which deals with search and seizure states that where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section on the basis of the information in his possession has "**reason to believe**" (**reason for such belief to be recorded in writing**) that any person has committed an offence which constitutes the money laundering or is in possession of any proceeds of crime involved in money laundering etc. may search building, place and seize any record or property found as a result of such search. Section 17 of PMLA also uses the expression "**reason to believe**" and "**reason for such belief to be recorded in writing**". Here again, the authorised officer shall immediately on search and seizure or upon issuance of freezing order forward a copy of the reasons so recorded along with the material in his possession to the Adjudicating Authority in a "**sealed envelope**" in the manner as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period as may be prescribed. In order to ensure the sanctity of the search and seizure and to ensure the safeguards, in exercise of power under Section 73 of PMLA, the Central Government has framed *"The Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the period of Retention) Rules, 2005"*.

33. Section 19 of PMLA deals with the power of the specified officer to arrest. Under sub-section (1) of Section 19 of PMLA, the specified officer viz. the Director, the Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, on the basis of the material in possession, having "**reason to believe**" and "**reasons for such belief be recorded in writing"** that the person has been guilty of offence punishable under the PMLA, has power to arrest such person. The authorised officer is required to inform the accused the grounds for such arrest at the earliest and in terms of subsection (3) of Section 19 of the Act, the arrested person is required to be produced to the jurisdictional Judicial Magistrate or Metropolitan Magistrate within 24 hours excluding the journey time from the place of arrest to the Magistrate's Court. In order to ensure the safeguards, in exercise of power under Section 73 of the Act, the Central Government has framed *"The Prevention of Money-Laundering (The Forms and the Manner of Forwarding a Copy of Order of Arrest of a Person along with the Material to the Adjudicating Authority and its Period of Retention) Rules, 2005"*. Rule 3 of the said Rules requires the arresting officer to forward a copy of order of arrest and the material to the Adjudicating Authority in a sealed cover marked "confidential" and Rule 3 provides for the manner in maintaining the confidentiality of the contents.

34. As rightly submitted by Mr. Tushar Mehta, the procedure under PMLA for arrest ensures sufficient safeguards viz.:- (i) only the specified officers are authorised to arrest; (ii) based on "**reasons to believe**" that an offence punishable under the Act has been committed; (iii) the reasons for such belief to be recorded in writing; (iv) evidence and the material submitted to the Adjudicating Authority in sealed envelope in the manner as may be prescribed ensuring the safeguards in maintaining the confidentiality; and (v) every person arrested under PMLA to be produced before the Judicial Magistrate or Metropolitan Magistrate within 24 hours. Section 19 of PMLA provides for the power to arrest to the specified officer on the basis of material in his possession and has "**reason to believe**" and the **"reasons for such belief to be recorded in writing"** that any person has been guilty of an offence punishable under PMLA. The statutory power has been vested upon the specified officers of higher rank to arrest the person whom the officer has **"reason to believe"** that such person has been guilty of an offence punishable under PMLA. In cases of PMLA, in exercising the power to grant anticipatory bail would be to scuttle the statutory power of the specified officers to arrest which is enshrined in the statute with sufficient safeguards.

35. Section 71 of PMLA gives overriding effect to the provisions of PMLA. Section 71 of PMLA states that the provisions of the Act would have overriding effect on the provisions of all other Acts applicable. The provisions of PMLA shall prevail over the contrary provisions of the other Acts. Section 65 of PMLA states that the provisions of Code of Criminal Procedure, 1973 shall apply to the provisions under the Act insofar as they are not inconsistent with the provisions of PMLA.

36. Insofar as the issue of grant of bail is concerned, Section 45 of PMLA starts with *non-obstante* clause. Section 45 imposes two conditions for grant of bail to any person accused of any offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule of the Act viz., (i) that the prosecutor must be given an opportunity to oppose the application for such bail; (ii) that the court must be satisfied that there are reasonable grounds for believing that the accused persons is not guilty of such offence and that he is not likely to commit any offence while on bail.

37. The twin conditions under Section 45(1) for the offences classified thereunder in Part-A of the Schedule was held arbitrary and discriminatory and invalid in ***Nikesh Tarachand Shah v. Union of India and another*** ***(2018) 11 SCC 1*** . Insofar as the twin conditions for release of accused on bail under Section 45 of the Act, the Supreme Court held the same to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. Subsequently, Section 45 has been amended by Amendment Act 13 of 2008. The words *"imprisonment for a term of imprisonment of more than three years under Part A of the Schedule"* has been substituted with *"accused of an offence under this Act....."*. Section 45 prior to *Nikesh Tarachand* and post *Nikesh Tarachand* reads as under:-

Section 45 - Prior to Nikesh Tarachand Shah	**Section 45 - Post Nikesh Tarachand Shah**
Section 45. Offence to be cognizable and nonbailable.	Section 45. Offences to be cognizable and non-bailable.
(1) Notwithstanding contained in the Code of Criminal Procedure, 1973 (2 of 1974), **no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his**	(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), **no person accused of an offence under this Act shall be released on bail or on his own bond unless-** (i) the Public Prosecutor has been given

own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail;

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail;

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money laundering a sum of **less than one crore rupees may be released on bail, if the Special court so directs:**

38. The occurrence was of the year 2007-2008. CBI registered the case against Sh. Karti Chidambaram, the appellant and others on 15.05.2017 under Sections 120-B IPC read with Section 420 IPC and under Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. Learned Senior counsel for the appellant, Mr. A.M. Singhvi has submitted that there could not have been 'reasons to believe' that the appellant has committed the offence under Section 3 of PMLA, since in 2007-2008 the time of commission of alleged offence, Sections 120-B IPC and 420 IPC and Section 13 of the Prevention of Corruption Act were not there in Part 'A' of the Schedule to PMLA and were included in Part 'A' of the Schedule only by Amendment Act 21 of 2009 w.e.f. 01.06.2009 and w.e.f. 26.07.2018 respectively and therefore, no prima-facie case of commission of offence by the appellant under PMLA is made out. It was urged that under Article 20 of the Constitution, no person shall be convicted of any offence except for violation of law in force at the time of the commission of that act charged as offence. When Section 120B IPC and Section 420 IPC and Section 13 of Prevention of Corruption Act were not then included in Part A of the Schedule, in 2007-2008, then the appellant and others cannot be said to have committed the offence under PMLA. Insofar as Section 8 of the Prevention of Corruption Act is concerned, it was submitted that Section 8 of the Prevention of Corruption Act is not attracted against the appellant as there are no allegations in the FIR that the appellant accepted or agreed to accept any gratification as a motive or reward for inducing any public servant and hence, the accusation under Section 8 of the Prevention of Corruption Act does not apply to the appellant. It was further submitted that even assuming Section 8 of the Prevention of Corruption Act is made out, the amount allegedly paid to ASCPL was only Rs.10,00,000/- whereas, Rs.30,00,000/- was the amount then stipulated to attract Section 8 to be the Scheduled offence under Part A of the Schedule to the Act and therefore, there was no basis for offence against the appellant and in such view of the matter, the appellant is entitled for anticipatory bail.

39. Section 45 of the PMLA makes the offence of money laundering cognizable and non-bailable and no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail unless the twin conditions thereon are satisfied. Section 120-B IPC – *Criminal Conspiracy* and Section 420 IPC - *Cheating and dishonestly inducing delivery of property* were included in Part A of the Schedule to PMLA by way of Amendment Act 21 of 2009 w.e.f. 01.06.2009 and by way of Amendment Act 2 of 2013 w.e.f. 15.02.2013. Likewise, Section 13 of the Prevention of Corruption Act has been introduced to Part A of the Schedule **(Paragraph 8)** by way of Amendment Act 16 of 2018 w.e.f. 26.07.2018. As pointed out earlier, the FIR was registered by CBI under Section 8 of the Prevention of Corruption Act also which was then in Part A of the Schedule at the time of alleged commission of offence.

40. Learned Senior counsel submitted that since the offence under Sections 120-B IPC and 420 IPC and under Section 13 of Prevention of Corruption Act were included in the Schedule only w.e.f. 01.06.2009 and w.e.f. 26.07.2018 respectively and there can never be a retrospective operation of a criminal/penal statue and the test is not whether the proceeds are retained by the person; but the test as laid down by the Constitution Bench of this Court is, the test of the acts constituting the offence at the time of the commission of the offence and the appellant cannot be proceeded with prosecution under PMLA in violation of constitutional protection under Article 20(1) of the Constitution of India.

41. Under Article 20(1) of the Constitution, no person shall be convicted of any offence except for violation of law in force at the time of commission of that act charged as an offence. FIR for the predicate offence has been registered by CBI under Section 120B IPC, 420 IPC and Section 13 of the Prevention of Corruption Act and also under Section 8 of the Prevention of Corruption Act. As discussed earlier, Section 120B IPC and Section 420 IPC were included in Part A of the Schedule only by Amendment Act 21 of 2009 w.e.f. 01.06.2009. Section 13 of the Prevention of Corruption Act was included in Part A of the Schedule by Amendment Act 16 of 2018 w.e.f. 26.07.2018. Section 8 of the Prevention of Corruption Act is punishable with imprisonment extending upto seven years. Section 8 of the Prevention of Corruption Act was very much available in Part A of the Schedule of PMLA at the time of alleged commission of offence in 2007-2008. It cannot therefore be said that the appellant is proceeded against in violation of Article 20(1) of the Constitution of India for the alleged commission of the acts which was not an offence as per law then in existence. The merits of the contention that Section 8 of the Prevention of Corruption Act cannot be the predicate offence qua the appellant, cannot be gone into at this stage when this Court is only considering the prayer for anticipatory bail.

42. Yet another contention advanced on behalf of the appellant is that minimum threshold for the Enforcement Directorate to acquire jurisdiction at the relevant time was Rs.30 lakhs whereas, in the present case, there is no material to show any payment apart from the sum of Rs.10 lakhs (approximately) allegedly paid by INX Media to ASCPL with which the appellant is said to be having no connection whatsoever. The merits of the contention that Section 8 of the Prevention of Corruption Act (then included in Schedule A of the PMLA in 2007-08) whether attracted or not and whether the Enforcement Directorate had the threshold to acquire jurisdiction under PMLA cannot be considered at this stage while this Court is considering only the prayer for anticipatory bail.

43. In terms of Section 4 of the PMLA, the offence of money-laundering is punishable with rigorous imprisonment for a term not

less than three years extending to seven years and with fine. The Second Schedule to the Criminal Procedure Code relates to classification of offences against other laws and in terms of the Second Schedule of the Code, an offence which is punishable with imprisonment for three years and upward but not more than seven years is a cognizable and non-bailable offence. Thus, Section 4 of the Act read with the Second Schedule of the Code makes it clear that the offences under the PMLA are cognizable offences. As pointed out earlier, Section 8 of the Prevention of Corruption Act was then found a mention in Part 'A' of the Schedule **(Paragraph 8)**. Section 8 of the Prevention of Corruption Act is punishable for a term extending to seven years. Thus, the essential requirement of Section 45 of PMLA "accused of an offence punishable for a term of imprisonment of more than three years under Part 'A' of the Schedule" is satisfied making the offence under PMLA. There is no merit in the contention of the appellant that very registration of the FIR against the appellant under PMLA is not maintainable.

Whether Court can look into the documents/materials collected during investigation

44. During the course of lengthy hearing, much arguments were advanced mainly on the question whether the court can look into the documents and materials produced by the prosecution before the court without first confronting the accused with those materials.

45. The learned Solicitor General submitted that during investigation, the Enforcement Directorate has collected materials and overseas banks have given specific inputs regarding the companies and properties that money has been parked in the name of shell companies and the said money has been used to make legitimate assets and that custodial interrogation is necessary with regard to the materials so collected. The learned Solicitor General sought to produce the materials so collected in the sealed cover and requested the court to peruse the documents and the materials to satisfy the conscience of the court as to the necessity for the custodial interrogation.

46. Contention of learned Solicitor General requesting the court to peruse the documents produced in the sealed cover was strongly objected by the appellant on the grounds :– (i) that the Enforcement Directorate cannot randomly place the documents in the court behind the back of the accused to seek custody of the accused; (ii) the materials so collected by Enforcement Directorate during investigation cannot be placed before the court unless the accused has been confronted with such materials.

47. Mr. Kapil Sibal, learned Senior counsel submitted that the statements recorded under Section 161 Cr.P.C. are part of the case diary and the case diary must reflect day to day movement of the investigation based on which the investigating agency came to the conclusion that the crime has been committed so that a final report can be filed before the court. The learned Senior counsel submitted that during the course of such investigation, the investigating officer may discover several documents which may have a bearing on the crime committed; however the documents themselves can never be the part of the case diary and the documents would be a piece of documentary evidence during trial which would be required to be proved in accordance with the provisions of the Evidence Act before such documents can be relied upon for the purpose of supporting the case of prosecution. Enforcement Directorate does not maintain a case diary; but maintain the file with paginated pages. It was urged that even assuming that there is a case diary maintained by the respondent in conformity with Section 172 Cr.P.C., the opinion of the investigating officer for the conclusion reached by the authorised officer under PMLA, can never be relied upon for the purposes of consideration of anticipatory bail.

48. Having regard to the submissions, two points arise for consideration – (i) whether the court can/cannot look into the documents/materials produced before the court unless the accused was earlier confronted with those documents/materials?; and (ii) whether the court is called upon to hold a mini inquiry during the intermediary stages of investigation by examining whether the questions put to the accused are 'satisfactory' or 'evasive', etc.?

49. Sub-section (2) of Section 172 Cr.P.C. permits any court to send for case diary to use them in the trial. Section 172(3) Cr.P.C. specifically provides that neither the accused nor his agents shall be entitled to call for case diary nor shall he or they be entitled to see them merely because they are referred to by the court. But if they are used by the police officer who made them to refresh his memory or if the court uses them for the purpose of contradicting the such police officer, the provisions of Section 161 Crl.P.C. or the provision of Section 145 of the Evidence Act shall be complied with. In this regard, the learned Solicitor General placed reliance upon ***Balakram v. State of Uttarakhand and others*** ***(2017) 7 SCC 668*** . Observing that the confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand, in *Balakram*, the Supreme Court held as under:-

> **"15.** The police diary is only a record of day-to-day investigation made by the investigating officer. Neither the accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred by the statute under Section 172(2) CrPC on the court to examine the entries of the police diary would not allow the accused to claim similar unfettered right to inspect the case diary.
>
> **...**.....
>
> **17.** From the aforementioned, it is clear that the denial of right to the accused to inspect the case diary cannot be characterised as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand."

50. Reiterating the same principles in ***Sidharth and others v. State of Bihar*** ***(2005) 12 SCC 545*** **,** the Supreme Court held as under:-

> **"27.** Lastly, we may point out that in the present case, we have noticed that the entire case diary maintained by the police was made available to the accused. Under Section 172 of the Criminal Procedure Code, every police officer making an investigation has to record his proceedings in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. It is specifically provided in sub-clause (3) of Section 172 that neither the accused nor his agents shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by the court, but if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of Section 161 CrPC or the provisions of Section 145 of the Evidence Act shall be complied with. The court is empowered to call for such diaries not to use it as evidence but to use it as aid to find out anything that happened during the investigation of the crime. These provisions

> have been incorporated in the Code of Criminal Procedure to achieve certain specific objectives. The police officer who is conducting the investigation may come across a series of information which cannot be divulged to the accused. He is bound to record such facts in the case diary. But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of CrPC." **[underlining added]**

The same position has been reiterated in ***Naresh Kumar Yadav v. Ravindra Kumar and others*** ***(2008) 1 SCC 632*** [Paras 11 to 14], ***Malkiat Singh and others v. State of Punjab*** ***(1991) 4 SCC 341*** [Para 11] and other judgments.

51. It is seen from various judgments that on several instances, court always received and perused the case diaries/materials collected by the prosecution during investigation to satisfy itself as to whether the investigation is proceeding in the right direction or for consideration of the question of grant of bail etc. In ***Directorate of Enforcement and another v. P.V. Prabhakar Rao*** ***(1997) 6 SCC 647***, the Supreme Court perused the records to examine the correctness of the order passed by the High Court granting bail. In ***R.K. Krishna Kumar v. State of Assam and others*** ***(1998) 1 SCC 474*** **,** the Supreme Court received court diary maintained under Section 172 Cr.P.C. and perused the case diary to satisfy itself that the investigation has revealed that the company thereon has funded the organisation (ULFA) and that the appellants thereon had a role to play in it. While considering the question of arrest of five well known human rights activists, journalists, advocates and political workers, in ***Romila Thapar and Others v. Union of India and Others*** ***(2018) 10 SCC 753***, this Court perused the registers containing relevant documents and the case diary produced by the State of Maharashtra. However, the court avoided to dilate on the factual position emerging therefrom on the ground that any observation made thereon might cause prejudice to the accused or to the prosecution in any manner. Upholding the validity of Section 172(3) Crl.P.C. and observing that "there can be no better custodian or guardian of the interest of justice than the court trying the case", in ***Mukund Lal v. Union of India and another 1989 Supp. (1) SCC 622***, the Supreme Court held as under:-

> **3.** …..
>
> > "So far as the other parts are concerned, the accused need not necessarily have a right of access to them because in a criminal trial or enquiry, whatever is sought to be proved against the accused, will have to be proved by the evidence other than the diary itself and the diary can only be used for a very limited purpose by the court or the police officer as stated above. ……. When in the enquiry or trial, everything which may appear against the accused has to be established and brought before the court by evidence other than the diary and the accused can have the benefit of cross-examining the witnesses and the court has power to call for the diary and use it, of course not as evidence but in aid of the enquiry or trial, I am clearly of the opinion, that the provisions under Section 172(3) CrPC cannot be said to be unconstitutional."
>
> We fully endorse the reasoning of the High Court and concur with its conclusion. We are of the opinion that the provision embodied in sub-section (3) of Section 172 of the CrPC cannot be characterised as unreasonable or arbitrary. Under sub-section (2) of Section 172 CrPC the court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary; if there is any inconsistency or contradiction arising in the context of the case diary the court can use the entries for the purpose of contradicting the police officer as provided in subsection (3) of Section 172 of the CrPC. Ultimately there can be no better custodian or guardian of the interest of justice than the court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny. ……. Public interest demands that such an entry is not made available to the accused for it might endanger the safety of the informants and it might deter the informants from giving any information to assist the investigating agency, ……." [**underlining added**]

52. So far as the production of the case diary during trial and reference to the same by the court and the interdict against accused to call for case diary is governed by Section 172 Cr.P.C. As per sub-section (3) of Section 172, neither the accused nor his agent is entitled to call for such case diaries and also not entitled to see them during the course of enquiry or trial. The case diaries can be used for refreshing memory by the investigating officer and court can use it for the purpose of contradicting such police officer as per provisions of Section 161 or Section 145 of the Indian Evidence Act. Unless the investigating officer or the court so uses the case diary either to refresh the memory or for contradicting the investigating officer as previous statement under Section 161, after drawing his attention under Section 145, the entries in case diary cannot be used by the accused as evidence (vide Section 172(3) Cr.P.C.).

53. It is well-settled that the court can peruse the case diary/materials collected during investigation by the prosecution even before the commencement of the trial inter-alia in circumstances like:- (i) to satisfy its conscience as to whether the investigation is proceeding in the right direction; (ii) to satisfy itself that the investigation has been conducted in the right lines and that there is no misuse or abuse of process in the investigation; (iii) whether regular or anticipatory bail is to be granted to the accused or not; (iv) whether any further custody of the accused is required for the prosecution; (v) to satisfy itself as to the correctness of the decision of the High Court/trial court which is under challenge. The above instances are only illustrative and not exhaustive. Where the interest of justice requires, the court has the powers, to receive the case diary/materials collected during the investigation. As held in *Mukund Lal*, ultimately there can be no better custodian or guardian of the interest of justice than the court trying the case. Needless to point out that when the Court has received and perused the documents/materials, it is only for the purpose of satisfaction of court's conscience. In the initial stages of investigation, the Court may not extract or *verbatim* refer to the materials which the Court has perused (as has been done in this case by the learned Single Judge) and make observations which might cause serious prejudice to the accused in trial and other proceedings resulting in miscarriage of justice.

54. The Enforcement Directorate has produced the sealed cover before us containing the materials collected during investigation

and the same was received. Vide order dated 29.08.2019, we have stated that the receipt of the sealed cover would be subject to our finding whether the court can peruse the materials or not. As discussed earlier, we have held that the court can receive the materials/documents collected during the investigation and peruse the same to satisfy its conscience that the investigation is proceeding in the right lines and for the purpose of consideration of grant of bail/anticipatory bail etc. In the present case, though sealed cover was received by this Court, we have consciously refrained from opening the sealed cover and perusing the documents. Lest, if we peruse the materials collected by the respondent and make some observations thereon, it might cause prejudice to the appellant and the other co-accused who are not before this court when they are to pursue the appropriate relief before various forum. Suffice to note that at present, we are only at the stage of considering the pre-arrest bail. Since according to the respondent, they have collected documents/materials for which custodial interrogation of the appellant is necessary, which we deem appropriate to accept the submission of the respondent for the limited purpose of refusing pre-arrest bail to the appellant.

55. Of course, while considering the request for anticipatory bail and while perusing the materials/note produced by the Enforcement Directorate/CBI, the learned Single Judge could have satisfied his conscience to hold that it is not a fit case for grant of anticipatory bail. On the other hand, the learned Single Judge has *verbatim* quoted the note produced by the respondent-Enforcement Directorate. The learned Single Judge, was not right in extracting the note produced by the Enforcement Directorate/CBI which in our view, is not a correct approach for consideration of grant/refusal of anticipatory bail. But such incorrect approach of the learned Single Judge, in our view, does not affect the correctness of the conclusion in refusing to grant of anticipatory bail to the appellant in view of all other aspects considered herein.

Re: Contention:- The appellant should have been confronted with the materials collected by the Enforcement Directorate earlier, before being produced to the court.

56. On behalf of the appellant, it was contended that the materials produced by the Enforcement Directorate could have never been relied upon for the purpose of consideration of anticipatory bail unless the appellant was earlier confronted with those documents/materials. It was submitted that if the appellant's response was completely "evasive" and "non co-operative" during the three days when he was interrogated i.e. 19.12.2018, 01.01.2019 and 21.01.2019, the respondent should place before the court the materials put to the appellant and the responses elicited from the accused to demonstrate to the court that "the accused was completely evasive and non-co-operative".

57. Contention of the appellant that the court will have to scrutinise the questions put to the accused during interrogation and answers given by the appellant and satisfy itself whether the answers were "evasive or not", would amount to conducting "mini trial" and substituting court's view over the view of the investigating agency about the "cooperation" or "evasiveness" of the accused and thereafter, the court to decide the questions of grant of anticipatory bail. This contention is far-fetched and does not merit acceptance.

58. As rightly submitted by learned Solicitor General that if the accused are to be confronted with the materials which were collected by the prosecution/Enforcement Directorate with huge efforts, it would lead to devastating consequences and would defeat the very purpose of the investigation into crimes, in particular, white collar offences. If the contention of the appellant is to be accepted, the investigating agency will have to question each and every accused such materials collected during investigation and in this process, the investigating agency would be exposing the evidence collected by them with huge efforts using their men and resources and this would give a chance to the accused to tamper with the evidence and to destroy the money trail apart from paving the way for the accused to influence the witnesses. If the contention of the appellant is to be accepted that the accused will have to be questioned with the materials and the investigating agency has to satisfy the court that the accused was "evasive" during interrogation, the court will have to undertake a "mini trial" of scrutinizing the matter at intermediary stages of investigation like interrogation of the accused and the answers elicited from the accused and to find out whether the answers given by the accused are 'evasive' or whether they are 'satisfactory' or not. This could have never been the intention of the legislature either under PMLA or any other statute.

59. Interrogation of the accused and the answers elicited from the accused and the opinion whether the answers given by the accused are "satisfactory" or "evasive", is purely within the domain of the investigating agency and the court cannot substitute its views by conducting mini trial at various stages of the investigation.

60. The investigation of a cognizable offence and the various stages thereon including the interrogation of the accused is exclusively reserved for the investigating agency whose powers are unfettered so long as the investigating officer exercises his investigating powers well within the provisions of the law and the legal bounds. In exercise of its inherent power under Section 482 Cr.P.C., the court can interfere and issue appropriate direction only when the court is convinced that the power of the investigating officer is exercised *mala fide* or where there is abuse of power and non-compliance of the provisions of Code of Criminal Procedure. However, this power of invoking inherent jurisdiction to issue direction and interfering with the investigation is exercised only in rare cases where there is abuse of process or non-compliance of the provisions of Criminal Procedure Code.

61. In ***King-Emperor v. Khwaja Nazir Ahmad AIR 1945 PC 18 : 1944 SCC Online PC 29***, it was held as under:-

> "…..it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry.
>
> In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under S. 491 of the Crl. P.C. …." **[underlining added]**

62. The above decision in *Khwaja Nazir Ahmad* has been quoted with approval by the Supreme Court in ***Abhinandan Jha and others v. Dinesh Mishra AIR 1968 SC 117*** and ***State of Bihar and another v. J.A.C. Saldanha and others (1980) 1 SCC 554***. Observing that the investigation of the offence is the field exclusively reserved for the executive through the police department and the superintendence over which vests in the State Government, in *J.A.C. Saldanha,* it was held as under:-

> "**25.** There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounded duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the court requesting the court to take cognizance of the offence under Section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the court the police function of investigation comes to an end subject to the provision contained in Section 173(8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the court, and to award adequate punishment according to law for the offence proved to the satisfaction of the court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate. This had been recognised way back in *King Emperor v. Khwaja Nazir Ahmad* AIR 1944 PC 18 ……..".

The same view was reiterated in ***Dukhishyam Benupani, Asstt. Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria*** (1998) 1 SCC 52 ***, M.C. Abraham and Another v. State of Maharashtra and Others*** (2003) 2 SCC 649 ***, Subramanian Swamy v. Director, Central Bureau of Investigation and another*** (2014) 8 SCC 682 and ***Divine Retreat Centre v. State of Kerala and Others*** (2008) 3 SCC 542 **.**

63. Investigation into crimes is the prerogative of the police and excepting in rare cases, the judiciary should keep out all the areas of investigation. In ***State of Bihar and another v. P.P. Sharma, IAS and another 1992 Supp. (1) 222***, it was held that "The investigating officer is an arm of the law and plays a pivotal role in the dispensation of criminal justice and maintenance of law and order. …..Enough power is therefore given to the police officer in the area of investigating process and granting them the court latitude to exercise its discretionary power to make a successful investigation…". In ***Dukhishyam Benupani, Asstt. Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria*** (1998) 1 SCC 52 , this Court held that "……it is not the function of the court to monitor investigation processes so long as such investigation does not transgress any provision of law. It must be left to the investigating agency to decide the venue, the timings and the questions and the manner of putting such questions to persons involved in such offences. A blanket order fully insulating a person from arrest would make his interrogation a mere ritual."

64. As held by the Supreme Court in a catena of judgments that there is a well-defined and demarcated function in the field of investigation and its subsequent adjudication. It is not the function of the court to monitor the investigation process so long as the investigation does not violate any provision of law. It must be left to the discretion of the investigating agency to decide the course of investigation. If the court is to interfere in each and every stage of the investigation and the interrogation of the accused, it would affect the normal course of investigation. It must be left to the investigating agency to proceed in its own manner in interrogation of the accused, nature of questions put to him and the manner of interrogation of the accused.

65. It is one thing to say that if the power of investigation has been exercised by an investigating officer *mala fide* or non-compliance of the provisions of the Criminal Procedure Code in the conduct of the investigation, it is open to the court to quash the proceedings where there is a clear case of abuse of power. It is a different matter that the High Court in exercise of its inherent power under Section 482 Cr.P.C., the court can always issue appropriate direction at the instance of an aggrieved person if the High Court is convinced that the power of investigation has been exercised by the investigating officer *mala fide* and not in accordance with the provisions of the Criminal Procedure Code. However, as pointed out earlier that power is to be exercised in rare cases where there is a clear abuse of power and non-compliance of the provisions falling under Chapter-XII of the Code of Criminal Procedure requiring the interference of the High Court. In the initial stages of investigation where the court is considering the question of grant of regular bail or pre-arrest bail, it is not for the court to enter into the demarcated function of the investigation and collection of evidence/materials for establishing the offence and interrogation of the accused and the witnesses.

66. **Whether direction to produce the transcripts could be issued:-**

Contention of the appellant is that it has not been placed before the court as to what were the questions/aspects on which the appellant was interrogated on 19.12.2018, 01.01.2019 and 21.01.2019 and the Enforcement Directorate has not been able to show as to how the answers given by the appellant are "evasive". It was submitted that the investigating agency-Enforcement Directorate cannot expect the accused to give answers in the manner they want and the investigating agency should always keep in their mind the rights of the accused protected under Article 20(3) of the Constitution of India. Since the interrogation of the accused and the questions put to the accused and the answers given by the accused are part of the investigation which is purely within the domain of the investigation officer, unless satisfied that the police officer has improperly and illegally exercised his investigating powers in breach of any statutory provision, the court cannot interfere. In the present case, no direction could be issued to the respondent to produce the transcripts of the questions put to the appellant and answers given by the appellant.

Grant of Anticipatory bail in exceptional cases:-

67. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 Cr.P.C. is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

68. On behalf of the appellant, much arguments were advanced contending that anticipatory bail is a facet of Article 21 of the Constitution of India. It was contended that unless custodial interrogation is warranted, in the facts and circumstances of the case, denial of anticipatory bail would amount to denial of the right conferred upon the appellant under Article 21 of the Constitution of India.

69. Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to

procedure prescribed by law. However, the power conferred by Article 21 of the Constitution of India is not unfettered and is qualified by the later part of the Article i.e. "*...except according to a procedure prescribed by law.*" In ***State of M.P. and another v. Ram Kishna Balothia and another*** ***(1995) 3 SCC 221*** , the Supreme Court held that the right of anticipatory bail is not a part of Article 21 of the Constitution of India and held as under:-

> "7. ……We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21; In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. The Law Commission in its 41st Report recommended introduction of a provision for grant of anticipatory bail. It observed:
>
> > "We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised."
>
> In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21; " [**underlining added**]

70. We are conscious of the fact that the legislative intent behind the introduction of Section 438 Cr.P.C. is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.

71. The learned Solicitor General has submitted that depending upon the facts of each case, it is for the investigating agency to confront the accused with the material, only when the accused is in custody. It was submitted that the statutory right under Section 19 of PMLA has an in-built safeguard against arbitrary exercise of power of arrest by the investigating officer. Submitting that custodial interrogation is a recognised mode of interrogation which is not only permissible but has been held to be more effective, the learned Solicitor General placed reliance upon ***State Rep. By The CBI v. Anil Sharma*** ***(1997) 7 SCC 187*** ***; Sudhir v. State of Maharashtra and Another*** ***(2016) 1 SCC 146*** ***;*** and ***Assistant Director, Directorate of Enforcement v. Hassan Ali Khan (2011) 12 SCC 684.***

72. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In ***State Rep. By The CBI v. Anil Sharma*** ***(1997) 7 SCC 187*** , the Supreme Court held as under:-

> **"6.** We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

73. Observing that the arrest is a part of the investigation intended to secure several purposes, in ***Adri Dharan Das v. State of W.B.*** ***(2005) 4 SCC 303*** , it was held as under:-

> **"19.** Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code."

74. In ***Siddharam Satlingappa Mhetre v. State of Maharashtra and Others*** ***(2011) 1 SCC 694*** , the Supreme Court laid down the factors and parameters to be considered while dealing with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

75. After referring to *Siddharam Satlingappa Mhetre* and other judgments and observing that anticipatory bail can be granted only in exceptional circumstances, in ***Jai Prakash Singh v. State of Bihar and another*** ***(2012) 4 SCC 379*** , the Supreme Court held as under:-

> **"19.** Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See *D.K. Ganesh Babu v. P.T. Manokaran (2007) 4 SCC 434 , State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain (2008) 1 SCC 213* and *Union of India v. Padam Narain Aggarwal (2008) 13 SCC 305* .)"

Economic Offences:-

76. Power under Section 438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In ***Directorate of Enforcement v. Ashok Kumar Jain (1998) 2 SCC 105*** , it was held that in economic offences, the accused is not entitled to anticipatory bail.

77. The learned Solicitor General submitted that the "Scheduled offence" and "offence of money laundering" are independent of each other and PMLA being a special enactment applicable to the offence of money laundering is not a fit case for grant of anticipatory bail. The learned Solicitor General submitted that money laundering being an economic offence committed with much planning and deliberate design poses a serious threat to the nation's economy and financial integrity and in order to unearth the laundering and trail of money, custodial interrogation of the appellant is necessary.

78. Observing that economic offence is committed with deliberate design with an eye on personal profit regardless to the consequence to the community, in ***State of Gujarat v. Mohanlal Jitamalji Porwal and others (1987) 2 SCC 364*** , it was held as under:-

> "5. ….The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest….."

79. Observing that economic offences constitute a class apart and need to be visited with different approach in the matter of bail, in ***Y.S. Jagan Mohan Reddy v. CBI (2013) 7 SCC 439*** , the Supreme Court held as under:-

> **"34.** Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.
>
> **35.** While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations." [**underlining added**]

80. Referring to ***Dukhishyam Benupani, Assistant Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria (1998) 1 SCC 52*** , in ***Enforcement Officer, Ted, Bombay v. Bher Chand Tikaji Bora and others (1999) 5 SCC 720*** , while hearing an appeal by the Enforcement Directorate against the order of the Single Judge of the Bombay High Court granting anticipatory bail to the respondent thereon, the Supreme Court set aside the order of the Single Judge granting anticipatory bail.

81. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the respondent-Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail.

82. In a case of money-laundering where it involves many stages of "placement", "layering i.e. funds moved to other institutions to conceal origin" and "interrogation i.e. funds used to acquire various assets", it requires systematic and analysed investigation which would be of great advantage. As held in *Anil Sharma,* success in such interrogation would elude if the accused knows that he is protected by a pre-arrest bail order. Section 438 Cr.P.C. is to be invoked only in exceptional cases where the case alleged is frivolous or groundless. In the case in hand, there are allegations of laundering the proceeds of the crime. The Enforcement Directorate claims to have certain specific inputs from various sources, including overseas banks. Letter rogatory is also said to have been issued and some response have been received by the department. Having regard to the nature of allegations and the stage of the investigation, in our view, the investigating agency has to be given sufficient freedom in the process of investigation. Though we do not endorse the approach of the learned Single Judge in extracting the note produced by the Enforcement Directorate, we do not find any ground warranting interference with the impugned order. Considering the facts and circumstances of the case, in our view, grant of anticipatory bail to the appellant will hamper the investigation and this is not a fit case for exercise of discretion to grant anticipatory bail to the appellant.

83. In the result, the appeal is dismissed. It is for the appellant to work out his remedy in accordance with law. As and when the application for regular bail is filed, the same shall be considered by the learned trial court on its own merits and in accordance with law without being influenced by any of the observations made in this judgment and the impugned order of the High Court.

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IN THE SUPREME COURT OF INDIA

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[Before : R. Banumathi, A.S. Bopanna, Hrishikesh Roy]

P. Chidambaram

versus

Directorate of Enforcement

Case No. : Criminal Appeal No.1831/2019 (Arising out of S.L.P.(Criminal) No.10493 of 2019) , Date of Decision : 04/12/2019

Criminal Procedure Code, 1973 -- Section 439 -- Indian Penal Code, 1860 -- Sections 120-B & 420 -- Prevention of Money Laundering Act, 2002 -- Section 3 -- Prevention of Corruption Act, 1988 -- Sections 8 & 13 -- Finding based on sealed cover documents -- Regular bail -- Open for Court to peruse documents -- It would be against concept of fair trial if in every case prosecution presents documents in sealed cover and findings on same are recorded as if offence is committed and same is treated as having a bearing for denial or grant of bail -- Rejection of regular bail based on material in sealed cover not justified and set aside -- Order of release on bail if he is not required in any other case, subject to executing bail bonds for a sum of Rs. 2 lakhs with two sureties of like sum produced to satisfaction of Special Judge.

Statutes Referred :

1. Indian Penal Code -- S.120B 2. Indian Penal Code -- S.420 3. Indian Penal Code -- S.120B 4. Indian Penal Code -- S.420 5. Indian Penal Code -- S.420 6. Indian Penal Code -- S.120B 7. Indian Penal Code -- S.120B 8. Indian Penal Code -- S.120B 9. Indian Penal Code -- S.420 10. Indian Penal Code -- S.420 11. Indian Penal Code -- S.420 12. Indian Penal Code -- S.120B 13. Indian Penal Code -- S.420 14. Indian Penal Code -- S.420 15. Indian Penal Code -- S.120B 16. Indian Penal Code -- S.120B 17. Code of Criminal Procedure -- S.439 18. Code of Criminal Procedure -- S.267 19. Code of Criminal Procedure -- S.267 20. Code of Criminal Procedure -- S.439 21. Code of Criminal Procedure -- S.439 22. Code of Criminal Procedure -- S.439 23. Code of Criminal Procedure -- S.439 24. Code of Criminal Procedure -- S.267 25. Code of Criminal Procedure -- S.267 26. Code of Criminal Procedure -- S.267 27. Code of Criminal Procedure -- S.439 28. Code of Criminal Procedure -- S.267 29. Code of Criminal Procedure -- S.439 30. Code of Criminal Procedure -- S.267 31. Code of Criminal Procedure -- S.267 32. Code of Criminal Procedure -- S.439 33. Prevention of Money Laundering Act -- S.3 34. Prevention of Money Laundering Act -- S.3 35. Prevention of Money Laundering Act -- S.3 36. Prevention of Money Laundering Act -- S.3 37. Prevention of Money Laundering Act -- S.3 38. Prevention of Money Laundering Act -- S.3 39. Prevention of Money Laundering Act -- S.3 40. Prevention of Money Laundering Act -- S.3

Cases Referred :

1. Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 [Para 19]
2. Nimmagadda Prasad v. CBI, (2013) 7 SCC 466 [Para 18]
3. Prahlad Singh Bhati v. NCT, Delhi and another (2001) 4 SCC 280 [Para 15]
4. Rohit Tandon v. Directorate of Enforcement (2018) 11 SCC 46 [Para 11]
5. Sanjay Chandra v. CBI, (2012) 1 SCC 40 [Paras 11 & 20]
6. Seniors Fraud Investigation Office v. Nittin Johari & Anr.; (2019) 9 SCC 165 [Para 18]
7. State of Bihar & Anr. v. Amit Kumar, (2017) 13 SCC 751 [Para 18]
8. State of Gujarat v. Mohanlal Jitamalji Porwal, (1987) 2 SCC 364 [Para 18]
9. Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439 [Para 18]

JUDGMENT/ORDER:

A.S. Bopanna, J.:--

Leave granted.

2. The instant appeal has been filed by the appellant assailing the final order dated 15.11.2019 passed by the High Court of Delhi at New Delhi in Bail Application No. 2718 of 2019 whereby the High Court declined to grant regular bail to the appellant.

3. The genesis of the case in question lies in FIR No. RC2202017-E0011 dated 15.5.2017, registered by the CBI under section 120-B r/w 420 IPC and sections 8 and 13(2) r/w 13(1)(d) of PC Act against some known and unknown suspects with allegations that M/s INX Media Private Limited (accused no. 1 in the FIR) sought approval of Foreign Investment Promotion Board (FIPB) for permission to issue by way of preferential allotment, certain equity and convertible, non-cumulative, redeemable preference shares for engaging in the business of creating, operating, managing and broadcasting of bouquet of television channels. The company had also sought approval to make a downstream financial investment to the extent of 26% of the issued and outstanding equity share capital of M/s INX News Private Limited (accused no. 2). The FIPB Board recommended the proposal of INX Media for consideration and approval of the Finance Minister. However, the Board did not approve the downstream investment by INX Media (P) Ltd. in INX News (P) Ltd. Further, in the press release dated 30.5.2007 issued by the FIPB Unit indicating details of proposals approved in the FIPB meeting, quantum of FDI/NRI inflow against M/s INX media was shown as Rs. 4.62 crores. Contrary to the approval of FIPB, M/s INX Media Pvt. Ltd. deliberately and in violation of conditions of approval, made a

downstream investment to the extent of 26% capital of INX News and also generated more than Rs. 305 crores FDI in INX Media (P) Ltd. against the approved foreign inflow of Rs. 4.62 crores is the allegation. A complaint is stated to have been received by the investigation wing of the Income Tax department which sought clarifications from the FIPB Unit of Ministry of Finance. The FIPB Unit vide letter dated 26.5.2008, sought clarifications from M/s INX Media Limited. It was further alleged in the FIR that upon receipt of this letter, M/s INX Media in order to avoid punitive action entered into criminal conspiracy with Mr. Karti Chidambaram (accused no. 3 in the FIR who is the son of the appellant). Mr. Karti Chidambaram is alleged to have exercised his influence over the officials of FIPB unit which led to the said officials showing undue favour to M/s INX News (P) Ltd. Thereafter by deliberately concealing the investment received in INX Media (P) Ltd., M/s INX News (P) Ltd. again approached the FIPB Unit and sought permission for the downstream investment. This proposal was favourably considered by the officials of ministry of finance and approved by the then Finance Minister. It was also stated in the FIR that Mr. Karti Chidambaram, in lieu of services rendered to M/s INX Group, received consideration in the form of payments. Information disclosed that invoices for approximately Rs. 3.5 crores were got raised in favour of M/s INX Group in the name of companies in which Mr. Karti Chidambaram was having sustainable interests either directly or indirectly. The appellant herein, who was the then Union Finance Minister, was not however named in the said FIR.

4. On the basis of the aforementioned FIR, the Respondent Directorate of Enforcement registered a case ECIR/07/HIU/2017 (hereinafter referred to as ECIR case) under section 3 of Prevention of Money Laundering Act, 2002 (hereinafter PMLA), punishable under section 4 of the said Act against the accused mentioned in the FIR. The allegations in the said ECIR case were the same as those in the aforementioned FIR. The appellant was not named an accused in this case as well.

5. On 23.7.2018, apprehending his arrest by the Respondent, the appellant filed an application before the High Court of Delhi seeking grant of anticipatory bail in the aforementioned ECIR case. The High Court extended interim protection to the appellant until 20.8.2019, when the appellant's application seeking anticipatory bail was dismissed.

6. The appellant then approached this court by filing Criminal Appeal No. 1340 of 2019 (arising out of SLP (Crl.) No. 7523 of 2019) wherein while dismissing the appeal of the appellant, the court concluded that in the instant case, grant of anticipatory bail to the appellant will hamper the investigation and that this is not a fit case for exercise of discretion to grant anticipatory bail. This court applied the following rationale for coming to the said conclusion: there are sufficient safeguards enshrined in the PMLA to ensure proper exercise of power of arrest; grant of anticipatory bail is not to be done as a matter of rule, especially in matters of economic offences which constitute a class apart. Regard must be had to the fact that grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting useful information and also materials which might have been concealed.

7. In the meanwhile, on 21.8.2019, the appellant was arrested in the CBI case (arising out of the above-mentioned FIR). Since then he has been in custody. In the ECIR case, he was arrested on 16.10.2019 on the grounds that payment of approx. Rs. 3 crores was made at the appellant's instance to the companies controlled by his son on account of FIPB work done for INX Group. Further it was stated in the grounds of arrest that the investigation is not fruitful due to the appellant's non-cooperation; the appellant has withheld relevant information which is within his exclusive knowledge and thus his custodial interrogation is necessary.

8. After dismissal of his application seeking anticipatory bail by this court, the appellant moved an application dated 5.9.2019 praying to surrender before the Trial Court (Court of Special Judge (PC Act), CBI) in the ECIR case. This application was rejected on 13.9.2019 in view of the submission on behalf of the respondent Directorate that it was not willing to arrest the appellant at that particular stage since it was completing investigation pertaining to some aspect of the money laundering and only on this background investigation was completed, the interrogation of the appellant would be meaningful. Thereafter, on 11.10.2019, the Respondent Directorate moved an application u/s 267 CrPC seeking issuance of production warrant against the appellant for the purpose of arrest and remand. The allegations which were levelled against the appellant in this application are that in lieu of granting FIPB approval to INX Media Pvt. Ltd., he and his son received a sum of approx. Rs. 3 crores through companies controlled by the son of the Appellant/accused Karti P. Chidambaram. Though INX media in its application did not mention the total amount of FDI inflow which they intended to bring, the appellant without ascertaining their competency, granted approval. Further the appellant became fully aware about the violations made by INX Group when the matter was highlighted by the Income Tax Department and a complaint was also received by him regarding the investment by M/s INX Media into M/s INX News without due approval. Despite this knowledge, the appellant again approved the downstream proposal of INX Group treating it as a fresh approval. Further investigation has revealed that there were at least 17 overseas bank accounts opened by the appellant and co-conspirators. In this regard, summons was issued to 11 persons and statements of some of these persons revealed that the overseas assets were acquired in the name of various shell companies on the instructions of appellant's son. Thus, it was stated that a need arises to confront the appellant with the material gathered. This application was allowed by the Trial Court vide order dated 11.10.2019. Thereafter on 14.10.2019, the Respondent inter alia moved an application seeking permission to arrest the appellant. The Trial Court treated this application as an application for interrogation of the appellant and allowed it. Subsequently, on 16.10.2019, the appellant was arrested for the grounds stated supra. Vide order dated 17.10.2019, the Trial Court remanded the appellant to the custody of the Respondent for a period of 7 days.

9. After his arrest, on 23.10.2019, the appellant moved a regular bail application (Bail Application No. 2718 of 2019) before the High Court u/s 439 of CrPC averring that he is a law abiding citizen having deep roots in the society; he is not a flight risk and is willing to abide by all conditions as may be imposed by the court while granting bail. It was also submitted that the instant case is a documentary case and being a respectable citizen and former Union Minister, he cannot and will not tamper with the documentary record of the instant case which is currently in the safe and secure possession of the incumbent government or the Trial Court. On merits, it was stated by the Appellant that he merely accorded approval to the unanimous recommendation made by the FIPB which was chaired by the Secretary, Economic Affairs and included 5 other secretaries who were all among the senior most IAS officers (one among them was a senior IFS officer) and had a long and distinguished record of service. Anyone familiar with the working of the FIPB would know that no single officer can take a decision on any proposal. Therefore, it is preposterous to allege that any person could have influenced any official of FIPB, including all 6 senior secretaries to the Government of India. Moreover, the ECIR case is a verbatim copy of the FIR dated 15.5.2017 and allegations registered therein and thus the Special Judge erred in granting remand of the appellant in the ECIR case since the offences allegedly committed in both the cases arise out of the same occurrence and have been committed in the course of the same transaction. Further the Special Court committed an error in not

accepting the surrender application of the appellant which was an application limited to surrendering before the Trial Court. The Special Court proceeded on an erroneous basis that the desire of an accused is contingent upon the desire of the investigating agency to arrest the accused and that arrest is a condition precedent for surrendering before the Court.

10. Vide the impugned order, the High Court observed that it has not even been alleged by the Respondent Enforcement Directorate in its counter affidavit that the appellant is a flight risk. Regarding tampering of evidence also the court observed that it is neither argued nor any material is available on record in this regard. Moreover, there is no chance to tamper the material on record as the same is with the investigating agencies, central government or courts. Regarding influencing of witnesses, the court noted that three witnesses have stated in their statements that the appellant and his family members have pressurised them and asked them not to appear before the Enforcement Directorate. However, since their statements have already been recorded, at this stage when the complaint is almost ready to be filed, the Court held that there is no chance to influence any witness. The High Court also took notice of the fact that co-accused have been granted bail. The Court was cognizant of the fact that the appellant has been suffering from illness but the Court opined that the Court has already issued directions to the Jail Superintendent in this regard and therefore this ground is no longer available to the appellant at this stage. The Court noted that during investigation, it has been revealed that there has been layering of proceeds of crime by use of shell companies, most of which are only on paper, and opined that there is cogent evidence collected so far that these shell companies are incorporated by persons who can be shown to be close and connected with the appellant. Next, the Court held that the material in the present case is completely distinct, different and independent from the material which was collected by the CBI in the predicate offence. Even the witnesses in the PMLA investigation are different from the investigation conducted by the CBI. The High Court concluded that prima facie, allegations are serious in nature and the appellant has played key and active role in the present case. On the basis of all these observations, the High Court dismissed the bail application.

11. It is the contention of the learned senior counsel Shri Kapil Sibal and Dr. Abhishek Manu Singhvi on behalf of the appellant before us that the High Court ought to have granted regular bail to the appellant after holding the triple test of flight risk, tampering with evidence and influencing of witnesses in favour of the appellant. The Impugned Order deserves to be set aside only on the ground that the allegations of a completely unrelated case (***Rohit Tandon v. Directorate of Enforcement*** *(2018) 11 SCC 46*) have been considered by the High Court as allegations relating to the instant case and findings on merits against the appellant have been rendered based on such unrelated allegations. Next, it has been contended by the appellant that the High Court erred in law in going into and rendering findings on merits of the case in order to deny bail to the appellant despite the settled position of law that merits of a case ought not to be gone into at the time of adjudication of a bail application. This Court in the appellant's own case seeking regular bail in the case registered by CBI against him titled ***P. Chidambaram v. CBI*** (Crl. Appeal No. 1603/2019) has held that "at the stage of granting bail, an elaborate examination of evidence and detailed reasons touching upon the merit of the case, which may prejudice the accused, should be avoided." It has also been contended on behalf of the appellant that the High Court erred in accepting at face value the allegations made on merits of the case in the counter affidavit filed by the respondent and converting such allegations verbatim into findings by the Court and declining to grant bail to the appellant solely on the basis of said findings. On merits, the appellant has submitted that he is neither a shareholder nor director of any allegedly connected company nor does he have any connection with any of these companies. No material linking the appellant directly or indirectly with the alleged offence of money laundering has either been put to the appellant so far or been placed on record before the High Court. Further, the 12 officers who signed the file pertaining to the approval of the FDI proposal of INX Media were not even arrested. Only the appellant, who was the 13th signatory has been arrested and denied bail. Moreover, all the other co-accused in the instant ECIR case have also been granted bail or have not been arrested. The High Court also failed to appreciate that the appellant has already been granted regular bail by this Court in the predicate offence FIR vide its order dated 22.10.2019. The High Court erred in denying bail to the appellant on the specious ground that allegations are of a serious nature. It is the submission of the learned senior counsel for the appellant that the gravity of an offence is to be determined from the severity of the prescribed punishment. In the instant case, the alleged offence of money laundering is punishable by imprisonment for a term which shall not exceed 7 years. Thus, the offence is not 'grave' or 'serious' in terms of the judgment of this Court in ***Sanjay Chandra v. CBI,*** *(2012) 1 SCC 40* . The High Court should also have considered that the appellant is a 74 year old person whose health is fragile and while being lodged in judicial custody of the Respondent Enforcement Directorate between 16.10.2019 and 30.10.2019 and thereafter being lodged in judicial custody between 30.10.2019 till date, the appellant has suffered multiple bouts of chronic and persistent pain in his abdomen, for which he was taken to AIIMS and Dr. Ram Manohar Lohia Hospital on various occasions (viz. On 23.10.2019, 26.10.2019, 28.10.2019, 30.10.2019 and 1.11.2019) for consultation, diagnosis and tests. The appellant's health continues to deteriorate and with the onset of the cold weather, the appellant will become more vulnerable.

12. Between 05.09.2019 and 16.10.2019 though the appellant was available in custody the respondent did not choose to interrogate but remand period was sought on 17.10.2019 and 24.10.2019, while the third remand sought was rejected and accordingly the remand period expired on 30.10.2019. No witness was confronted despite seeking remand for that purpose. It is contended that the very manner in which the whole process is being conducted is only to see that the appellant remains in custody. It is contended that the liberty of the appellant cannot be denied in such manner by adopting an unfair procedure. Though much is sought to be made out as if the offence committed is grave there is absolutely no material to indicate that the appellant is involved and even otherwise it is a matter of trial wherein the charge is to be established. The gravity can only beget the length of sentence provided in law and by asserting that the offence is grave, the grant of bail cannot be thwarted. The respondent cannot contend as if the appellant should remain in custody till the trial is over.

13. Shri Tushar Mehta, learned Solicitor General while seeking to oppose the petition has made reference to the counter affidavit filed on behalf of the respondent. It is contended that though the High Court has held that there is no possibility of tampering the evidence and has not influenced any witnesses and has ultimately denied the bail, such conclusion is not justified. It is contended that the appellant having held a very high position and also due to his status is likely to influence the witnesses and one of the witness had already indicated that he hails from the same State to which the appellant belongs and is not in a position to appear for the purpose of being confronted. Hence even in that regard it should be held against the appellant. It is further contended that even otherwise despite holding the triple test in favour of the appellant the gravity of the offence can be considered as a stand-alone aspect as the gravity of the offence in a particular case is also important while considering bail. In that circumstance, the three aspects to be taken note is the manner in which the offence has taken place, gravity of the offence and also the contemporaneous documents to show that the accused either in custody or otherwise, wields influence over the witnesses. Hence, he contends that the finding of

the High Court insofar as saying that the appellant has not tampered is factually incorrect. The learned Solicitor General further contends that the economic offences are graver offences which affect the society and the community suffers. The common man loses confidence in the establishment. It is contended that the Investigating Agency has collected documentary evidence such as emails exchanged between the co-conspirators on behalf of the appellant and documents to indicate investment of laundered money in benami properties whose beneficial owners can be traced to the appellant and his family members. The respondent has also recorded the statement of material witnesses who are the part of process of money laundering. It is his contention that the appellant has knowledge of all these aspects and the material will show the share holding pattern of the 16 companies. It is further contended that the learned Judge of the High Court has referred to the documents produced in a sealed cover and in that light has arrived at the conclusion to deny bail. The High Court has, however, not properly considered while recording that a complaint is ready to be filed and therefore, he would not influence the witnesses. Even if the complaint/charge sheet is filed in 60 days it is only to avoid default and the investigation which is not complete would continue. In that light it is contended that when economic offences are premeditated it would require detailed investigation to unearth material and, in such circumstances, if bail is granted it would defeat the case of the prosecution. The learned Solicitor General has also referred to the decisions which would be taken note at the appropriate stage.

14. The learned senior counsel for the appellant in reply to the submissions contended that not a single document is available to indicate that the appellant is involved in the offence. The allegation of the appellant tampering the evidence or influencing the witnesses as sought to be made out on behalf of the respondent cannot be accepted for the reason that the alleged offence is of the year 2007-08 and though the proceedings were initiated in the year 2017, the appellant was arrested only in the year 2019. In such event when the appellant has not influenced any person while he was at large, the allegation of tempering while in custody is not acceptable. The statement of the alleged witnesses is stated to have been recorded in the year 2018 and the case of the respondent that they are seeking to confront the witnesses is being put forth at this stage only to indicate as if the custody of the appellant is still required by them. When there is no document to indicate that the appellant is involved, the mere allegation against the alleged co-conspirators cannot be the basis to indicate that an economic offence has been committed by the appellant. In that light it is contended that the prayer made in the petition be accepted.

15. Though we have heard the matter elaborately and also have narrated the contention of both sides in great detail including those which were urged on the merits of the matter we are conscious of the fact that in the instant appeal the consideration is limited to the aspect of regular bail sought by the appellant under Section 439 of Cr.PC. While stating so, in order to put the matter in perspective it would be appropriate to take note of the observation made by us in the case of this very appellant v. CBI, in Criminal Appeal No. 1603/2019 which reads as hereunder;

> "The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:- (i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of materials relied upon by the prosecution; (ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; (iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; (iv) character behaviour and standing of the accused and the circumstances which are peculiar to the accused; (v) larger interest of the public or the State and similar other considerations (vide *Prahlad Singh Bhati v. NCT, Delhi and another (2001) 4 SCC 280*). There is no hard and fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner."

16. In the above background, perusal of the order dated 15.11.2019 impugned herein indicates that the learned Single Judge having taken note of the rival contentions in so far as the triple test or the tripod test to be applied while considering an application for grant of regular bail under Sec. 439 Cr.PC, has answered the same in paragraphs 50 to 53 of the order, in favour of the appellant herein. The learned Solicitor General has however sought to contend that though there is not much grievance with regard to the conclusion on 'flight risk', the finding on likelihood of tampering and influencing witness has not been considered in its correct perspective. The finding in that regard has not been assailed and in such event, the appellant in our opinion cannot be taken by surprise. Even otherwise as rightly observed by the learned Single Judge the evidence and material stated to have been collected is already available with the Investigating agency. Learned Solicitor General would however contend that still further materials are to be collected and letter rogatory has been issued and as such tampering cannot be ruled out. In the present situation the appellant is not in political power nor is he holding any post in the Government of the day so as to be in a position to interfere. In that view such allegation cannot be accepted on its face value. With regard to the witness having written that he is not prepared to be confronted as he is from the same state, the appellant cannot be held responsible for the same when there is no material to indicate that the appellant or anyone on his behalf had restrained or threatened the concerned witness who refused to be confronted with the appellant in custody.

17. The only other aspect therefore for consideration is as to whether the further consideration made by the learned Judge of the High Court, despite holding the triple test in appellant's favour was justified and if consideration is permissible, whether the learned Judge was justified in his conclusion.

18. While opposing the contention put forth by the learned Senior Counsel for the appellant that the learned Judge of the High Court ought not to have travelled beyond the consideration on the triple test and holding it in favour of the appellant, the learned Solicitor General would contend that the gravity of the offence and the role played by the accused should also be a part of consideration in the matter of bail. It is contended by the learned Solicitor General that the economic offences is a class apart and the gravity is an extremely relevant factor while considering bail. In order to contend that this aspect has been judicially recognised, the decisions in the case of ***State of Bihar & Anr. v. Amit Kumar, (2017) 13 SCC 751 ; Nimmagadda Prasad v. CBI, (2013) 7 SCC 466 ; CBI v. Ramendu Chattopadhyay,*** Crl Appeal.No.1711 of 2019; ***Seniors Fraud Investigation Office v. Nittin Johari & Anr.; (2019) 9 SCC 165 ; Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439 ; State of Gujarat v. Mohanlal Jitamalji Porwal, (1987) 2 SCC 364*** are relied upon. Perusal of the cited decisions would indicate that this Court has held that economic offences are also of grave nature, being a class apart which arises out of deep-rooted conspiracies and effect on the community as a whole is also to be kept in view, while consideration for bail is made.

19. On the consideration as made in the above noted cases and the enunciation in that regard having been noted, the decisions relied

upon by the learned senior counsel for the appellant and the principles laid down for consideration of application for bail will require our consideration. The learned senior counsel for the appellant has relied upon the decision of the Constitution Bench of this Court in the case of ***Shri Gurbaksh Singh Sibbia v. State of Punjab,*** ***(1980) 2 SCC 565*** with reference to paragraph 27 which reads as hereunder:

> "It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in *Nagendra v. King-Emperor [AIR 1924 Cal 476 , 479, 480 : 25 Cri LJ 732]* that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the 'Meerut Conspiracy cases' observations are to be found regarding the right to bail which deserve a special mention. In *K.N. Joglekar v. Emperor [AIR 1931 All 504 : 33 Cri LJ 94]* it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the court that there was no hard and fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In *Emperor v. Hutchinson [AIR 1931 All 356, 358 : 32 Cri LJ 1271]* it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence."

We have taken note of the said decision since even though the consideration therein was made in the situation where an application for anticipatory bail under Section 438 was considered, the entire conspectus of the matter relating to bail has been noted by the Constitution Bench.

20. The learned senior counsel for the appellant has also placed reliance on the decision on the decision in the case of ***Sanjay Chandra v. CBI,*** ***(2012) 1 SCC 40*** with specific reference to paragraph 39 which reads as hereunder:

> "Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds: the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration."

The said case was a case of financial irregularities and in the said circumstance this Court in addition to taking note of the deep-rooted planning in causing huge financial loss, the scope of consideration relating to bail has been taken into consideration in the background of the term of sentence being seven years if convicted and in that regard it has been held that in determining the grant or otherwise of bail, the seriousness of the charge and severity of the punishment should be taken into consideration.

21. Thus from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provides so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case to case basis on the facts involved therein and securing the presence of the accused to stand trial.

22. In the above circumstance it would be clear that even after concluding the triple test in favour of the appellant the learned Judge of the High Court was certainly justified in adverting to the issue relating to the gravity of the offence. However, we disapprove the manner in which the conclusions are recorded in paragraphs 57 to 62 wherein the observations are reflected to be in the nature of finding relating to the alleged offence. The learned senior counsel for the appellant with specific reference to certain observations contained in the above noted paragraphs has pointed out that the very contentions to that effect as contained in paragraphs 17, 20 and 24 of the counter affidavit has been incorporated as if, it is the findings of the Court. The learned Solicitor General while seeking to controvert such contention would however contend that in addition to the counter affidavit the respondent had also furnished the documents in a sealed cover which was taken note by the learned Judge and conclusion has been reached.

23. The question as to whether the Court could look into the documents while considering an application for bail had arisen for consideration in the very case between the parties herein in Criminal Appeal No.130/2019 wherein through the judgment dated 05.09.2019 while considering the matter relating to the order dated 20.08.2019 whereby the High Court had rejected the bail, this Court had held that it would be open for the Court to receive the materials/documents collected during the investigation and peruse the same to satisfy its conscience that the investigation is proceeding in the right lines and for the purpose of consideration of grant of bail/anticipatory bail etc. At the same time, this Court, had disapproved the manner in which the learned Judge of the High Court in the said case had verbatim quoted a note produced by the respondent. If that be the position, in the instant case, the learned Judge while adverting to the materials, ought not have recorded a finding based on the materials produced before him. While the learned Judge was empowered to look at the materials produced in a sealed cover to satisfy his judicial conscience, the learned Judge ought not to have recorded finding based on the materials produced in a sealed cover. Further while deciding the same case of the appellant in Crl. Appeal No.1340 of 2019, after holding so, this Court had consciously refrained from opening the sealed cover and perusing the documents lest some observations are made thereon after perusal of the same, which would prejudice the accused pre-trial. In that circumstance though it is held that it would be open for the Court to peruse the documents, it would be against the concept of fair trial if in every case the prosecution presents documents in sealed cover and the findings on the same are recorded as if the offence is committed and the same is treated as having a bearing for denial or grant of bail.

24. Having said so, in present circumstance we were not very much inclined to open the sealed cover although the materials in sealed cover was received from the respondent. However, since the learned Single Judge of the High Court had perused the documents in sealed cover and arrived at certain conclusion and since that order is under challenge, it had become imperative for us to also open the sealed cover and peruse the contents so as to satisfy ourselves to that extent. On perusal we have taken note that the statements of persons concerned have been recorded and the details collected have been collated. The recording of statements and the collation of material is in the nature of allegation against one of the co-accused Karti Chidambaram- son of appellant of opening shell companies and also purchasing benami properties in the name of relatives at various places in different countries. Except for recording the same, we do not wish to advert to the documents any further since ultimately, these are allegations which would have to be established in the trial wherein the accused/co-accused would have the opportunity of putting forth their case, if any, and an ultimate conclusion would be reached. Hence in our opinion, the finding recorded by the learned Judge of the High Court based on the material in sealed cover is not justified.

25. Therefore, at this stage while considering the bail application of the appellant herein what is to be taken note is that, at a stage when the appellant was before this Court in an application seeking for interim protection/anticipatory bail, this Court while considering the matter in Criminal Appeal No.1340/2019 had in that regard held that in a matter of present nature wherein grave economic offence is alleged, custodial interrogation as contended would be necessary and in that circumstance the anticipatory bail was rejected. Subsequently the appellant has been taken into custody and has been interrogated and for the said purpose the appellant was available in custody in this case from 16.10.2019 onwards. It is, however, contended on behalf of the respondent that the witnesses will have to be confronted and as such custody is required for that purpose. As noted, the appellant has not been named as one of the accused in the ECIR but the allegation while being made against the co-accused it is indicated the appellant who was the Finance Minister at that point, has aided the illegal transactions since one of the co-accused is the son of the appellant. In this context even if the statements on record and materials gathered are taken note, the complicity of the appellant will have to be established in the trial and if convicted, the appellant will undergo sentence. For the present, as taken note the anticipatory bail had been declined earlier and the appellant was available for custodial interrogation for more than 45 days. In addition to the custodial interrogation if further investigation is to be made, the appellant would be bound to participate in such investigation as is required by the respondent. Further it is noticed that one of the co-accused has been granted bail by the High Court while the other co-accused is enjoying interim protection from arrest. The appellant is aged about 74 years and as noted by the High Court itself in its order, the appellant has already suffered two bouts of illness during incarceration and was put on antibiotics and has been advised to take steroids of maximum strength. In that circumstance, the availability of the appellant for further investigation, interrogation and facing trial is not jeopardized and he is already held to be not a 'flight risk' and there is no possibility of tampering the evidence or influencing\intimidating the witnesses. Taking these and all other facts and circumstances including the duration of custody into consideration the appellant in our considered view is entitled to be granted bail. It is made clear that the observations contained touching upon the merits either in the order of the High Court or in this order shall not be construed as an opinion expressed on merits and all contentions are left open to be considered during the course of trial.

26. For the reasons stated above, we pass the following order:

i) The instant appeal is allowed and the judgment dated 15.11.2019 passed by the High Court of Delhi in Bail Application No.2718 of 2019 impugned herein is set aside;

ii) The appellant is ordered to be released on bail if he is not required in any other case, subject to executing bail bonds for a sum of Rs.2 lakhs with two sureties of the like sum produced to the satisfaction of the learned Special Judge;

iii) The passport ordered to be deposited by this Court in the CBI case shall remain in deposit and the appellant shall not leave the country without specific orders to be passed by the learned Special Judge.

iv) The appellant shall make himself available for interrogation in the course of further investigation as and when required by the respondent.

v) The appellant shall not tamper with the evidence or attempt to intimidate or influence the witnesses;

vi) The appellant shall not give any press interviews nor make any public comment in connection with this case qua him or other co-accused.

vii) There shall be no order as to costs.

ORDER

After pronouncement of the Judgment in the above mentioned matter, Mr. Tushar Mehta, learned Solicitor General appearing for the respondent-Directorate of Enforcement, has submitted that the findings in the Judgment may not have a bearing qua the other accused.

Considering the above submission, we make it clear that the findings in the Judgment, as above, shall not have any bearing qua the

other accused in the case and the same shall be considered independently on its own merits.

2021 Legal Eagle (SC) 436

IN THE SUPREME COURT OF INDIA

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[Before : Sanjay Kishan Kaul, Hrishikesh Roy]

Siddharth

versus

State of Uttar Pradesh & Anr.

Case No. : Criminal Appeal No.838 of 2021 (Arising out of SLP(Crl.) No.5442/2021) , Date of Decision : 16/08/2021

(A) Criminal Law -- Code of Criminal Procedure, 1973 -- Section 439 -- Anticipatory Bail -- Arrest of accused on filing of charge sheet, necessity of -- Custodial investigation -- Appellant has joined the investigation – Appellant roped in after seven years of registration of the FIR -- No reason why at this stage he must be arrested before the charge-sheet is taken on record -- It is assured by the Counsel that on summons being issued the appellant will put the appearance before the trial court -- Merely because an arrest can be made because it is lawful does not mandate that arrest must be made -- Impugned order set aside -- Appeal allowed.

(B) Code of Criminal Procedure, 1973 -- Section 170 -- Arrest of accused -- On filing of charge sheet -- Necessity of -- Power of arrest and justification to exercise the power -- Personal liberty is an important aspect of our constitutional mandate -- The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond -- Merely because an arrest can be made because it is lawful does not mandate that arrest must be made -- A distinction must be made between the existence of the power to arrest and the justification for exercise of it -- If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person -- If the Investigating Officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation, there should not be a compulsion on the officer to arrest the accused -- The word "custody" appearing in Section 170 of the Cr.P.C. does not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the Investigating Officer before the court while filing the chargesheet -- Arrest not required -- Anticipatory Bail Granted.

Advocates Appeared :

For the Petitioner : Mr. P. K. Dube, Sr. Adv., Mr. Ravi Sharma, AOR, Mr. Sandeep Gaur, Adv., Mr. Sujeet Kumar, Adv., Ms. Madhulika Rai Sharma, Adv., Ms. Chhaya Gupta, Adv., Mr. Anjani kumar Rai, Advocate.
For the Respondent : Ms. Garima Prashad, Sr. Adv., AAG, Mr. Sarvesh Singh Baghel, AOR, Mr. Utkarsh Sharma, Advocate.

Statutes Referred :

1. Code of Criminal Procedure -- S.170

Cases Referred :

1. Court on its own motion v. Central Bureau of Investigation 2004 (72) DRJ 629
2. Court on its own Motion v. State (2018) 254 DLT 641 (DB)
3. Deendayal Kishanchand & Ors. v. State of Gujarat 1983 Crl.LJ 1583
4. Joginder Kumar v. State of UP & Ors. (1994) 4 SCC 260

JUDGMENT/ORDER:

Leave granted.

The short issue before us is whether the anticipatory bail application of the appellant ought to have been allowed. We may note that as per the Order dated 02.8.2021 we had granted interim protection.

The fact which emerges is that the appellant along with 83 other private persons were sought to be roped in a FIR which was registered seven years ago. The appellant claims to be supplier of stone for which royalty was paid in advance to these holders and claims not to be involved in the tendering process. Similar person was stated to have been granted interim protection until filing of the police report. The appellant had already joined the investigation before approaching this Court and the charge-sheet was stated to be ready to be filed. However, the reason to approach this Court was on account of arrest memo having been issued.

It is not disputed before us by learned counsel for the respondent that the charge-sheet is ready to be filed but submits that the trial court takes a view that unless the person is taken into custody the charge-sheet will not be taken on record in view of Section 170 of the Cr.P.C.

In order to appreciate the controversy we reproduce the provision of Section 170 of Cr.P.C. as under:

> "170. Cases to be sent to Magistrate, when evidence is sufficient. – (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid,

> such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed."

There are judicial precedents available on the interpretation of the aforesaid provision albeit the Delhi High Court.

In ***Court on its own motion v. Central Bureau of Investigation*** ***2004 (72) DRJ 629*** , the Delhi High Court dealt with an argument similar to the contention of the respondent that Section 170 Cr.P.C. prevents the trial court from taking a charge-sheet on record unless the accused is taken into custody. The relevant extracts are as under:

> "15. Word "custody" appearing in this Section does not contemplate either police or judicial custody. It merely connotes the presentation of accused by the Investigating Officer before the Court at the time of filing of the charge-sheet whereafter the role of the Court starts. Had it not been so the Investigating Officer would not have been vested with powers to release a person on bail in a bailable offence after finding that there was sufficient evidence to put the accused on trial and it would have been obligatory upon him to produce such an accused in custody before the Magistrate for being released on bail by the Court.
>
> 16. In case the police/Investigating Officer thinks it unnecessary to present the accused in custody for the reason that accused would neither abscond nor would disobey the summons as he has been co-operating in investigation and investigation can be completed without arresting him, the IO is not obliged to produce such an accused in custody.
>
> […]
>
> 19. It appears that the learned Special Judge was labouring under a misconception that in every non-bailable and cognizable offence the police is required to invariably arrest a person, even if it is not essential for the purpose of investigation.
>
> 20. Rather the law is otherwise. In normal and ordinary course the police should always avoid arresting a person and sending him to jail, if it is possible for the police to complete the investigation without his arrest and if every kind of co-operation is provided by the accused to the Investigating Officer in completing the investigation. It is only in cases of utmost necessity, where the investigation cannot be completed without arresting the person, for instance, a person may be required for recovery of incriminating articles or weapon of offence or for eliciting some information or clue as to his accomplices or any circumstantial evidence, that his arrest may be necessary. Such an arrest may also be necessary if the concerned Investigating Officer or Officer-in-charge of the Police Station thinks that presence of accused will be difficult to procure because of grave and serious nature of crime as the possibility of his absconding or disobeying the process or fleeing from justice cannot be ruled out."

In a subsequent judgment the Division Bench of the Delhi High Court in ***Court on its own Motion v. State*** ***(2018) 254 DLT 641 (DB)*** relied on these observations in ***Re Court on its own Motion*** *(supra)* and observed that it is not essential in every case involving a cognizable and non-bailable offence that an accused be taken into custody when the charge-sheet/final report is filed.

The Delhi High Court is not alone in having adopted this view and other High Courts apparently have also followed suit on the proposition that criminal courts cannot refuse to accept a charge-sheet simply because the accused has not been arrested and produced before the court.

In ***Deendayal Kishanchand & Ors. v. State of Gujarat 1983 Crl.LJ 1583***, the High Court observed as under:

> "2.…It was the case of the prosecution that two accused, i.e. present petitioners Nos. 4 and 5, who are ladies, were not available to be produced before the Court along with the charge-sheet, even though earlier they were released on bail. Therefore, as the Court refused to accept the charge-sheet unless all the accused are produced, the charge-sheet could not be submitted, and ultimately also, by a specific letter, it seems from the record, the charge-sheet was submitted without accused Nos. 4 and 5. This is very clear from the evidence on record. […]
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> … … … … … …
>
> 8. I must say at this stage that the refusal by criminal Courts either through the learned Magistrate or through their office staff to accept the charge-sheet without production of the accused persons is not justified by any provision of law. Therefore, it should be impressed upon all the Courts that they should accept the charge-sheet whenever it is produced by the police with any endorsement to be made on the charge-sheet by the staff or the Magistrate pertaining to any omission or requirement in the charge-sheet. But when the police submit the charge-sheet, it is the duty of the Court to accept it especially in view of the provisions of Section 468 of the Code which creates a limitation of taking cognizance of offence. Likewise, police authorities also should impress on all police officers that if charge-sheet is not accepted for any such reason, then attention of the Sessions Judge should be drawn to these facts and get suitable orders so that such difficulties would not arise henceforth."

We are in agreement with the aforesaid view of the High Courts and would like to give our imprimatur to the said judicial view. It has rightly been observed on consideration of Section 170 of the Cr.P.C. that it does not impose an obligation on the Officer-in-charge to arrest each and every accused at the time of filing of the charge-sheet. We have, in fact, come across cases where the accused has cooperated with the investigation throughout and yet on the charge-sheet being filed non-bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the accused and produce him before the court. We are of the view that if the Investigating Officer does not believe that the accused will abscond or disobey summons he/she is not required to be produced in custody. The word "custody" appearing in Section 170 of the Cr.P.C. does not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the Investigating Officer before the court while filing the charge-sheet.

We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. [4]

If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the Investigating Officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused.

[4] *Joginder Kumar v. State of UP & Ors.* *(1994) 4 SCC 260* .

We are, in fact, faced with a situation where contrary to the observations in *Joginder Kumar's* case how a police officer has to deal with a scenario of arrest, the trial courts are stated to be insisting on the arrest of an accused as a pre-requisite formality to take the charge-sheet on record in view of the provisions of Section 170 of the Cr.P.C. We consider such a course misplaced and contrary to the very intent of Section 170 of the Cr.P.C.

In the present case when the appellant has joined the investigation, investigation has completed and he has been roped in after seven years of registration of the FIR we can think of no reason why at this stage he must be arrested before the charge-sheet is taken on record. We may note that learned counsel for the appellant has already stated before us that on summons being issued the appellant will put the appearance before the trial court.

We accordingly set aside the impugned order and allow the appeal in terms aforesaid leaving the parties to bear their own costs.

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IN THE SUPREME COURT OF INDIA

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[Before : Sanjay Kishan Kaul, M.M. Sundresh]

Satender Kumar Antil

versus

Central Bureau of Investigation & Anr.

Case No. : Petition(s) for Special Leave to Appeal (Crl.) No. 5191/2021 (Arising out of impugned final judgment and order dated 01-07-2021 in CRMABA No. 7598/2021 passed by the High Court of Judicature at Allahabad) , Date of Decision : 07/10/2021

Criminal law -- Bail for various offences -- Guidelines issued.

Held: In terms of the suggestions, the offences have been categorized and guidelines are sought to be laid down for grant of bail, without fettering the discretion of the courts concerned and keeping in mind the statutory provisions.

We are inclined to accept the guidelines and make them a part of the order of the Court for the benefit of the Courts below.

A copy of this order be circulated to the Registrars of the different High Courts to be further circulated to the trial Courts so that the unnecessary bail matters do not come up to this Court.

This is the only purpose for which we have issued these guidelines, but they are not fettered on the powers of the Courts.

Advocates Appeared :

For the Petitioner : Mr. Sidharth Luthra, Sr. Adv., Mr. Akbar Siddique, AOR, Mr. Rajneesh Chuni, Adv., Mr. Malik Javed Ansari, Adv., Mr. Chirag Madan, Adv., Mr. Hardik Rupal, Adv., Mr. Parv Garg, Adv., Mr. Adeel Talib, Adv., Mr. Fareed Siddiqui, Adv., Mr. Shashank Gaurav, Advocate.
For the Respondent : Mr. S.V. Raju, Ld. ASG, Ms. Sairica Raju, Adv., Mr. Annam Venkatesh, Adv., Ms. Priyanka Das, Adv., Mr. Udai Khanna, Adv., Mr. Arvind Kumar Sharma, AOR, Mr.Vikram Chaudhary, Sr. Adv., Mr. Mahesh Agarwal, Adv., Mr. Pranjal Krishna, Adv., Mr. E.C. Agrawala, AOR, Mr. Vikram Chaudhri, Sr. Adv., Mr. Harshit Sethi, Adv., Mr. Keshavam Chaudhri, Adv., Ms. Anzu. K. Varkey, AOR, Ms. Ria Khanna, Adv., Mr. Kapil Dahiya, Advocate.

Cases Referred :

1. Sanjay Chandra v. CBI, (2012) 1 SCC 40
2. Siddharth v. State of UP, 2021 SCC online SC 615

JUDGMENT/ORDER:

Application for intervention is allowed.

We have been provided assistance both by Mr. S.V. Raju, learned Additional Solicitor General and Mr. Sidharth Luthra, learned senior counsel and there is broad unanimity in terms of the suggestions made by learned ASG. In terms of the suggestions, the offences have been categorized and guidelines are sought to be laid down for grant of bail, without fettering the discretion of the courts concerned and keeping in mind the statutory provisions.

We are inclined to accept the guidelines and make them a part of the order of the Court for the benefit of the Courts below. The guidelines are as under :

"Categories/Types of Offences

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.

B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc.

D) Economic offences not covered by Special Acts.

REQUISITE CONDITIONS

1) Not arrested during investigation.

2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an accused along with the chargesheet (Siddharth Vs. State of UP, 2021 SCC online SC 615)

CATEGORY A

After filing of chargesheet/complaint taking of cognizance

a) Ordinary summons at the 1st instance/including permitting appearance through Lawyer.

b) If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) NBW on failure to failure to appear despite issuance of Bailable Warrant.

d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing.

e) Bail applications of such accused on appearance may be decided w/o the accused being taken in physical custody or by granting interim bail till the bail application is decided.

CATEGORY B/D

On appearance of the accused in Court pursuant to process issued bail application to be decided on merits.

CATEGORY C

Same as Category B & D with the additional condition of compliance of the provisions of Bail uner NDPS S. 37, 45 PMLA, 212(6) Companies Act 43 d(5) of UAPA, POSCO etc."

Needless to say that the category A deals with both police cases and complaint cases.

The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

We may also notice an aspect submitted by Mr. Luthra that while issuing notice to consider bail, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the accused during the investigation which has not warranted arrest. On this aspect also we would give our imprimatur and naturally the bail application to be ultimately considered, would be guided by the statutory provisions.

The suggestions of learned ASG which we have adopted have categorized a separate set of offences as "economic Offences" not covered by the special Acts. In this behalf, suffice to say on the submission of Mr. Luthra that this Court in ***Sanjay Chandra v. CBI,*** ***(2012) 1 SCC 40*** has observed in para 39 that in determining whether to grant bail both aspects have to be taken into account:

a) seriousness of the charge and

b) severity of punishment.

Thus, it is not as if economic offences are completely taken out of the aforesaid guidelines but do form a different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor.

We appreciate the assistance given by the learned counsels and the positive approach adopted by the learned ASG.

The SLP stands disposed of and the matter need not be listed further.

A copy of this order be circulated to the Registrars of the different High Courts to be further circulated to the trial Courts so that the unnecessary bail matters do not come up to this Court.

This is the only purpose for which we have issued these guidelines, but they are not fettered on the powers of the Courts.

Pending applications stand disposed of.

2022 Legal Eagle (SC) 744

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 2022 AIR(SC) 3386 : 2022 (3) Crimes 290 : 2022 (291) DLT 619 : 2022 (10) SCC 51 : 2022 (10) SCR 351

[Before : Sanjay Kishan Kaul, M.M. Sundresh]

Satender Kumar Antil

versus

Central Bureau of Investigation and Ors.

Case No. : Miscellaneous Application No. 1849 of 2021 in Special Leave Petition (Crl.) No. 5191 of 2021 and Miscellaneous Application Diary No. 29164 of 2021 in Special Leave Petition (Crl.) No. 5191 of 2021 , Date of Decision : 11/07/2022

Code of Criminal Procedure, 1973 -- Sections 170 and 439 -- Efforts to reduce under trial prisoners -- Taking note of the continuous supply of cases seeking bail after filing of the final report on a wrong interpretation of the law -- An endeavour was made by this Court to categorize the types of offenses to be used as guidelines for the future -- We make it clear that our intent was to ease the process of bail and not to restrict it -- The order, in no way, imposes any additional fetters but is in furtherance of the line of judicial thinking to enlarge the scope of bail -- Directions issued. (Para 73).

Statutes Referred :

1. Code of Criminal Procedure -- S.167
2. Code of Criminal Procedure -- S.167(2)
3. Code of Criminal Procedure -- S.170
4. Code of Criminal Procedure -- S.389
5. Code of Criminal Procedure -- S.41
6. Code of Criminal Procedure -- S.41(1)
7. Code of Criminal Procedure -- S.41(1)(a)
8. Code of Criminal Procedure -- S.41(1)(b)
9. Code of Criminal Procedure -- S.41(1)(c)
10. Code of Criminal Procedure -- S.41(1)(d)
11. Code of Criminal Procedure -- S.41(1)(e)
12. Code of Criminal Procedure -- S.482
13. Code of Criminal Procedure -- S.497
14. Code of Criminal Procedure -- S.57
15. Constitution of India -- Art.14
16. Constitution of India -- Art.15
17. Constitution of India -- Art.19
18. Constitution of India -- Art.21
19. Constitution of India -- Art.22
20. Constitution of India -- Art.22(2)
21. Constitution of India -- Art.359(1)
22. Dowry Prohibition Act -- S.4
23. Indian Penal Code -- S.302
24. Indian Penal Code -- S.326
25. Indian Penal Code -- S.376A
26. Indian Penal Code -- S.376AB
27. Indian Penal Code -- S.376B
28. Indian Penal Code -- S.376C
29. Indian Penal Code -- S.376D
30. Indian Penal Code -- S.376DA
31. Indian Penal Code -- S.376DB
32. Indian Penal Code -- S.409
33. Indian Penal Code -- S.420
34. Indian Penal Code -- S.467
35. Indian Penal Code -- S.498A
36. Narcotic Drugs and Psychotropic Substances Act -- S.37
37. Prevention of Money Laundering Act -- S.45

Cases Referred :

1. A.R. Antulay v. R.S. Nayak (1992) 1 SCC 225 : 1992 SCC (Cri.) 93 [Para 64]
2. Akhtari Bi v. State of M.P., (2001) 4 SCC 355 : 2001 SCC (Cri.) 714 [Para 41]
3. Ambarish Rangshahi Patnigere v. State of Maharashtra, 2010 ALL Mr. (Cri.) 2775 [Para 54]
4. Angana v. State of Rajasthan, (2009) 3 SCC 767 [Para 44]
5. Arnab Manoranjan Goswami v. State of Maharashtra, (2021) 2 SCC 427 [Para 68]

6. Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273 [Para 25]
7. Atul Tripathi v. State of U.P. and Anr., 2014 (9) SCC 177 [Para 44]
8. Balasaheb Satbhai Merchant Coop Bank Ltd. v. The State of Maharashtra and Ors., 2011 SCC OnLine Bom 1261 [Para 54]
9. Bhim Singh v. Union of India, (2015) 13 SCC 605 [Para 47]
10. Corey Lee James Myers v. Her Majesty the Queen, 2019 SCC 18 [Para 16]
11. Deendayal Kishanchand v. State of Gujarat, 1982 SCC OnLine Guj 172 : 1983 Cri. LJ 1583 [Para 36]
12. Emperor v. H.L. Hutchinson, 1931 SCC OnLine All 14 : AIR 1931 All 356 : 1931 Cri. LJ 1271 [Para 11]
13. Gudikanti Narasimhulu v. State, (1978) 1 SCC 240 : 1978 SCC (Cri.) 115 [Para 11]
14. Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri.) 465 [Para 11]
15. Gurcharan Singh v. State (UT of Delhi), (1978) 1 SCC 118 : 1978 SCC (Cri.) 41 [Para 11]
16. H.M. Boudville v. Emperor, AIR 1925 129 : (1925) 26 Cri. LJ 427 [Para 54]
17. Harish Uppal v. Union of India, (2003) 2 SCC 45 [Para 41]
18. Her Majesty the Queen v. Kevin Antic and Ors., 2017 SCC 27 [Para 16]
19. High Court of Delhi v. CBI, 2004 SCC OnLine Del 53 : (2004) 72 DRJ 629 [Para 36]
20. High Court of Delhi v. State, 2018 SCC OnLine Del 12306 : (2018) 254 DLT 641 [Para 36]
21. Hussain and Anr. v. Union of India and Ors., 2017 (5) SCC 702 [Para 41]
22. Hussainara Khatoon (7) v. State of Bihar, (1995) 5 SCC 326 : 1995 SCC (Cri.) 913 [Para 41]
23. Hussainara Khatoon (IV) v. Home Secy., State of Bihar (1980) 1 SCC 98 : 1980 SCC (Cri.) 40 [Para 64]
24. Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, 1980 (1) SCC 81 [Paras 41 & 62]
25. Imtiyaz Ahmad v. State of U.P., (2012) 2 SCC 688 : (2012) 1 SCC (Cri.) 986 [Para 41]
26. Imtiyaz Ahmad v. State of U.P., (2017) 3 SCC 658 : (2017) 3 SCC 665 : (2017) 2 SCC (Civ) 311 : (2017) 2 SCC (Civ) 318 : (2017) 2 SCC (Cri.) 228 : (2017) 2 SCC (Cri.) 235 : (2017) 1 SCC (L & S) 724 : (2017) 1 SCC (L & S) 731 [Para 41]
27. Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1 [Para 32]
28. Joginder Kumar v. State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri.) 1172 [Para 36]
29. K.N. Joglekar v. Emperor, 1931 SCC OnLine All 60 : AIR 1931 All 504 : 1932 Cri. LJ 94 [Para 11]
30. Kadra Pahadiya v. State of Bihar (1983) 2 SCC 104 : 1983 SCC (Cri.) 361 [Para 64]
31. Kartar Singh v. State of Punjab (1994) 3 SCC 569 : 1994 SCC (Cri.) 899 [Para 64]
32. Kashmira Singh v. State of Punjab (1977) 4 SCC 291 : 1977 SCC (Cri.) 559 [Para 41]
33. M. Ravindran v. Directorate of Revenue Intelligence, (2021) 2 SCC 485 [Para 34]
34. Mahammed Eusoof v. Emperor, AIR 1926 Rang 51 : (1926) 27 Cri LJ 401 [Para 54]
35. Maneka Gandhi v. Union of India (1978) 2 SCR 621 : (1978) 1 SCC 248 [Paras 11, 35 & 41]
36. Moti Ram v. State of M.P. (1978) 4 SCC 47 [Para 62]
37. Nagendra Nath Chakravarti, In re, 1923 SCC OnLine Cal 318 : AIR 1924 Cal476 : 1924 Cri. LJ 732 [Para 11]
38. Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1 [Para 11]
39. Noor Mohammed v. Jethanand, (2013) 5 SCC 202 : (2013) 2 SCC (Crv) 754 [Para 41]
40. P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791 [Para 66]
41. Pankaj Jain v. Union of India, (2018) 5 SCC 743 [Para 33]
42. Prahlad Sigh Bhati v. NCT, Delhi and Anr. JT 2001 (4) SCC 280 [Paras 53 & 54]
43. R. v. St-Cloud, 2015 SCC 27, [2015] 2 S.C.R. 328 [Para 16]
44. Raghubir Singh v. State of Bihar (1986) 4 SCC 481 : 1986 SCC (Cri.) 511 [Para 64]
45. Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67 : (2018) 1 SCC (Cri.) 401 [Para 35]
46. S. Kasi v. State, (2021) 12 SCC 1 : 2020 SCC OnLine SC 529 [Para 35]
47. Sanjay Chandra v. CBI (2012) 1 SCC 40 [Paras 1, 12 & 66]
48. Satyan v. State 1981 Cr.L.J. 1313 [Para 54]
49. Siddharth v. State of U.P., (2021) 1 SCC 676 : 2021 SCC online SC 615 : Criminal Appeal No. 838/2021 dated 16.08.2021 [Paras 1, 2 & 36]
50. Sunil Kumar v. Vipin Kumar (2014) 8 SCC 868 [Para 44]
51. Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731 , para 15 : 1995 SCC (Cri.) 39 [Paras 41 & 64]
52. Surinder Singh @ Shingara Singh v. State Of Punjab, 2005 (7) SCC 387 [Para 41]
53. Thana Singh v. Central Bureau of Narcotics, (2013) 2 SCC 590 : (2013) 2 SCC (Cri.) 818 [Para 41]
54. Tularam v. Emperor, AIR 1927 Nag 53 : (1926) 27 Cri LJ 1063 [Para 54]
55. Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri.) 760 [Para 35]
56. Union of India v. K.A. Najeeb, (2021) 3 SCC 713 [Para 64]

JUDGMENT/ORDER:

M.M. Sundresh, J.:--

Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization. It is the very quintessence of civilized existence and essential requirement of a modern man

- John E.E.D. in "Essays on Freedom and Power"

1. Taking note of the continuous supply of cases seeking bail after filing of the final report on a wrong interpretation of Section 170 of the Code of Criminal Procedure (hereinafter referred to as "the Code" for short), an endeavour was made by this Court to categorize the types of offenses to be used as guidelines for the future. Assistance was sought from Shri Sidharth Luthra, learned senior counsel, and learned Additional Solicitor General Shri S.V. Raju. After allowing the application for intervention, an appropriate Order was passed on 07.10.2021. The same is reproduced as under:

> *"We have been provided assistance both by Mr. S.V. Raju, learned Additional Solicitor General and Mr. Sidharth Luthra, learned senior Counsel and there is broad unanimity in terms of the suggestions made by learned ASG. In terms of the suggestions, the offences have been categorized and guidelines are sought to be laid down for grant of bail,*

without fettering the discretion of the courts concerned and keeping in mind the statutory provisions.

We are inclined to accept the guidelines and make them a part of the order of the Court for the benefit of the Courts below. The guidelines are as under:

Categories/Types of Offences

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.

B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S. 37), PMLA (S. 45), UAPA (S. 43D(5), Companies Act, 212(6), etc.

D) Economic offences not covered by Special Acts.

REQUISITE CONDITIONS

1) Not arrested during investigation.

2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an Accused along with the chargesheet (Siddharth v. State of UP, 2021 SCC online SC 615)

CATEGORY A

After filing of chargesheet/complaint taking of cognizance

a) Ordinary summons at the 1st instance/including permitting appearance through Lawyer.

b) If such an Accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) NBW on failure to failure to appear despite issuance of Bailable Warrant.

d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the Accused before execution of the NBW on an undertaking of the Accused to appear physically on the next date/s of hearing.

e) Bail applications of such Accused on appearance may be decided w/o. the Accused being taken in physical custody or by granting interim bail till the bail application is decided.

CATEGORY B/D

On appearance of the Accused in Court pursuant to process issued bail application to be decided on merits.

CATEGORY C

Same as Category B & D with the additional condition of compliance of the provisions of Bail under NDPS Section. 37, 45 PMLA, 212(6) Companies Act 43d(5) of UAPA, POSCO etc.

Needless to say that the category A deals with both police cases and complaint cases.

The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the Accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the Accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

We may also notice an aspect submitted by Mr. Luthra that while issuing notice to consider bail, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the Accused during the investigation which has not warranted arrest. On this aspect also we would give our imprimatur and naturally the bail application to be ultimately considered, would be guided by the statutory provisions.

The suggestions of learned ASG which we have adopted have categorized a separate set of offences as "economic Offences" not covered by the special Acts. In this behalf, suffice to say on the submission of Mr. Luthra that this Court in Sanjay Chandra v. CBI, (2012) 1 SCC 40 has observed in para 39 that in determining whether to grant bail both aspects have to be taken into account:

a) seriousness of the charge and

b) severity of punishment.

Thus, it is not as if economic offences are completely taken out of the aforesaid guidelines but do form a different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor.

We appreciate the assistance given by the learned counsels and the positive approach adopted by the learned ASG.

The SLP stands disposed of and the matter need not be listed further.

A copy of this order be circulated to the Registrars of the different High Courts to be further circulated to the trial Courts so that the unnecessary bail matters do not come up to this Court.

This is the only purpose for which we have issued these guidelines, but they are not fettered on the powers of the Courts.

2. Two more applications, being M.A. No. 1849/2021 and M.A. Diary No. 29164/2021, were filed seeking a clarification referring to category 'C' wherein, inadvertently, Section 45 of the Prevention of Money Laundering Act, 2002 despite being struck down, found a place, thus came the Order dated 16.12.2021:

"Learned senior counsels for parties state that they will endeavour to work out some of the fine tuning which is required to give meaning to the intent of our order dated 07.10.2021.

> *We make it clear that our intent was to ease the process of bail and not to restrict it. The order, in no way, imposes any additional fetters but is in furtherance of the line of judicial thinking to enlarge the scope of bail.*
>
> *At this stage, suffice for us to say that while referring to category 'C', inadvertently, Section 45 of Prevention of Money laundering Act (PMLA) has been mentioned which has been struck down by this Court. Learned ASG states that an amendment was made and that is pending challenge before this Court before a different Bench. That would be a matter to be considered by that Bench.*
>
> *We are also putting a caution that merely by categorizing certain offences as economic offences which may be non-cognizable, it does not mean that a different meaning is to be given to our order.*
>
> *We may also clarify that if during the course of investigation, there has been no cause to arrest the accused, merely because a charge sheet is filed, would not be an ipso facto cause to arrest the Petitioner, an aspect in general clarified by us in Criminal Appeal No. 838/2021 Siddharth v. State of Uttar Pradesh and Anr. dated 16.08.2021."*

3. Some more applications have been filed seeking certain directions/clarifications, while impressing this Court to deal with the other aspects governing the grant of bail. We have heard Shri Amit Desai, learned senior counsel, Shri Sidharth Luthra, learned senior counsel, and learned Additional Solicitor General Shri S.V. Raju.

4. Having found that special leave petitions pertaining to different offenses, particularly on the rejection of bail applications are being filed before this Court, despite various directions issued from time to time, we deem it appropriate to undertake this exercise. We do make it clear that all our discussion along with the directions, are meant to act as guidelines, as each case pertaining to a bail application is obviously to be decided on its own merits.

PREVAILING SITUATION

5. Jails in India are flooded with undertrial prisoners. The statistics placed before us would indicate that more than 2/3rd of the inmates of the prisons constitute undertrial prisoners. Of this category of prisoners, majority may not even be required to be arrested despite registration of a cognizable offense, being charged with offenses punishable for seven years or less. They are not only poor and illiterate but also would include women. Thus, there is a culture of offense being inherited by many of them. As observed by this Court, it certainly exhibits the mindset, a vestige of colonial India, on the part of the Investigating Agency, notwithstanding the fact arrest is a draconian measure resulting in curtailment of liberty, and thus to be used sparingly. In a democracy, there can never be an impression that it is a police State as both are conceptually opposite to each other.

DEFINITION OF TRIAL

6. The word 'trial' is not explained and defined under the Code. An extended meaning has to be given to this word for the purpose of enlargement on bail to include, the stage of investigation and thereafter. Primary considerations would obviously be different between these two stages. In the former stage, an arrest followed by a police custody may be warranted for a thorough investigation, while in the latter what matters substantially is the proceedings before the Court in the form of a trial. If we keep the above distinction in mind, the consequence to be drawn is for a more favourable consideration towards enlargement when investigation is completed, of course, among other factors.

7. Similarly, an appeal or revision shall also be construed as a facet of trial when it comes to the consideration of bail on suspension of sentence.

DEFINITION OF BAIL

8. The term "bail" has not been defined in the Code, though is used very often. A bail is nothing but a surety inclusive of a personal bond from the accused. It means the release of an Accused person either by the orders of the Court or by the police or by the Investigating Agency.

9. It is a set of pre-trial restrictions imposed on a suspect while enabling any interference in the judicial process. Thus, it is a conditional release on the solemn undertaking by the suspect that he would cooperate both with the investigation and the trial. The word "bail" has been defined in the Black's Law Dictionary, 9th Edn., pg. 160 as:

> *"A security such as cash or a bond; esp., security required by a court for the release of a prisoner who must appear in court at a future time."*

10. Wharton's Law Lexicon, 14th Edn., pg. 105 defines bail as:

> *"to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely protected from prison, to which they have, if they fear his escape, etc., the legal power to deliver him."*

BAIL IS THE RULE

11. The principle that bail is the Rule and jail is the exception has been well recognised through the repetitive pronouncements of this Court. This again is on the touchstone of Article 21 of the Constitution of India. This Court in ***Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1*** , held that:

> *"19. In Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri.) 465], the purpose of granting bail is set out with great felicity as follows: (SCC pp. 586-88, paras 27-30)*
>
> *27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra Nath Chakravarti, In re [Nagendra Nath Chakravarti, In re, 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476 : 1924 Cri. LJ 732], AIR pp. 479-80 that the object of bail is to secure the attendance of the Accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the "Meerut Conspiracy cases" observations are to be found regarding the right to bail which deserve a special mention. In K.N. Joglekar v. Emperor [K.N. Joglekar*

v. Emperor, 1931 SCC OnLine All 60 : AIR 1931 All 504 : 1932 Cri. LJ 94] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the Court that there was no hard-and-fast Rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. H.L. Hutchinson [Emperor v. H.L. Hutchinson, 1931 SCC OnLine All 14 : AIR 1931 All 356 : 1931 Cri. LJ 1271], AIR p. 358 it was said that it was very unwise to make an attempt to lay down any particular Rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various Sections in the Code of Criminal Procedure was that grant of bail is the Rule and refusal is the exception. An Accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer, J., in Gudikanti Narasimhulu v. State [Gudikanti Narasimhulu v. State, (1978) 1 SCC 240 : 1978 SCC (Cri.) 115] that: (SCC p. 242, para 1)

> *'1. ... the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. ... After all, personal liberty of an Accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.'*

29. In Gurcharan Singh v. State (UT of Delhi) [Gurcharan Singh v. State (UT of Delhi), (1978) 1 SCC 118 : 1978 SCC (Cri.) 41] it was observed by Goswami, J., who spoke for the Court, that: (SCC p. 129, para 29)

> *'29. ... There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.'*

30. In AMERICAN JURISPRUDENCE (2nd, Vol. 8, p. 806, para 39), it is stated:

> *'Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the Accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end.'*
>
> *It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.*
>
> *xxx xxx xxx*
>
> *24. Article 21 is the Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only Article in the Fundamental Rights Chapter (along with Article 20) that cannot be suspended even in an emergency [see Article 359(1) of the Constitution]. At present, Article 21 is the repository of a vast number of substantive and procedural rights post Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248]."*

12. Further this Court in ***Sanjay Chandra v. CBI*** ***(2012) 1 SCC 40*** , has observed that:

> *"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the Accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an Accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.*
>
> *22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.*
>
> *23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the Accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."*

PRESUMPTION OF INNOCENCE

13. Innocence of a person Accused of an offense is presumed through a legal fiction, placing the onus on the prosecution to prove the guilt before the Court. Thus, it is for that agency to satisfy the Court that the arrest made was warranted and enlargement on bail is to be denied.

14. Presumption of innocence has been acknowledged throughout the world. Article 14(2) of the International Covenant on Civil and Political Rights, 1966 and Article 11 of the Universal Declaration of Human Rights acknowledge the presumption of

innocence, as a cardinal principle of law, until the individual is proven guilty.

15. Both in Australia and Canada, a prima facie right to a reasonable bail is recognized based on the gravity of offence. In the United States, it is a common practice for bail to be a cash deposit. In the United Kingdom, bail is more likely to consist of a set of restrictions.

16. The Supreme Court of Canada in ***Corey Lee James Myers v. Her Majesty the Queen, 2019 SCC 18***, has held that bail has to be considered on acceptable legal parameters. It thus confers adequate discretion on the Court to consider the enlargement on bail of which unreasonable delay is one of the grounds. ***Her Majesty the Queen v. Kevin Antic and Ors., 2017 SCC 27***:

> *"The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of Accused persons. This right has two aspects: a person charged with an offence has the right not to be denied bail without just cause and the right to reasonable bail. Under the first aspect, a provision may not deny bail without "just cause" there is just cause to deny bail only if the denial occurs in a narrow set of circumstances, and the denial is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to that system. The second aspect, the right to reasonable bail, relates to the terms of bail, including the quantum of any monetary component and other restrictions that are imposed on the Accused for the release period. It protects Accused persons from conditions and forms of release that are unreasonable.*
>
> *While a bail hearing is an expedited procedure, the bail provisions are federal law and must be applied consistently and fairly in all provinces and territories. A central part of the Canadian law of bail consists of the ladder principle and the authorized forms of release, which are found in Section 515(1) to (3) of the Criminal Code. Save for exceptions, an unconditional release on an undertaking is the default position when granting release. Alternative forms of release are to be imposed in accordance with the ladder principle, which must be adhered to strictly: release is favoured at the earliest reasonable opportunity and on the least onerous grounds. If the Crown proposes an alternate form of release, it must show why this form is necessary for a more restrictive form of release to be imposed. Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a judge to order a more restrictive form without justifying the decision to reject the less onerous forms. A recognizance with sureties is one of the most onerous forms of release, and should not be imposed unless all the less onerous forms have been considered and rejected as inappropriate. It is not necessary to impose cash bail on Accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court. A recognizance is functionally equivalent to cash bail and has the same coercive effect. Cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable. When cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the Accused and the circumstances of the case. The judge is under a positive obligation to inquire into the ability of the Accused to pay. Terms of release under s. 515(4) should only be imposed to the extent that they are necessary to address concerns related to the statutory criteria for detention and to ensure that the Accused is released. They must not be imposed to change an Accused person's behaviour or to punish an Accused person. Where a bail review is requested, courts must follow the bail review process set out in R. v. St-Cloud, 2015 SCC 27, [2015] 2 S.C.R. 328."*

17. We may only state that notwithstanding the special provisions in many of the countries world-over governing the consideration for enlargement on bail, courts have always interpreted them on the accepted principle of presumption of innocence and held in favour of the accused.

18. The position in India is no different. It has been the consistent stand of the courts, including this Court, that presumption of innocence, being a facet of Article 21, shall inure to the benefit of the accused. Resultantly burden is placed on the prosecution to prove the charges to the court of law. The weightage of the evidence has to be assessed on the principle of beyond reasonable doubt.

PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE

> *"An uncontrolled power is the natural enemy of freedom"*
>
> *-Harold Laski in 'Liberty in the Modern State'*

19. The Code of Criminal Procedure, despite being a procedural law, is enacted on the inviolable right enshrined Under Article 21 and 22 of the Constitution of India. The provisions governing clearly exhibited the aforesaid intendment of the Parliament.

20. Though the word 'bail' has not been defined as aforesaid, Section 2A defines a bailable and non-bailable offense. A non-bailable offense is a cognizable offense enabling the police officer to arrest without a warrant. To exercise the said power, the Code introduces certain embargoes by way of restrictions.

Section 41, 41A and 60A of the Code

CHAPTER V

ARREST OF PERSONS

41. When police may arrest without warrant.--(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person--

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:--

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has

committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary--

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any Rule made under Sub-section (5) of Section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Subject to the provisions of Section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.

41A. Notice of appearance before police officer.--(1) [The police officer shall], in all cases where the arrest of a person is not required under the provisions of Sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

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60A. Arrest to be made strictly according to the Code.--No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest."

21. Section 41 under Chapter V of the Code deals with the arrest of persons. Even for a cognizable offense, an arrest is not mandatory as can be seen from the mandate of this provision. If the officer is satisfied that a person has committed a cognizable offense, punishable with imprisonment for a term which may be less than seven years, or which may extend to the said period, with or without fine, an arrest could only follow when he is satisfied that there is a reason to believe or suspect, that the said person has committed an offense, and there is a necessity for an arrest. Such necessity is drawn to prevent the committing of any further offense, for a proper investigation, and to prevent him/her from either disappearing or tampering with the evidence. He/she can also be arrested to prevent such person from making any inducement, threat, or promise to any person according to the facts, so as to dissuade him from disclosing said facts either to the court or to the police officer. One more ground on which an arrest may be necessary is when his/her presence is required after arrest for production before the Court and the same cannot be assured.

22. This provision mandates the police officer to record his reasons in writing while making the arrest. Thus, a police officer is duty-bound to record the reasons for arrest in writing. Similarly, the police officer shall record reasons when he/she chooses not to arrest. There is no requirement of the aforesaid procedure when the offense alleged is more than seven years, among other reasons.

23. The consequence of non-compliance with Section 41 shall certainly inure to the benefit of the person suspected of the offense. Resultantly, while considering the application for enlargement on bail, courts will have to satisfy themselves on the due compliance of this provision. Any non-compliance would entitle the Accused to a grant of bail.

24. Section 41A deals with the procedure for appearance before the police officer who is required to issue a notice to the person against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence, and arrest is not required Under Section 41(1). Section 41B deals with the procedure of arrest along with mandatory duty on the part of the officer.

25. On the scope and objective of Section 41 and 41A, it is obvious that they are facets of Article 21 of the Constitution. We need not elaborate any further, in light of the judgment of this Court in ***Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273*** :

> *"7.1. From a plain reading of the aforesaid provision, it is evident that a person Accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the Accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such Accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.*
>
> *7.2. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest.*
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> *7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the Accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of Clause (1) of Section 41 Code of Criminal Procedure.*
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> *8. An Accused arrested without warrant by the police has the constitutional right Under Article 22(2) of the Constitution of India and Section 57 Code of Criminal Procedure to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey:*
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> *8.1. During the course of investigation of a case, an Accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power Under Section 167 Code of Criminal Procedure The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner.*
>
> *8.2. Before a Magistrate authorises detention Under Section 167 Code of Criminal Procedure, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty-bound not to authorise his further detention and release the accused. In other words, when an Accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that the condition precedent for arrest Under Section 41 Code of Criminal Procedure has been satisfied and it is only thereafter that he will authorise the detention of an accused.*
>
> *8.3. The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an Accused from tampering with evidence or making inducement, etc. the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording his satisfaction in writing that the Magistrate will authorise the detention of the accused.*
>
> *8.4. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant, and secondly, a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.*
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> *9. ...The aforesaid provision makes it clear that in all cases where the arrest of a person is not required Under Section 41(1) Code of Criminal Procedure, the police officer is required to issue notice directing the Accused to appear before him at a specified place and time. Law obliges such an Accused to appear before the police officer and it further mandates that if such an Accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged Under Section 41 Code of Criminal Procedure has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.*
>
> *10. We are of the opinion that if the provisions of Section 41 Code of Criminal Procedure which authorises the police officer to arrest an Accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Code of Criminal Procedure for effecting arrest be discouraged and discontinued.*
>
> *11. Our endeavour in this judgment is to ensure that police officers do not arrest the Accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we*

give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case Under Section 498-A Indian Penal Code is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. All police officers be provided with a check list containing specified sub-clauses Under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the Accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the Accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A Code of Criminal Procedure be served on the Accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases Under Section 498-A Indian Penal Code or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine."

26. We only reiterate that the directions aforesaid ought to be complied with in letter and spirit by the investigating and prosecuting agencies, while the view expressed by us on the non-compliance of Section 41 and the consequences that flow from it has to be kept in mind by the Court, which is expected to be reflected in the orders.

27. Despite the dictum of this Court in ***Arnesh Kumar*** (supra), no concrete step has been taken to comply with the mandate of Section 41A of the Code. This Court has clearly interpreted Section 41(1)(b)(i) and (ii) inter alia holding that notwithstanding the existence of a reason to believe qua a police officer, the satisfaction for the need to arrest shall also be present. Thus, Sub-clause (1)(b)(i) of Section 41 has to be read along with Sub-clause (ii) and therefore both the elements of 'reason to believe' and 'satisfaction qua an arrest' are mandated and accordingly are to be recorded by the police officer.

28. It is also brought to our notice that there are no specific guidelines with respect to the mandatory compliance of Section 41A of the Code. An endeavour was made by the Delhi High Court while deciding Writ Petition (C) No. 7608 of 2017 vide order dated 07.02.2018, followed by order dated 28.10.2021 in Contempt Case (C) No. 480 of 2020 & CM Application No. 25054 of 2020, wherein not only the need for guidelines but also the effect of non-compliance towards taking action against the officers concerned was discussed. We also take note of the fact that a standing order has been passed by the Delhi Police viz., Standing Order No. 109 of 2020, which provides for a set of guidelines in the form of procedure for issuance of notices or orders by the police officers. Considering the aforesaid action taken, in due compliance with the order passed by the Delhi High Court in Writ Petition (C) No. 7608 of 2017 dated 07.02.2018, this Court has also passed an order in Writ Petition (Crl.) 420 of 2021 dated 10.05.2021 directing the State of Bihar to look into the said aspect of an appropriate modification to give effect to the mandate of Section 41A. A recent judgment has also been rendered on the same lines by the High Court of Jharkhand in Cr.M.P. No. 1291 of 2021 dated 16.06.2022.

29. Thus, we deem it appropriate to direct all the State Governments and the Union Territories to facilitate standing orders while taking note of the standing order issued by the Delhi Police i.e., Standing Order No. 109 of 2020, to comply with the mandate of Section 41A. We do feel that this would certainly take care of not only the unwarranted arrests, but also the clogging of bail applications before various Courts as they may not even be required for the offences up to seven years.

30. We also expect the courts to come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A. We express our hope that the Investigating Agencies would keep in mind the law laid down in ***Arnesh Kumar*** (Supra), the discretion to be exercised on the touchstone of presumption of innocence, and the safeguards provided Under Section 41, since an arrest is not mandatory. If discretion is exercised to effect such an arrest, there shall be procedural compliance. Our view is also reflected by the interpretation of the specific provision Under Section 60A of the Code which warrants the officer concerned to make the arrest strictly in accordance with the Code.

Section 87 and 88 of the Code

"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 such summons, or after the issue of the same but before the 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."

31. When the courts seek the attendance of a person, either a summons or a warrant is to be issued depending upon the nature and facts governing the case. Section 87 gives the discretion to the court to issue a warrant, either in lieu of or in addition to summons. The exercise of the aforesaid power can only be done after recording of reasons. A warrant can be either bailable or non-bailable. Section 88 of the Code empowers the Court to take a bond for appearance of a person with or without sureties.

32. Considering the aforesaid two provisions, courts will have to adopt the procedure in issuing summons first, thereafter a bailable warrant, and then a non-bailable warrant may be issued, if so warranted, as held by this Court in ***Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1*** . Despite the aforesaid clear dictum, we notice that non-bailable warrants are issued as a matter of course without due application of mind and against the tenor of the provision, which merely facilitates a discretion, which is obviously to be exercised in favour of the person whose attendance is sought for, particularly in the light of liberty enshrined Under Article 21 of the Constitution. Therefore, valid reasons have to be given for not exercising discretion in favour of the said person. This Court in ***Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1*** , has held that:

"50. Civilised countries have recognised that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice--liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law.

51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

When non-bailable warrants should be issued

53. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:

- *it is reasonable to believe that the person will not voluntarily appear in court; or*
- *the police authorities are unable to find the person to serve him with a summon; or*
- *it is considered that the person could harm someone if not placed into custody immediately.*

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the Accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the Accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the Accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an Accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

57. The court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant."

33. On the exercise of discretion Under Section 88, this Court in ***Pankaj Jain v. Union of India, (2018) 5 SCC 743*** , has held that:

"12. The main issue which needs to be answered in the present appeal is as to whether it was obligatory for the Court to release the Appellant by accepting the bond Under Section 88 Code of Criminal Procedure on the ground that he was not arrested during investigation or the Court has rightly exercised its jurisdiction Under Section 88 in rejecting the application filed by the Appellant praying for release by accepting the bond Under Section 88 Code of Criminal Procedure.

13. Section 88 Code of Criminal Procedure is a provision which is contained in Chapter VI "Processes to Compel Appearance" of the Code of Criminal Procedure, 1973. Chapter VI is divided in four Sections -- A. Summons; B. Warrant of arrest; C. Proclamation and Attachment; and D. Other Rules regarding processes. Section 88 provides as follows:

> *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.*

14. We need to first consider as to what was the import of the words "may" used in Section 88.

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22. Section 88 Code of Criminal Procedure does not confer any right on any person, who is present in a court. Discretionary power given to the court is for the purpose and object of ensuring appearance of such person in that court or to any other court into which the case may be transferred for trial. Discretion given Under Section 88 to the court does not confer any right on a person, who is present in the court rather it is the power given to the court to facilitate his appearance, which clearly indicates that use of the word "may" is discretionary and it is for the court to exercise its discretion when situation so demands. It is further relevant to note that the word used in Section 88 "any person" has to be given wide meaning, which may include persons, who are not even Accused in a case and appeared as witnesses.

Section 167(2) of the Code

167. Procedure when investigation cannot be completed in twenty-four hours.--

(1) xxx xxx xxx

(2) The Magistrate to whom an Accused person is forwarded under this Section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the Accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the Accused to be forwarded to a Magistrate having such jurisdiction:

Provided that--

(a) the Magistrate may authorise the detention of the Accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the Accused person in custody under this paragraph for a total period exceeding,--

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the Accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the Accused in custody of the police under this Section unless the Accused is produced before him in person for the first time and subsequently every time till the Accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the Accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.--For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in Para (a), the Accused shall be detained in custody so long as he does not furnish bail.

Explanation II.--If any question arises whether an Accused person was produced before the Magistrate as required under Clause (b), the production of the Accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the Accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution."

34. Section 167(2) was introduced in the year 1978, giving emphasis to the maximum period of time to complete the investigation. This provision has got a laudable object behind it, which is to ensure an expeditious investigation and a fair trial, and to set down a rationalised procedure that protects the interests of the indigent Sections of society. This is also another limb of Article 21; Presumption of innocence is also inbuilt in this provision. An investigating agency has to expedite the process of investigation as a suspect is languishing under incarceration. Thus, a duty is enjoined upon the agency to complete the investigation within the time prescribed and a failure would enable the release of the accused. The right enshrined is an absolute and indefeasible one, inuring to the benefit of suspect. Such a right cannot be taken away even during any unforeseen circumstances, such as the recent pandemic, as held by this Court in ***M. Ravindran v. Directorate of Revenue Intelligence, (2021) 2 SCC 485*** :

II. Section 167(2) and the Fundamental Right to Life and Personal Liberty

"17. Before we proceed to expand upon the parameters of the right to default bail Under Section 167(2) as interpreted by various decisions of this Court, we find it pertinent to note the observations made by this Court in Uday Mohanlal Acharya [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri.) 760] on the fundamental right to personal liberty of the person and the effect of deprivation of the same as follows: (SCC p. 472, para 13)

13. ... Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated Under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the Accused in custody up to a maximum period as indicated in the proviso to Sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution.

17.1. Article 21 of the Constitution of India provides that "no person shall be deprived of his life or personal liberty

except according to procedure established by law". It has been settled by a Constitution Bench of this Court in Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248], that such a procedure cannot be arbitrary, unfair or unreasonable. The history of the enactment of Section 167(2) Code of Criminal Procedure and the safeguard of "default bail" contained in the proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with Rule of law.

17.2. Under Section 167 of the Code of Criminal Procedure, 1898 ("the 1898 Code") which was in force prior to the enactment of the Code of Criminal Procedure, the maximum period for which an Accused could be remanded to custody, either police or judicial, was 15 days. However, since it was often unworkable to conclude complicated investigations within 15 days, a practice arose wherein investigating officers would file "preliminary charge-sheets" after the expiry of the remand period. The State would then request the Magistrate to postpone commencement of the trial and authorise further remand of the Accused Under Section 344 of the 1898 Code till the time the investigation was completed and the final charge-sheet was filed. The Law Commission of India in Report No. 14 on Reforms of the Judicial Administration (Vol. II, 1948, pp. 758-760) pointed out that in many cases the Accused were languishing for several months in custody without any final report being filed before the courts. It was also pointed out that there was conflict in judicial opinion as to whether the Magistrate was bound to release the Accused if the police report was not filed within 15 days.

17.3. Hence the Law Commission in Report No. 14 recommended the need for an appropriate provision specifically providing for continued remand after the expiry of 15 days, in a manner that "while meeting the needs of a full and proper investigation in cases of serious crime, will still safeguard the liberty of the person of the individual". Further, that the legislature should prescribe a maximum time period beyond which no Accused could be detained without filing of the police report before the Magistrate. It was pointed out that in England, even a person Accused of grave offences such as treason could not be indefinitely detained in prison till commencement of the trial.

17.4. The suggestion made in Report No. 14 was reiterated by the Law Commission in Report No. 41 on The Code of Criminal Procedure, 1898 (Vol. I, 1969, pp. 76-77). The Law Commission re-emphasised the need to guard against the misuse of Section 344 of the 1898 Code by filing "preliminary reports" for remanding the Accused beyond the statutory period prescribed Under Section 167; It was pointed out that this could lead to serious abuse wherein "the arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner". Hence the Commission recommended fixing of a maximum time-limit of 60 days for remand. The Commission considered the reservation expressed earlier in Report No. 37 that such an extension may result in the 60-day period becoming a matter of routine. However, faith was expressed that proper supervision by the superior courts would help circumvent the same.

17.5. The suggestions made in Report No. 41 were taken note of and incorporated by the Central Government while drafting the Code of Criminal Procedure Bill in 1970. Ultimately, the 1898 Code was replaced by the present Code of Criminal Procedure The Statement of Objects and Reasons of the Code of Criminal Procedure provides that the Government took the following important considerations into account while evaluating the recommendations of the Law Commission:

> *3. The recommendations of the Commission were examined carefully by the Government, keeping in view, among others, the following basic considerations:*
>
> *(i) an Accused person should get a fair trial in accordance with the accepted principles of natural justice;*
>
> *(ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and*
>
> *(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer Sections of the community.*

17.6. It was in this backdrop that Section 167(2) was enacted within the present day Code of Criminal Procedure, providing for time-limits on the period of remand of the accused, proportionate to the seriousness of the offence committed, failing which the Accused acquires the indefeasible right to bail. As is evident from the recommendations of the Law Commission mentioned supra, the intent of the legislature was to balance the need for sufficient time-limits to complete the investigation with the need to protect the civil liberties of the accused. Section 167(2) provides for a clear mandate that the investigative agency must collect the required evidence within the prescribed time period, failing which the Accused can no longer be detained. This ensures that the investigating officers are compelled to act swiftly and efficiently without misusing the prospect of further remand. This also ensures that the court takes cognizance of the case without any undue delay from the date of giving information of the offence, so that society at large does not lose faith and develop cynicism towards the criminal justice system.

17.7. Therefore, as mentioned supra, Section 167(2) is integrally linked to the constitutional commitment Under Article 21 promising protection of life and personal liberty against unlawful and arbitrary detention, and must be interpreted in a manner which serves this purpose. In this regard we find it useful to refer to the decision of the three-Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam [Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67 : (2018) 1 SCC (Cri.) 401], which laid down certain seminal principles as to the interpretation of Section 167(2) Code of Criminal Procedure though the questions of law involved were somewhat different from the present case. The questions before the three-Judge Bench in Rakesh Kumar Paul [Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67 : (2018) 1 SCC (Cri.) 401] were whether, firstly, the 90-day remand extension Under Section 167(2)(a)(i) would be applicable in respect of offences where the maximum period of imprisonment was 10 years, though the minimum period was less than 10 years. Secondly, whether the application for bail filed by the Accused could be construed as an application for default bail, even though the expiry of the statutory period Under Section 167(2) had not been specifically pleaded as a ground for bail. The majority opinion held that the 90-day limit is only available in respect of offences where a minimum ten year' imprisonment period is stipulated, and that the oral arguments for default bail made by the counsel for the Accused before the High Court would suffice in lieu of a written application. This was based on the reasoning that the court should not be too technical in matters of personal liberty. Madan B. Lokur, J. in his majority opinion, pertinently

observed as follows: (SCC pp. 95-96 & 99, paras 29, 32 & 41)

> *29. Notwithstanding this, the basic legislative intent of completing investigations within twenty-four hours and also within an otherwise time-bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an Accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time-limits have been laid down by the legislature. ...*
>
> *xxx xxx xxx*
>
> *32. ...Such views and opinions over a prolonged period have prompted the legislature for more than a century to ensure expeditious conclusion of investigations so that an Accused person is not unnecessarily deprived of his or her personal liberty by remaining in prolonged custody for an offence that he or she might not even have committed. In our opinion, the entire debate before us must also be looked at from the point of view of expeditious conclusion of investigations and from the angle of personal liberty and not from a purely dictionary or textual perspective as canvassed by the learned Counsel for the State.*
>
> *xxx xxx xxx*
>
> *41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court. (emphasis supplied)*

Therefore, the courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in Article 21:

17.8. We may also refer with benefit to the recent judgment of this Court in S. Kasi v. State [S. Kasi v. State, (2021) 12 SCC 1 : 2020 SCC OnLine SC 529], wherein it was observed that the indefeasible right to default bail Under Section 167(2) is an integral part of the right to personal liberty Under Article 21, and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. It was emphasised that the right of the Accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a charge-sheet.

17.9. Additionally, it is well-settled that in case of any ambiguity in the construction of a penal statute, the courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual Accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedures providing for the curtailment of the liberty of the accused.

17.10. With respect to the Code of Criminal Procedure particularly, the Statement of Objects and Reasons (supra) is an important aid of construction. Section 167(2) has to be interpreted keeping in mind the threefold objectives expressed by the legislature, namely, ensuring a fair trial, expeditious investigation and trial, and setting down a rationalised procedure that protects the interests of indigent Sections of society. These objects are nothing but subsets of the overarching fundamental right guaranteed Under Article 21:

17.11. Hence, it is from the perspective of upholding the fundamental right to life and personal liberty Under Article 21 that we shall clarify and reconcile the various judicial interpretations of Section 167(2) for the purpose of resolving the dilemma that has arisen in the present case.

35. As a consequence of the right flowing from the said provision, courts will have to give due effect to it, and thus any detention beyond this period would certainly be illegal, being an affront to the liberty of the person concerned. Therefore, it is not only the duty of the investigating agency but also the courts to see to it that an Accused gets the benefit of Section 167(2).

Section 170 of the Code:

> *"170. Cases to be sent to Magistrate when evidence is sufficient.--(1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the Accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the Accused or commit him for trial, or, if the offence is bailable and the Accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed."*

36. The scope and ambit of Section 170 has already been dealt with by this Court in ***Siddharth v. State of U.P., (2021) 1 SCC 676***. This is a power which is to be exercised by the court after the completion of the investigation by the agency concerned. Therefore, this is a procedural compliance from the point of view of the court alone, and thus the investigating agency has got a limited role to play. In a case where the prosecution does not require custody of the accused, there is no need for an arrest when a case is sent to the magistrate Under Section 170 of the Code. There is not even a need for filing a bail application, as the Accused is merely forwarded to the court for the framing of charges and issuance of process for trial. If the court is of the view that there is no need for any remand, then the court can fall back upon Section 88 of the Code and complete the formalities required to secure the presence of the Accused for the commencement of the trial. Of course, there may be a situation where a remand may be required, it is only in such cases that the Accused will have to be heard. Therefore, in such a situation, an opportunity will have to be given to the Accused persons, if the court is of the prima facie view that the remand would be required. We make it clear that we have not said anything on the cases in which the Accused persons are already in custody, for which, the bail application has to be decided on its own merits. Suffice it to state that for due compliance of Section 170 of the Code, there is no need for filing of a bail application. This Court in ***Siddharth v. State of U.P., (2021) 1 SCC 676***, has held that:

> *"There are judicial precedents available on the interpretation of the aforesaid provision albeit of the Delhi High Court.*
>
> *5. In High Court of Delhi v. CBI [High Court of Delhi v. CBI, 2004 SCC OnLine Del 53 : (2004) 72 DRJ 629], the Delhi High Court dealt with an argument similar to the contention of the Respondent that Section 170 Code of Criminal*

Procedure prevents the trial court from taking a charge-sheet on record unless the Accused is taken into custody. The relevant extracts are as under : (SCC OnLine Del paras 15-16 & 19-20)

> *15. Word "custody" appearing in this Section does not contemplate either police or judicial custody. It merely connotes the presentation of Accused by the investigating officer before the Court at the time of filing of the charge-sheet whereafter the role of the Court starts. Had it not been so the investigating officer would not have been vested with powers to release a person on bail in a bailable offence after finding that there was sufficient evidence to put the Accused on trial and it would have been obligatory upon him to produce such an Accused in custody before the Magistrate for being released on bail by the Court.*
>
> *16. In case the police/investigating officer thinks it unnecessary to present the Accused in custody for the reason that the Accused would neither abscond nor would disobey the summons as he has been cooperating in investigation and investigation can be completed without arresting him, the IO is not obliged to produce such an Accused in custody.*
>
> *xxx xxx xxx*
>
> *19. It appears that the learned Special Judge was labouring under a misconception that in every non-bailable and cognizable offence the police is required to invariably arrest a person, even if it is not essential for the purpose of investigation.*
>
> *20. Rather the law is otherwise. In normal and ordinary course the police should always avoid arresting a person and sending him to jail, if it is possible for the police to complete the investigation without his arrest and if every kind of cooperation is provided by the Accused to the investigating officer in completing the investigation. It is only in cases of utmost necessity, where the investigation cannot be completed without arresting the person, for instance, a person may be required for recovery of incriminating articles or weapon of offence or for eliciting some information or clue as to his accomplices or any circumstantial evidence, that his arrest may be necessary. Such an arrest may also be necessary if the investigating officer concerned or officer in charge of the police station thinks that presence of the Accused will be difficult to procure because of grave and serious nature of crime as the possibility of his absconding or disobeying the process or fleeing from justice cannot be ruled out.*

6. In a subsequent judgment the Division Bench of the Delhi High Court in High Court of Delhi v. State [High Court of Delhi v. State, 2018 SCC OnLine Del 12306 : (2018) 254 DLT 641] relied on these observations in High Court of Delhi [High Court of Delhi v. CBI, 2004 SCC OnLine Del 53 : (2004) 72 DRJ 629] and observed that it is not essential in every case involving a cognizable and non-bailable offence that an Accused be taken into custody when the charge-sheet/final report is filed.

7. The Delhi High Court is not alone in having adopted this view and other High Courts apparently have also followed suit on the proposition that criminal courts cannot refuse to accept a charge-sheet simply because the Accused has not been arrested and produced before the court.

8. In Deendayal Kishanchand v. State of Gujarat [Deendayal Kishanchand v. State of Gujarat, 1982 SCC OnLine Guj 172 : 1983 Cri. LJ 1583], the High Court observed as under : (SCC OnLine Guj paras 2 & 8)

> *2. ... It was the case of the prosecution that two Accused i.e. present Petitioners 4 and 5, who are ladies, were not available to be produced before the court along with the charge-sheet, even though earlier they were released on bail. Therefore, as the court refused to accept the charge-sheet unless all the Accused are produced, the charge-sheet could not be submitted, and ultimately also, by a specific letter, it seems from the record, the charge-sheet was submitted without Accused 4 and 5. This is very clear from the evidence on record.*
>
> *xxx xxx xxx*
>
> *8. I must say at this stage that the refusal by criminal courts either through the learned Magistrate or through their office staff to accept the charge-sheet without production of the Accused persons is not justified by any provision of law. Therefore, it should be impressed upon all the courts that they should accept the charge-sheet whenever it is produced by the police with any endorsement to be made on the charge-sheet by the staff or the Magistrate pertaining to any omission or requirement in the charge-sheet. But when the police submits the charge-sheet, it is the duty of the court to accept it especially in view of the provisions of Section 468 of the Code which creates a limitation of taking cognizance of offence. Likewise, police authorities also should impress on all police officers that if charge-sheet is not accepted for any such reason, then attention of the Sessions Judge should be drawn to these facts and get suitable orders so that such difficulties would not arise henceforth.*

9. We are in agreement with the aforesaid view of the High Courts and would like to give our imprimatur to the said judicial view. It has rightly been observed on consideration of Section 170 Code of Criminal Procedure that it does not impose an obligation on the officer-in-charge to arrest each and every Accused at the time of filing of the charge-sheet. We have, in fact, come across cases where the Accused has cooperated with the investigation throughout and yet on the charge-sheet being filed non-bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the Accused and produce him before the court. We are of the view that if the investigating officer does not believe that the Accused will abscond or disobey summons he/she is not required to be produced in custody. The word "custody" appearing in Section 170 Code of Criminal Procedure does not contemplate either police or judicial custody but it merely connotes the presentation of the Accused by the investigating officer before the court while filing the charge-sheet.

10. We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an Accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or Accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it [Joginder Kumar v. State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri.) 1172]. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the

investigating officer has no reason to believe that the Accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused.

11. We are, in fact, faced with a situation where contrary to the observations in Joginder Kumar case [Joginder Kumar v. State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri.) 1172] how a police officer has to deal with a scenario of arrest, the trial courts are stated to be insisting on the arrest of an Accused as a prerequisite formality to take the charge-sheet on record in view of the provisions of Section 170 Code of Criminal Procedure We consider such a course misplaced and contrary to the very intent of Section 170 Code of Criminal Procedure.

Section 204 and 209 of the Code

204. Issue of process.--(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be--

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) 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 such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

209. Commitment of case to Court of Session when offence is triable exclusively by it.--When in a case instituted on a police report or otherwise, the Accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall--

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the Accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the Accused to custody during, and until the conclusion of, the trial;"

37. Section 204 of the Code speaks of issue of process while commencing the proceeding before the Magistrate. Sub-section (1)(b) gives a discretion to a Magistrate qua a warrant case, either to issue a warrant or a summons. As this provision gives a discretion, and being procedural in nature, it is to be exercised as a matter of course by following the prescription of Section 88 of the Code. Thus, issuing a warrant may be an exception in which case the Magistrate will have to give reasons.

38. Section 209 of the Code pertains to commitment of a case to a Court of Sessions by the Magistrate when the offence is triable exclusively by the said court. Sub-sections (a) and (b) of Section 209 of the Code give ample power to the Magistrate to remand a person into custody during or until the conclusion of the trial. Since the power is to be exercised by the Magistrate on a case-to-case basis, it is his wisdom in either remanding an Accused or granting bail. Even here, it is judicial discretion which the Magistrate has to exercise. As we have already dealt with the definition of bail, which in simple parlance means a release subject to the restrictions and conditions, a Magistrate can take a call even without an application for bail if he is inclined to do so. In such a case he can seek a bond or surety, and thus can take recourse to Section 88. However, if he is to remand the case for the reasons to be recorded, then the said person has to be heard. Here again, we make it clear that there is no need for a separate application and Magistrate is required to afford an opportunity and to pass a speaking order on bail.

Section 309 of the Code

39. This provision has been substituted by Act 13 of 2013 and Act 22 of 2018. It would be appropriate to reproduce the said provision for better appreciation:

"309. Power to postpone or adjourn proceedings. --(1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence Under Section 376, [Section 376A, Section 376AB, Section 376B, Section 376C, Section 376D, Section 376DA or Section 376DB of the Indian Penal Code (45 of 1860), the inquiry or trial shall] be completed within a period of two months from the date of filing of the charge sheet.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the Accused if in custody:

Provided that no Magistrate shall remand an Accused person to custody under this Section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the Accused person to show cause against the sentence proposed to be imposed on him.

[Provided also that--

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness,

as the case may be.]

Explanation 1.--If sufficient evidence has been obtained to raise a suspicion that the Accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.--The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

40. Sub-section (1) mandates courts to continue the proceedings on a day-to-day basis till the completion of the evidence. Therefore, once a trial starts, it should reach the logical end. Various directions have been issued by this Court not to give unnecessary adjournments resulting in the witnesses being won over. However, the non-compliance of Section 309 continues with gay abandon. Perhaps courts alone cannot be faulted as there are multiple reasons that lead to such adjournments. Though the Section makes adjournments and that too not for a longer time period as an exception, they become the norm. We are touching upon this provision only to show that any delay on the part of the court or the prosecution would certainly violate Article 21; This is more so when the Accused person is under incarceration. This provision must be applied inuring to the benefit of the Accused while considering the application for bail. Whatever may be the nature of the offence, a prolonged trial, appeal or a revision against an Accused or a convict under custody or incarceration, would be violative of Article 21; While the courts will have to endeavour to complete at least the recording of the evidence of the private witnesses, as indicated by this Court on quite a few occasions, they shall make sure that the Accused does not suffer for the delay occasioned due to no fault of his own.

41. Sub-section (2) has to be read along with Sub-section (1). The proviso to Sub-section (2) restricts the period of remand to a maximum of 15 days at a time. The second proviso prohibits an adjournment when the witnesses are in attendance except for special reasons, which are to be recorded. Certain reasons for seeking adjournment are held to be permissible. One must read this provision from the point of view of the dispensation of justice. After all, right to a fair and speedy trial is yet another facet of Article 21; Therefore, while it is expected of the court to comply with Section 309 of the Code to the extent possible, an unexplained, avoidable and prolonged delay in concluding a trial, appeal or revision would certainly be a factor for the consideration of bail. This we hold so notwithstanding the beneficial provision Under Section 436A of the Code which stands on a different footing.

Precedents:

• ***Hussainara Khatoon and Ors. v. Home Secretary, State Of Bihar, 1980 (1) SCC 81*** :

"2. Though we issued notice to the State of Bihar two weeks ago, it is unfortunate that on February 5, 1979, no one has appeared on behalf of the State and we must, therefore, at this stage proceed on the basis that the allegations contained in the issues of the Indian Express dated January 8 and 9, 1979 which are incorporated in the writ petition are correct. The information contained in these newspaper cuttings is most distressing and it is sufficient to stir the conscience and disturb the equanimity of any socially motivated lawyer or judge. Some of the undertrial prisoners whose names are given in the newspaper cuttings have been in jail for as many as 5, 7 or 9 years and a few of them, even more than 10 years, without their trial having begun. What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and the courts have no time to try them. It is a travesty of justice that many poor accused, "little Indians, are forced into long cellular servitude for little offences" because the bail procedure is beyond their meagre means and trials don't commence and even if they do, they never conclude. There can be little doubt, after the dynamic interpretation placed by this Court on Article 21 in Maneka Gandhi v. Union of India [(1978) 2 SCR 621 : (1978) 1 SCC 248] that a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as 'reasonable, just or fair"' so as to be in conformity with the requirement of that article. It is necessary, therefore, that the law as enacted by the legislature and as administered by the courts must radically change its approach to pre-trial detention and ensure 'reasonable, just and fair' procedure which has creative connotation after Maneka Gandhi case [(1978) 2 SCR 621 : (1978) 1 SCC 248].

3. Now, one reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention is our highly unsatisfactory bail system. It suffers from a property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. The Code of Criminal Procedure, even after its re-enactment, continues to adopt the same antiquated approach as the earlier Code enacted towards the end of the last century and where an Accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the Accused to pay a sum of money in case he fails to appear at the trial. Moreover, as if this were not sufficient deterrent to the poor, the courts mechanically and as a matter of course insist that the Accused should produce sureties who will stand bail for him and these sureties must again establish their solvency to be able to pay up the amount of the bail in case the Accused fails to appear to answer the charge. This system of bails operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the courts is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences, namely, (1) though presumed innocent, they are subjected to psychological and physical deprivations of jail life, (2) they are prevented from contributing to the preparation of their defence, and (3) they lose their job, if they have one, and are deprived of an opportunity to work to support themselves and their family members with the result that the burden of their detention almost invariably falls heavily on the innocent members of the family. It is here that the poor find our legal and judicial system oppressive and heavily weighted against them and a feeling of frustration and despair occurs upon them as they find that they are helplessly in a position of inequality with the non-poor. The Legal Aid Committee appointed by the Government of Gujarat under the chairmanship of one of us, Mr. Justice Bhagwati,

emphasised this glaring inequality in the following words:

The bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the Accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the Accused from fleeing is of doubtful validity. There are several considerations which deter an Accused from running away from justice and risk of financial loss is only one of them and that too not a major one. The experience of enlightened Bail Projects in the United States such as Manhattan Bail Project and D.C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the Accused at the trial in quite a large number of cases. Moreover, the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail is fixed by the Magistrate is not high, for a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount.

The Gujarat Committee also pointed out how the practice of fixing the amount of bail with reference to the nature of the charge without taking into account relevant factors, such as the individual financial circumstances of the Accused and the probability of his fleeing before trial, is harsh and oppressive and discriminates against the poor:

The discriminatory nature of the bail system becomes all the more acute by reason of the mechanical way in which it is customarily operated. It is no doubt true that theoretically the Magistrate has broad discretion in fixing the amount of bail but in practice it seems that the amount of bail depends almost always on the seriousness of the offence. It is fixed according to a Schedule related to the nature of the charge. Little weight is given either to the probability that the Accused will attempt to flee before his trial or to his individual financial circumstances, the very factors which seem most relevant if the purpose of bail is to assure the appearance of the Accused at the trial. The result of ignoring these factors and fixing the amount of bail mechanically having regard only to the seriousness of the offence is to discriminate against the poor who are not in the same position as the rich as regards capacity to furnish bail. The courts by ignoring the differential capacity of the rich and the poor to furnish bail and treating them equally produce inequality between the rich and the poor: the rich who is charged with the same offence in the same circumstances is able to secure his release while the poor is unable to do so on account of his poverty. These are some of the major defects in the bail system as it is operated today.

The same anguish was expressed by President Lyndon B. Johnson at the time of signing the Bail Reforms Act, 1966:

Today, we join to recognise a major development in our system of criminal justice: the reform of the bail system.

This system has endured--archaic, unjust and virtually unexamined --since the Judiciary Act of 1789.

The principal purpose of bail is to insure that an Accused person will return for trial if he is released after arrest.

How is that purpose met under the present system? The Defendant with means can afford to pay bail. He can afford to buy his freedom. But poorer Defendant cannot pay the price. He languishes in jail weeks, months and perhaps even years before trial.

He does not stay in jail because he is guilty.

He does not stay in jail because any sentence has been passed.

He does not stay in jail because he is any more likely to flee before trial.

He stays in jail for one reason only--because he is poor....

The bail system, as it operates today, is a source of great hardship to the poor and if we really want to eliminate the evil effects of poverty and assure a fair and just treatment to the poor in the administration of justice, it is imperative that the bail system should be thoroughly reformed so that it should be possible for the poor, as easily as the rich, to obtain pre-trial release without jeopardising the interest of justice.

4. It is high time that our Parliament realises that risk of monetary loss is not the only deterrent against fleeing from justice, but there are also other factors which act as equal deterrents against fleeing. Ours is a socialist republic with social justice as the signature tune of our Constitution and Parliament would do well to consider whether it would not be more consonant with the ethos of our Constitution that instead of risk of financial loss, other relevant considerations such as family ties, roots in the community, job security, membership of stable organisations etc., should be the determinative factors in grant of bail and the Accused should in appropriate cases be released on his personal bond without monetary obligation. Of course, it may be necessary in such a case to provide by an amendment of the penal law that if the Accused willfully fails to appear in compliance with the promise contained in his personal bond, he shall be liable to penal action. But even under the law as it stands today the courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good. The new insight into the subject of pre-trial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our courts in regard to pre-trial release. If the Court is satisfied, after taking into account, on the basis of information placed before it, that the Accused has his roots in the community and is not likely to abscond, it can safely release the Accused on his personal bond. To determine whether the Accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors concerning the accused:

1. The length of his residence in the community,

2. his employment status, history and his financial condition,

3. his family ties and relationships,

4. his reputation, character and monetary condition,

5. his prior criminal record including any record of prior release on recognizance or on bail,

6. the identity of responsible members of the community who would vouch for his reliability,

7. the nature of the offence charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of non-appearance, and

8. any other factors indicating the ties of the Accused to the community or bearing on the risk of willful failure to appear.

If the court is satisfied on a consideration of the relevant factors that the Accused has his ties in the community and there is no substantial risk of non-appearance, the Accused may, as far as possible, be released on his personal bond. Of course, if facts are brought to the notice of the court which go to show that having regard to the condition and background of the accused, his previous record and the nature and circumstances of the offence, there may be a substantial risk of his non-appearance at the trial, as for example, where the Accused is a notorious bad character or a confirmed criminal or the offence is serious (these examples are only by way of illustration), the Court may not release the Accused on his personal bond and may insist on bail with sureties. But in the majority of cases, considerations like family ties and relationship, roots in the community, employment status etc. may prevail with the Court in releasing the Accused on his personal bond and particularly in cases where the offence is not grave and the Accused is poor or belongs to a weaker Section of the community, release on personal bond could, as far as possible, be preferred. But even while releasing the Accused on personal bond it is necessary to caution the Court that the amount of the bond which it fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual financial circumstances of the Accused and the probability of his absconding. The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a Schedule keyed to the nature of the charge. Otherwise, it would be difficult for the Accused to secure his release even by executing a personal bond. Moreover, when the Accused is released on his personal bond, it would be very harsh and oppressive if he is required to satisfy the Court--and what we have said here in regard to the court must apply equally in relation to the police while granting bail--that he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited. The inquiry into the solvency of the Accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond. We have no doubt that if the system of bail, even under the existing law, is administered in the manner we have indicated in this judgment, it would go a long way towards relieving hardship of the poor and help them to secure pre-trial release from incarceration. It is for this reason we have directed the undertrial prisoners whose names are given in the two issues of the Indian Express should be released forthwith on their personal bond. We should have ordinarily said that personal bond to be executed by them should be with monetary obligation but we directed as an exceptional measure that there need be no monetary obligation in the personal bond because we found that all these persons have been in jail without trial for several years, and in some cases for offences for which the punishment would in all probability be less than the period of their detention and, moreover, the order we were making was merely an interim order. The peculiar facts and circumstances of the case dictated such an unusual course.

5. There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the undertrial prisoners and that is the notorious delay in disposal of cases. It is a sad reflection on the legal and judicial system that the trial of an Accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough: how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that in the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that:

In all criminal prosecutions, the Accused shall enjoy the right to a speedy and public trial.

So also Article 3 of the European Convention on Human Rights provides that:

Every one arrested or detained. . . shall be entitled to trial within a reasonable time or to release pending trial.

We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India [(1978) 2 SCR 621 : (1978) 1 SCC 248]. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violative of his fundamental right Under Article 21, and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21; There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21; The question which would, however, arise is as to what would be the consequence if a person Accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long-delayed trial in violation of his fundamental right Under Article 21; Would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right Under Article 21; That is a question we shall have to consider when we hear the writ petition on merits on the adjourned date. But one thing is certain, and we cannot impress it too strongly on the State Government that it is high time that the State Government realized its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases. We may point out that it would not be enough merely to establish more courts but

the State Government would also have to man them by competent Judges and whatever is necessary for the purpose of recruiting competent Judges, such as improving their conditions of service, would have to be done by the State Government, if they want to improve the system of administration of justice and make it an effective instrument for reaching justice to the large masses of people for whom justice is today a meaningless and empty word."

• ***Hussain and Anr. v. Union of India and Ors.,*** *2017 (5) SCC 702* :

"28. Judicial service as well as legal service are not like any other services. They are missions for serving the society. The mission is not achieved if the litigant who is waiting in the queue does not get his turn for a long time. The Chief Justices and Chief Ministers have resolved that all cases must be disposed of within five years which by any standard is quite a long time for a case to be decided in the first court. Decision of cases of undertrials in custody is one of the priority areas. There are obstructions at every level in enforcement of right of speedy trial--vested interests or unscrupulous elements try to delay the proceedings. Lack of infrastructure is another handicap. In spite of all odds, determined efforts are required at every level for success of the mission. Ways and means have to be found out by constant thinking and monitoring. The Presiding Officer of a court cannot rest in a state of helplessness. This is the constitutional responsibility of the State to provide necessary infrastructure and of the High Courts to monitor the functioning of subordinate courts to ensure timely disposal of cases. The first step in this direction is preparation of an appropriate action plan at the level of the High Court and thereafter at the level of each and every individual judicial officer. Implementation of the action plan will require serious efforts and constant monitoring.

29. To sum up:

29.1. The High Courts may issue directions to subordinate courts that--

29.1.1. Bail applications be disposed of normally within one week;

29.1.2. Magisterial trials, where Accused are in custody, be normally concluded within six months and sessions trials where Accused are in custody be normally concluded within two years;

29.1.3. Efforts be made to dispose of all cases which are five years old by the end of the year;

29.1.4. As a supplement to Section 436-A, but consistent with the spirit thereof, if an undertrial has completed period of custody in excess of the sentence likely to be awarded if conviction is recorded such undertrial must be released on personal bond. Such an assessment must be made by the trial courts concerned from time to time;

29.1.5. The above timelines may be the touchstone for assessment of judicial performance in annual confidential reports.

29.2. The High Courts are requested to ensure that bail applications filed before them are decided as far as possible within one month and criminal appeals where Accused are in custody for more than five years are concluded at the earliest;

29.3. The High Courts may prepare, issue and monitor appropriate action plans for the subordinate courts;

29.4. The High Courts may monitor steps for speedy investigation and trials on administrative and judicial side from time to time;

29.5. The High Courts may take such stringent measures as may be found necessary in the light of judgment of this Court in Harish Uppal [Harish Uppal v. Union of India, (2003) 2 SCC 45].

30. Accordingly, we request the Chief Justices of all the High Courts to forthwith take appropriate steps consistent with the directions of this Court in Hussainara Khatoon [Hussainara Khatoon (7) v. State of Bihar, (1995) 5 SCC 326 : 1995 SCC (Cri.) 913], Akhtari Bi [Akhtari Bi v. State of M.P., (2001) 4 SCC 355 : 2001 SCC (Cri.) 714], Noor Mohammed [Noor Mohammed v. Jethanand, (2013) 5 SCC 202 : (2013) 2 SCC (Crv) 754], Thana Singh [Thana Singh v. Central Bureau of Narcotics, (2013) 2 SCC 590 : (2013) 2 SCC (Cri.) 818], Supreme Court Legal Aid Committee [Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731 , para 15 : 1995 SCC (Cri.) 39], Imtiaz Ahmad [Imtiyaz Ahmad v. State of U.P., (2012) 2 SCC 688 : (2012) 1 SCC (Cri.) 986], [Imtiyaz Ahmad v. State of U.P., (2017) 3 SCC 658 : (2017) 3 SCC 665 : (2017) 2 SCC (Civ) 311 : (2017) 2 SCC (Civ) 318 : (2017) 2 SCC (Cri.) 228 : (2017) 2 SCC (Cri.) 235 : (2017) 1 SCC (L & S) 724 : (2017) 1 SCC (L & S) 731], Harish Uppal [Harish Uppal v. Union of India, (2003) 2 SCC 45] and Resolution of Chief Justices' Conference and observations hereinabove and to have appropriate monitoring mechanism in place on the administrative side as well as on the judicial side for speeding up disposal of cases of undertrials pending in subordinate courts and appeals pending in the High Courts."

• ***Surinder Singh @ Shingara Singh v. State Of Punjab,*** *2005 (7) SCC 387* :

"8. It is no doubt true that this Court has repeatedly emphasised the fact that speedy trial is a fundamental right implicit in the broad sweep and content of Article 21 of the Constitution. The aforesaid Article confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law. If a person is deprived of his liberty under a procedure which is not reasonable, fair, or just, such deprivation would be violative of his fundamental right Under Article 21 of the Constitution. It has also been emphasised by this Court that the procedure so prescribed must ensure a speedy trial for determination of the guilt of such person. It is conceded that some amount of deprivation of personal liberty cannot be avoided, but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. These are observations made in several decisions of this Court dealing with the subject of speedy trial. In this case, we are concerned with the case where a person has been found guilty of an offence punishable Under Section 302 Indian Penal Code and who has been sentenced to imprisonment for life. The Code of Criminal Procedure affords a right of appeal to such a convict. The difficulty arises when the appeal preferred by such a convict cannot be disposed of within a reasonable time. In Kashmira Singh v. State of Punjab [(1977) 4 SCC 291 : 1977 SCC (Cri.) 559] this Court dealt with such a case. It is observed: (SCC pp. 292-93, para 2)

The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High

Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: 'We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?' What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an Accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the Accused on bail in cases where special leave has been granted to the Accused to appeal against his conviction and sentence.

9. Similar observations are found in some of the other decisions of this Court which have been brought to our notice. But, however, it is significant to note that all these decisions only lay down broad guidelines which the courts must bear in mind while dealing with an application for grant of bail to an Appellant before the court. None of the decisions lay down any invariable Rule for grant of bail on completion of a specified period of detention in custody. Indeed in a discretionary matter, like grant or refusal of bail, it would be impossible to lay down any invariable Rule or evolve a straitjacket formula. The court must exercise its discretion having regard to all the relevant facts and circumstances. What the relevant facts and circumstances are, which the court must keep in mind, has been laid down over the years by the courts in this country in a large number of decisions which are well known. It is, therefore, futile to attempt to lay down any invariable Rule or formula in such matters.

10. The counsel for the parties submitted before us that though it has been so understood by the courts in Punjab, the decision of the Punjab and Haryana High Court in Dharam Pal case [(2000) 1 Chan LR 74] only lays down guidelines and not any invariable rule. Unfortunately, the decision has been misunderstood by the Court in view of the manner in which the principles have been couched in the aforesaid judgment. After considering the various decisions of this Court and the difficulties faced by the courts, the High Court in Dharam Pal case [(2000) 1 Chan LR 74] observed: (Chan LR p. 87, para 18)

We, therefore, direct that life convicts, who have undergone at least five years of imprisonment of which at least three years should be after conviction, should be released on bail pending the hearing of their appeals should they make an application for this purpose. We are also of the opinion that the same principles ought to apply to those convicted by the courts martial and such prisoners should also be entitled to release after seeking a suspension of their sentences. We further direct that the period of five years would be reduced to four for females and minors, with at least two years imprisonment after conviction. We, however, clarify that these directions shall not be applicable in cases where the very grant of bail is forbidden by law.

Section 389 of the Code

389. Suspension of sentence pending the appeal; release of Appellant on bail.--(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.

(2) The power conferred by this Section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,--

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under Sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the Appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

42. Section 389 of the Code concerns itself with circumstances pending appeal leading to the release of the Appellant on bail. The power exercisable Under Section 389 is different from that of the one either Under Section 437 or Under Section 439 of the Code, pending trial. This is for the reason that “presumption of innocence” and “bail is the Rule and jail is the exception” may not be available to the Appellant who has suffered a conviction. A mere pendency of an appeal per se would not be a factor.

43. A suspension of sentence is an act of keeping the sentence in abeyance, pending the final adjudication. Though delay in taking up the main appeal would certainly be a factor and the benefit available Under Section 436A would also be considered, the Courts will have to see the relevant factors including the conviction rendered by the trial court. When it is so apparent that the appeals are not likely to be taken up and disposed of, then the delay would certainly be a factor in favour of the Appellant.

44. Thus, we hold that the delay in taking up the main appeal or revision coupled with the benefit conferred Under Section 436A of the Code among other factors ought to be considered for a favourable release on bail.

Precedents:

• ***Atul Tripathi v. State of U.P. and Anr.,*** *2014 (9) SCC 177* :

> *"13. It may be seen that there is a marked difference between the procedure for consideration of bail Under Section 439, which is pre-conviction stage and Section 389 Code of Criminal Procedure, which is post-conviction stage. In case of Section 439, the Code provides that only notice to the public prosecutor unless impractical be given before granting bail to a person who is Accused of an offence which is triable exclusively by the Court of Sessions or where the punishment for the offence is imprisonment for life; whereas in the case of post-conviction bail Under Section 389 Code of Criminal Procedure, where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory that the appellate court gives an opportunity to the public prosecutor for showing cause in writing against such release.*
>
> *14. ...in case the appellate court is inclined to consider the release of the convict on bail, the public prosecutor shall be granted an opportunity to show cause in writing as to why the Appellant be not released on bail. Such a stringent provision is introduced only to ensure that the court is apprised of all the relevant factors so that the court may consider whether it is an appropriate case for release having regard to the manner in which the crime is committed, gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice-delivery system, etc. Despite such an opportunity being granted to the Public Prosecutor, in case no cause is shown in writing, the appellate court shall record that the State has not filed any objection in writing. This procedure is intended to ensure transparency, to ensure that there is no allegation of collusion and to ensure that the court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post-conviction stage."*

• ***Angana v. State of Rajasthan,*** *(2009) 3 SCC 767* :

> *"14. When an appeal is preferred against conviction in the High Court, the Court has ample power and discretion to suspend the sentence, but that discretion has to be exercised judiciously depending on the facts and circumstances of each case. While considering the suspension of sentence, each case is to be considered on the basis of nature of the offence, manner in which occurrence had taken place, whether in any manner bail granted earlier had been misused. In fact, there is no straitjacket formula which can be applied in exercising the discretion. The facts and circumstances of each case will govern the exercise of judicial discretion while considering the application filed by the convict Under Section 389 of the Criminal Procedure Code."*

• ***Sunil Kumar v. Vipin Kumar*** *(2014) 8 SCC 868* :

> *"13. We have heard the rival legal contentions raised by both the parties. We are of the opinion that the High Court has rightly applied its discretionary power Under Section 389 Code of Criminal Procedure to enlarge the Respondents on bail. Firstly, both the criminal appeal and criminal revision filed by both the parties are pending before the High Court which means that the convictions of the Respondents are not confirmed by the appellate court. Secondly, it is an admitted fact that the Respondents had been granted bail earlier and they did not misuse the liberty. Also, the Respondents had conceded to the occurrence of the incident though with a different version.*
>
> *14. We are of the opinion that the High Court has taken into consideration all the relevant facts including the fact that the chance of the appeal being heard in the near future is extremely remote, hence, the High Court has released the Respondents on bail on the basis of sound legal reasoning. We do not wish to interfere with the decision of the High Court at this stage. The appeal is dismissed accordingly."*

45. However, we hasten to add that if the court is inclined to release the Appellant on bail, it has to be predicated on his own bond as facilitated by Sub-section (1).

Section 436A of the Code

> *"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."*

46. Section 436A of the Code has been inserted by Act 25 of 2005. This provision has got a laudable object behind it, particularly from the point of view of granting bail. This provision draws the maximum period for which an undertrial prisoner can be detained. This period has to be reckoned with the custody of the Accused during the investigation, inquiry and trial. We have already explained that the word 'trial' will have to be given an expanded meaning particularly when an appeal or admission is pending.

Thus, in a case where an appeal is pending for a longer time, to bring it Under Section 436A, the period of incarceration in all forms will have to be reckoned, and so also for the revision.

47. 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 offense, 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, (2015) 13 SCC 605*** , while dealing with the aforesaid provision, has directed that:

> *"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."*

48. 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.

Section 437 of the Code

> *"437. When bail may be taken in case of non-bailable offence.--1 [(1) When any person Accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of session, he may be released on bail, but--*
>
> *(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;*
>
> *(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:*
>
> *Provided that the Court may direct that a person referred to in Clause (i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:*
>
> *Provided further that the Court may also direct that a person referred to in Clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:*
>
> *Provided also that the mere fact that an Accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:]*
>
> *Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this Sub-section without giving an opportunity of hearing to the Public Prosecutor.*
>
> *(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the Accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the Accused shall, subject to the provisions of Section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.*
>
> *(3) When a person Accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abatement of, or conspiracy or attempt to commit, any such offence, is released on bail under Sub-section (1), the Court shall impose the conditions,--*
>
> *(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,*
>
> *(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the*

commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.]

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

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

(6) If, in any case triable by a Magistrate, the trial of a person Accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

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

49. Seeking to impeach Warren Hastings for his activities during the colonial period, Sir Edmund Burke made the following famous statement in "The World's Famous Orations" authored by Bryan, William Jennings, published by New York: Funk and Wagnalls Company, 1906:

"Law and arbitrary power are in eternal enmity. Name me a magistrate, and I will name property; name me power, and I will name protection. It is a contradiction in terms, it is blasphemy in religion, it is wickedness in politics, to say that any man can have arbitrary power. In every patent of office the duty is included. For what else does a magistrate exist? To suppose for power is an absurdity in idea. Judges are guided and governed by the eternal laws of justice, to which we are all subject. We may bite our chains, if we will, but we shall be made to know ourselves, and be taught that man is born to be governed by law; and he that will substitute will in the place of it is an enemy to God."

50. Section 437 of the Code is a provision dealing with bail in case of non-bailable offenses by a court other than the High Court or a Court of Sessions. Here again, bail is the Rule but the exception would come when the court is satisfied that there are reasonable grounds that the Accused has been guilty of the offense punishable either with death or imprisonment for life. Similarly, if the said person is previously convicted of an offense punishable with death or imprisonment for life or imprisonment for seven years or more or convicted previously on two or more occasions, the Accused shall not be released on bail by the magistrate.

51. Proviso to Section 437 of the Code mandates that when the Accused is under the age of sixteen years, sick or infirm or being a woman, is something which is required to be taken note of. Obviously, the court has to satisfy itself that the Accused person is sick or infirm. In a case pertaining to women, the court is expected to show some sensitivity. We have already taken note of the fact that many women who commit cognizable offenses are poor and illiterate. In many cases, upon being young they have children to take care of, and there are many instances when the children are to live in prisons. The statistics would show that more than 1000 children are living in prisons along with their mothers. This is an aspect that the courts are expected to take note of as it would not only involve the interest of the accused, but also the children who are not expected to get exposed to the prisons. There is a grave danger of their being inherited not only with poverty but with crime as well.

52. The power of a court is quite enormous while exercising the power Under Section 437. Apart from the general principle which we have discussed, the court is also empowered to grant bail on special reasons. The said power has to be exercised keeping in view the mandate of Section 41 and 41A of the Code as well. If there is a proper exercise of power either by the investigating agencies or by the court, the majority of the problem of the undertrials would be taken care of.

53. The proviso to Section 437 warrants an opportunity to be afforded to the learned Public Prosecutor while considering an offense punishable with death, imprisonment for life, or imprisonment for seven years or more. Though, this proviso appears to be contrary to the main provision contained in Section 437(1) which, by way of a positive direction, prohibits the Magistrate from releasing a person guilty of an offense punishable with either death or imprisonment for life. It is trite that a proviso has to be understood in the teeth of the main provision. Section 437(1)(i) operates in a different field. The object is to exclude the offense exclusively triable by the Court of Sessions. Thus, one has to understand the proviso by a combined reading of Sections 437 and 439 of the Code, as the latter provision reiterates the aforesaid provision to the exclusion of the learned Magistrate over an offense triable exclusively by a Court of Sessions. To make the position clear, if the Magistrate has got the jurisdiction to try an offense for which the maximum punishment is either life or death, when such jurisdiction is conferred on the learned Magistrate, it goes without saying that the power to release the Accused on bail for the offense alleged also can be exercised. This Court in ***Prahlad Singh Bhati v. NCT, Delhi, (2001) 4 SCC 280*** has held:

"7. Powers of the Magistrate, while dealing with the applications for grant of bail, are regulated by the punishment prescribed for the offence in which the bail is sought. Generally speaking if punishment prescribed is for imprisonment for life and death penalty and the offence is exclusively triable by the Court of Session, the Magistrate has no jurisdiction to grant bail unless the matter is covered by the provisos attached to Section 437 of the Code. The limitations circumscribing the jurisdiction of the Magistrate are evident and apparent. Assumption of jurisdiction to entertain the application is distinguishable from the exercise of the jurisdiction."

54. We wish to place reliance on the judgment of the Bombay High Court in ***The Balasaheb Satbhai Merchant Coop Bank Ltd. v. The State of Maharashtra and Ors., 2011 SCC OnLine Bom 1261***:

"13. At this stage, it may be useful to quote the observations of this Court in "Ambarish Rangshhi Patnigere v. State of Maharashtra" referred supra, which reads thus-

17. It may be noted here that the learned Counsel for intervener contended that the Magistrate did not have

jurisdiction to grant bail because the offences Under Sections 467 and 409 Indian Penal Code, carry punishment which may be life imprisonment. According to the learned Counsel, if the offence is punishable with sentence of death or life imprisonment, the Magistrate cannot grant bail Under Section 437(1) Code of Criminal Procedure, unless there are special grounds mentioned therein. He relied upon certain authorities in this respect including Prahlad Sigh Bhati v. NCT, Delhi and Anr. JT 2001 (4) SCC 280 . In that case, offence was Under Section 302 which is punishable with death sentence or life imprisonment and is exclusively triable by Court of Sessions. The offence Under Section 409 is punishable with imprisonment for life or imprisonment for 10 years and fine. Similarly, the office Under Section 467 is also punishable with imprisonment for life or imprisonment for 10 years and fine. Even though the maximum sentence which may be awarded is life imprisonment, as per Part I of Schedule annexed to Code of Criminal Procedure, both these offences are triable by a Magistrate of First Class. It appears that there are several offences including Under Sections 326 in the Penal Code, 1860 wherein sentence, which may be awarded, is imprisonment for life or imprisonment for lesser terms and such offences are triable by Magistrate of the First Class. If the Magistrate is empowered to try the case and pass judgment and order of conviction or acquittal, it is difficult to understand why he cannot pass order granting bail, which is interlocutory in nature, in such cases. In fact, the restriction Under Section 437(1) Code of Criminal Procedure is in respect of those offences which are punishable with alternative sentence of death or life imprisonment. If the offence is punishable with life imprisonment or any other lesser sentence and is triable by Magistrate, it cannot be said that Magistrate does not have jurisdiction to consider the bail application. In taking this view, I am supported by the old Judgment of Nagpur Judicial Commissioner's Court in Tularam and Ors. v. Emperor 27 Cri.L.J. 1926 page 1063 and also by the Judgment of the Kerala High Court in Satyan v. State 1981 Cr.L.J. 1313. In Satyan, the Kerala High Court considered several earlier judgments and observed thus in paras 7 and 8:

7. According to the learned Magistrate Section 437(1) does not empower him to release a person on bail if there are reasonable grounds for believing that he has committed an offence punishable with death or an offence punishable with imprisonment for life. In other words the learned Magistrate has interpreted the expression "offence punishable with death or imprisonment for life" in Section 437(1) to include all offences where the punishment extends to imprisonment for life. This reasoning, no doubt, is seen adopted in an old Rangoon Case H.M. Boudville v. Emperor, AIR 1925 129 : (1925) 26 Cri. LJ 427 while interpreting the phrase "an offence punishable with death or transportation for life" in Section 497 Code of Criminal Procedure 1898. But that case was dissented from in Mahammed Eusoof v. Emperor, AIR 1926 Rang 51 : (1926) 27 Cri LJ 401). The Rangoon High Court held that the prohibition against granting bail is confined to cases where the sentence is either death or alternative transportation for life. In other words, what the Court held was that the phrase "death or transportation for life" in Section 497 of the old Code did not extend to offences punishable with transportation for life only, it will be interesting to note the following passage from the above judgment:

> *It is difficult to see what principle, other than pure empiricism should distinguish offences punishable with transportation for life from offences punishable with long terms of imprisonment; why, for instance, the detenu Accused of lurking house trespass with a view to commit theft, for which the punishment is fourteen years imprisonment, should be specially favoured as against the individual who has dishonestly received stolen property, knowing that it was obtained by dacoity, for which the punishment happens to be transportation for life? It cannot seriously be argued that the comparatively slight difference in decree of possible punishment will render it morally less likely that the person arrested will put in an appearance in the one case rather than the other. On the other hand the degree of difference is so great as between transportation for life and death as to be immeasurable. A prudent Legislature will, therefore, withdraw from the discretion of the Magistracy cases in which, if guilt is probable, even a man of the greatest fortitude may be wiling to pay a material price, however, exorbitant, for life.*

The above decision has been followed by the Nagpur High Court in the case reported in Tularam v. Emperor, (AIR 1927 Nag 53) : (1926) 27 Cri LJ 1063).

8. The reasoning applies with equal force in interpreting the phrase "offence punishable with death or imprisonment for life" So long as an offence Under Section 326 is triable by a Magistrate of the First Class there is no reason why it should be viewed differently in the matter of granting bail from an offence Under Section 420 I.P.C. for which the punishment extends imprisonment for 7 years or any other non-bailable offence for which the punishment is a term of imprisonment.

It would be illogical and incomprehensible to say that the magistrate who can hold the trial and pass judgment of acquittal or conviction for the offences punishable with sentence of life imprisonment or lesser term of imprisonment, for example in offences under Section. 326, 409, 467, etc., cannot consider the application for bail in such offences. In fact, it appears that the restriction Under Section 437(1)(a) is applicable only to those cases which are punishable with death sentence or life imprisonment as alternative sentence. It may be noted that in Prahlad Sigh Bhati (supra), in para 6, the Supreme Court held that even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a Court of session, yet it would be proper and appropriate that in such a case the Magistrate directs the Accused person to approach the Court of Session for the purposes of getting the relief of bail. This may be applicable to many cases, wherein the sentence, which may be awarded, is not even life imprisonment, but the offence is exclusively triable by court of Sessions for example offences punishable Under Sections 306, 308, 314, 315, 316, 399, 400 and 450. Taking into consideration the legal position, I do not find any substance in the contention of Mr. Bhatt, learned Counsel for the intervener that merely because the offence is Under Section 409 and 467 Indian Penal Code, Magistrate did not have jurisdiction to hear and grant the bail.

14. It may also be useful to refer the observations of this Court in Ishan Vasant Deshmukh v. State of Maharashtra" referred supra, which read thus--

The observations of the Supreme Court that generally speaking if the punishment prescribed is that of imprisonment for

life or death penalty, and the offence is exclusively triable by the Court of Sessions, the Magistrate has no jurisdiction to grant bail, unless the matter is covered by the provisos attached to Section 437 of the Code. Thus, merely because an offence is punishable when imprisonment for life, it does not follow a Magistrate would have no jurisdiction to grant bail, unless offence is also exclusively triable by the Court of Sessions. This, implies that the Magistrate would be entitled to grant bail in cases triable by him even though punishment prescribed may extend to imprisonment for life. This Judgment in Prahlad Singh Bhati's case had not been cited before Judge, who decided State of Maharashtra v. Rajkumar Kunda Swami. Had this Judgment been noticed by the Hon'ble Judge deciding that case, the observation that the Magistrate may not decide an application for bail if the offence is punishable with imprisonment for life would possibly would not have been made. In view of the observations of the Supreme Court in Prahlad Singh Bhati's case, it is clear that the view taken by J.H. Bhatia, J. in Ambarish Rangshahi Patnigere v. State of Maharashtra, reported at 2010 ALL Mr. (Cri.) 2775 is in tune with the Judgment of the Supreme Court and therefore, the Magistrate would have jurisdiction to grant bail."

55. Thus, we would like to reiterate the aforesaid position so that the jurisdictional Magistrate who otherwise has the jurisdiction to try a criminal case which provides for a maximum punishment of either life or death sentence, has got ample jurisdiction to consider the release on bail.

Section 439 of the Code

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

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

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

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

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

xxx xxx xxx

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

56. Section 439 confers a power upon the High Court or a Court of Sessions regarding the bail. This power is to be exercised against the order of the judicial magistrate exercising power Under Section 437 of the Code or in a case triable by the Court of Sessions exclusively. In the former set of cases, the observations made by us would apply to the exercise of power Under Section 439 as well.

57. Interestingly, the second proviso to Section 439 prescribes for the notice of an application to be served on the public prosecutor within a time limit of 15 days on the set of offenses mentioned thereunder. Similarly, proviso to Sub-section (1)(a) makes it obligatory to give notice of the application for bail to the public prosecutor as well as the informant or any other person authorised by him at the time of hearing the application for bail. This being the mandate of the legislation, the High Court and the Court of Sessions shall see to it that it is being complied with.

58. Section 437 of the Code empowers the Magistrate to deal with all the offenses while considering an application for bail with the exception of an offense punishable either with life imprisonment or death triable exclusively by the Court of Sessions. The first proviso facilitates a court to conditionally release on bail an Accused if he is under the age of 16 years or is a woman or is sick or infirm, as discussed earlier. This being a welfare legislation, though introduced by way of a proviso, has to be applied while considering release on bail either by the Court of Sessions or the High Court, as the case may be. The power Under Section 439 of the Code is exercised against an order rejecting an application for bail and against an offence exclusively decided by the Court of Sessions. There cannot be a divided application of proviso to Section 437, while exercising the power Under Section 439. While dealing with a welfare legislation, a purposive interpretation giving the benefit to the needy person being the intendment is the role required to be played by the court. We do not wish to state that this proviso has to be considered favourably in all cases as the application depends upon the facts and circumstances contained therein. What is required is the consideration per se by the court of this proviso among other factors.

Section 440 of the Code

"440. Amount of bond and reduction thereof.--(1) The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(2) The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced."

59. Before we deal with the objective behind Section 440, certain precedents and laws adopted in the United States of America are required to be taken note of.

60. In the State of Illinois, a conscious decision was taken to dispense with the requirement of cost as a predominant factor in the execution of a warrant while granting bail, as such a condition is an affront to liberty, and thus, affects the fundamental rights of an arrestee. If an individual is not able to comply with the condition due to the circumstances beyond his control, and thus making it impossible for him to enjoy the fruits of the bail granted, it certainly constitutes an act of injustice. The objective behind granting of bail is different from the conditions imposed. The State of Illinois took note of the fact that a prisoner cannot be made to comply with the deposit of cash as a pre-condition for enlargement, and therefore dispensed with the same.

61. When such an onerous condition was challenged on the premise that it affects a category of persons who do not have the financial wherewithal, making them to continue in incarceration despite a temporary relief being granted, enabling them to conduct the trial as free persons, the Supreme Court of California in In re Kenneth Humphrey, S247278; 482 P.3d 1008 (2021), was

pleased to hold that the very objective is lost and would possibly impair the preparation of a defense, as such, the court was of the view that such onerous conditions cannot be sustained in the eye of law. Relevant paras of the judgment are reproduced hereunder:

> *"IV.*
>
> *....In choosing between pretrial release and detention, we recognize that absolute certainty -- particularly at the pretrial stage, when the trial meant to adjudicate guilt or innocence is yet to occur -- will prove all but impossible. A court making these determinations should focus instead on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur. (See Stack v. Boyle (1951) 342 U.S. 1, 8 (conc. opn. of Jackson, J.) ["Admission to bail always involves a risk that the Accused will take flight. That is a calculated risk which the law takes as the price of our system of justice"]; cf. Salerno, supra, 481 U.S. at p. 751 [discussing an arrestee's "identified and articulable threat to an individual or the community"].)*
>
> *Even when a bail determination complies with the above prerequisites, the court must still consider whether the deprivation of liberty caused by an order of pretrial detention is consistent with state statutory and constitutional law specifically addressing bail -- a question not resolved here7 -- and with due process. While due process does not categorically prohibit the government from ordering pretrial detention, it remains true that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (Salerno, supra, 481 U.S. at p. 755.)*
>
> *V.*
>
> *In a crucially important respect, California law is in line with the federal Constitution: "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (Salerno, supra, 481 U.S. at p. 755.) An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the Defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests. (See Humphrey, supra, 19 Cal.App. 5th at p. 1026.) Pretrial detention on victim and public safety grounds, subject to specific and reliable constitutional constraints, is a key element of our criminal justice system. Conditioning such detention on the arrestee's financial resources, without ever assessing whether a Defendant can meet those conditions or whether the state's interests could be met by less restrictive alternatives, is not."*

62. Under Section 440 the amount of every bond executed under Chapter XXXIII is to be fixed with regard to the circumstances of the case and shall not be excessive. This is a salutary provision which has to be kept in mind. The conditions imposed shall not be mechanical and uniform in all cases. It is a mandatory duty of the court to take into consideration the circumstances of the case and satisfy itself that it is not excessive. Imposing a condition which is impossible of compliance would be defeating the very object of the release. In this connection, we would only say that Section 436, 437, 438 and 439 of the Code are to be read in consonance. Reasonableness of the bond and surety is something which the court has to keep in mind whenever the same is insisted upon, and therefore while exercising the power Under Section 88 of the Code also the said factum has to be kept in mind. This Court in ***Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar,*** ***1980 (1) SCC 81*** , has held that:

> *"8. In regard to the exercise of the judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance, I have to say this briefly. There is an amplitude of power in this regard within the existing provisions of the Code of Criminal Procedure, and it is for the courts to fully acquaint themselves with the nature and extent of their discretion in exercising it. I think it is no longer possible to countenance a mechanical exercise of the power. What should be the amount of security required or the monetary obligation demanded in a bond is a matter calling for the careful consideration of several factors. The entire object being only to ensure that the undertrial does not flee or hide himself from trial, all the relevant considerations which enter into the determination of that question must be taken into account. [Section 440, Code of Criminal Procedure.] A synoptic impression of what the considerations could be may be drawn from the following provision in the United States Bail Reform Act of 1966:*
>
> *In determining which conditions of releases will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offence charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings. [18 US Section. 3146(b)]*
>
> *These are considerations which should be kept in mind when determining the amount of the security or monetary obligation. Perhaps, if this is done the abuses attendant on the prevailing system of pre-trial release in India could be avoided or, in any event, greatly reduced. See Moti Ram v. State of M.P. [(1978) 4 SCC 47]"*

CATEGORIES A & B

63. We have already dealt with the relevant provisions which would take care of categories A and B. At the cost of repetition, we wish to state that, in category A, one would expect a better exercise of discretion on the part of the court in favour of the accused. Coming to category B, these cases will have to be dealt with on a case-to-case basis again keeping in view the general principle of law and the provisions, as discussed by us.

SPECIAL ACTS (CATEGORY C)

64. Now we shall come to category (C). We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigor imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigor as provided Under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigor, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the

Code.

Precedents

• ***Union of India v. K.A. Najeeb, (2021) 3 SCC 713*** :

"15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India [Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731 , para 15 : 1995 SCC (Cri.) 39], it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the Accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail."

• ***Supreme Court Legal Aid Committee v. Union of India (1994) 6 SCC 731*** :

"15. ...In substance the Petitioner now prays that all undertrials who are in jail for the commission of any offence or offences under the Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be forthwith released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they should in any case be released on bail. It is indeed true and that is obvious from the plain language of Section 36(1) of the Act, that the legislature contemplated the creation of Special Courts to speed up the trial of those prosecuted for the commission of any offence under the Act. It is equally true that similar is the objective of Section 309 of the Code. It is also true that this Court has emphasised in a series of decisions that Articles 14, 19 and 21 sustain and nourish each other and any law depriving a person of "personal liberty" must prescribe a procedure which is just, fair and reasonable, i.e., a procedure which promotes speedy trial. See Hussainara Khatoon (IV) v. Home Secy., State of Bihar [(1980) 1 SCC 98 : 1980 SCC (Cri.) 40], Raghubir Singh v. State of Bihar [(1986) 4 SCC 481 : 1986 SCC (Cri.) 511] and Kadra Pahadiya v. State of Bihar [(1983) 2 SCC 104 : 1983 SCC (Cri.) 361] to quote only a few. This is also the avowed objective of Section 36(1) of the Act. However, this laudable objective got frustrated when the State Government delayed the constitution of sufficient number of Special Courts in Greater Bombay; the process of constituting the first two Special Courts started with the issuance of notifications Under Section 36(1) on 4-1-1991 and Under Section 36(2) on 6-4-1991 almost two years from 29-5-1989 when Amendment Act 2 of 1989 became effective. Since the number of courts constituted to try offences under the Act were not sufficient and the appointments of Judges to man these courts were delayed, cases piled up and the provision in regard to enlargement on bail being strict the offenders have had to languish in jails for want of trials. As stated earlier Section 37 of the Act makes every offence punishable under the Act cognizable and non-bailable and provides that no person Accused of an offence punishable for a term of five years or more shall be released on bail unless (i) the Public Prosecutor has had an opportunity to oppose bail and (ii) if opposed, the court is satisfied that there are reasonable grounds for believing that he is not guilty of the offence and is not likely to indulge in similar activity. On account of the strict language of the said provision very few persons Accused of certain offences under the Act could secure bail. Now to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution. 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 : 1994 SCC (Cri.) 899]. 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 : 1992 SCC (Cri.) 93], 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 visualised 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. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned Counsel for the Petitioner that we should quash the prosecutions and set free the Accused persons whose trials are delayed beyond reasonable time. Alternatively, he contended that such Accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose. This suggestion commends to us. We were told by the learned Counsel for the State of Maharashtra that additional Special Courts have since been constituted but having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:

(i) Where the undertrial is Accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed

bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial Accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs. 50,000 with two sureties for like amount.

(iii) Where the undertrial Accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial Accused is charged for the commission of an offence punishable Under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order."

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

"(i) The undertrial Accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial Accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under Clause (i), once in a fortnight in the case of those covered under Clause (ii) and once in a week in the case of those covered by Clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those Accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial Accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said Accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial Accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial Accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial Accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.

16. We may state that the above are intended to operate as one-time directions for cases in which the Accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail Under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the Accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order."

65. We may clarify on one aspect which is on the interpretation of Section 170 of the Code. Our discussion made for the other offences would apply to these cases also. To clarify this position, we may hold that if an Accused is already under incarceration, then the same would continue, and therefore, it is needless to say that the provision of the Special Act would get applied thereafter. It is only in a case where the Accused is either not arrested consciously by the prosecution or arrested and enlarged on bail, there is no need for further arrest at the instance of the court. Similarly, we would also add that the existence of a pari materia or a similar provision like Section 167(2) of the Code available under the Special Act would have the same effect entitling the Accused for a default bail. Even here the court will have to consider the satisfaction Under Section 440 of the Code.

ECONOMIC OFFENSES (CATEGORY D)

66. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in the case of ***P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791*** , after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis. Suffice it to state that law, as laid down in the following judgments, will govern the field:

Precedents

• ***P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791*** :

"23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the Rule and refusal is the exception so as to ensure that the Accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each

case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the Accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a Rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the Accused to stand trial."

• ***Sanjay Chandra v. CBI*** *(2012) 1 SCC 40* :

"39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds: the primary ground is that the offence alleged against the Accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the Accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the Accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the Accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

xxx xxx xxx

46. We are conscious of the fact that the Accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the Appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."

ROLE OF THE COURT

67. The rate of conviction in criminal cases in India is abysmally low. It appears to us that this factor weighs on the mind of the Court while deciding the bail applications in a negative sense. Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles. We cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial. On the contrary, an ultimate acquittal with continued custody would be a case of grave injustice.

68. Criminal courts in general with the trial court in particular are the guardian angels of liberty. Liberty, as embedded in the Code, has to be preserved, protected, and enforced by the Criminal Courts. Any conscious failure by the Criminal Courts would constitute an affront to liberty. It is the pious duty of the Criminal Court to zealously guard and keep a consistent vision in safeguarding the constitutional values and ethos. A criminal court must uphold the constitutional thrust with responsibility mandated on them by acting akin to a high priest. This Court in ***Arnab Manoranjan Goswami v. State of Maharashtra,*** *(2021) 2 SCC 427* , has observed that:

"67. Human liberty is a precious constitutional value, which is undoubtedly subject to Regulation by validly enacted legislation. As such, the citizen is subject to the edicts of criminal law and procedure. Section 482 recognises the inherent power of the High Court to make such orders as are necessary to give effect to the provisions of Code of Criminal Procedure "or prevent abuse of the process of any court or otherwise to secure the ends of justice". Decisions of this Court require the High Courts, in exercising the jurisdiction entrusted to them Under Section 482, to act with circumspection. In emphasising that the High Court must exercise this power with a sense of restraint, the decisions of this Court are founded on the basic principle that the due enforcement of criminal law should not be obstructed by the Accused taking recourse to artifices and strategies. The public interest in ensuring the due investigation of crime is protected by ensuring that the inherent power of the High Court is exercised with caution. That indeed is one--and a significant--end of the spectrum. The other end of the spectrum is equally important : the recognition by Section 482 of the power inhering in the High Court to prevent the abuse of process or to secure the ends of justice is a valuable safeguard for protecting liberty. The Code of Criminal Procedure, 1898 was enacted by a legislature which was not subject to constitutional rights and limitations; yet it recognised the inherent power in Section 561-A. Post-Independence, the recognition by Parliament [Section 482 Code of Criminal Procedure, 1973] of the inherent power of the High Court must be construed as an aid to preserve the constitutional value of liberty. The writ of liberty runs through the fabric of the Constitution. The need to ensure the fair investigation of crime is undoubtedly important in itself, because it protects at one level the rights of the victim and, at a more fundamental level, the societal interest in ensuring that crime is investigated and dealt with in accordance with law. On the other hand, the misuse of the criminal law is a matter of which the High Court and the lower courts in this country must be alive. In the present case, the High Court could not but have been cognizant of the specific ground which was raised before it by the Appellant that he was being made a

target as a part of a series of occurrences which have been taking place since April 2020. The specific case of the Appellant is that he has been targeted because his opinions on his television channel are unpalatable to authority. Whether the Appellant has established a case for quashing the FIR is something on which the High Court will take a final view when the proceedings are listed before it but we are clearly of the view that in failing to make even a prima facie evaluation of the FIR, the High Court abdicated its constitutional duty and function as a protector of liberty. Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum--the district judiciary, the High Courts and the Supreme Court--to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum--the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the Rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting. (emphasis supplied)

69. We wish to note the existence of exclusive Acts in the form of Bail Acts prevailing in the United Kingdom and various States of USA. These Acts prescribe adequate guidelines both for investigating agencies and the courts. We shall now take note of Section 4(1) of the Bail Act of 1976 pertaining to United Kingdom:

General right to bail of Accused persons and Ors..

"4.-(1) A person to whom this Section applies shall be granted bail except as provided in Schedule 1 to this Act."

70. Even other than the aforesaid provision, the enactment does take into consideration of the principles of law which we have discussed on the presumption of innocence and the grant of bail being a matter of right.

71. Uniformity and certainty in the decisions of the court are the foundations of judicial dispensation. Persons Accused with same offense shall never be treated differently either by the same court or by the same or different courts. Such an action though by an exercise of discretion despite being a judicial one would be a grave affront to Articles 14 and 15 of the Constitution of India.

72. The Bail Act of United Kingdom takes into consideration various factors. It is an attempt to have a comprehensive law dealing with bails by following a simple procedure. The Act takes into consideration clogging of the prisons with the undertrial prisoners, cases involving the issuance of warrants, granting of bail both before and after conviction, exercise of the power by the investigating agency and the court, violation of the bail conditions, execution of bond and sureties on the unassailable principle of presumption and right to get bail. Exceptions have been carved out as mentioned in Schedule I dealing with different contingencies and factors including the nature and continuity of offence. They also include Special Acts as well. We believe there is a pressing need for a similar enactment in our country. We do not wish to say anything beyond the observation made, except to call on the Government of India to consider the introduction of an Act specifically meant for granting of bail as done in various other countries like the United Kingdom. Our belief is also for the reason that the Code as it exists today is a continuation of the pre-independence one with its modifications. We hope and trust that the Government of India would look into the suggestion made in right earnest.

SUMMARY/CONCLUSION

73. In conclusion, we would like to issue certain directions. These directions are meant for the investigating agencies and also for the courts. Accordingly, we deem it appropriate to issue the following directions, which may be subject to State amendments :

"a) The Government of India may consider the introduction of a separate enactment in the nature of a Bail Act so as to streamline the grant of bails.

b) The investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in Arnesh Kumar (supra). Any dereliction on their part has to be brought to the notice of the higher authorities by the court followed by appropriate action.

c) The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non-compliance would entitle the Accused for grant of bail.

d) All the State Governments and the Union Territories are directed to facilitate standing orders for the procedure to be followed Under Section 41 and 41A of the Code while taking note of the order of the High Court of Delhi dated 07.02.2018 in Writ Petition (C) No. 7608 of 2018 and the standing order issued by the Delhi Police i.e. Standing Order No. 109 of 2020, to comply with the mandate of Section 41A of the Code.

e) There need not be any insistence of a bail application while considering the application Under Section 88, 170, 204 and 209 of the Code.

f) There needs to be a strict compliance of the mandate laid down in the judgment of this Court in Siddharth (supra).

g) The State and Central Governments will have to comply with the directions issued by this Court from time to time with respect to constitution of special courts. The High Court in consultation with the State Governments will have to undertake an exercise on the need for the special courts. The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.

h) The High Courts are directed to undertake the exercise of finding out the undertrial prisoners who are not able to comply with the bail conditions. After doing so, appropriate action will have to be taken in light of Section 440 of the Code, facilitating the release.

i) While insisting upon sureties the mandate of Section 440 of the Code has to be kept in mind.

j) An exercise will have to be done in a similar manner to comply with the mandate of Section 436A of the Code both at the district judiciary level and the High Court as earlier directed by this Court in Bhim Singh (supra), followed by appropriate orders.

k) Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of

within a period of six weeks with the exception of any intervening application.

l) All State Governments, Union Territories and High Courts are directed to file affidavits/status reports within a period of four months."

74. The Registry is directed to send copy of this judgment to the Government of India and all the State Governments/Union Territories.

75. As such, M.A. 1849 of 2021 is disposed of in the aforesaid terms. I.A. No. 51315 of 2022, application for intervention is allowed. I.A. Nos. 164761 of 2021, 148421 of 2021 and M.A. Diary No. 29164 of 2021 (I.A. No. 154863 of 2021), applications for clarification/direction are also disposed of. List for compliance after a period of four months from today.

HIGH COURT OF TRIPURA
AGARTALA

AB 87/2020

Karnajit De

----Petitioner(s)

Versus

The State of Tripura

----Respondent(s)

For Petitioner(s) : Mr. S. Kar Bhowmik, Advocate.

For Respondent(s) : Mr. Ratan Datta, P.P.

HON'BLE MR. JUSTICE ARINDAM LODH

ORDER

Later on
(05.08.2020)

Received the Lower Court Records as called for by this Court.

Heard Mr. Kar Bhowmik, learned counsel appearing for the accused-petitioner.

I find from the case record that the subject matter of the case registered before the O.C., Amtali P.S. being numbered as No.71/2020, under Sections 353/186/188 of IPC and 3 (1) of ED Act, has no connection with the incident occurred at Bhagat Singh COVID Care Centre.

The I.O. has produced the case diary in connection with this case.

Since this Case has no connection with the NCC PS Case, I decline to take any cognizance of the Amtali P.S. case and thus the related case diary is returned back to the I.O. present before this Court.

NCC PS Case No.106/2020, registered under Sections 323/353/506/34 of IPC and 3(2) (i) of Epidemic Diseases (Amendment) Ordinance, 2020 read with Tripura Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act,2013, on the basis of complaint lodged by the Director of Health Services, Government of Tripura, has turned into different complexion. During the currency of the present application for granting anticipatory bail before this Court the accused person, Karnajit De along with other alleged offenders were arrested on 04.08.2020.

After their arrest they were produced before the Court of learned Magistrate and the learned Court had granted them interim bail.

At the very outset, Mr. Kar Bhowmik, learned counsel for the accused person, Karnajit De submits that the present application filed under Section 438 of CrPC has become infructuous as the accused persons in connection with the instant case were arrested and enlarged on interim bail. When the matter came up before this Court in the morning at 10:30, keeping in view the new developments of the case I had called for the entire records of the learned Judicial Magistrate. From the records, I find that the accused-petitioner in his petition filed under Section 439 of CrPC before the learned Magistrate has specifically averred at Para 6 of the application that he filed an application under Section 438 CrPC and reads as under:

> *"6. That the applicant being anticipated and having been apprehended by the activities of the authority for his arrest, he had approached the Hon'ble High Court by filing an anticipatory bail application on 30.07.2020 and the same is registered and numbered as Case No. A.B.87 of 2020. The Hon'ble High Court after hearing both the sides has passed the order dated 30.07.2020, fixing the matter next on 05.08.2020 as such the anticipatory bail prayer is still pendig before the Hon'ble High Court. Be it noted here that the humble accused-applicant has been arrested by the I.O. of the case most illegally and arbitrarily because since the anticipatory bail prayer is still pending before the Hon'ble High Court, the accused-applicant should not be arrested. It is further submitted here that the arrest of the*

accused-applicant has been effected by the investigating authority under the immense media pressure."

The bail application which was filed by the accused-petitioners under Section 437 of CrPC was heard by the learned Judicial Magistrate, 1st Class and he passed an order wherein the present petitioner along with other accused persons were released on interim bail. In my opinion, the learned Magistrate ought to have waited till today before passing an order granting bail to the accused persons which is desirable to maintain the judicial discipline amongst all the Courts. When a bail application, be it under Section 438 or 437 of CrPC, the Courts below should wait for the decision of the superior Courts and that will uphold the judicial discipline which is necessary to the orderly administration of justice. Despite the order of this Court dated 30.07.2020 being brought to the notice of the Court of learned Magistrate, the learned Magistrate failed to take into account the observations made in that order. However, while passing this order I restrain myself from making any further comments on this issue on judicial side. I accept the submission of learned counsel Mr. Kar Bhowmik for the petitioner that the present application under Section 438 of CrPC for granting anticipatory bail to the accused person does not exist and it has become infructuous, and I declare it as infructuous and dropped.

But, the matter does not end and rather, should not end here. The case in hand relates to spitting upon some doctors and Para-medical staff by the alleged accused persons and at the time when the doctor went to COVID Care Centre with some patients who were happened to be the mothers of newly born babies and infected with the dreaded Corona Virus. It caused serious repercussions in the doctors' community and other health care staff. The citizens of the State from all levels and strata agitated and seriously condemned the incident and demanded stern action against the persons who were involved in the said shameful incident.

The Apex Court in the case of ***Siddharam Satlingappa Mhetre V. State of Maharashtra, (2011) 1 SCC 694*** had observed that the society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest in the society. The law of bail dovetails two conflicting interests, namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentially of repeating the same crime while on bail and on the other hand, absolute adherence to the fundamental principle of criminal jurisprudence regarding presumption of innocence of accused until he is found guilty and sanctity of individual liberty.

I am conscious about the present scenario and the facts and circumstances of the case and the allegations levelled against the accused persons. I have meticulously gone through the order dated 04.08.2020 passed by the learned Judicial Magistrate. The order provokes me to interfere to render justice to the complainant, the victims of the incident and the accused persons as well and for this reason, let me examine whether this Court can suo motu take up and examine the merits of the order passed by any subordinate Courts to prevent the abuse of the process of the Court.

The Supreme Court in ***R. Rathinam Vrs. State***, ***(2000) 2 SCC 391*** had observed that there is no barrier either in Section 439 of the Code or in any other law which inhabits the High Court to exercise the power of cancellation of bail suo motu.

At Para 8 of the Rathinam (supra) the Supreme Court had observed that –*"It is not disputed before us that the power so vested in the High Court can be invoked either by the State or by any aggrieved*

party. Nor is it disputed that the said power can be exercised suo motu by the High Court."

I may reproduce Section 439(2) of CrPC which reads as under:

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

Mr. Kar Bhowmik has participated in the hearing when the matter has been taken up suo motu by this Court and has strongly defended the order granting bail to the accused persons. Before I advent to the merits of the order passed by the learned Magistrate, I would like to discuss the settled legal propositions in regard to exercise inherent power of this Court for cancelling the bail once granted tro the accused persons.

In the case of ***Brij Nandan Jaiswal Vrs. Munna alias Munna Jaiswal & Anr.***, reported in ***(2009) 1 SCC 678*** the Apex Court has settled the issue in the manner as follows: (SCC P. 680, Para 12)

> *"12. It is now a well settled law that the complainant can always question the order granting bail if the said order is not validly passed. It is not as if once a bail is granted by any court, the only way is to get it cancelled on account of its misuse. The bail order can be tested on merits also."*

In ***Gobarbhai Narenbhai Singala vs. State of Gujarat & ors.*** *with* ***Joyeshbhai @ Panchabhai Muljibhai Satadiya vs. Jayrajsing Temubha Jadeja & anr.***, reported in ***AIR 2008 SC 1134,*** the Apex Court has observed that *"there is no doubt that this court does not ordinarily interfere in the matter granting bail but the same is subject to some exceptions. When the basic requirements necessary for grant of bail are completely ignored by the High Court, this Court would be justified in canceling the bail…"*

Then again, in my view a power always inheres with the High Court which can be exercised under Article 227 of the Constitution of India. Even, an extra revisionary power both in the Civil and Criminal jurisdiction could be exercised by the High Court in the proper administration of the justice delivery system. I am of the opinion that the superior Court has got ample power to interfere with an order, passed by any subordinate Courts, the object being to prevent the miscarriage of justice. Similar view was expressed by a Division Bench of Calcutta High Court in the case of ***Re Renu Singh*** as petitioner, reported in 1995(1) Crimes 863.

In view of above, this Court has enough jurisdiction and power to examine the merits of the order dated 04.08.2020 passed by the learned Court below while granting bail to the accused persons arrested in connection with the NCC PS Case No. 106/2020.

Now, it is necessary to recapitulate some of the findings returned by the learned Magistrate in granting bail to the accused persons.

Learned Court below in his order dated 04.08.2020, has observed that- "*from the material facts and nature of allegation, prima facie as on record, I find section 353 of IPC cannot be discarded. As there are allegation of obstruction which are factually quite different from making opposition".*

Again the court has observed that- *"further taking into consideration the materials on record, I find there is no ground to discard the relevant the penal section of Epidemic Diseases Act being amended by Epidemic Diseases (Amendment) Ordinance, 2020 or the relevant penal section of The Tripura Medicare Service Persons & Medicare Service Institutions (Prevention of Violence and Damage to Property) Act, 2013".*

Learned Magistrate has further observed that- *"needless to say, in the present situation of Epidemic the Medicare Personnel are the front warrior and such kind of obstruction or alleged activity is of serious in nature. The alleged activities not only cause damage to the top most required service in present situation but, also put into risk the mothers along with their new born babies. There are also convincing prima facie materials against the present accused persons.*

However, most astonishing feature is that, having been found all materials and ingredients of the provisions of Section 353 IPC and other penal sections under Epidemic Diseases (amendment) Ordinance, 2020 and the penal section of The Tripura Medicare Service Persons & Medicare Service Institutions (Prevention of Violence and Damage to Property) Act, 2013, the learned Magistrate suddenly has observed that- *"the investigating agency could not dispense with the requirements provided by the Hon'ble Apex Court in the case of* ***Arnesh Kumar vs. the State of Bihar, (2014) 8 SCC 273.***

Now, let us see what principles have been delineated in the case of ***Arnesh Kumar (supra)*** in respect of arrest and granting bail to the accused persons. The Apex Court has observed thus: [SCC p. 281 para 11]:

> " 11. *Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:*
> *11.1 All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;*
> *11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);*
> *11.3. The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;*
> *11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;*
> *11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate*

which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine".

After considering the principles laid down in the case of ***Arnesh Kumar (supra),*** the learned Magistrate came to the conclusion that the arresting officer had failed to justify the grounds of arrest and observed that the investigating officer did not mention the facts based on which he came to the conclusion that the FIR named accused persons must be tampering the witnesses by way of making inducement or threat.

Next, coming to the present case, a brief narration of facts would facilitate further discussion. According to the prosecution, a complaint was lodged by the Director of Health Services, Government of Tripura, stating inter alia that one doctor, namely, Sangita Chakraborty, who was serving as District Health Officer, West Tripura, and was discharging her duties as in-charge of distribution of COVID-19 patients in the two centres on 24.07.2020, Saturday, at around 7.00 P.M. five post delivery mothers along with their new born babies, who were tested COVID-19 positive, were sent to the Bhagat Singh COVID Care Centre, soon after their deliveries to ensure maximum safety and much needed seclusion for the mother and the new born babies under the strict surveillance of Dr. Sangita Chakraborty. It is further stated that when the said patients and the accompanying health staffs reached near B-Block of the said centre, some of the previously admitted older inmate patients

started protesting indiscriminately demanding that they would not allow entry of any new patients in the centre. It is further stated in the complaint that when the situation had worsened, Dr. Chakraborty realizing the seriousness of the developments, immediately reached the place of occurrence and maintaining the desired composure form a public servant, tried to convince the unruly protestors and repeatedly insisted to behave responsibly. However, the protestors furiously reciprocated and started abusing Dr. Chakraborty in utterly filthy languages and also threw some sexually coloured remarks. They even went further and started jointly spitting on the face of Dr. Sangita Chakraborty and one of them climbed upstairs from where he took some water in his mouth and showered gargled water upon Dr. Chakraborty, who was then somehow saved by the timely interference of her staff but not before receiving some minor injuries. Some of the protestors even went further and threatened her and her family with dire consequences once they are out of their quarantine, which has left the esteemed doctor and her family in a state of terror and helplessness.

On the basis of this complaint, the Officer-in-Charge of the NCC Police Station had registered an FIR No. 2020 NCC 106 dated 27.07.2020 under Section 323/353/506/34 IPC and Section 3(2)(i) of Epidemic Diseases Amendment Act, 2020 read with Section 3 of the Tripura Medicare Service Persons and Medicare Service Institution (Prevention of Violence & damage Property) Act, 2013.

The relevant provisions which need to be considered, to examine the merits of the order dated 04.08.2020 passed by the learned Judicial Magistrate, is necessary to be reproduced herein.

> "*353. **Assault or criminal force to deter public servant form discharge of his duty**.- Whoever assaults or use criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be*

punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Section 3 of The Epidemic Diseases (Amendment) Ordinance, 2020 (for short, Ordinance 2020) reads thus:-

"3. After section 1 of the principal Act, the following section shall be inserted, namely:-

1A. In this Act, unless the context otherwise requires-

(a) "act of violence" includes any of the following acts committed by any person against a health care service personnel serving during an epidemic, which causes or may cause-

(i) Harassment impacting the living or working conditions of such healthcare service personnel and preventing him from discharging his duties

(ii) Harm, injury, hurt intimidation or danger to the life of such healthcare service personnel either within the premises of a clinical establishment or otherwise;

(iii) Obstruction or hindrance to such healthcare service personnel in the discharge of his duties, either within the premises of a clinical establishment or otherwise; or

(iv) Loss of damage to any property or documents in the custody of, or in relation to, such healthcare service personnel

(b) "healthcare service personnel" means a person who while carrying out his duties in relation to epidemic related responsibilities, may come in direct contact with affected patients and thereby is at the risk of being impacted by such disease, and includes-

(i) any public and clinical healthcare provider such as doctor, nurse, paramedical worker and community health worker;

(ii) any other person empowered under the Act to take measures to prevent the outbreak of the disease or spread thereof; and

(iii) any person declared as such by the State Government, by notification in the Official Gazette;

(c) "property" includes-

(i) A clinical establishment as defined in the Clinical Establishment (Registration and Regulation) Act. 2010;

(ii) any facility indentified for quarantine and isolation of patients during an epidemic;

(iii) a mobile medical unit; and

(iv) any other property in which a healthcare service personnel had direct interest in relation to the epidemic;

(d) the words and expression used herein and not defined, but defined in the Indian Ports Act, 1908, the Aircraft Act, 1934 or the Land Ports Authority of India Act, 2010, as the case may be, shall have the same meaning as assigned to them in that Act."

Section 6 of the Epidemic Diseases (Amendment) Ordinance, 2020 further provides that:-

"6. Section 3 of the principal Act shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so renumbered, the following sub-sections shall be inserted, namely:-

"(2) Whoever,-

(i) commits or abets the commission of an act of violence against the healthcare service personnel; or

(ii) abets or causes damages or loss to any property,

Shall be punished with imprisonment for a term which shall not be less than three months, but which may extend to five years, and with fine, which shall not be less than fifty thousand rupees, but which may extend to tow lakhs rupees

(3) Whoever, while committing an act of violence against a healthcare service personnel, causes grievous hurt as defined in Section 320 of the Indian Penal Code to such person, shall be punished with imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine, which shall not be less than one lakh rupees, but which may extend to five lakh rupees."

Section-7 of the Ordinance Act 2020 further stipulates that:-

"After section 3 of the principal Act, the following sections shall be inserted namely:-

(i) an offence punishable under sub-section (2) or sub-section(30 of section 3 shall be cognizable and non-bailable;

(ii) any case registered under sub-section (2) or sub-section 93) of section 3 shall be investigated by a police officer not below the rank of Inspector.;

(iii) investigation of a case under sub-section (2) or sub-section (3) of section 3 shall be completed within a period of thirty days from the date of registration of the First Information Report.

(iv) In every inquiry of trial of a case under sub-Section (2) or sub-section (3) of section 3, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded, and an endeavour shall be made to ensure that the inquiry or trial is concluded within a period of one year……."

Section 3 of the Tripura Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act, 2013 read as under:-

"Whoever-

(a) Commits an act of violence against a medicare service person; or

(b) Causes any damages to the property of any medicare service institutions, shall be punished with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees.

Section 4 of the Tripura Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act, 2013 read as under:-

> *" 4. An offence punishable under Section 3 shall be cognizable and non-bailable"*

Keeping in view the law as delineated here-in-above and the object of bringing amendment and legislation as carried out by our law makers, let me proceed to examine the present bail application.

Indubitably, the law-makers of our country in the wake of COVID-19 pandemic in their own wisdom have described the doctors, para-medical staff and their associates as well as the police force as the 'first-line defence of our country' in the fight against Coronavirus. Having observed that, the law makers found many disgruntled elements were constantly creating obstacles in the smooth functioning of the doctors and other assisting officials and forced the law-makers of the country to promulgate Ordinance called Epidemic Diseases (Amendment) Ordinance, 2020, as extracted here-in-above.

It is noticed that after providing well-thought consideration and keeping in mind the gravity of the present situation of the country due to COVID-19 pandemic, *the punishment for the offence is prescribed cognizable and non-bailable.*

The State of Tripura had also introduced a new Law considering the violence and atrocities against the doctors and other para-medical staff committed by some unscrupulous persons. The Act came into force in the year 2013 and it is called as "The Tripura Medicare Service Persons & Medicare Service Institutions (Prevention of Violence and Damage to Property) Act, 2013" (for short, the Medicare Act, 2013). The object of bringing this legislation is to prohibit violence against Medicare Service Persons and Damage Property in Medicare Service Institutions and matters connected therewith and incidental thereto.

Section 3 of the Act, 2013, reads as under:

> "3. Whoever-
> (a) commits an act of violence against a medicare service person: or
> (b) causes any damage to the property of any medicare service institution,
> Shall be punished with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees".

Section 4 of the Act, 2013, provides that an offence punishable under Section 3 of the Act, shall be cognizable and non-bailable.

After perusal of the order dated 04.08.2020, as I have extracted here-in-above, it is clear like crystal that the learned Magistrate had himself observed that there are sufficient materials and ingredients to attract Section 353 IPC and penal sections of the Epidemic Diseases (Amendment) Ordinance, 2020 and Medicare Act, 2013.

Having given my thoughtful considerations to the observations made by learned Magistrate, I am of the considered opinion that the order dated 04.08.2020 granting interim bail to the accused persons is wholly perverse and based on irrelevant considerations. Firstly, the observation of the learned Magistrate that the complaint is hit by Section 162 Cr.P.C. has to be taken into account at the time of framing of Charge, at the stage of trial or after conclusion of the Trial and at the stage of argument.

I have perused the case diary as produced by the investigating officer.

It is apparent from the case diary that Dr. Sangita Chakraborty did not lodge any complaint or FIR before the police station, but, maintaining the protocol and the Service Conduct Rules, she made a written complaint to the Director of Health Services with copies to the other administrative personnel like Additional Chief Secretary, DM and Collector, West Tripura, etc. On the basis of her complaint, the Director of Health Services, Government of Tripura had lodged a written

complaint to the Officer-in-Charge of NCC police station. This fact itself proves non-application of mind by the learned Magistrate. In the case diary, it is found that the investigating officer had arranged recording of statements of some of the witnesses and the victim under Section 164(5) Cr.P.C.. Dr. Chakraborty, in her statement had disclosed the names of Biswajit Das, Ranjit Saha, Miran Das @ Milan and Karnajit De, who spat upon the officials on duty and threw gurgled water. Dr. Chakraborty, has specifically stated that she could identify those four persons by their face if they were produced before her. She has also specifically stated the filthy and slang languages used by those persons and those filthy words were written/recorded in verbatim by the learned Magistrate. Even it has been stated that they threatened her and other staff that they would teach a lesson to them once they were out of the Centre. Other four witnesses also made statements under Section 164(5) Cr.P.C. though these statements recorded by the Magistrate under Section 164 Cr.P.C. at the instance of the investigating officer. The learned Magistrate appeared to be silent about those statements and went on extraneous consideration to grant bail to the accused persons.

Further, in my opinion, the impression of the learned Magistrate was that the prosecution evidence was over and there was no likelihood of any influence being exercised by the accused persons on prosecution witnesses, which is perverse.

Considering the present state of affairs, when the entire State and the Country are engulfed of COVID-19 pandemic, this court cannot be a silent spectator to the subject matter. In our judicial system there are courts, one above the other. The superior court is also entrusted in the trial over the one below it, to ensure that the subordinate courts function properly and judiciously in discharge of its duty. A Judge can foul judicial process and administration by misdemeanours while engaged in the exercise of judicial function. It is, therefore, as important for the

superior court to be vigilant also about the conduct and behavior of the subordinate judicial officers so as to administer the law, since both functions are of equal importance in the administration of justice.

Ordinarily, the High Court will not exercise its discretion either under Section 439 (2) Cr.P.C. or its inherent power under Section 482 Cr.P.C. or 397 Cr.P.C. for cancelling bail granted by the subordinate courts of competent jurisdiction in favour of an accused but, if bail has been granted to an accused in a non-bailable offence without keeping in view the object of the law of the land enacted by the legislatures, in a manner which smacks of arbitrariness, capriciousness or perversity, on the part of the court of Session or any inferior Courts in granting such bail, the High Court has not merely the discretion but a duty is laid on it under Section 439(2) Cr.P.C., to cancel the bail and order the accused to be re-arrested.

In my opinion, if bail granted illegally and/or improperly by wrong and arbitrary exercise of judicial discretion can be cancelled by the High Court and/or Sessions court under Section 439(2) of the Code, even if there is no additional circumstances against an accused appearing in the record after the grant of the bail, if High Court as a superior court comes across an order of a lower court exercising discretion conferred under Section 437 or 439 of the Cr.P.C. that it has founded its order on irrelevant consideration or on consideration not germane to the issue the power conferred upon the High Court can be exercised in the interest of justice or else, Section 482, Section 397 or Section 439 (2) of Cr.P.C. shall be a dead-letter.

Mr. Kar Bhowmik, learned counsel for the accused-petitioners has agreed to participate in the suo motu proceeding of this Court on behalf of the accused persons and argued in vehemence while defending the order of the learned Magistrate. Mr.S. Ghosh, learned Additional PP opposing the order of granting interim bail as aforestated

has urged before this court that the investigating officer should be directed to arrange for the Test Identification parade (for short TI parade) and ask the victim and other persons about the conduct of each of the accused persons i.e. they have meant to say "***who did what, and what role was attributed by which of the accused persons***".

Mr. Kar Bhowmik, learned counsel has fairly accepted the observations made by the learned court below which were extracted here-in-above that the learned Magistrate found that there were some convincing materials to attract the penal sections as envisaged under Section 353 IPC, penal provisions of Epidemic Diseases Act and subsequent Ordinance, 2020, and Section 3 read with Section 4 of the Medicare Act, 2013. Mr. Kar Bhowmik, learned counsel in his usual fairness has also agreed that this court under its supervisory power can examine the merits of the order passed by any subordinate courts being the superior court within its jurisdiction.

I am constrained to note that the learned Magistrate has failed to visualize the situation prevailing in the State and the obligations of the citizens towards the society. He has noted the provisions of Section 3 of the Medicare Act, 2013 is punishable for three years or some other sections are punishable upto five years and on those considerations he had released the accused persons on bail without keeping in view the object of bringing the amendment of Epidemic Diseases (Amendment) Ordinance, 2020 thereto and the introduction of Medicare Services Act, 2013. Further, the observation of the learned Magistrate that requirement of TI Parade cannot be the ground to deny bail in the context of the case and he directed investigating officer to conduct TI parade after enlarging the accused persons on bail which is against the principle of conducting TI parade. In my opinion, the TI parade has to be held without much delay and before the accused goes on bail, for once on bail, there is a

chance of the accused not only being seen by the witness but, they could also be influenced by the accused at large.

In the light of above analysis on the legal provisions as well as the factual and material aspects of the case, I am inclined to set aside the order dated 04.08.2020 passed by the learned Magistrate.

Accordingly, the order dated 04.08.2020 is set aside and quashed. Consequently, the interim bail granted by the learned Magistrate is hereby cancelled.

All the four accused persons, namely, Biswajit Das, Ranjit Saha, Miran Das @ Milan and Karnajit De, who were released on bail by order dated 04.08.2020 in connection with case No. 2020 NCC 106, shall surrender to the investigating officer forthwith. If they do not surrender, the investigating officer is directed to arrest the aforesaid accused persons and, further, if they are not found available, proper application is to be filed before the competent court of jurisdiction for issuance of non-bailable warrant of arrest against those accused persons. The investigating officer is directed to arrange and conduct TI parade of the accused persons in accordance with law within next two days.

Needless to say, that the accused persons have got every right to move bail applications before the competent Court of appropriate jurisdiction which would be decided on merits. It is made clear, that in the event of such application, if filed, and while deciding the matter the Court will not be influenced by any of the observations made by this Court in this order. The investigating officer shall also collect the CC T.V. footage of the relevant date i.e. 24.07.2020 of Bhagat Singh COVID Centre.

Before I part with the records it would be injustice to the learned counsel if this Court does not appreciate the valuable assistance by both the learned counsel appearing for the parties to the *lis*.

Send down the L.C. Records.

A copy of this order may be supplied to the learned counsel for the parties through e-mail or Whatsapp duly authenticated by the Registrar (Judicial) which shall serve all practical purposes.

JUDGE