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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 29.05.2024

+ CRL.A. 215/2024

SHARJEEL IMAM

..... Appellant

Through: Mr. Talib Mustafa, Mr. Ahmad Ibrahim, Ms. Raksha Agarwal, Mr. Kartik Venu, Mr. Shaurca Tyagi and Ms. Ayesha Zaidi, Advocates

versus

STATE OF NCT DELHI & ANR.

..... Respondent

Through: Mr. Rajat Nair, SPP with Mr. Dhruv Pande, Advocate, ACP Umesh Barthwal and Insp. Rohit Kumar, ISC/Crime Branch

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T (oral)

1. Appellant has taken exception to order dated 17.02.2024 passed by the learned Trial Court whereby his plea for release on bail under Section 436-A Cr.P.C. has been turned down.
2. Appellant was arrested on 28.01.2020 for commission of offences under Sections 124A/153A/153B/505(2) IPC and for offence under Section 13 of Unlawful Activities (Prevention) Act (in short UAPA) and continues to be in custody.
3. Charges were framed on 15.03.2022 and trial was proceeded on day-to-day basis. We are apprised that the prosecution has already examined 22 witnesses out of 48 cited witnesses.



4. Though, appellant had been arrested for offence under Section 124-A IPC as well but admittedly, the aspect related to constitutionality of said penal provision was raised before the Hon'ble Supreme Court. Reference be made to *S.G. Vombatkere Vs. Union of India*: (2022) 7 SCC 433 wherein the Apex Court gave certain directions regarding stay of trial of all the proceedings arising out of offence punishable under Section 124-A IPC. Relevant extract of said order is as under: -

“5. In view of the above, it is clear that the Union of India agrees with the prima facie opinion expressed by this Court that the rigours of Section 124-A IPC are not in tune with the current social milieu, and was intended for a time when this country was under the colonial regime. In light of the same, the Union of India may reconsider the aforesaid provision of law.

6. This Court is cognizant of security interests and integrity of the State on one hand, and the civil liberties of citizens on the other. There is a requirement to balance both sets of considerations, which is a difficult exercise. The case of the petitioners is that this provision of law dates back to 1898, and pre-dates the Constitution itself, and is being misused. The Attorney General had also, on an earlier date of hearing, given some instances of glaring misuse of this provision, like in the case of recital of the Hanuman Chalisa.

7. Therefore, we expect that, till the re-examination of the provision is complete, it will be appropriate not to continue the usage of the aforesaid provision of law by the Governments.

8. In view of the clear stand taken by the Union of India, we deem it appropriate to pass the following order in the interest of justice:

8.1. The interim stay granted in WP (Crl.) No. 217 of 2021 along with WP (Crl.) No. 216 of 2021 vide order dated 31-5-2021 [Aamoda Broadcasting Co. (P) Ltd. v. State of A.P., (2022) 7 SCC 437] shall continue to operate till further orders.

8.2. We hope and expect that the State and Central Governments will restrain from registering any FIR, continuing any investigation or taking any coercive measures by invoking Section 124-A IPC while the aforesaid provision



of law is under consideration.

8.3. If any fresh case is registered under Section 124-A IPC, the affected parties are at liberty to approach the courts concerned for appropriate relief. The courts are requested to examine the reliefs sought, taking into account the present order passed as well as the clear stand taken by the Union of India.

8.4. All pending trials, appeals and proceedings with respect to the charge framed under Section 124-A IPC be kept in abeyance. Adjudication with respect to other sections, if any, could proceed if the courts are of the opinion that no prejudice would be caused to the accused.

8.5. In addition to the above, the Union of India shall be at liberty to issue the directive as proposed and placed before us, to the State Governments/Union Territories to prevent any misuse of Section 124-A IPC.

8.6. The above directions may continue till further orders are passed.”

5. Consequent to such directions, the appellant prayed for stay of the trial and also sought bail. However, learned Special Court declined the same. Such order dated 23.07.2022 was assailed before this court and in terms of order passed by this Court on 31.0.2022 in Crl. A. 347/2022, the trial of the present case is lying stayed in the sense that recording of evidence of material witnesses is on hold. Such order was passed on the basis of mutual consent of the parties with the direction that such witnesses be not examined by the learned Special Court till the decision of the Hon'ble Supreme Court.

6. Thus, the trial is lying in limbo, at the moment.

7. Appellant, being in incarceration for more than four years, sought bail relying on provision contained under Section 436-A Cr.P.C.



8. Learned Trial Court, being conscious of the fact that so far as Section 124-A IPC was concerned it was to be kept aside, considered the sentence provided for other offences and noticed that Section 13 of UAPA was the grave most one which attracted maximum sentence of seven years.

9. Though, the appellant had, unquestionably, undergone half of the maximum sentence, learned Trial Court *declined to enlarge him on bail holding that the facts of the present case were not normal and thus considering the severity of the allegations, no relief was granted to him.*

10. It is in the aforesaid premise that the present appeal has been filed under Section 21(4) of National Investigation Agency Act, 2008.

11. Section 436-A Cr.P.C. reads as under: -

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.



12. As noted already, there is no dispute that the appellant has already served more than half of the maximum sentence.

13. Learned Trial Court excluded, and rightly so, the offence of Section 124-A IPC from the scope of consideration, keeping in mind the directions given by the Hon'ble Supreme Court in *S.G. Vombatkere Vs. Union of India* (supra).

14. A careful perusal of Section 436-A Cr.P.C. would indicate that bail is not always automatic and, therefore, it cannot be claimed as a matter of right. As per proviso, a discretion is vested in Court and it may, for reasons to be recorded in writing, decline the bail and may order for continued detention of such person for further period. Moreover, while computing the period of detention under said section, the period of detention passed due to delay in proceedings caused by the accused is also liable to be excluded.

15. In the case in hand, a bare perusal of the impugned order would reflect that the following reasons weighed with the learned Trial Court while declining such relief: -

(i) *In exceptional circumstances, Court can decline such relief and bail under Section 436-A Cr.P.C. cannot be granted mechanically.*

(ii) *Allegations against the appellant are serious in nature and the speeches made by him resulted in riots, causing violence and huge damage to public property and also in death of large number of people.*

16. There is no other reason mentioned in the impugned order. It was neither pointed out that any period was liable to be excluded on the ground that any delay had been caused by the appellant nor there is any observation to said effect by the learned Trial Court.



17. During course of the arguments, Mr. Rajat Nair, SPP for State has contended that bail can be declined if it is found that delay has been caused by the accused himself. It has been vehemently contended that the delay is solely attributable to the accused as it was at his instance that trial was stayed in the year 2022. It is argued that on one hand, he had sought stay of trial and on the other, he is trying to take advantage on the ground that he has suffered half of the maximum sentence. It is argued that he himself is shying away from facing trial and has employed dilatory tactics to ensure that the trial does not reach to its logical conclusion. It is contended that for the reasons best known to the appellant, he has not chosen to face the trial for other offences and, therefore, he cannot be permitted to take benefit of Section 436-A Cr.P.C. and, therefore, the present case is squarely covered under the explanation attached with Section 436-A Cr.P.C.

18. We, however, do not find any force in such contention.

19. If any accused chooses to avail legal remedy and that too in terms of specific judicial pronouncement, he cannot be blamed for causing delay in the matter. Since he continued to be in detention, he was, even otherwise, not going to dig out any advantage at all, by exploring such other possible legal avenues.

20. As noted already, such stay was given by this Court on the basis of joint statements of parties and such order has not even been further challenged by State.

21. Moreover, no such objection regarding delay was taken by prosecution before the learned Trial Court. On the contrary, a very strange argument was raised before the learned Trial Court by State. It was



contended that if conviction is recorded, the sentence likely to be awarded is to be seen in terms of the legal provision under section 31 Cr.P.C., which prescribes that when a person is convicted at one trial for two or more offences, the punishments shall run one after the other, unless the court, in its discretion, orders that the punishments shall run concurrently. Obviously, such contention did not cut any ice.

22. Be that as it may, we have to be mindful of the objective behind incorporating Section 436-A Cr.P.C. This benevolent provision has been introduced by Criminal Procedure Code (Amendment) Act 2005 with the idea that no undertrial prisoner is detained in jail beyond half of the maximum sentence provided for such offences. Undoubtedly, as per proviso, Court can order further detention but the reasons have to be rational and logical, else the very purpose of introducing the provision would stand defeated.

23. Learned Trial Court got swayed by the enormity of the allegations, observing that he had made inflammatory speeches which resulted in riots, the bail was declined.

24. We have already observed in *Abdul Subhan Qureshi Vs. State (NCT OF DELHI)*: 2024 SCC OnLine Del 3485 that mere fact that the allegations against the appellant were serious in nature, cannot be taken as a ground for declining such relief provided under Section 436-A Cr.P.C. If any such accused has merely attempted to avail legal remedies, it cannot be taken as an adverse conduct, disintitling him seeking release.

25. In the case in hand, we do not find any justifiable reason which could have compelled the Court from not granting the relief. We may also make



reference to *Ajay Ajit Peter Kerkar Vs. Directorate of Enforcement & Anr.:* CRL. Appeal Nos. 2601-2602 of 2024 (DOD: 16.05.2024) (Arising out of S.L.P. (Criminal) Nos. 6090-6091 of 2024). In that case, trial had not started and even charges had not been framed and the learned Trial Court denied the relief owing to the ground that trial had been delayed at the instance of the accused. It was noticed by the Hon'ble Supreme Court that there was no reason or occasion for the said accused to cause delay in the trial as even the charges had not been framed and finding that there was no other adverse circumstances against the accused, benefit under Section 436-A Cr.P.C. was passed on to the accused.

26. Herein also, we have no hesitation in holding that there was, actually speaking, nothing on record which could have disentitled the accused from seeking relief under Section 436-A Cr.P.C.

27. Resultantly, we hereby allow the appeal and direct that appellant be released on bail on terms and conditions to be imposed by the learned Trial Court.

28. A copy of order be immediately transmitted to the learned Trial Court for due compliance.

29. Appeal stands disposed of accordingly.

SURESH KUMAR KAIT, J

MANOJ JAIN, J

MAY 29, 2024/dr