JAHIR HAK

v.

THE STATE OF RAJASTHAN

(Criminal Appeal No. 605 of 2022)

April 11, 2022

[K. M. JOSEPH AND HRISHIKESH ROY, JJ.]

Code of Criminal Procedure, 1973: s.439 – Application for anticipatory bail by undertrial prisoner who has undergone 8 years of incarceration – Appellant was arrested in connection with FIR for offences punishable under ss.10, 13, 15 to 18, 18A, 18B, 19, 20, 23 and 38 of 1967 Act – Charges were framed against him on 29.01.2018 – Appellant has been in custody for a period of 8 years – By impugned order, his application for bail was rejected by High Court – On appeal, held: Appellant is charged with offences, some of which are punishable with a minimum punishment of 10 years and the sentence extending to imprisonment for life – The condition in s.43D(5) of the Act of 1967 has been understood to be less stringent than the provisions contained in Narcotic Drugs and Psychotropic Substances Act, 1985 – Prosecution seeks to examine as many as 109 witnesses of which only 6 witnesses have been fully examined so far – In view of nature of the case against the appellant, the evidence and long period of incarceration that he has already undergone, appellant released on bail subject to such conditions as shall be fixed by the trial court – Unlawful Activities (Prevention) Act, 1967 – ss.10, 13, 15, 16, 17, 18, 18A, 18B, 19, 20, 23 and 38

Union of India v. *K. A. Najeeb* **(2021) 3 SCC 713 – relied on.**

Case Law Reference

(2021) 3 SCC 713	**relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.605 of 2022.

From the Judgment and Order dated 24.03.2021 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Miscellaneous Bail Application No.14646 of 2020.

A Mohd. Irshad Hanif, Mujahid Ahmed, Rizwan Ahmed, Danish Sher Khan, A. R.Siddiqui, Mohit Kumar, Advs. for the Appellant.

Ms. Pragati Neekhra, Adv. for the Respondent.

The following order of the Court was passed:

B **ORDER**

Leave granted.

(1) By the impugned order, the appellant is denied bail which is sought under Section 439 of the Code of Criminal Procedure. The appellant was arrested on 08.05.2014 in connection with FIR 113/2014 C of Police Station Pratapnagar, Jodhpur for offences punishable under Sections 10, 13, 15, 16, 17, 18, 18A, 18B, 19, 20, 23 and 38 of the Unlawful Activities (Prevention) Act, 1967 (in short 'Act of 1967').

(2) A chargesheet came to be filed against the appellant on 17.09.2014. Charges have been framed against the appellant on D 29.01.2018. It is not in dispute that the appellant has been in custody for a period of almost 8 years. As far as stage of the case is concerned, examination of only 6 witnesses have been completed. The seventh witness is being examined. Ms. Pragati Neekra, learned counsel for the State, does not dispute the fact that there are 109 witnesses. Without much dispute, it can be found that the appellant who is an undertrial E prisoner, has already undergone a long period of incarceration.

(3) This Court issued notice in this matter on 29.09.2021. Thereafter the matter came up on 26.11.2021 wherein the complaint of the appellant that out of 180 witnesses cited by the prosecution, evidence of not even a single witness was complete was noted; the counsel for the State, was F asked to get instructions and also to submit before the Court as to the approximate time within which the trial can be concluded.

(4) Thereafter this Court passed the following order on 03.12.2021:

"The petitioner is in custody since the last 7 years. Learned G counsel for the State submits that there are a total of 109 witnesses for prosecution. It is common case that the evidence of even the first witness is not yet completely recorded. In the circumstances, we think it fit to call for a report from the Additional District and Sessions Judge, No. 3, Jodhpur City, as to within what time the trial in the case can be concluded. Accordingly, we direct that

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Additional District and Sessions Judge, No. 3, Jodhpur City, shall send a report as to the earliest point of time when the trial can be concluded. The report to be sent within a period of three weeks from today.

List the case on 10th January, 2022."

Pursuant to the said order, a report was filed by the Judge concerned wherein it was indicated that there is quite a probability of taking at least 2 to 3 years in disposal of the instant case. The said report is dated 20.12.2021.

(5) Thereafter, again, this matter was taken up on 19.01.2022. On the said date, the following order was passed:

"After hearing the learned counsel for the parties, we are of the view that interest of justice requires that the State places an affidavit before us indicating the position of the other accused with charges against them and the difference, if any, between the petitioner and the other accused. The affidavit shall also indicate about the need for any measures to protect the witnesses who will depose in the trial. The affidavit shall be file on or before 24.01.2022.

The petitioner will be free to file affidavit-in-reply to the affidavit which we have ordered the State to file.

List the matter on 25.01.2022.

(6) Still further, the following order passed on 04.02.2022:

"By the impugned order, the High Court has rejected the application for bail maintained by the petitioner under the provisions of the Unlawful Activities (Prevention) Act, 1967.

We have heard learned counsel for the petitioner and also the learned counsel appearing for the respondent-State.

The petitioner has been in custody since 08.05.2014, that is almost for 8 years. Based on an order passed by this Court as to the possibility of an early disposal of the trial itself, the report indicates that even after putting every effort in the matter and keeping in view the number of witnesses, accused persons, Advocates, cross examination by them and the number of cases pending in the Court, there is probability of at least 2-3 years for the disposal in the case.

A In the affidavit filed by the State before this Court by way of compliance with the order passed by this Court asking the respondent to indicate about the need for any measures to protect the witnesses who would depose in trial, it has been stated that a total of 110 witnesses shall be deposing during trial out of which, the statements of three prosecution witnesses have already been recorded. It is further stated that the concerned official had contacted the private witnesses out of whom three witnesses have apprehended danger to their lives to depose against the accused during trial.

Learned counsel for the petitioner would point out that such an apprehension has not been raised during the past eight years and it is frivolous and there is no threat from the petitioner. This is besides reiterating that there is no material against the petitioner whereas the learned counsel for the State would, on her part, reiterate that it is a matter where very serious offences are alleged and is not a case where bail may be granted to the petitioner. She further would point out that the trial is progressing and the State is also taking effective steps for an early disposal of the matter.

We are of the view that in the facts of this case, when the petitioner has already spent nearly 8 years in custody, the appropriate order to pass would be to first direct the examination of the three witnesses who have raised concerns about threat to their lives from the accused and the matter should receive attention of this Court after their evidence is adduced. However, these witnesses must be examined on a priority basis. In such circumstances, we pass the following order:

There will be a direction that the respondent-State shall ensure that these witnesses are examined on priority basis and that, at any rate, the examination is completed within a maximum period of two months from today.

List this case for further consideration on 11.04.2022.

The State will ensure that the deposition of the witnesses in question shall be placed before this Court after translation on or before 08.04.2022."

Today the depositions of witnesses mentioned in the order dated 04.02.2022 have been placed before the Court.

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(7) The learned counsel for the appellant would point out that witness named Devendra Patel has been declared hostile. As far as the other two witness - Hemant and Pappuram examined on behalf of the prosecution are concerned, it is pointed out by the learned counsel for the appellant that there is nothing in the deposition of the said witnesses which implicates the appellant. This aspect, as such, is not disputed by the learned counsel for the State. No doubt, the learned counsel for the State does point out that in the nature of the case set up against the appellant, there would be further evidence which may unfold.

(8) In this regard, the basis of the case against the appellant appears to be largely the fact that he was found to be in touch with one of the accused and which is sought to be made good by conversations which the appellant is alleged to have engaged in with that accused on 31 occasions, who is a co-villager. According to the respondent, the said accused is the head of a sleeper cell *module* of Indian Mujahideen.

(9) We bear in mind the judgment of this Court reported in *Union of India* v. *K. A. Najeeb* (2021) (3) SCC 713. Therein, the following observations cannot be overlooked:

> "12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act") which too have somewhat rigorous conditions for grant of bail, this Court in *Paramjit Singh* v. *State (NCT of Delhi)* [*Paramjit Singh* v. *State (NCT of Delhi)*, (1999) 9 SCC 252 : 1999 SCC (Cri) 1156] , *Babba* v. *State of Maharashtra* [*Babba* v. *State of Maharashtra*, (2005) 11 SCC 569 : (2006) 2 SCC (Cri) 118] and *Umarmia* v. *State of Gujarat* [*Umarmia* v. *State of Gujarat*, (2017) 2 SCC 731 : (2017) 2 SCC (Cri) 114] enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.
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> 19. Yet another reason which persuades us to enlarge the respondent on bail is that Section 43-D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS Act. Unlike the NDPS Act where the competent court needs to be satisfied that prima facie the accused is not guilty and that he is

A unlikely to commit another offence while on bail; there is no such precondition under UAPA. Instead, Section 43-D(5) of the UAPA merely provides another possible ground for the competent court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion, etc."

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(10) No doubt, in the said case, as pointed out by the learned counsel appearing on behalf of the State, the Court was dealing with an order passed by the High Court granting bail, whereas, in this case, the converse is true, that is, the impugned order is one rejecting the application for bail. The fact remains that the appellant has been in custody as an undertrial prisoner for a period of nearly 8 years already. The appellant, it may be noted, is charged with offences, some of which are punishable with a minimum punishment of 10 years and the sentence may extend to imprisonment for life. Learned counsel for the appellant also points out that one of the co-accused namely Shri Aadil Ansari has been released on bail on 30.09.2020 by this Court. No doubt, in this regard, we keep in mind the submission of the State that the role attributed to the said accused is different.

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(11) The condition in Section 43D(5) of the Act of 1967 has been understood to be less stringent than the provisions contained in Narcotic Drugs and Psychotropic Substances Act, 1985, as already noticed by us. We would think that in the nature of the case against the appellant, the evidence which has already unfolded and above all, the long period of incarceration that the appellant has already undergone, time has arrived when the appellant be enlarged on bail. We bear in mind the fact that the prosecution seeks to examine as many as 109 witnesses of which only 6 witnesses have been fully examined so far. Accordingly, we allow the appeal, set aside the impugned order and direct that the appellant shall be released on bail subject to such conditions as shall be fixed by the trial Court.

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Needless to say, the observations which have been made in this order are for the purpose of deciding the application for bail and the Court will, undoubtedly, decide upon the fate of the appellant in the trial on the basis of the evidence and in accordance with law.

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Devika Gujral Appeal allowed.