

A.F.R.**Neutral Citation No. - 2024:AHC:52164****Reserved on 20.03.2024****Delivered on 22.03.2024****Court No. - 77****Case :- APPLICATION U/S 482 No. - 3614 of 2024****Applicant :- Amar Mani Tripathi****Opposite Party :- State of U.P. and Another****Counsel for Applicant :- Ajatshatru Pandey, Sr. Advocate****Counsel for Opposite Party :- G.A.****Hon'ble Sanjay Kumar Singh,J.**

1-Heard Mr. G. S. Chaturvedi, learned Senior Advocate assisted by Mr. Ajatsatru Panday learned counsel for the applicant, Mr. A.K. Sand, learned Government Advocate, assisted by Mr. J.K. Upadhyay, Mr. Rabindra Kumar Singh and Mr. Deepak Mishra, learned Additional Government Advocates for the State of U.P. and perused the record.

Relief

2-The instant application under Section 482 Cr.P.C. has been preferred by the applicant for staying the order dated 01.11.2023 passed by the 7th Additional District and Sessions Judge/Special Judge (M.P./M.L.A.) Basti as well as for staying the further proceeding of S.T. No. 02 of 2022 (State versus Shivam @ Ram Yagya and others), arising out of case crime no. 1207 of 2001, under Sections 363, 364, 364A, 216A, 212, 120B IPC and Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Basti, pending in the Court of 7th Additional District and Sessions Judge / Special Judge (M.P. / M.L.A.), Basti.

Facts of this case

3-This is old matter of the year 2002. Brief facts of the case which are required to be stated in chronological order as pointed out by the learned counsel for the parties are as follows:

3.1-On 06.12.2001, a first information report was lodged by one Dharmraj Maddheshiya against some unknown persons alleging inter-alia that as usual, today my son Rahul Maddheshiya left the house for school at around 07:45 am on a bicycle in gray coloured pant, white long sleeves shirt, maroon coloured half sweater and blazer. When he reached in front of Dr. Ramkumar Gupta's house, some people suddenly came in a white coloured Maruti Car and started forcing him to sit in car. When he protested, they beat him up, forced him to sit in car and ran away. Many people present there have seen the incident. Said report was registered as Case Crime No. 1207 of 2001, under Section 364 I.P.C. at Police Station Kotwali, District Basti.

3.2-In above case after culmination of investigation charge-sheet No. 25 of 2002 dated 26.01.2002 under Sections 364, 364A, 216A, 212, 120B I.P.C. was filed against the applicant-Amar Mani Tripathi by the investigating officer in the Court of Chief Judicial Magistrate, Basti. The applicant-Amar Mani Tripathi surrendered in the above case crime no. 1207 of 2001 before the concerned court below and his bail application was rejected by the Special Judge, E.C. Act, Basti vide order dated 30.01.2002. Subsequently he had been granted bail by the High Court vide order dated 01.02.2002.

3.3-After approval of gang chart on 05.01.2002 by the District Magistrate, charge sheet No. 25A dated 30.05.2002 under Sections 364, 364A, 216A, 212, 120B I.P.C. and Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986

was filed against co-accused Sandeep Tripathi, Hanuman Shukla, Shivam alias Ram Yagya, Ajay Mishra, Mainesh Sharma and Anand Singh in the Court of Special Judge (Gangster Act), Gorakhpur.

3.4-When new District Magistrate, took over charge in district Basti, he directed to prepare revised gang chart of all the accused persons, who were involved in case crime no. 1207 of 2001. Accordingly fresh gang chart of all the accused namely Amar Mani Tripathi, Sandeep Tripathi, Hanuman Shukla, Shivam Shukla, Ajay Mishra, Nainesh Sharma, Anand Singh, Ramvilas, Jag Prasad Verma and Santosh Shukla was prepared by senior Sub-Inspector Kotwali, Basti on 30.06.2002, which was recommended by then Superintendent of Police, Basti on 15.07.2002 and finally approved by the District Magistrate on 02.09.2002.

3.5-After aforesaid approval dated 02.09.2002, charge-sheet no. 25B dated 26.10.2002 under Sections 364, 364A, 216A, 212, 120B I.P.C. and Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 was filed against co-accused Ram Vilash and Jag Prasad in the Court of Special Judge (Gangster Act) Gorakhpur.

3.6- Thereafter a separate charge-sheet no. 25C dated 26.10.2002 under Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 was filed against the applicant-Amar Mani Tripathi in the Court of Special Judge (Gangster Act) Gorakhpur.

Facts of the case U/S 302 IPC against the applicant.

3.7-In the year 2003, the applicant was involved in murder case of Madhumita Shukla, who was shot dead in her house on 9th May, 2003. Nidhi Shukla lodged a First Information Report in regard to the blind murder of her sister Madhumita Shukla on 9.5.2003 in the Mahanagar Police Station, Lucknow. The case was transferred

to Crime Branch, CID on 17.5.2003. Thereafter on a request made by the State of U.P. on 17.6.2003, the C.B.I. took over the investigation. Amarmani Tripathi was arrested in said case on 23.9.2003. On 19.12.2003 a charge-sheet was filed against six accused, namely, Santosh Kumar Rai @ Satya Prakash, Prakash Chander Pandey @ Pappu, Rohit Chaturvedi, Madhumani Tripathi, Amarmani Tripathi and Yagya Narain Dixit. Amar Mani Tripathi was granted bail in the said case vide order dated 29.04.2004 by the High Court.

3.8-The C.B.I., aggrieved by the bail order dated 29th April, 2004 of Amar Mani Tripathi passed by Allahabad High Court (Lucknow Bench), has filed Criminal appeal No. 1248 of 2005 before the Hon'ble Supreme Court, which was allowed by order dated 26.09.2005 (**reported in (2005) 8 SCC 21**) and bail granted to Amarmani Tripathi by High Court vide order dated 29.04.2004 was cancelled directing him to surrender forthwith.

3.9-Complainant-Nidhi Shukla and Smt. Shanti Shukla (sister and mother of the deceased-Madhumita Shukla respectively) also preferred Transfer Petition (Crl.) No. 465 of 2005 before the Hon'ble Supreme Court for transfer of trial of Madhumita Shukla's murder case, which was allowed vide order dated 08.02.2007 and trial of applicant-Amarmani Tripathi in the said case was transferred to the trial court at Dehradun.

3.10- In Madhumita Shukla's murder case, applicant has been convicted by the trial court under sections 120 r/w 302 IPC and sentenced to imprisonment for life vide judgment and order dated 24.10.2007, against which applicant preferred criminal appeal no. 517 of 2007 before the High Court of Uttarakhand, Nainital, which had been dismissed vide order dated 16.7.2012. The said order was challenged before the Apex Court, but the same met with the

same fate vide order dated 18.02.2013 by the Hon'ble Supreme Court. Accordingly applicant has served the sentence pursuant to above order of conviction dated 24.10.2007 and after serving total 20 years 1 months 19 days (including remission) in jail, premature release order was passed vide order 24.08.2023 by the State Government of Uttar Pradesh. Thereafter applicant was released on 25.08.2023 from district-jail Gorakhpur.

3.11-The present case is related to proceeding arising out of charge-sheet no. 25C dated 26.10.2002 filed in above case crime no. 1207 of 2001 under Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 against the applicant-Amar Mani Tripathi. On 22.10.2008 above case had been transferred from the Court of Special Judge (Gangster Act), Gorakhpur to the Court of Special Judge (Gangster Act), Basti. Thereafter on 21.09.2022 case has been transferred to the Court of 7th Additional District and Sessions Judge / Special Judge (M.P. / M.L.A.), Basti.

3.12-Vide order of this Court dated 06.03.2024, complete order sheet of trial Court of this case was summoned, which is made part of record of this case.

3.13-The order sheet of the trial Court of this case shows that on the supplementary charge sheet no. 25 C dated 26.10.2002 under Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, the concerned Court below took cognizance of the offence on 17.12.2002. From 16.08.2003 to 06.05.2008 summons were being issued to the accused persons. Thereafter since 26.02.2009 non-bailable warrants were being issued against the accused persons. From 08.08.2011, non-bailable warrants and since 17.06.2015 non-bailable warrants along with process

under Section 82 and 83 Cr.P.C. are continuously being issued against the applicant-Amar Mani Tripathi. From the order sheet dated 30.07.2015, it appears that service report (paper no.146 kha) of the police station had been produced before the Trial Court, wherein accused-Amar Mani Tripathi's detention in District Jail Gorakhpur was mentioned, on which trial Court directed to keep the said report in the record. Trial Court on 12.09.2019, 26.09.2019, 10.10.2019 and 25.11.2019 directed to issue letter to the Superintendent of Police, Basti to ensure the presence of the applicant but it appears that no response was given by then officers in the matter.

3.14-On 23.01.2020 file of the applicant-Amar Mani Tripathi along with accused Hanuman Shukla and Shivam alias Ram Yagya was separated from other co-accused. Thereafter on 09.08.2022 case of the applicant along with absconding accused has been allotted different number and registered as S.T. No. 02 of 2022 in the said Court.

3.15-Order-sheet dated 17.08.2023 of the case shows that pursuant to order of the trial Court and communication letter dated 02.03.2023, Superintendent of Police Basti was directed to ensure the service of N.B.W. on Amar Mani Tripathi, on which, the Senior Superintendent of District Jail, Gorakhpur submitted a report to the Court that accused Amar Mani Tripathi was sent to B.R.D. Medical College Gorakhpur for treatment on 26.10.2021. When trial Court through letter dated 23.05.2023 called a clear report about the physical health of Amar Mani Tripathi from the Principal B.R.D. Medical College, Gorakhpur, then he did not submit clear report about health and illness etc. of accused Amar Mani Tripathi. Under the circumstances, the trial Court looking to the conduct of Principal, B.R.D. Medical College Gorakhpur, passed

an order dated 17.08.2023 directing the Chief Medical Officer, Gorakhpur to constitute an independent medical board and immediately send report regarding health of accused Amar Mani Tripathi, but despite service of order dated 17.08.2023 of the trial Court, the Chief Medical Officer, Gorakhpur also did not submit report by the next date i.e. on 24.08.2023. The trial Court on 28.08.2023 again by expressing annoyance passed order directing the Chief Medical Officer to send required report. Thereafter the Chief Medical Officer, Gorakhpur submitted report dated 11.09.2023 mentioning that treatment of '*Recurrent depressive disorders along with other multiple medical comorbidities*' of Amar Mani Tripathi is going on. The trial court, considering the above report, passed an order dated 15.09.2023 directing the Senior Jail Superintendent, District Jail Gorakhpur to produce Amar Mani Tripathi before the Court on 16.10.2023 for framing the charge. On 16.10.2023 Senior Jail Superintendent, District Jail, Gorakhpur submitted report before the trial court mentioning that on 24.08.2023 State Government has passed order for premature release of Amar Mani Tripathi, accordingly he has been released on 25.08.2023 from district-jail Gorakhpur. Since applicant-Amar Mani Tripathi despite being released from jail on 25.08.2023, did not appear before the trial court in the case in hand, hence trial court has issued non-bailable warrant on 16.10.2023 against him fixing further date as 01.11.2023, but again he did not appear and moved an application dated 25.10.2023 through his counsel for recall of non-bailable warrant dated 16.10.2023, which has been dismissed by the trial Court vide order dated 01.11.2023 observing that since applicant is not physically present, therefore, his application is not maintainable. The process under Section 82 Cr.P.C. was also issued against the applicant fixing 16.11.2023.

The said order dated 01.11.2023 is the subject matter of challenge in the present case.

3.16-On 16.11.2023 applicant moved two applications dated 16.11.2023. through his counsel. One application was moved with a prayer to grant some time to the applicant for his appearance before the trial Court. The second application was moved with a prayer that applicant is on bail under Sections 364, 364A, 216A, 212, 120B I.P.C., therefore it would be appropriate to allowed him to remain on bail in added Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, on earlier bail bond or he may be allowed to furnish fresh bail bonds and sureties. Said applications were rejected by order dated 16.11.2023 on the ground that despite order of N.B.W. and process under Section 82 Cr.P.C., applicant did not personally present before the Court and the superintendent of police, Basti has also not taken any effective steps in the matter. Trial Court further directed that in case applicant does not appear on the next date, i.e. 02.12.2023, proceeding under Section 83 Cr.P.C. shall be initiated against him. On 02.12.2023 also neither superintendent of police, Basti has taken any pain to ensure the compliance of above orders of the Court nor applicant appeared before the trial Court, therefore the order under Section 83 Cr.P.C. has been passed against the applicant on 02.12.2023 but the same has not yet been executed by the police concerned.

Submissions on behalf of the applicant

4-Mr. G.S. Chaturvedi, learned Senior Advocate for the applicant submits that:-

(i)- Initially the applicant had been granted bail vide order dated 01.02.2002 of the High Court in Case Crime No. 1207 of 2001,

under Sections 364, 364A, 216A, 212, 120B I.P.C. Thereafter supplementary charge-sheet no. 25C dated 26.10.2002 was illegally filed in above case crime no. 1207 of 2001 under Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 against the applicant-Amar Mani Tripathi.

(ii)-The applicant was in jail in connection with Madhumita Shukla's murder case as noted above and after his conviction vide judgment and order dated 24.10.2007 of the trial court under sections 120 r/w 302 IPC and sentence of imprisonment for life, applicant came out of jail on 25.08.2023 after serving total 20 years sentence.

(iii)-The applicant was continuously in jail since October 2005 to 24.08.2023, but trial court instead of issuing B warrant has been continuously issuing N.B.W. since the beginning in violation of Provisions of Section 267 Cr.P.C. but no notice, summon or N.B.W., etc. was ever served upon the applicant after submission of charge-sheet no. 25C dated 26.10.2002, therefore applicant had no knowledge about the same, hence earlier he could not appear before the concerned Court below.

(iv)-Lastly referring to two judgments of the Apex Court in the cases of **State of A.P. versus Golconda Linga Swamy and another (2004) 6 Supreme Court Cases 522** and **Ramesh Chandra Gupta Versus State of U.P. and others 2022 SCC On Line SC 1634**, much emphasis has been given by contending that powers possessed by High Court under Section 482 Cr.P.C. are very wide. Since applicant has come out of jail after serving twenty years sentence in a case under Section 302 IPC., therefore in order to secure the end of justice, it would be appropriate that instead of insisting appearance of the applicant before the trial

court of this case, he may be allowed only to furnish bail bond and sureties in added Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act.

(v)-No other point has been pressed.

Submissions on behalf of the State of U.P.

5-On the other hand, Mr. A.K. Sand, learned Government Advocate appearing on behalf of the State refuting the submissions advanced on behalf of the applicant, contended that since charge-sheet No. 25 of 2002 dated 26.01.2002 under Sections 364, 364A, 216A, 212, 120B I.P.C. was already filed against the applicant, therefore after approval of gang chart by the District Magistrate on 02.09.2002, separate charge-sheet No. 25C dated 26.10.2002 under Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act was filed against the applicant, on which concerned court below took cognizance on 17.12.2002, but applicant did not appear before the trial court, although between 17.12.2002 and 22.09.2003 applicant was not in jail. Regarding non service of non-bailable warrants, it is argued that NBWs were issued by the Special Judge against the applicant on 12.09.2019, 26.09.2019, 10.10.2019 and 25.11.2019, but from the records of police station Kotwali, District Basti prior to 04.02.2023 no such non-bailable warrants have been received at the police station. Even there is no mention in the file of the trial court about receipt of above mentioned NBWs by any officials of the police station. It is also pointed out that applicant was not summoned by the trial court by issuing Warrant-B while applicant was in jail. It further submitted that when the applicant after serving twenty years sentence in a case under Section 302 I.P.C., released from jail on 25.08.2023, he, despite having knowledge of issuance of non-bailable warrant dated 16.10.2023 in case crime no. 1207 of 2001

against him, did not obtain bail pursuant to above charge-sheet No. 25C dated 26.10.2002. Efforts have been made to produce the applicant before the Court and in this regard, police team has raided at various possible places including his house, but in vain. On non-appearance of the applicant before the trial Court, proclamation under section 82 and 83 Cr.P.C. has been issued against the applicant. Lastly relying upon the Division Bench judgment dated 23.03.2006 of this Court in the case of **Babu Lal and others versus Smt. Momina Begum** and Single Bench judgment in the case of **Virendra Goel versus Union of India 2020** (3-5) ILR (Allahabad) 1519, it is submitted that provision of section 88 of Cr.P.C. is not attracted in non bailable offence, hence benefit of the same cannot be extended to the applicant in this case.

6- Mr. A.K. Sand, learned Government Advocate also produced the criminal history of the applicant, which has been taken on record vide order of this Court dated 20.03.2023. Details of the same are as under:

Sr. No.	Case Crime No.	Sections	Police Station
1.	8/81	364 IPC	Nautanwa, District Maharajganj
2.	109/84	143/ 352/ 504/506 IPC	Nautanwa, District Maharajganj
3.	110/84	143/352/504/506 IPC	Nautanwa, District Maharajganj
4.	113/84	147/148/149/307 IPC	Nautanwa, District Maharajganj
5.	113A/84	147/148/149/307 IPC	Nautanwa, District Maharajganj

6.	113B/84	147/148/149/307 IPC	Nautanwa, District Maharajganj
7.	144/86	147/504/506 IPC	Nautanwa, District Maharajganj
8.	70/93	406 IPC	Nautanwa, District Maharajganj
9.	87/93	448/323 IPC	Nautanwa, District Maharajganj
10.	93/93	147/148/353/323/50 4/506 IPC	Nautanwa, District Maharajganj
11.	91/93	506 IPC	Nautanwa, District Maharajganj
12.	84/93	296/504/506 IPC	Nautanwa, District Maharajganj
13.	164/84	457/380/120-B IPC	Nautanwa, District Maharajganj
14.	146/84	147/148/149/307/50 4/506 IPC	Nautanwa, District Maharajganj
15.	539/96	147/352/506 IPC	Nautanwa, District Maharajganj
16.	304/97	147/148/149/323/50 4/506 I.P.C. & 3(1)X SC/ST Act	Nautanwa, District Maharajganj
17.	105/93	323 IPC	Nautanwa, District Maharajganj
18.	1207/2001	363/364/364- A/216A/120-B IPC 3(1) U.P. Gangster Act	Kotwali, District Basti
19.	779/81	302 IPC	Kotwali, District Gorakhpur

20.	199/81	147/148/149/302 IPC	Kotwali, District Gorakhpur
21.	62A/82	253/147/148/149/30 7/302 IPC	Gorakhnath, District Gorakhpur
22.	353/82	147/148/149/307 IPC	Kotwali, District Gorakhpur
23.	351/82	147/148/149/307IPC	Kotwali, District Gorakhpur
24.	476/82	147/148/149/307/30 2 IPC	Gorakhnath, District Gorakhpur
25.	53/83	147/148/149/307 IPC	Kotwali, District Gorakhpur
26.	84/83	147/148/149/307/11 4/171 IPC	Patehrwa, District Deoria
27.	63/83	147/148/149/307/30 2 IPC	Purandarpur, Maharajganj
28.	277/83	147/148/149/307/30 2 IPC	Khalilabad, Sant Kabir Nagar
29.	271/84	382 IPC	Kotwali, District Gorakhpur
30.	310/84	3 U.P. Gangster Act	Cantt, District Gorakhpur
31.	45A/83	147/148/506/120-B IPC	Sonali, District Maharajganj
32.	146/94	147/148/307/501/50 6 IPC	Nautanwa, District Maharajganj
33.	1035/94	147/323/504//150 IPC & 3(1)X SC/ST Act	Cantt, Gorakhpur
34.	269/95	323/504/506 IPC & 3(1)(X) SC/ST Act	Nichloul, District Maharajganj
35.	543/96	147/148/149/307/50 4/506 IPC	Nichloul, District Maharajganj

36.	529/96	98A Land Reforms Act	Nichloul, District Maharajganj
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Issue

7-Under the facts of the case and in the light of submissions on behalf of the applicant, the moot questions which have arisen for consideration before this Court is :-

(i) Whether the criminal proceeding under the Gangster Act on the basis of single case is liable to be quashed or not?

(ii) whether the applicant who is already on bail under Section under Sections 364, 364A, 216A, 212, 120B I.P.C. and on filing separate charge sheet under Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act in the different designated Special Court, whether he can be allowed to furnish bail bond in cognizable and non bailable offence under Special Act, instead of seeking regular bail under Section 439 Cr.P.C. or not?

Discussion

8-Having heard the learned counsel for the parties and perusing the record, I find that indisputably from 02.02.2002 to 22.09.2003 and from 30.04.2004 to 26.09.2005 applicant was not in jail. Order sheet of this case indicates that though the order of non-bailable warrants against the applicant are being issued continuously since 17.06.2015 by the trial Court, but the there is no report or finding of the Court about service of non-bailable warrant upon the applicant whereas applicant was in jail. No sincere effort was made by the trial court to ensure the service of notice, summons or non-bailable warrants upon the applicant or issuance of B warrant to the applicant. The manner in which orders have been passed on the order-sheet since last twenty years from 2002 to 2022, the possibility of manipulation in the

matter adopting different modus operandi at each and every level can not be ruled out. No sincere efforts have been made to get the trial concluded at the earliest by the Court as well as prosecution. Only paper formalities have been done since 2002 and charge has been framed against five co-accused after about twenty years on 07.11.2022. Record of case relating to offence under Sections 364, 364A, 216A, 212, 120B I.P.C. pending before the Court of Chief Judicial Magistrate, Basti has been summoned recently on 02.12.2023. It is also not in dispute that from 25.08.2023 till date applicant is out of jail. After the release of the applicant from jail, non bailable warrant of arrest has been issued against him on 16.10.2023. First time, the applicant moved an application dated 25.10.2023 through his counsel for recall of non-bailable warrant dated 16.10.2023 without appearing in the concerned Court below, which has been dismissed vide impugned order dated 01.11.2023. Nowhere in the application dated 25.10.2023, it is mentioned by the applicant that earlier, he was not aware about charge-sheet no. 25C dated 26.10.2002 under Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act in Case Crime No. 1207 of 2001 against him. Even the date of knowledge about the non-bailable warrant dated 16.10.2023 has also not been disclosed, but it can be presumed that on the day of moving application dated 25.10.2023, the applicant who was not in jail, was fully aware about charge-sheet no. 25C dated 26.10.2002 as well as non-bailable warrants against him. As on date, the process under section 82 and 83 Cr.P.C. has been issued against him as noted above. Hence the applicant cannot be regarded as a free agent to appear or not to appear in the Court.

9-So far as first issue before this Court with regard to maintainability of the criminal proceeding against the applicant

under Section 3(1) of U.P. Gangsters and Antisocial Activities (Prevention) Act is concerned, I find that after wholesome treatment, the said issue has been settled by the Apex Court in the case of **Shraddha Gupta vs. State of Uttar Pradesh and Others**, 2022 SCC OnLine SC 514, in which it has been held that even a single crime committed by a 'gang' is sufficient to implant Gangster Act on such members of the 'gang'. In the light of said judgment, the prayer for quashing of the proceedings of this case under Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act is not liable to be allowed.

10-So far as second issue relating to furnishing a bond under Section 88 Cr.P.C. is concerned, it would also be useful to refer some relevant judgments of the Apex Court and High Court, wherein law has been settled in such matters.

(i)-The Hon'ble Apex Court in the case of **Hamida versus Rashid alias Rasheed and others** (2008) 1 SCC 747, has held that an accused after addition of serious non bailable offence is required to surrender and apply for bail for newly added offences. It is, thus, clear that the bail granted to an accused earlier to addition of new non-bailable offence shall not enure to the benefit of accused so far as newly added offences to save him from arrest.

(ii)-The Hon'ble Apex Court in the case of **Pankaj Jain versus Union of India and another** (2018) 5 SCC 743, considering several judgments on the issue including the judgment in the case of **Sanjay Chandra versus C.B.I.** 2011SCC Online Del 2365 has elaborately considered the provisions of Section 88 Cr.P.C. and held that the power under Section 88 Cr.P.C. is not mandatory. It does not confer any right on any person to be released on his furnishing a bond. Relevant observations made in paragraph nos. 21 and 22 of the judgment in the case of **Sanjay Chandra**

(Supra), which has been impliedly affirmed in the case of **Pankaj Jain (supra)** are as under :-

21. *The interpretation sought to be given by the petitioners is misconceived and based on incorrect reading of Section 88 Cr.P.C., which is reproduced thus:*

'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 a sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial'

22. *On reading of the above, it is obvious that Section 88 Cr.P.C. empowers the Court to seek bond for appearance from any person present in the Court in exercise of its judicial discretion. This Section also provides that aforesaid power is not unrestricted and it can be exercised only against such persons for whose appearance or arrest the Court is empowered to issue summons or warrants. The word used in the section are 'may require such person to execute a bond' and any person present in the Court. The user of word 'may' signifies that Section 88 Cr.P.C. is not mandatory and it is a matter of judicial discretion of the Court. The word 'any person' signifies that the power of the Court defined under Section 88 Cr.P.C. is not accused specific only, but it can be exercised against other category of persons such as witness whose presence the Court may deem necessary for the purpose of inquiry or trial. Careful reading of Section 88 Cr.P.C. makes it evident that it is a general provision defining the discretionary power of the Court, but it does not provide that how and in what manner this discretionary power is to be exercised. It does not confer any express right of the person / accused. The petitioners are accused of having committed non-bailable offences, therefore their case for bail falls within Section 437 Cr.P.C. which is the specific provision dealing with grant of bail to an accused in case of non-bailable offences. Thus on conjoint reading of section 88 and 437 of Cr.P.C. it is obvious that section 88 is not an independent section and it is subject to section 437 Cr.P.C. Therefore, I do not merit in the contention that order of*

learned Special Judge refusing bail to the petitioners is illegal being violative of Section 88 Cr.P.C”.

(iii)-The Patna High Court in the case of **Anand Deo Singh versus State of Bihar** 2000 SCC Online Pat 311, also had the occasion to consider Section 88 Cr.P.C. and held that:-

“8. In my considered view, Section 88 of the code is an enabling provision, which vests a discretion in the Magistrate to exercise power under the said section asking the person to execute a bond for appearance only in bailable cases or in trivial cases and it can not be resorted to in cases of serious offences. Section 436 of the code itself provides that bond may be asked for only in case of bailable offences.”

(iv)-This Court in the case of **Chheda Lal versus State of U.P.** 2002 (44) Allahabd Criminal Cases 286 has held that if accused of non-bailable offence appears before the Court, he has to apply for bail under chapter XXXIII of Cr.P.C. He can not be released on the bond of Section 88 Cr.P.C.

(v)-The Apex Court in the case of **Pradeep Ram versus State of Jharkhand and another** (2019) 17 SCC 326 has considered the issue *“Whether in a case where an accused has been bailed out in a criminal case, in which case, subsequently new offences are added, is it necessary that bail earlier granted should be cancelled for taking the accused in custody.” ?*

The Apex Court answered the aforesaid issue in para 31, which are as under:-

“31. In view of the foregoing discussions, we arrive at the following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:

31.1 The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

31.2 The investigating agency can seek order from the court under Section 437(5) or 439(2) Cr.P.C. for arrest of the accused and his custody.

31.3 The court, in exercise of power under Section 437(5) or 439(2) Cr.P.C., can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-bailable offences which may not be necessary always with order of cancelling of earlier bail.

31.4 In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it needs to obtain an order to arrest the accused from the court which had granted the bail.

(vi)-The Hon'ble Apex Court in the case of **Niranjan Singh and another Versus Prabhakar Rajaram Kharote and others, (1980) 2 SCC 559**, considering the question as to whether bail can be granted to an accused, who is not in custody, held that no person accused of an offence can move the court for bail under Section 439 Cr.P.C. unless he is in custody. Further considering as to when a person can be said to be in custody the Hon'ble Apex Court held that if he is in duress either because he is held by the investigating agency or the police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. The Apex Court has further held that the 'custody', in the context of Section 439 Cr.P.C. is physical control or at least physical presence of the accused in court coupled with submission of jurisdiction and orders of the court.

11-So far as judgments in the case of **State of A.P. versus Golconda Linga Swamy and another (Supra)** and **Ramesh**

Chandra Gupta Versus State of U.P. and others (Supra)

relied upon on behalf of the applicant are concerned, I find that there is no dispute about the propositions laid down in the said cases, but the same are distinguishable on the facts of this case. It is well settled in the said cases also and it was held that though the powers of High Court under Section 482 Cr.P.C. are very wide, but the Court must be careful to see that its decision in exercise of this power is based on sound reasoning. It is well settled that that every case turns on its own facts. Even one additional or different fact may make a big difference between the conclusion in two cases, because even a single significant detail may alter the entire aspect.

Conclusion

12- Considering the above mentioned judgements, I find that law is well settled that if accused has been summoned for a cognizable and non-bailable offences, he cannot apply for utilization of Section 88 Cr.P.C. The accused has to apply for regular bail in accordance with law and Court has to decide the bail application on merits. In other words it can be said that the cases, where provisions of Chapter XXXIII of Code of Criminal Procedure would be applicable, they cannot be dealt with by the procedure provided under Section 88 Cr.P.C. The considerations for granting bail are different and includes several other aspects, which are not to be considered while applying Section 88 Cr.P.C. It is further clarified by taking a example, where a person is accused of a bailable offence and process are issued, as and when he appears before the Court either after his arrest or detention or otherwise, if he shows his readiness to give bail to the Court, he shall be released on bail. But where a person is accused of non-bailable offence, as and when he appears before the Court

whether by arrest or detention or otherwise, he may be released on bail under Section 437 Cr.P.C or 439 Cr.P.C. as the case may be subject to satisfaction of certain parameters settled for grant of bail. Here it is also relevant to mention that where there is overlapping power or provision, but one provision is specific while other is general, the law is well settled that specific and special provision shall prevail over the general provision in the matter of accused. Since the procedure with respect to bail and bonds, is provided under Chapter XXXIII of Cr.P.C., in my view, under the facts of this case, Section 88 Cr.P.C. would not be attracted, hence submissions advanced on behalf of the applicant are not liable to be accepted.

13-In the light of the above discussion, I could not persuade myself to extend the benefit of Section 88 Cr.P.C. to the applicant.

Result

14-As a fall out and consequence of above discussion and principles of law laid down by the Hon'ble Apex Court and High Courts as noted above, I do not find any illegality in the impugned order dated 01.11.2023, which is wholly impeccable.

15- The application lacks merit and is accordingly **rejected**.

16-However, it goes without saying that in case the applicant appears and apply for regular bail, the same shall be decided on the same day in the light of judgment of the Apex Court in the case of **Satender Kumar Antil Vs. C.B.I. and Another**, (2021) 10 SCC 773.

Order Date :- 22.3.2024

Shubham