GAHC010007022023

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./24/2023

RAKESH KUMAR PAUL
S/O- LATE RANJIT KUMAR PAUL, R/O- HOUSE NO. 47, SAKTIGARH PATH,
P.S. BHANGAGHAR, DIST. KAMRUP(M), GUWAHATI-781005.

VERSUS

THE STATE OF ASSAM
REP. BY THE P.P., ASSAM

Advocate for the Petitioner : MR. D DAS SR. ADV
: MR. S. DAS

Advocate for the Respondent : MR. M. PHUKAN

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (CAV)

Date : 24-03-2023

Heard Mr. Diganta Das, the learned Senior counsel assisted by Mr. S. Das, the learned counsel appearing on behalf of the petitioner and Mr. M. Phukan, the learned Public Prosecutor for the State of Assam.

2. The inherent powers of this Court under Section 482 of the Code of

Criminal Procedure (for short "the Code") have been invoked to challenge the order dated 28.12.2022 passed by the learned Special Judge, Assam in Special Case No.5/2021 whereby the Bail Application being Petition No.2569/2022 by the petitioner filed under Section 436A of the Code was rejected. By the instant application, the petitioner has also assailed the order dated 16.11.2022 as well as the order dated 15.12.2022 in Special Case No.05/2021.

3. At the outset, the learned Senior counsel appearing on behalf of the petitioner had submitted that the instant application be treated as an application only as regards the challenge to the order dated 28.12.2022 whereby the application of the petitioner under Section 436A of the Code was rejected. As regards the challenge made to the orders dated 16.11.2022 and 15.12.2022, the learned Senior counsel appearing on behalf of the petitioner submitted that liberty may be given to challenge the said orders separately, if need be, and the instant application as stated be only confined to the challenge to the order dated 28.12.2022. The learned Public Prosecutor has no objection to segregation of the challenge and the liberty sought for thereby limiting the instant application only to the extent of the challenge to the order dated 28.12.2022. The learned Public Prosecutor however submitted that the liberty so given should be subject to maintainability. In view of the said consensus, this Court would limit its adjudication only as regards the order dated 28.12.2022 with an observation that the petitioner would be at liberty to challenge the orders dated 16.11.2022 and 15.12.2022 if so advised, subject to such challenge being otherwise maintainable under law.

4. The order impugned therefore in the instant proceedings dated 28.12.2022 is an order by which the application of the petitioner under Section 436A of the Code was rejected.

5. A challenge was made to the maintainability of the instant application by the State on the ground that as the Bail Application was rejected, the petitioner ought to have approached this Court by way of a separate Bail Application and not by way of a proceedings under Section 482 of the Code. On the other hand, the learned Senior counsel appearing on behalf of the Petitioner submitted that the order of rejection of the bail under Section 436A of the Code. is an intermediate order which is interlocutory in nature. It was submitted that as the discretionary jurisdiction under Section 397 of the Code is to be exercised only in respect of final orders and intermediate orders but taking into account that the provisions of Section 19(3)(c) of the Prevention of Corruption Act, 1988 (for short "the Act of 1988") there is a restriction on revisional jurisdiction of this Court. Under such circumstances, the inherent jurisdiction under Section 482 of the Cr.P.C. is the only appropriate remedy available to challenge the order dated 28.12.2022 of the Trial Court. The learned Senior counsel further submitted that it is no longer res integra that for invoking the rights under Section 436A of the Code, there is even no requirement for filing a bail Application and as such the rejection of the bail Application by the impugned order has to be looked into in the context of the negation of the rights under Article 21 of the Constitution and this Court in exercise of the powers under Section 482 of the Code can exercise powers for preventing the abuse of the process of the Court and/or to secure the ends of justice. This Court on the question of maintainability of the instant application has given anxious consideration to the matter.

6. The grievance of the petitioner for approaching this Court under Section 482 of the Code is on account of the infraction of his rights under Section 436A of the Code which stood triggered upon his completion of detention as undertrial prisoner for a period extending up to one-half of the maximum period of imprisonment specified for that offence for which he has been charged. This right so agitated by the petitioner is a right based upon Article 21 of the Constitution and as such this Court at this stage finds it relevant to take note of paragraph No.67 of the judgment of the Supreme Court in the case of ***Arnab Manoranjan Goswami Vs. State of Maharashtra and Others*** *reported in* ***(2021) 2 SCC 427***. The said paragraph being relevant is quoted hereinbelow:

> ***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 CrPC "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 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.

7. A reading of the above paragraph quoted hereinabove would show that Section 482 of the Code recognizes the inherent power of this Court to make such orders as a necessary to give effect to the provisions of Code or prevent the abuse of the process of any Court or otherwise to secure the ends of justice. It was further observed that the recognition of Section 482 of the Code thereby the power inhering in this Court to prevent the abuse of the process or to secure the ends of justice is a valuable safeguard for protecting liberty. The recognition by the Parliament of the inherent powers of this Court must be construed as an aid to preserve the constitutional value of liberty which runs through the fabric of the Constitution. The Supreme Court in the above quoted paragraph further observed that the Courts must be alive to the need to safeguard the public interest in ensuring that the due enforceability of criminal law is not obstructed as fair investigation of a crime is an aid to it. It is also equally important for the Courts across the spectrum be it 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. Therefore, the Courts should be alive to both ends of the spectrum i.e. the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other thereby ensuring that the law does not become a ruse for targeted harassment. The above observations made by the Supreme Court as extracted hereinabove would show that in a given case, this Court in exercise of powers under Section 482 of the Code to prevent the abuse of the process of the Court or otherwise to secure the ends of justice and more

particularly in a matter touching upon the liberty of a citizen can exercise jurisdiction under Section 482 of the Code to test as to whether there has been an infraction of the petitioner's right to liberty as enshrined under Article 21 of the Constitution. Under such circumstances, this Court therefore holds that the instant application can be maintained to challenge the order dated 28.12.2022 passed by the learned Special Judge whereby the Petitioner's bail application filed under Section 436A of the Code was rejected.

8. The question as regards the legality and validity of the order dated 28.12.2022 (hereinafter referred to as "the impugned order") and further as to whether the petitioner would be entitled to the benefit under Section 436A of the Code would require a discussion on the intendants and the scope of Section 436A of the Code. This Court finds it apt before discussing the contours of Section 436A of the Code to trace the reason behind the insertion of Section 436A of the Code vide the Act 25 of 2005 w.e.f. 23.06.2006. The legislative history of the provision lies embedded in prolonged debates, seemingly unending, amongst jurists and legal pundits on the subject of bail. While it has been generally acknowledged that it is not always just or advisable to confine the accused before conviction, the differences on the actual practice of bail are quite sharp. The opinion makers have been at variance as to how, when and on what conditions the bail be granted before conviction. Both ends of the spectrum of practice of bail are represented by extreme views. The enforcers of law would argue for extreme caution and the stinginess in granting the bail in the interest of stringent legal action, need for preventing frequent bail jumping and keeping away the professional sureties. The pro-pounders of liberty would vouch for

liberal practice of bail to avoid agony of accused, prolonged investigations and delayed trials, keeping in view the principle of presumption of innocence of accused. More than four decades ago, in a celebrated judgment in the case of ***State of Rajasthan, Jaipur Vs. Balchand*** *reported in* ***(1977) 4 SCC 308***, Krishna Iyer, J. (as his Lordship's then was) succinctly explained that the basic rule of our criminal justice system is "bail, not jail". This Court further finds it relevant to take note of another observation of His Lordship Krishna Iyer, J. in the case of ***Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh*** *reported in* ***(1978) 1 SCC 240*** in paragraph No.1 as reproduced hereinunder:

> ***1.*** *"Bail or jail?" — at the pre-trial or post-conviction stage — belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue 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 sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. 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.*

9. Subsequent thereto, in the 177 report of the Law Commission of India, the introduction of further bail reforms was considered. The Law Commission, referring to its previous reports such as the 41st, 78th and 154th report made recommendations that as a general proposition, in an offence prescribing maximum punishment up to 7 years with or without fine, the normal Rule should be bail and denial thereof an exception in the circumstances mentioned specifically in the said report. One of the situations referred to in the report is relevant here. It is related to consideration by the Law Commission of the amendment proposed by the Code of Criminal Procedure, (Amendment Bill), 1994 which was for insertion of a new provision in Chapter-XXXI of the Code in the nature of Section 436A of the Code. The Law Commission also recommended that in case of an offence punishable with imprisonment of 7 years or less, the Police Officer or the Court would not insist for surety, unless there are special reasons for imposing the condition. This report was submitted in December, 2001 and before that the Bill to amend the Code of Criminal Procedure, 1973 being Bill No.XXXV-C of 1994 was already introduced in Rajya Sabha on 9th of May, 1994. The Bill had proposed several amendments and one of them was for insertion of Section 436A of the Code. However it took many more years for the Bill to become the law. In fact, the Rajya Sabha passed the Bill on 4th May, 2005. It finally received the assent of the President on 23rd June, 2006 and was published in the Gazette on the same day and this is how Section 436A of the Code came into force w.e.f. 23.06.2006.

10. The judgment of the Supreme Court in the case of ***Vijay Madanlal Choudhary and Others Vs. Union of India and Others*** *reported in* ***(2022) SCC***

Online SC 929, the statement of objects and reasons in respect to Section 436A of the Code is mentioned in paragraph No.414. Taking into account its relevance, the said paragraph 414 of the said judgment is quoted hereinbelow:

> *414. In the Statement of Objects and Reasons, it was stated thus:*
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> "*There had been instances, where under-trial prisoners were detained in jail for periods beyond the maximum period of imprisonment provided for the alleged offence. As remedial measure section 436A has been inserted to provide that where an under-trial prisoner other than the one accused of an offence for which death has been prescribed as one of the punishments, has been under detention for a period extending to one-half of the maximum period of imprisonment provided for the alleged offence, he should be released on his personal bond, with or without sureties. It has also been provided that in no case will an under-trial prisoner be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offence.*"

11. Before further proceeding, this Court now finds it relevant to reproduce Section 436A of the Code which is as hereinunder:

> "***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. A perusal of the above Statement of Objects and Reasons as quoted hereinabove would show that Section 436A of the Code was incorporated as a remedial measure to provide that when an undertrial prisoner other than the accused of an offence for which death has been prescribed as one of the punishment, had been under detention for a period extending to one-half of the maximum period of imprisonment provided for the alleged offence, he should be released on his personal bond, with or without sureties. It was also provided that in no case will an undertrial prisoner be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offence. Interestingly, from the Statement of Objects and Reasons, one can discern that an undertrial prisoner upon completion of one-half of the period of the maximum period of imprisonment prosecuted for the alleged offence would be released on his personal bond with or without sureties. However, in respect to the untertrial prisoners who have been completed the maximum period of imprisonment cannot be detained any further. The right of the Public Prosecutor to object however is not seen from

the Statement of Objects and Reasons.

13. A perusal of Section 436A of the Code would show without any difficulty or doubt that the benefit intended to be given is for the person who had during the period of investigation, inquiry or trial under the Code of an offence, not being an offence for which capital punishment has been prescribed as one of the punishments, undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law. In such a case, the person is required to be released on his personal bond with or without sureties in normal course of circumstances. But, there could be some special circumstances justifying his further detention, for reasons to be recorded, which makes the right of the person limited and not absolute. This aspect of the matter is evident from the first proviso which lays down that the Court may, after hearing the Public Prosecutor and for reasons to be recorded in writing, order the continued detention of the person for a longer period than one-half of the maximum period of imprisonment or release him on bail instead of personal bond with or without sureties. However, this limited right has the potential of becoming absolute when the condition prescribed in the second proviso is fulfilled. The condition is that if the person had been detained during the period of investigation, inquiry or trial for the maximum period of imprisonment or more provided for an offence under that law, the person has to be released. There is also an Explanation appended to the Section. It lays down that in computing the period of detention for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded. A question therefore arises as to under what circumstances the Court can enlarge the period of detention beyond the permissible limits as stated in the

main provision of Section 436A of the Code.

14. In the judgment of the Supreme Court in the case of ***Satender Kumar Antil Vs. Central Bureau of Investigation and Another*** *reported in* ***(2022) 10 SCC 51***, the Supreme Court dealt with Section 436A of the Code. It was observed by the Supreme Court in the said judgment that the provision draws the maximum period for which an undertrial prisoner can be detained. The period has to be reckoned with the custody of the accused during the investigation, inquiry and trial. The Supreme Court further observed that the word "trial" has to be given an expanded meaning particularly when an appeal or admission is pending thereby in a case where an appeal is pending for a longer time, to bring it under Section 436A of the Code, the period of incarceration in all forms will have to be reckoned and so also for the revision. Therefore, the Supreme Court expanded the applicability of Section 436A of the Code thereby not limiting the benefits under the provisions of Section 436A of the Code to undertrial prisoners but also when an appeal or a revision is pending thereby giving an expanded meaning to the term "trial". The Supreme Court further observed that when a person had undergone detention for the period extending to one-half of the maximum period of imprisonment specified for that offence, he shall be released by the Court on his personal bond with or without sureties. The word "shall", as observed by the Supreme Court, clearly denotes the mandatory compliance of the provision. The Supreme Court further observed that there was no need for a bail application in a case of this nature particularly when the reasons for delay are not attributable against the accused. It was also observed taking into account that the first proviso to Section 436A of the Code that while taking a decision, the Public Prosecutor is to 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 which is "bail is the Rule and jail is an exception" coupled with the principle governing the presumption of innocence.

15. It was further observed that the provision of Section 436A of the Code is a substantive one, facilitating liberty, being the core intendment of Article 21 of the Constitution. The only caveat as per the Supreme Court, is furnished under the Explanation being the delay in the proceedings caused on account of the accused to be excluded. The said caveat as mentioned by the Supreme Court, gives an insight when the Court can enlarge the period of detention beyond the permissible limit as stipulated in the main provision of Section 436A of the Code. In other words, the Court in view of the word "shall" used in the main provision is under a mandatory obligation to allow the release of the undertrial prisoners after completion of the period mentioned in the main provision of Section 436A of the Code but could extend the period if the delay has been caused on account of the accused undertrial prisoner.

16. The Supreme Court further taking note of the directions passed in the case of ***Bhim Singh Vs. Union of India and Others*** *reported in* ***(2015) 13 SCC 605*** directed compliance to the said directions, if not complied with, in order to prevent the unnecessary incarceration of undertrials and to uphold the inviolable principle of presumption of innocence until proven guilty.

17. It is also relevant at this stage to take note of the directions passed by the Supreme Court in the case of ***Bhim Singh (supra)*** to understand the

scope and ambit of Section 436A of the Code. Paragraph Nos. 5 and 6 of the judgment rendered in the case of ***Bhim Singh (supra)*** was quoted by the Supreme Court in the case of ***Satender Kumar Antil (Supra)***. The Supreme Court in the case of ***Bhim Singh (supra)*** after taking into account the legislative policy engrafted in Section 436A of the Code and the large number of undertrials housed in the prisons passed orders so that the undertrials do not continue to be detained in prison beyond the maximum period provided under Section 436A of the Code. The Supreme Court therefore directed the jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge to hold one sitting in a week in each jail/prison for two months commencing from 01.10.2014 for the purpose of effective implementation of Section 436A of the Code. It was further directed by the Supreme Court that upon identification of the undertrial prisoners who have completed one half period of the maximum period or the maximum period of imprisonment provided for the said offence under law to pass appropriate orders in the jail itself after complying with the procedure prescribed under Section 436A of the Code for release of such undertrial prisoners who fulfill the requirement of Section 436A of the Code for their release immediately. In the said order, passed by the Supreme Court in the case of ***Bhim Singh (supra)***, further directions were given to send compliance report. The above aspect of the matter in the opinion of this Court further shows the necessity for mandatory compliance to the provision of Section 436A of the Code and to enlarge the period of incarceration from what the main provision of Section 436A of the Code stipulate is an exception. Another important aspect of the said directions in the case of ***Bhim Singh (supra)*** is the continuous monitoring of applicability of Section 436A of the Code in respect to the

undertrial prisoners which would not only aid in the release of the undertrial prisoners but also keep a tab on the undertrial prisoners impending right of the speedy justice, a facet of Article 21 of the Constitution which would fructify in terms with the main provision of Section 436A of the Code. Paragraph Nos. 63, 64 and 65 of the said judgment in the case of ***Satender Kumar Antil (supra)*** being relevant is extracted hereinunder:

> "***63.*** *Section 436-A 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 e 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 436-A, fs the period of incarceration in all forms will have to be reckoned, and so also for the revision.*
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> ***64. 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 offence, 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, while dealing with the aforesaid provision, has directed thal: (SCC pp. 606-07, paras 5-6)*

> "*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.*
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> *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 fulfill 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."*
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> ***65**. 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."*

18. This Court also finds it apt to deal with two other aspects before referring to the judgment of the Supreme Court in the case of ***Vijay Madanlal Choudhary (supra)*** wherein the Supreme Court dealt with Section 436A of the Code in much more detail. The Government of India, Ministry of Home Affairs had issued an Advisory dated 17.01.2013 to all Home Secretaries of States/Union Territories for use of Section 436A of the Code to reduce overcrowding of prisoners. In the said Advisory, it was categorically mentioned that under Section 436A of the Code, an undertrial prisoner has the right to seek bail on serving more than one-half of the maximum possible sentence on their personal bond. It was further mentioned that no person can be detained in prison as an undertrial for a period exceeding the maximum possible sentence. However Section 436A of the Code was not applicable for those who are charged with offences punishable with death sentence. This very Advisory was taken into account by the Social Justice Bench of the Supreme Court in the case of ***Inhuman Conditions in 1382***

Prisons, In Re *reported in* ***(2016) 3 SCC 700*** and there were various directions issued to educate the undertrials of their rights to be released on bail in view of the provisions of Section 436A of the Code. The reference to the said Advisory dated 17.01.2013 and the order of the Supreme Court in ***Inhuman Conditions in 1382 Prisons (supra)*** is made herein to analyse the legislative intent behind the insertion of Section 436A of the Code, a right of the undertrial prisoners facilitating liberty which is the core intendment of Article 21 of the Constitution coupled with the principle governing the presumption of innocence.

19. The evolvement of the rights under Section 436A of the Code of an undertrial prisoner can be seen from the judgment of the Supreme Court in the case of ***Vijay Madanlal Choudhary (supra).*** The said case was concerning the validity and interpretation of certain provisions of Prevention of Money Laundering Act, 2002 (for short the "Act of 2002") and the procedure followed by the Enforcement Directorate while enquiring into/investigating offence under the said Act of 2002 being violative of the constitutional mandate. In the said judgment, the Supreme Court amongst others took into consideration Section 45 of the Act of 2002. In terms with Section 45 of the Act of 2002, no person shall be released on bail or on his own bond unless (i) The Public Prosecutor has been given an opportunity to oppose the application for his 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. The twin conditions as mentioned in Section 45(1)(ii) of the Act of 2002 was one of the subject matter of challenge before the Supreme Court. The Supreme Court upheld the twin

conditions and further held that the rigors of Section 45 of the Act of 2002 will also apply in the case of anticipatory bail. However, most interestingly for the purpose of the instant case, the Supreme Court curved out an exception to the strict compliance of the twin conditions i.e. Section 436A of the Code. In doing so, the Supreme Court observed that the right under Section 436A of the Code emanates from the right to speedy trial which is one of the facets of Article 21 of the Constitution and is a fundamental right. It was observed that the Parliament in its wisdom inserted Section 436A of the Code recognizing the deteriorating state of undertrial prisoners so as to provide them with a remedy in case of unjustified detention. Reference was made in the said judgment to the judgment of the Supreme Court in the case of ***Supreme Court Legal Aid Committee Representing Undertrial Priosoners Vs. Union of India*** *reported in* ***(1994) 6 SCC 731*** whereby the directions were issued to release the prisoners charged under the Narcotic Drugs and Psychotropic Substances Act, 1985 after completion of one-half of the maximum term prescribed under the said Act. It may be relevant herein to mention that Section 37 of Narcotic Drugs and Psychotropic Substances Act, 1985 also imposes similar conditions to Section 45 of the Prevention of Money Laundering Act, 2002.

20. This Court finds it relevant at this stage to refer to the relevant portion of paragraph No.15 of the judgment in the case of ***Supreme Court Legal Aid Committee Representing Undertrial Priosoners (supra).*** Before extracting the same, this Court finds it also relevant to mention that the said judgment was rendered on 07.10.1994, after a decade of which Section 436A of the Code was brought in the Statute books. This further gives an insight that right to be released after being incarcerated for a period of one-half of the maximum

period of imprisonment springs from the fundamental rights under Article 21 read with Article 14 of the Constitution. The relevant portion of the said judgment is extracted hereinunder:

> ***15.*** "……*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. 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, 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."

21. The Supreme Court in the case of ***Vijay Madanlal Choudhary (supra)*** observed at paragraph No.416 that the Union of India had also recognized the right to speedy trial and access to justice as fundamental right in their written submissions and thus submitted that in a limited situation right of bail can be granted in the case of violation of Article 21 of the Constitution. The Supreme Court further observed that Section 436A of the Code was inserted after the enactment of the Act of 2002 and as such it would not be appropriate to deny the relief of Section 436A of the Code which is a wholesome provision beneficial to a person accused under the provisions of the Act of 2002. It was however observed that Section 436A of the Code does not provide for an absolute right of bail as in the case of a default bail under Section 167 of the Code inasmuch as in the fact situation of a case, the Court may still deny the relief owing to the ground such as where the

trial was delayed at the instance of the accused himself. These observations at paragraph 416 of the judgment gives a deeper understanding to the limits of discretion available to the Court for enlarging the period of detention beyond the period mentioned in the main provision of Section 436A of the Code.

22. The Supreme Court further observed that the provision of Section 436A of the Code is comparable with the statutory bail provision or so to say, the default bail to be granted in terms with Section 167 of the Code consequent to the failure of the investigating agency to file the charge sheet within the statutory period and in the context of the Act of 2002, complaint within the specified period after arrest of the person concerned. It was observed that the provision in the form of Section 436A of the Code is a recognition of the constitutional right of the accused regarding speedy trial under Article 21 of the Constitution inasmuch as it is the sanguine hope of every accused who is in custody in particular that he/she should be tried expeditiously so as uphold the tenets of speedy justice. It was categorically observed that if the trial cannot be completed even after the accused have undergone one-half of the maximum period of imprisonment provided by law, there is no reason to deny the accused the lesser relief of considering his prayer for release on bail or bond as the case may with appropriate conditions to secure his/her presence during the trial.

23. It is further pertinent for the purpose of the instant case to take note of the observations of the Supreme Court in paragraph No.418 of the said judgment wherein the Supreme Court while considering the submission made by the learned Solicitor General to the effect that super imposition of

Section 436A of the Code over Section 45 of the Act of 2002 would impact the objectives of the Act of 2002 and the same logic may be invoked in respect of other serious offences including terrorist offences which would be counterproductive. The Supreme Court completely discarded the said submission made by the learned Solicitor General by observing that it is the constitutional obligation of the State to ensure that the trials are concluded expeditiously and at least within a reasonable time where the strict bail provisions apply. It was observed that if a person is detained for a period extending up to one-half of the maximum period of imprisonment specified by law and is still facing trial, it is nothing short of failure of the State in upholding the constitutional rights of the citizens, including the person accused of an offence.

24. The Supreme Court further observed in paragraph 419 of the said judgment that Section 436A of the Code is a wholesome beneficial provision which is for effectuating the right of speedy trial guaranteed by Article 21 of the Constitution which merely specifies the outer limits within which the trial is expected to be concluded, failing which the accused ought not to be detained further. It was observed that Section 436A of the Code contemplates that the relief under the provision cannot be granted mechanically and the Court still retains discretion unlike to case of default bail under Section 167 of the Code. It was further observed that the Court is required to consider the relief on case to case basis. It was observed that the Court still in a given case can continue the detention even for longer period than one-half of the period for which reasons are to be recorded by it in writing or can grant bail by imposing such terms and conditions so as to ensure that after release, the accused makes himself/herself available for

expeditious completion of the trial. It was further observed that when the Parliament/Legislature provides for stringent provisions of no bail, unless the stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable time, at least before the accused undergoes detention for a period extending up to one-half of the maximum period of imprisonment specified for the concerned offence by law.

25. While concluding on the aspect of Section 436A of the Code, the Supreme Court observed that Section 436A of the Code needs to be construed as a statutory bail provision and akin to Section 167 of the Code. The Supreme Court further observed that Section 436A of the Code could be invoked by the accused arrested for an offence punishable under the Act of 2002 being a statutory bail. Paragraph Nos. 415 to 421 of the said judgment in the case of ***Vijay Madanlal Choudhary (supra)*** are reproduced hereinunder:

> *415. In Hussainara Khatoon v. Home Secretary, State of Bihar, Patna , this Court stated that the right to speedy trial is one of the facets of Article 21 and recognized the right to speedy trial as a fundamental right. This dictum has been consistently followed by this Court in several cases. The Parliament in its wisdom inserted Section 436A under the 1973 Code recognizing the deteriorating state of undertrial prisoners so as to provide them with a remedy in case of unjustified detention. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, the Court, relying on Hussainara Khatoon , directed the release of prisoners charged under the Narcotic Drugs and Psychotropic Act after completion of onehalf of the maximum term prescribed under the Act. The Court issued such direction after taking into account the non obstante provision of Section 37 of the NDPS Act, which imposed the rigors of twin conditions for release on bail. It*

was observed:

> "*15. ….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 . 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 , 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. …*"

416. The Union of India also recognized the right to speedy trial and access to justice as fundamental right in their written submissions and, thus, submitted that in a limited situation right of bail can be granted in case of violation of Article 21 of the Constitution. Further, it is to be noted that the Section 436A of the 1973 Code was inserted after the enactment of the 2002 Act. Thus, it would not be appropriate to deny the relief of Section 436A of the 1973 Code which is a wholesome provision beneficial to a person accused under the 2002 Act. However, Section 436A of the 1973 Code, does not provide for an absolute right of bail as in the case of default bail under Section 167 of the 1973 Code. For, in the fact situation of a case, the Court may still deny the relief owing to ground, such as where the trial was delayed at the instance of accused himself.

417. Be that as it may, in our opinion, this provision is comparable with the statutory bail provision or, so to say, the default bail, to be granted in terms of Section 167 of the 1973 Code consequent to failure of the investigating agency to file the chargesheet within the statutory period and, in the context of the 2002 Act, complaint within the specified period after arrest of the person concerned. In the case of Section 167 of the 1973 Code, an indefeasible right is triggered in favour of the accused the moment the investigating agency commits default in filing the chargesheet/complaint within the statutory period. The provision in the form of Section 436A of the 1973 Code, as has now come into being is in recognition of the constitutional right of the accused regarding speedy trial under Article 21 of the Constitution. For, it is a sanguine hope of every accused, who is in custody in particular, that he/she should be tried expeditiously — so as to uphold the tenets of speedy justice. If the trial cannot proceed even after the accused has undergone one-half of the maximum period of imprisonment provided by law, there is no reason to deny him this lesser relief of considering his prayer for release on bail or bond, as the case may be, with appropriate conditions, including to secure his/her presence during the trial.

418. Learned Solicitor General was at pains to persuade us that this view would impact the objectives of the 2002 Act and is in the nature of super imposition of Section 436A of the 1973 Code over Section 45 of the 2002 Act. He has also expressed concern that the same logic may be invoked in respect of other serious offences, including terrorist offences which would be counterproductive. So be it. We are not impressed by this submission. For, it is the constitutional obligation of the State to ensure that trials are concluded expeditiously and at least within a reasonable time where strict bail provisions apply. If a person is detained for a period extending up to one-half of the maximum period of imprisonment specified by law and is still facing trial, it is nothing short of failure of the State in upholding the constitutional rights of the citizens, including person accused of an offence.

419. Section 436A of the 1973 Code, is a wholesome beneficial provision, which is for effectuating the right of speedy trial guaranteed by Article 21 of the Constitution and which merely specifies the outer limits within which the trial is expected to be concluded, failing which, the accused ought not to be detained further. Indeed, Section 436A of the 1973 Code also contemplates that the relief under this provision cannot be granted mechanically. It is still within the discretion of the Court, unlike the default bail under Section 167 of the 1973 Code. Under Section 436A of the 1973 Code, however, the Court is required to consider the relief on case-to-case basis. As the proviso therein itself recognises that, in a given case, the detention can be continued by the Court even longer than one-half of the period, for which, reasons are to be recorded by it in writing and also by imposing such terms and conditions so as to ensure that after release, the accused makes himself/herself available for expeditious completion of the trial.

420. However, that does not mean that the principle enunciated by this Court in Supreme Court Legal Aid Committee Representing Undertrial Prisoners , to ameliorate the agony and pain of persons kept in jail for unreasonably long time, even without trial, can be whittled down on such specious plea of the State. If the Parliament/Legislature provides for stringent provision of no bail, unless the stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable time, at least before the accused undergoes detention for a period extending up to one-half of the maximum period of imprisonment specified for the concerned offence by law. [Be it noted, this provision (Section 436A of the 1973 Code) is not available to accused who is facing trial for offences punishable with death sentence].

421. In our opinion, therefore, Section 436A needs to be construed as a statutory bail provision and akin to Section 167 of the 1973 Code. Notably, learned Solicitor General has fairly accepted during the arguments and also restated in the written notes that the mandate of Section 167 of the 1973 Code would apply with full force even to cases falling under Section 3 of the 2002 Act, regarding money-laundering offences. On the same logic, we must hold that Section 436A of the 1973 Code could be invoked by accused arrested for offence punishable under the 2002 Act, being a statutory bail."

26. From the above discussions one can cull out the following propositions:

(i) Section 436A of the Code have been engrafted to the Code by recognizing the right to speedy trial and access to justice which is a fundamental right, being one of the facets of Article 21 of the Constitution.

(ii) It is the constitutional obligation of the State to ensure that trials are

concluded expeditiously and at least within a reasonable time where a person remains incarcerated. If a person is detained for a period extending up to one-half of the maximum period of imprisonment specified by law, and is still facing trial, it is nothing short of the failure of the State in upholding the constitutional rights of the citizens including the person accused of an offence and therefore the rights under Article 21 of the Constitution shall stand violated in respect to such persons.

(iii) Section 436A of the Code having come into existence w.e.f. 23.06.2006 and being a wholesome beneficial provision, all penal statues existing prior to 23.06.2006 shall be subject to Section 436A of the Code.

(iv) Section 436A of the Code is a statutory bail provision and akin to Section 167 of the Code.

(v) If the Parliament or the Legislative provides for stringent provisions for no bail, unless stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials gets precedence and are concluded within a reasonable time at least before the accused undergoes detention for a period extending to one-half of the maximum period of imprisonment specified for the concerned offence by law.

(vi) In terms with Section 436A of the Code when a person has undergone detention for a period extending to one-half of the maximum period of imprisonment specified for that offence, he shall be released by the Court on his personal bond with or without sureties and the word "shall" in the main provision of Section 436A clearly denotes the mandatory compliance to the said provision.

(vii) There is no requirement for a bail application in a case of Section 436A of the Code particularly when the reasons for delay are not attributable against the accused.

(viii) In terms with the first proviso, the Public Prosecutor has a right to be heard when an accused upon completion of one-half of the maximum period of imprisonment is to be released on his personal bond with or without sureties and the Court may enlarge detention of such person for a period longer than one-half of the said period or release him on bail instead of personal bond with or without sureties. In doing so, the Court has to record reasons. However, such an exercise of power is expected to be undertaken sparingly being an exception to the general rule that "bail is the Rule and jail is an exception" coupled with the principle governing the presumption of innocence. The only caveat for not releasing the accused in terms with the Explanation to Section 436A of the Code being the delay in the proceedings caused on account of the accused to be excluded.

(ix) In terms with the second proviso to Section 436A of the Code, the right of the accused who has been in detention for the maximum period of imprisonment or more provided for the offence charged with is absolute and the Court is bound to release such person.

(x) Section 436A of the Code does not apply where the offence charged with entails capital punishment.

(xi) The exercise of discretion by the Court in the case of Section 436A of the Code not to release the accused after completion of the period as mentioned in the main provision of Section 436A of the Code is very limited

taking into consideration that the rights accruing under Section 436A of the Code is in the realm of a right to speedy justice which is a fundamental right enshrined under Article 21 read with Article 14 of the Constitution. The discretion has to be exercised keeping in mind the Explanation to Section 436A of the Code.

(xii) The right of the undertrial prisoner under Section 436A of the Code being a statutory bail provision akin to Section 167 of the Code, the further detention would be permissible, only if it was on account of the accused, there was delay which had resulted in the completion of the period as mentioned in the main provision of Section 436A of the Code. Else the Court is bound to release the accused but in doing so, the Court, after hearing the Public Prosecutor and by recording reasons can instead of releasing the accused on personal bond with or without sureties direct the release of the accused with or without sureties by imposing conditions.

(xiii) While considering the right of an accused in detention under Section 436A of the Code, the discretion to be exercised under the first proviso to Section 436A is completely different from the discretion to be exercised in the case of Section 437 or 439 of the Code.

27. In the backdrop of the propositions set out, let this Court take into account the facts involved.

28. The petitioner in the instant case was arrested on 04.11.2016 in connection with an FIR registered as Dibrugarh P.S. Case No.936/2016. The Supreme Court had granted default bail to the petitioner vide its judgment and order dated 16.08.2017 which is reported as ***Rakesh Kumar Paul Vs.***

State of Assam *in* ***(2017) 15 SCC 67***. Immediately thereafter, on 17.08.2017, the petitioner was arrested in connection with Bhangagarh P.S. Case No.159/2017 and the petitioner was shown arrest on the same date in respect to the said Bhangagarh P.S. Case No.159/2017. It appears from the records that the Investigating Officer has submitted the charge sheet on 09.10.2017. Thereafter, on 12.07.2018, the 1st supplementary charge sheet was filed with a prayer to extend more time for further investigation. It further appears that the 2nd supplementary charge sheet was filed on 26.10.2018. Subsequent thereto, on 17.11.2018, the 3rd supplementary charge sheet was filed. On 04.07.2019, the Investigating Agency filed the 4th supplementary charge sheet. Further to that, on 06.01.2020, the 5th supplementary charge sheet was filed. After a passage of another 10 months, the 6th supplementary charge sheet was filed i.e. on 09.10.2020.

29. Pursuant to the filing of the 6th supplementary charge sheet, the Special Case No.05/2021 was registered on 21.01.2021 i.e. after a lapse of around 3 years 3 months 13 days from the date of filing of the charge sheet on 09.10.2017. At this stage, it may be relevant to mention that this Court vide an order dated 07.04.2021 in Bail Application No.423/2021 filed by the petitioner had directed the Trial Court, in view of the fact that cognizance have already taken by the Trial Court, to expedite the matter of trial with topmost priority by taking day to day hearing with due concern about the length of detention of the petitioner. Paragraph No.33 of the said order being relevant is extracted hereinunder:

"*33. Prior to parting with the matter, this Court is of the view that as the*

cognizance has already been taken by the learned trial Court, so in the interest of justice for all concerned, the trial Court should expedite the matter of trial with topmost priority by taking day-to-day hearing with due concern about the length of detention of the accused petitioner."

30. However, the records shows that the prosecution took more than 13 months to complete the stage of supplying documents as required under Section 207 of the Code. Thereupon, the case was fixed for consideration of charge on 10.12.2021. On 18.12.2021, the charges were framed. At the cost of repetition it is reiterated that in spite of the categorical order passed on 07.04.2021 thereby directing day to day trial in view of the length of detention of the petitioner, it was only on 06.04.2022, the first witness of the case was examined. In fact, it would be relevant to take note of that on 18.12.2021 when the charges were framed, the Trial Court fixed 12.01.2022 as the first date for taking evidence in the case.

31. Taking into account that the prosecution had taken its sweet time and the petitioner continued to remain incarcerated from 17.08.2017 in connection with Bhangagarh P.S. Case No.159/2017, a Bail Application was filed before this Court which was registered and numbered as Bail Application No.904/2022. Relevant herein to mention that the maximum period of imprisonment in respect to the offence to which the petitioner had been charged is 10 years. At the time of filing the Bail Application being B.A. No.904/2022, the period mandated in the main provisions of Section 436A of the Code was not over. However, the Bail Application remained pending before this Court and it was on 16.08.2022, the petitioner had completed the period prescribed by Section 436A of the Code.

32. The Coordinate Bench of this Court rejected the Bail Application on 21.09.2022. The Coordinate Bench of this Court was of the opinion that it would be unreasonable to hold the view that the collective interest of the society or the people of the State must outweigh the right to personal liberty of the individual whose trial just commenced on 18.12.2021. It was also observed that there is a need to balance between the petitioner's right under Article 21 of the Constitution and the right of the unemployed job aspirants to a fair and transparent competitive examination which the petitioner deliberately flouted. It was observed that Article 21 of the Constitution is not an absolute right of a prisoner/individual. The Coordinate Bench of this Court further was of the opinion that the continuation of detention of the petitioner therefore is of utmost necessity to prevent any further probable manipulation and tampering with the charge sheet cited witnesses in course of a fair trial of the case until an appropriate favourable stage for him is reached. It may be relevant to take note of that the Coordinate Bench of this Court while deciding the said Bail Application though had referred to Section 436A of the Code but the same was taken into account only for the purpose deciding the maximum period of permissible detention and not especially the right of the petitioner under Section 436A of the Code. Neither paragraphs 63, 64 and 65 of the judgment in the case of ***Satender Kumar Antil (Supra)*** were taken into consideration nor the judgment in the case of ***Vijay Madanlal Choudhary (supra)*** was taken into consideration. It was however directed that the petitioner shall have a right to apply for bail afresh before the learned Trial Court, if so advised, and if such bail application is filed, the same shall be considered and disposed of at an appropriate stage of trial of the case in accordance with law. The Coordinate Bench of this Court further at

paragraph No.20 of the said order dated 21.09.2022 directed the Trial Court to make an endeavour to identify the material witnesses of the case and ensure their examination on day to day basis so as to prevent undue delay in the disposal of the case, preferably within a period of 6 (six) months from the date of the said order. The Trial Court was further directed to submit monthly progress report of the trial of the case to the Registrar (Vigilance) of this Court for the next 6 (six) months. Paragraph Nos. 18 to 21 of the said order dated 21.09.2022 in Bail Application No.904/2022 are extracted hereinunder:

> "*18. Accordingly, the bail application of the accused petitioner namely, Rakesh Kumar Paul stands* ***rejected.***
>
> *19. It is, however, provided that the accused petitioner shall have right to apply for bail afresh before the learned trial Court, if so advised and if such bail application is filed, the same shall be considered and disposed of at an appropriate stage of trial of the case in accordance with law.*
>
> *20. The learned trial Court shall make an endeavour to identify the most material witnesses of the case and ensure their examination on day to day basis so as to prevent undue delay in the disposal of the case, preferably within a period of 6(six) months from the date of this order. The learned trial Court shall see that steps for summoning the witnesses are taken well in advance from the due date for evidence and that the process serving agencies punctually serve the same. The learned trial Court shall also submit monthly progress report of trial of the case to the Registrar (Vigilance) of this Court for the next 6(six) months.*
>
> *21. Be it mentioned that no observation made in course of this order shall have any bearing on the discretion of the learned trial Court."*

33. As already stated hereinabove, the maximum imprisonment in respect to the offence to which the petitioner has been charged is 10 (ten) years. Taking into account that the petitioner has already undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for the offence under which the petitioner has been charged, the petitioner on 05.12.2022 filed a Bail Application before the Trial Court under Section 436A of the Code. On 12.12.2022, the prosecution filed written objection stating that there were altogether 75 witnesses cited in the list of witnesses out of which 27 witnesses have already been examined and the prosecution may examine another 20 witnesses if the situation so demands. It was further mentioned in the said objection that in that view of the matter, there is every possibility to complete the trial within the period of 6 (six) months as per the direction passed by this Court on 21.09.2022 in Bail Application No.904/2022. It may also be relevant herein to mention that from a perusal of the said objection so filed by the prosecution, the edifice thereof is based upon the order dated 21.09.2022 in Bail Application No.904/2022 wherein the Coordinate Bench of this Court had come to a finding that continuous detention of the petitioner is necessary to prevent any probable manipulation or tampering the charge sheeted witnesses. It was further mentioned that the trial was at a very crucial stage and the officials of the APSC as well as some members of Sat Sangha are yet to be examined. It was also mentioned that as the petitioner was a formar Chairman of APSC as well as a Senior Member of Sat Sangha (Rwitick), he still continued to wields influence over the affairs of the Sat Sangha as well as over the staff of APSC. It was therefore submitted that the release of the petitioner would not be conducive for a fair trial. It further reveals from the

record that the petitioner filed a reply to the objection filed by the prosecution wherein it has been mentioned that there are 81 witnesses instead of 75 witnesses as stated by the prosecution. It was further mentioned that even after commencement of the trial, the prosecution has failed to identify the exact number of witnesses in the instant case.

34. It further reveals from the record that on 15.12.2022, the prosecution had furnished the list of material witnesses in pursuance to the order passed by this Court on 21.09.2022 in Bail Application No.904/2022. It reveals from the said document so enclosed as Annexure-17 to the instant application that the prosecution had identified 30 material witnesses who remained to be examined.

35. The Special Judge, Assam who is the Trial Court vide the order dated 28.12.2022 rejected the Bail Application of the petitioner. The first reason for rejecting the Bail Application is that the Coordinate Bench of this Court had earlier considered the plea of the petitioner under Section 436A of the Code. The second reason is that the case is very serious as the petitioner has allegedly committed a socio-economic offence and deprived the rights of the genuine job aspirants and thereby lowered the constitutional sanctity of APSC. In the said order, reference was made to the order dated 18.11.2022 by learned Trial Court whereby another Bail Application of the petitioner was rejected on account of the gravity of the offence and also taking into account that at the time when the petitioner was the Chairman of the APSC, he had allegedly pressurized one of the Members of APSC who was an IAS Officer. The relevant portion of the order by which the Trial Court had rejected the Bail Application of the petitioner being relevant is quoted

hereinbelow:

> "*I have perused the decisions relied on by learned counsel for the accused. As the Honb'e Gauhati High Court has considered the plea of the accused/petitioner under Section 436A Cr.P.C. and rejected the bail prayer of the accused, I find no reason to consider the same plea subsequently. The Hon'ble Gauhati High Court in its order dated 21.09.2022 directed this Court to consider the bail prayer of the accused at an appropriate stage of trial of the case in accordance with the law. So, this Court is bound to obey the direction of the Hon'ble Gauhati High Court. As the case has been taken on day to day basis and the Prosecution has examined a good number of witnesses and is yet to examine some of the most material witnesses and the accused is an influential person having the capability to influence the witnesses like the employees of APSC who were once his subordinates and the members of Satsangha, I am of the considered view that this is not the appropriate stage of the trial to consider the bail prayer of the accused in his favour and his continued detention is necessary. Hence the bail petition filed by accused Rakesh Kr. Paul is rejected.*"

36. Being aggrieved by such rejection, the instant petition has been filed before this Court.

37. This Court in the foregoing paragraphs have dealt with the scope and ambit of Section 436A of the Code. This Court had also perused the order passed by the Coordinate Bench of this Court on 21.09.2022 in Bail Application No.904/2022 which would clearly show that the Coordinate Bench did not take into account the scope and ambit of Section 436A of the Code as observed by the Supreme Court in the case of ***Satender Kumar Antil (Supra)*** in paragraph Nos. 63, 64 and 65 as well as the judgment of the Supreme Court in the case of ***Vijay Madanlal Choudhary (supra)*** and more

particularly to paragraph Nos. 415 to 421 which have already been quoted hereinabove. The Coordinate Bench of this Court further with due respect did not take into consideration the judgment of the Supreme Court in the case of ***Supreme Court Legal Aid Committee Representing Undertrial Priosoners (supra)*** wherein at paragraph No.15 as quoted hereinabove, the Supreme Court in the case of grave offences like offences under the N.D.P.S. Act, 1985 have also released the accused persons who have suffered imprisonment which is half of the maximum punishment provided for an offence and further observed that any further deprivation of personal liberty would be violative of the fundamental rights visualized by Article 21 of the Constitution which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in the procedures of matters. In paragraph No.418 of the judgment in the case of ***Vijay Madanlal Choudhary (supra),*** the Supreme Court had referred to the submissions made by the learned Solicitor General to the effect that the super imposition of Section 436A of the Code to the provisions of Act of 2002 would impact upon the objectives of the Act of 2002 and in the same logic may be invoked in respect of other serious offences, including terrorist offences which would be counterproductive. The Supreme Court categorically discarded the said submission observing that it is the constitutional obligation of the State to ensure that the trials are concluded expeditiously and at least within a reasonable time where strict bail provisions apply and if a person is detained for a period extending up to one-half of the maximum period of imprisonment specified by law and is still facing trial, it is nothing short of failure of the State in upholding the constitutional rights of the citizens including the person accused of an

offence. This aspect of the matter with utmost respect to the Coordinate Bench, have not been taken into consideration.

38. It would further be seen in the judgment of the Supreme Court in the case of ***Vijay Madanlal Choudhary (supra)*** that the Supreme Court had observed that Section 436A of the Code is a wholesome beneficial provision for effectuating the right of speedy trial guaranteed by Article 21 of the Constitution which merely specifies the outer limit within which the trial is expected to be concluded failing which the accused ought not to be detained further. The Supreme Court went to extent of observing that Section 436A of the Code needs to be construed as a statutory bail provision and akin to Section 167 of the Act of 1973. This Court while further analyzing the scope and ambit of Section 436A of the Code has also to keep in mind the observations of the Supreme Court in the case of ***Satender Kumar Antil (Supra)*** more particularly in paragraph No.64 that the word "shall" appearing in the main provision of Section 436A of the Code denotes mandatory compliance of the said provision and it was the observation of the Supreme Court that there is even no need for filing a bail application in a case of this nature particularly when the reason for delay are not attributable against the accused. Again with great respect, these aspects were not taken into consideration by the learned Coordinate Bench of this Court.

39. In the instant case, it would be seen that admittedly, the Investigating Agency had taken 3 years 1 month 23 days in completing the investigation. It was only after a lapse of 3 years 3 months 13 days from the date of filing of the charge sheet that the case was registered as Special Case No.5/2021 on 21.01.2021. The prosecution thereafter took 13 months to supply

documents as required under Section 207 of the Code. It may be noted herein that the Coordinate Bench of this Court vide an order dated 07.04.2021, the relevant portion of which has been quoted supra had cautioned the prosecution and the learned Trial Court was directed to complete the trial as early as possible by doing it on day to day basis taking into account the period of detention of the petitioner. In spite of that, it was only on 18.12.2021, the charges were framed and the case was fixed for evidence on 12.01.2022. It further appears that on 06.04.2022, the first witness was examined.

40. A perusal of the impugned order dated 28.12.2022 would show that the learned Special Judge had observed that examination of the witnesses on day to day basis on the basis of the directions passed by this Court on 21.09.2022 had started. It surprises this Court to take note of that the Trial Court completely failed to take into account the order dated 07.04.2021 passed in Bail Application No.423/2021 wherein there was already a direction to give utmost priority to the said case by taking day to day hearing with due concern about the length of detention of the petitioner. This Court further fails to understand that since the prosecution knew it very well that the petitioner has remained incarcerated since 17.08.2017 and the petitioner had moved one bail application after another then also as to why there was no urgency on the part of the State as regards the completion of the trial, if there was any apprehension as stated in the objection that the petitioner may hamper and tamper with the evidence of the witnesses. It further shocks this Court to take note of that on 15.12.2022 after a passage of almost 3 (three) months, the prosecution woke up to submit the list of material witnesses whom they have identified in pursuant to the order dated

21.09.2021 in Bail Application No.904/2022. This clearly shows the callous attitude on the part of the prosecution without caring to the concept of speedy justice and with total disregard to the fact that the petitioner continued to remain incarcerated and the period as prescribed in the main provision of Section 436A of the Code was over on 16.08.2022.

41. During the course of hearing, the learned Public Prosecutor had placed before this Court on 17.03.2023 that out of the list of material witnesses submitted on 15.12.2022, 9 (nine) witnesses along with the Sanctioning Authority which is another 6 witnesses and the Investigating Officer of the case is yet to be examined. This Court further fails to understand that when the prosecution was aware of that the right of the petitioner under Section 436A of the Code to be released had already fructified, why the prosecution was not vigilant to take appropriate steps with utmost urgency. The fact that presently, the learned Trial Court is proceeding with the trial on day to day basis cannot be a ground to deprive the petitioner of his right under Section 436A of the Code inasmuch as it is otherwise the mandate of law under Section 309 of the Code that when the trial begins, it shall be continued on day to day basis. Any curb on liberty of a person on the basis that the trial is taken up on day to day basis in the opinion of this Court would make the right under Section 436A of the Code, a facet of Article 21 of the Constitution, otiose.

42. Let this Court further take into consideration the aspect as to how the Trial Court dealt with the rights under Article 21 of the Constitution insofar as the petitioner is concerned. There is nothing mentioned in the judgment that it was on account of the delay caused by the petitioner which had led to the

delay in the trial. Merely on the ground that the case is serious which amounts to commission of a socio-economic offence whereby allegedly rights of the genuine job aspirants were deprived and the constitutional sanctity of APSC lowered, the petitioner's rights under Section 436A of the Code was nullified. As noted above, the gravity of the offence cannot be the reason for depriving the petitioner of his rights under Section 436A of the Code inasmuch as the Supreme Court in the case of ***Vijay Madanlal Choudhary (supra)*** had categorically observed that even in respect to offences under the Act of 2002 which are serious economic offences and grave in nature and in spite of that, it was held that the right under Section 436A of the Code was still there. More so, when Section 436A of the Code was brought into the Statute books much after the offences under which the petitioner has been charged.

43. This Court further finds it relevant to take note of another reason for denial that the petitioner may hamper or tamper with the evidence as was reflected in the order dated 18.11.2022 by the Trial Court. The alleged incident mentioned therein was at a time when the petitioner was the Chairman of the APSC and he had allegedly pressured one of the Members of APSC. As on today, the petitioner is no longer the Chairman of APSC and this Court fails to understand how the said aspect of the matter can be applied in the present facts and circumstances. This Court further finds it relevant at this stage to take into account the judgment of the Supreme Court in the case of ***Satender Kumar Antil (Supra)*** and more particularly to paragraph Nos.14 to 19 wherein the Supreme Court had categorically observed that innocence of a person accused of an offence is presumed through a legal fiction placing the onus on the prosecution to prove the guilt

before the Court. It was further observed that it is the worldwide accepted proposition that for consideration for enlargement on bail, Courts have always interpreted on the accepted principle of presumption of innocence and held in favour of the accused. In paragraph No.19 of the said judgment, the Supreme Court further observed that presumption of innocence being a facet of Article 21 shall inure to the benefit of the accused and resultantly, the burden is placed on prosecution to prove the charges to the Court of law and the weightage of the evidence have to be assessed on the principle of beyond reasonable doubt.

44. In view of the such proposition of law as held by the Supreme Court in the case of ***Satender Kumar Antil (Supra)*** which was duly placed before the learned Special Judge, it surprises this Court as to how even before the evidence of the prosecution is complete, the Court rather presuming the innocence of the petitioner until being proved guilty on the basis of the materials have denied the rights of the petitioner under Section 436A of the Code.

45. It is pertinent herein to mention that the learned Public Prosecutor had failed to show that it was on account of the petitioner there had been a delay during the course of investigation, inquiry and trial which led to the completion of the period mentioned in the main provision of Section 436A of the Code. It would also be not out of the place to mention that as on today, the total period of detention is five (5) years, seven (7) months and eight (8) days. It also appears from the E-Court services of the Kamrup Judiciary that as on 23.03.2023, the trial is still continuing and the case is fixed today for further examination of the P.W.49.

46. Accordingly, this Court therefore interferes with the order dated 28.12.2022 passed by the learned Trial Court whereby the Bail Application No.2569/2022 was rejected by the learned Special Judge, Assam. This Court is further of the opinion that the petitioner is entitled to be released in terms with Section 436A of the Code however taking into account the objections so raised by the Public Prosecutor as well as the apprehension, this Court instead of releasing the petitioner on his personal bond with or without sureties is of the opinion that the petitioner be released subject to the conditions as enumerated hereinunder;

(i) The Petitioner is directed to be released forthwith if his detention is not required in any other case on bail of Rs.1,00,000/- (Rupees One Lakh) with two sureties of the like amount to the satisfaction of the learned Special Judge, Assam.

(ii) The Petitioner shall not leave the Guwahati City without prior intimation and permission of the learned Special Judge, Assam. The Petitioner shall not tamper with the evidence of the Case. The Petitioner is further prohibited to contact the charge sheeted witnesses.

(iii) The Petitioner shall not directly or indirectly make any inducement, threat or promise to any of the witnesses so as to dissuade them from disclosing such facts to the Court.

(iv) The Petitioner shall forthwith surrender the passport to the Court of the Special Judge, Assam.

(v) The Petitioner shall appear before the Special Judge, Assam in connection with Special Case No.05/2021 pending before the Court of the

learned Special Judge, Assam on each date as so fixed by the learned Special Judge, Assam. It is categorically directed that the Petitioner shall only after taking due permission from the learned Special Judge, Assam, not appear before the said Court on a date as fixed by the learned Special Judge, Assam.

(vi) The Petitioner shall not cause any delay to the proceedings in Special Case No.05/2021 pending before the Special Judge, Assam.

(vii) In case of medical emergency, the learned counsel for the Petitioner shall apprise the learned Special Judge, Assam about such circumstances and it shall be within the jurisdiction of the learned Special Judge, Assam to pass such orders as deemed fit.

47. With the above, the instant petition stands allowed with the direction to release the petitioner on the conditions as mentioned hereinabove.

48. Before concluding, this Court further would like to observe that the learned Special Judge, Assam shall take appropriate steps to continue with the trial on day to day basis as was directed by this Court in the order dated 21.09.2022 passed in Bail Application No.904/2022 and further continue to submit monthly progress report to the Registrar (Vigilance) of this Court.

JUDGE

Comparing Assistant