IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATIONN (APPA) NO. 270/2020

IN

CRIMINAL APPEAL NO. 336/2016

Maksud Sheikh Gaffur Sheikh,
Aged about 46 years, Occu. - Labour,
R/o. Samta Colony, Tukum,
Chandrapur, District : Chandrapur.

.... **APPLICANT**
Org. Appellant No.1.

// **VERSUS** //

State of Maharashtra,
Through Police Station Officer,
Ramnagar Police Station,
Chandrapur. **.... RESPONDENT**

Shri R. K. Tiwari, counsel for the Applicant.
Shri T. A. Mirza, A.P.P. for the Respondent.

CORAM : **DIPANKAR DATTA, C.J.**
R. K. DESHPANDE &
SUNIL B. SHUKRE, JJ.

DATE OF RESERVING THE JUDGMENT : 25.08.2020
DATE OF PRONOUNCING THE JUDGMENT : 28.08.2020

JUDGMENT (Per : Sunil B. Shukre, J)

1. Heard Shri R. K. Tiwari, learned counsel for the applicant and Shri T. A. Mirza, learned A.P.P. for the respondent/State.

2. We have been called upon to answer the question referred to us in a Criminal Application filed by present applicant seeking his bail under Section 436-A of Code of Criminal Procedure (hereinafter referred to as “Code” for the sake of convenience) in a pending appeal.

3. The applicant was prosecuted along with five accused persons for offences punishable under Sections 450, 506-II, 326, 452, 366, 354-A, 354-B, 354-C, 376-B, 426, 307, 394, 201, 212 read with Sections 343 and 149 of the Indian Penal Code 1860 and Sections 67 and 67-A of the Information Technology Act, 2000 read with Sections 109 and 114 of the Indian Penal Code, 1860. The applicant, upon conclusion of his trial for these offences in Session Trial No.22 of 2015, was convicted by the judgment dated 01.08.2016, delivered by Additional Sessions Judge–4, Chandrapur. He was convicted for offences punishable under Sections 506-II, 450, 326, 452, 354-A read with Sections 34, 149, 109 and 114 of the Indian

Penal Code and also under Section 66E of the Information Technology Act, 2000. Various terms of imprisonments, ranging from three years to ten years came to be awarded to him. During pendency of the appeal, the applicant filed an application under Section 389 of the Code seeking suspension of sentences imposed upon him and his release on bail. The application was rejected by the Division Bench of this Court by its order passed on 18th November, 2016. Liberty, however, was granted to the applicant to file an independent application seeking bail on medical grounds, if any. The liberty so granted to the applicant was exhausted by him later and his bail application was rejected by the Division Bench on 31st January, 2017.

4. Having failed to get any reprieve twice, the applicant has again renewed his effort to secure his release on bail during pendency of appeal, this time on a new ground he sees as available to him in Section 436-A of the Code. It is the contention of the applicant that as he is in jail since 07th November, 2014 and has completed in jail a period equivalent to one half of the maximum imprisonment imposed upon him, he is entitled to be released on bail by virtue of his right under Section 436-A of the Code. The applicant relies upon

the decisions in the cases of ***Pradip Vs. State of Maharashtra***, 2019 SCC Online Bom 9768 and ***Mudassir Hussain and Anr., Vs. State and Anr.***, 2020 SCC Online J & K 381, and also a few more judgments.

5. The Division Bench, while considering the application of the applicant has found itself in disagreement with the view taken by it's co-ordinate Bench in the case of **Pradip** (*Supra*) while it distinguished the other cases, for the reasons recorded in it's detailed order, which forms the basis of this reference. The Division Bench has, however, found that this case involves a question of general importance arising frequently in criminal matters and so by framing a question, it has referred the matter for answering of the question to a Larger Bench. The question framed by the Division Bench, which we are called upon to answer, is as under :-

> *" Whether a convict who has challenged his conviction under Section 374 of the Code of Criminal Procedure, 1973 is entitled to the benefit of Section 436 A of the Code ?"*

6. Shri R. K. Tiwari, learned counsel for the applicant submits that the provision of Section 436-A of the Code is

beneficial in nature and, therefore, it deserves liberal interpretation to be made in favour of the person for whose benefit the provision has been inserted in the Code by an Act of Parliament, the Act 25 of 2005. He further submits that if the provision is liberally constructed, it would bring big relief to the convicts whose appeals filed under Section 374 of the Code are pending for final disposal for long years. He further contends that speedy trial is a fundamental right and the legislative intent underlying Section 436-A of the Code is to effectuate the fundamental right of the accused persons, whether under-trials or convicts. He further submits that on the first blush, it may appear from the language used in Section 436-A of the Code that it is applicable to only under-trial prisoners but it is really not so, if we consider the purpose for which the provision is made. He further submits that the provision is also applicable to an appeal proceeding, as the appeal is nothing but an extension of the trial.

7. Shri T. A. Mirza, learned Additional Public Prosecutor is completely at odds with the submissions made by the learned counsel for the applicant. In the opinion of Shri Mirza, language of Section 436-A of the Code is clear and unequivocal admitting of no two interpretations and,

therefore, rule of liberal construction has no application here. He submits that an elaborate scheme has been provided in the Code for trial of offences, recording findings of guilt or innocence, imposing of sentences of imprisonment on conviction, filing of appeals against the conviction, provisions regarding bail and bonds and other allied matters. He submits that these provisions are required to be considered together and understood as creating distinct stages of investigation, inquiry or trial and an appeal. He submits that once it is seen that there are separate stages for procedurally dealing with criminal offences and accused persons, it would be easy to not mistake an appeal for trial on the ground that appeal is extension of trial, as far as provision of release of a person on personal bond or bail under Section 436-A of the Code is concerned.

8. Shri T. A. Mirza, learned A.P.P. further submits that placement of Section 436-A in Chapter-XXXIII which relates to provisions as to bail and bonds is also significant and it suggests that a limited right created under Section 436-A of the Code has been intended by the legislature to be conferred only upon under-trial prisoners and if it were not so the legislature would also have made a suitable provision under

Section 389 of the Code, which is the only provision under which bail can be sought by a convict who has filed an appeal under Section 374 of the Code and that too after successfully pleading his case for suspension of sentence.

9. The question which we have to answer is about applicability of Section 436-A of the Code to an appeal proceeding. So, let us begin our quest for answer with Section 436-A of the Code. It reads as under :-

> *"**436-A**. **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."

10. This section has been inserted by the Parliament in the Code by it's Act, 2005, which came into force w.e.f. 23.06.2005. 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 stinginess in granting bail in the interest of

stringent legal action, need for preventing frequent bail jumping, and keeping away the professional sureties. The propounders 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 (See Law Commission of India, 177th Report, Chapter Ten pp. 117,118). Way back in the year 1977, in the case of ***The State of Rajasthan, Jaipur Vs. Balchand***, AIR 1977 SC 2447, the Hon'ble Shri Justice Krishna Iyer, speaking on behalf of the Bench, held that bail and not jail would be the basic Rule in ordinary circumstances, when he observed, "The basic Rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like……''.

11. In the 177th Report of Law Commission of India, the issue of introducing further bail reforms was considered (see Chapter Ten). The Law Commission, referring to its previous reports such as 41st, 78th and 154th reports, made a recommendation that as a general preposition, in an offence prescribing maximum punishment up to seven years with or

without fine, the normal rule should be bail and denial thereof an exception, in the circumstances mentioned specifically in the report. One of the situations referred to in the report is relevant here. It 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 XXXIII of the Code in the nature of Section 436-A. The Law Commission also recommended that in case of an offence punishable with imprisonment of seven years or less, the Police Officer or the Court would not insist for the 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 was already introduced in the Rajya Sabha on 09th May 1994. The Bill had proposed several amendments and one of them was for insertion of Section 436-A. It, however took many more years for the Bill to become the law. It finally received assent of the President on 23rd June, 2005 and was published in the Gazette of India on the same day and that is how Section 436-A came into force w.e.f. 23.06.2005.

12. Now, if we take a look at the amending Act entitled the Code of Criminal Procedure (Amendment) Act, 2005, some disappointment would be in store for us as we do not come across any Statement of Objects and Reasons in so far as Section 436-A is concerned. However, there is annexed to the Bill introduced in the Rajya Sabha on 09th May, 1994 a Statement of Objects and Reasons. It would be quite helpful for us, to reproduce it here. It goes as under :-

> *"Having regard to the recommendations made by the Law Commission and the National Police Commission, the observations made by the courts and the suggestions received from the State Governments and others, and with a view to removing certain difficulties or lacunae felt in its working, it has been found necessary to amend various sections of the Code of Criminal Procedure, 1973.*
>
> *2. The Notes on clauses explain, in brief, the various provisions of the Bill.*
>
> *3. The Bill seeks to achieve the above objects."*

As the above Statement refers to notes on clauses explaining in brief various provisions of the Bill, consideration of the note on the relevant clause, which is clause 41, is necessary. It reads thus :-

> "Insertion of new section 436A. Maximum period for which an ***under trial prisoner ,*** can be detained."

13. The raging controversy on practice of bail, recommendations of Law Commission and Statement of Objects and Reasons appended to the Bill introduced in the Rajya Sabha in 1994, would give us a fair idea about the situation prevailing at the time when the Code of Criminal Procedure (Amendment) Act, 2005 was passed, in so far as provisions made in Section 436-A are concerned. The situation which went into birth of Section 436-A was of under-trial prisoners, the primary concern being of their incarceration in jail for long period of time pending investigation, inquiry or trial, even though the presumption of innocence till found guilty was operating in their favour. By introducing Section 436-A to the Code, an endeavor was made to remedy the condition of torture and misery of accused persons as under-trial prisoners, relegated to dark corners within jails, away from the hustle and bustle of life activity without jails.

14. With this background, we will deal with the provisions contained in Section 436-A of the Code in the light of the rival arguments and relevant provisions of law.

15. In the referral order, the Division Bench, disagreeing with the view expressed by the co-ordinate Division Bench in **Pradip** (*supra*) has, in a *prima facie* manner, opined that Section 436-A of the Code is applicable only to an under-trial prisoner on various grounds. It pointed out that the section refers to “the period of investigation, inquiry or trial” and also to the maximum period of imprisonment specified for the offences and not to the imprisonment as imposed while convicting the accused. The Division Bench observed that the contingency of considering maximum period of imprisonment specified for an offence would arise only in case of an under-trial prisoner. The Division Bench noted that in Section 389 of the Code, which deals with suspension of the sentence pending appeal, the reference is to an appeal by a convicted person. The Division Bench also found positioning of Section 436-A in the Code, which is inserted in Chapter-XXXIII relating to provisions as to bail and bonds, is not without significance.

16. All these factors, weighed with the Division Bench, have also been emphasised upon by the learned Additional Public Prosecutor appearing for the State, though Shri R. K. Tiwari, learned counsel for the applicant would like to strike a discordant note. According to him, right of speedy trial being a fundamental right, all criminal cases including criminal appeals need to be decided as expeditiously as possible and the Supreme Court has, in several cases, given directions to the High Courts to find out ways and means for disposal of such cases including appeals within specified period. He points out that in the case of **Smt. Akhtari Vs. State of M.P.**, AIR 2001 SC 1528, directions have been issued by the Apex Court to the High Courts to find a way out for speedy disposal of pending appeals within specified period not exceeding five years in any case. He also relies upon the decision in the case of ***Kashmira Singh Vs. The State of Punjab****, 1977 SCC (4) 291*. In this case the Supreme Court has held that although it has been the practice of Courts to not release on bail a person who has been sentenced to life imprisonment for an offence punishable under Section 302 of the Indian Penal Code, the underlying postulate being of the appeal of the said person getting disposed of within a measurable distance of time so that if he is ultimately found

to be innocent, he would not be required to remain in jail for a unduly long period, the practice would have to be departed from if it is not possible to dispose of the appeal within reasonable period of time and the accused would have to be granted bail. Shri Tiwari, submits that it is this exception made to the general practice which would have to be said as having found its expression in Section 436-A of the Code by according to it liberal construction so that the limited right thereunder becomes available even to a convict who has filed an appeal under Section 374 of the Code.

17. There can be no two opinions about the fact that the provision under consideration in the present case is beneficient as well as remedial as it seeks to confer benefit of release from custody with or without sureties or on bail with a view to alleviating suffering of those who have slid into obscurity of jails pending their trials. So, the principle of liberal construction, would apply and to this extent Shri Tiwari, the learned counsel for the applicant is right. But, the rule of liberal construction of beneficient or remedial provision has it’s own limitations, in ignorance of which the construction cannot be stretched so much as to rewrite the provision. The rule only states that if a remedial or beneficient provision is

reasonably capable of two constructions, that construction must be preferred which furthers the policy of the legislature and which is more beneficial to those in whose interest it is made, and the doubt, if any should be resolved in their favour (*See* ***Alembic Chemical Works Co. Ltd. vs. The Workmen****,* AIR 1961 SC 647). The liberal construction, however, must flow from the language used and the rule does not permit placing of an unnatural interpretation to the words contained in the provision, nor does it permit raising of any presumption that protection of widest amplitude must be deemed to have been conferred upon those for whose benefit the legislation may have been enacted, as held in the case of ***Mangilal vs. Sugan Chand****,* AIR 1965 SC 101. The principle of liberal construction of beneficial enactment has to be applied without rewriting or doing violence to the enactment for removing the ambiguity but where there is none and the language is clear, the rule of liberal construction, cannot be given a go bye (See ***Steel Authority of India Ltd. and ors. Vs. National Union Water Front Workers and ors.****,* AIR 2001 SC 3527, PP. 3535, 3539). These principles of interpretation cannot be put under shelf as we proceed to ascertain true meaning of the words used in Section 436-A of the Code and true intent of the legislature in enacting it.

18. Upon the closer examination of the language used in Section 436-A of the Code, it can be seen without any difficulty or doubt that the benefit intended to be given is for a person who has, 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 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 continued detention of the person for a period longer than one half of the period mentioned in the Section or release him on bail instead of the personal bond with or without sureties. However, this limited right has the potential of becoming absolute when the condition prescribed in second proviso is fulfilled. The condition is that if the person has been detained during the period of investigation, inquiry or trial for

more than maximum period of imprisonment 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.

19. Reading the Section as a whole, we find that the benefit under the section has been intended to be given only to the under-trial prisoners. The words “during the period of investigation, inquiry or trial” and the words “maximum period of imprisonment specified for that offence” are significant. They indicate that only that person who has undergone detention for a period of one half or more of the maximum prescribed punishment during investigation, inquiry or trial under the Code who is eligible for his release on personal bond with or without sureties or bail, as the case may be. The Section does not say that a person who has been detained for one half period of imprisonment imposed would be eligible. Mentioning of “the maximum period of imprisonment specified for that offence under that law” and omission of the words “punishment imposed” shows that the legislature was aware of the difference in the status of an

undertrial prisoner and a convict, and with it of the consequences of detaining a person who enjoys presumption of innocence till found guilty for unduly long time. Such presumption of innocence being absent in case of a convict, the legislature refrained, and consciously, from mentioning the words “punishment imposed”. This clearly shows the intention of the legislature to confer the benefit on the under-trials and not the convicts. This being the position, we do not think that rule of liberal construction would have any application here.

20. There are further indications about the clarity of intention of the legislature. The provision refers to “investigation, inquiry and trial under the Code”. There can be no doubt about what “investigation or inquiry” means as they have been defined in Section 2(h) and Section 2(g) of the Code respectively. The doubt, however, could be about meaning of the word “trial” as it has not been defined in the Code. It has not been defined in the General Clauses Act either. So, we have to turn to its dictionary meaning, if it helps. In Black’s Law Dictionary (9th Edition page 1644) “trial” has been defined to be a formal judicial examination of evidence and determination of legal claims in a advisory

proceeding. This definition is too general an explanation of "trial" and, therefore, it would not help us in understanding its meaning here. So, we must again revert to the Code, in an attempt to understand the sense in which the word "trial" has been used in Section 436-A of the Code or to be precise, to know, as to whether or not the trial of an accused goes beyond his conviction and continues, if appeal is filed under 374 of the Code, till it is finally decided, or it culminates upon acquittal or conviction for the purpose of Section 436-A of the Code.

21. Upon taking a birds eye view of various provisions contained in the Code, something that strikingly appears is that the process of dispensation of justice in criminal cases has been divided into different stages beginning from lodging of First Information Report or complaint, investigation or inquiry into the report or complaint, discharge of the accused or framing of the charge against the accused, trial of the accused, and the termination of the trial upon pronouncement of the judgment in open Court by the Presiding Officer. These provisions referring specifically to various stages of investigation, inquiry and trials are found in different Chapters

from the Chapter-XII to Chapter XXVII and lay down a procedural framework for administration of criminal justice.

22. In so far as the provisions relating to appeals are concerned, they find their place in Chapter-XXIX entitled “Appeals”. Section 374 of the Code creates a right of appeal and it lays down that any person convicted on a “trial” would have remedy of appeal to the superior Court. When conviction on “trial” is by Sessions Judge or Additional Sessions Judge, or by any other Court in which sentence of imprisonment imposed is for more than seven years, the appeal would lie to the High Court and when the conviction is rendered on “trial” by a High Court in its extraordinary orignal criminal jurisdiction, the appeal would lie to the Supreme Court.

23. As these provisions create a step-wise mechanism to procedurally deal with crimes and so the word, “trial” used in Section 436-A would get it’s meaning in the context of this scheme of the Code, at least for the purpose which is sought to be achieved by the provision of Section 436-A. Under this scheme of the Code, “trial” of a person accused of an offence is contemplated only by a Court having original criminal jurisdiction or assuming original criminal jurisdiction after

committal of a Sessions case and appeal as a remedy against the judgment of conviction and/or sentence or even acquittal has been made available before the Court exercising Appellate jurisdiction. In this sense, so far as the Section 436-A benefit is concerned, the word “trial” has to be understood in contra-distinction to an “appeal proceeding”. Our conclusion is further bolstered up by the provisions contained in Section 353. Provisions contained in Section 389 also help us in drawing of such an inference. It would be, therefore, convenient for us to quote relevant portions of these sections here. They are as under :

> *“**353**. **Judgment** – (1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders,*
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> *(a) by delivering the whole of the judgment; or*
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> *(b) by reading out the whole of the judgment; or*
>
> *(c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.”*

> *"**389**. **Suspension of sentence pending the appeal; release of appellant on bail**. - (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond:*
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> *Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:"*

It is clear from Section 353 that it requires a criminal Court to pronounce judgment in every trial in open Court immediately "after the termination of the trial or at some subsequent time". It is indicative of the fact that upon pronouncement of the judgment, in the contemplation of the scheme of the Code, there occurs termination of the trial. If we examine Section 389 of the Code, on the backdrop of Section 353, we would find that under the scheme of the Code, appeal has been considered to be a stage separate from trial, which comes into being after pronouncement of the

judgment upon termination of the trial. In other words, unless there is termination of trial, there is no question of stage of appeal being born. That means the words “trial” and “appeal” have been used in distinctive sense thereby signaling that no one makes a mistake in understanding that “trial” is not synonymous with “appeal”, when it comes to extending benefit available to an under trial prisoner to a convict undergoing sentence of imprisonment. Of course, in general sense, appeal could be said to be an extension of trial on the parameters of rights available to a convict, principles to be followed by Appellate Court in appreciation of evidence and power of Appellate Court. But, this is not so for the purposes of Section 436-A of the Code. This is the reason why in Section 389 of the Code, the words “trial of the person”, “are not used and instead the words, “pending any appeal by a convicted person” are employed for considering suspension of sentence of the convict and grant of bail to him.

24. At this juncture, explanation to Section 436-A of the Code also assumes importance. It clarifies as to how the period of detention contemplated under Section 436-A of the Code for granting bail has to be calculated. It lays down that period of delay in a proceeding caused by an accused must be

excluded. Any occasion of causing of delay in a proceeding, if it has to arise, would arise only during trial as for hearing of an appeal against conviction, personal presence of the accused is not required, unless directed otherwise, and so there would be no question of the convict personally contributing to delay in an appeal proceeding.

25. The discussion thus far made would show that even though an appeal could be said to be continuation of trial in the general sense of the term, it is not so for the purposes of Section 436-A of the Code. The word “trial” used in Section 436-A of the Code is for achieving a certain purpose, a defined goal of reducing the woes of a person in jail as he faces trial, even before he is found guilty and to a larger extent also to decongest overcrowded jails. The provision is benefic and remedial and, therefore, it must be understood in the sense which sub-serves the purpose, which remedies the situation or otherwise the remedial medicine may itself become the malady. So, the meaning plainly conveyed by Section 436-A is that its benefit is intended only for under-trial prisoners, and it is not possible to make any different or alternate construction. When two different constructions are not fairly possible, contingency of adopting that construction which favours the

convict by granting him benefit of Section 436-A of the Code does not arise and so, rule of liberal construction would have no application here.

26. Here is a case where the intention of the Parliament to confer the benefit of Section 436-A of the Code upon only undertrial prisoners is clearly found in the words used in Section 436-A of the Code and understood in the context of the scheme of the Code. In the case of ***State of Himachal Pradesh and anr. Vs. Kailash Chand Mahajan and ors.***, AIR 1992 SC 1277, p. 1300, the Hon'ble Apex Court has held that the legislative intention behind an enactment and the true meaning thereof is derived by considering the meaning of the words used in the enactment in the light of it's discernible purpose or object which comprehends the mischief and provides a remedy. This formulation later came to be known as the "cardinal principle of construction" (See ***Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd.***, AIR 2001 SC 724, p. 740).

27. Upon considering the scheme of the Code, in a holistic manner as also the distinctive use of the terms "trial" and "appeal" therein, we have already found that the benefit

under Section 436-A of the Code is aimed only at under-trial prisoners. We have also delved into the legislative history of Section 436-A of the Code briefly and Statement of Objects and Reasons appended to the Bill seeking amendment to the Code of Criminal Procedure, 1973 introduced in the Rajya Sabha on 09th May, 1994. They all would show that the entire endeavor was for reducing the agony of the person accused of an offence who is detained in jail pending his trial for unduly long time, affecting his fundamental right to speedy trial. Even the notes on relevant clause, clause 41, which proposed insertion of Section 436-A, clarified that the benefit was made for an under-trial prisoner when it suggestively explained the purpose which was of the maximum period for which an "under-trial prisoner" could be detained.

28. There are more indications appearing from the section. One of them is the placement in the Code of the Section, which points out that the benefit has been intended by the Parliament to be only for the under-trial prisoners and not convicts. Essential prescription of the Section is that one half period of detention has to be counted not in relation to the punishment awarded but in relation to the maximum period of imprisonment prescribed for an offence. If it were

the intention of the legislature to confer this benefit even upon a convict, it would also have made suitable provision by making appropriate reference to the sentence imposed. But, that is not the case here. As against this, Section 389 of the Code specifically refers to a convicted person and the power of the Court to suspend the sentence or order appealed against and also direct release of the convict on bail, if he is in confinement. Section 389 of the Code has not been amended so as to include the limited right given by Section 436-A to a person under investigation or inquiry or facing trial. The other indicator is that Section 436-A has been inserted in Chapter-XXXIII containing provisions as to bail and bonds. The provisions contained in this Chapter, deal with bail and bonds and the principles applicable to them in relation to a person accused of or suspected of commission of an offence. These provisions do not by themselves enable a convict to secure bail, and he has to take recourse to Section 389 of the Code, which makes possibility of getting bail for a convict a reality, subject to appellate court suspending his sentence. In other words the provision does not make the event of grant of bail as independent of the satisfaction of the Court as regards the need for suspending the sentence or order appealled against, till final disposal of the appeal and it is only upon recording

necessary satisfaction that a convict would succeed in getting bail. So, in a pending appeal there is no right of bail for a convict which is alive and available for him to be taken advantage of at any point of time desired by him. The right remains eclipsed by the requirement of suspension of sentence and becomes clearly visible when the eclipse is removed. Even after the right becomes available, it's realization depends on the discretion of the Court. But that is a different matter. The point here is of the exercise of right being dependent on suspension of sentence by the Court. That would show that the right of bail in Section 389 of the Code is consequential to suspension of the sentence and unless the first requirement is fulfilled, the consequence of bail of convict would not happen. If the legislature had intended that the benefit under Section 436-A of the Code should be given even to a convict before an Appellate Court, it would have amended suitably Section 389 of the Code. The legislature did not do it. It would show that the legislative policy was limited to extending benefit only to an undertrial prisoner and not to convicts whose appeal is pending before the Appellate Court under Section 374 of the Code.

29. The interpretation so made by us receives support from the decision of the Apex Court in the case of ***Hussain and Anr., Vs. Union of India***, (2017) 5 SCC, 702 relied upon by learned Additional Public Prosecutor. In this case, the Supreme Court being concerned about speedy conclusion of criminal trials and appeals considered the question as to the circumstances in which bail could be granted on the ground of delay in the proceeding when a person is in custody. Supreme Court, having noticed that speedy trial was a part of reasonable, fair and just procedure guaranteed under Article 21 of Constitution of India, issued several directions for speedy disposal of cases of under-trial prisoners. In that case, a submission was made that the provisions contained in Section 436-A of the Code were not applicable to appeals and they would apply only during trials. Supreme Court was of the view that while deprivation of personal liberty guaranteed under Article 21 for some period may not be unavoidable, deprivation of the same pending trial/appeal could not be unduly long. While finding so, Supreme Court considered the decisions in the cases of **Akhtari Bi Vs.State of M.P,** AIR 2001 SC 1528, ***Abdul Rehman Antulay Vs.R.S.Nayak and anr***, AIR 1992 SC 1701, ***Surinder Singh @ Shingara Singh Vs. State of Punjab,*** (2005) 7 SCC 387, ***Hussainara***

Khatoon Vs. State of Bihar, 1980 SCC (1) 98 and some more cases. Ultimately, Supreme Court directed the High Courts to issue directions to subordinate Courts for disposal of bail applications and criminal trials within the periods mentioned therein. It also observed that the timelines given in its decision could be made the touchstone for assessing judicial performance of judges in their confidential reports. Supreme Court, however, nowhere held that the provisions contained in Section 436-A of the Code would also be applicable to an appeal proceeding rather, in paragraph 29.1.4, it directed as under :

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

30. It would be clear from above that Supreme Court did not reject the submission that Section 436-A of the Code was not applicable to an appeal proceeding, rather, it added that as a supplement to Section 436-A of the Code and consistent with its spirit, an under-trial prisoner completing

period of custody which is in excess of the sentence likely to be awarded, if conviction was to be recorded, must be released on personal bond. The Apex Court having thus considered the issue of applicability of Section 436-A of the Code and having extended further its benefit only to under-trial prisoners and not to convicts, cannot be said to have approved, even by implication, the proposition that the benefit is applicable to a convict. In fact, a conclusion in reversal would arise that Supreme Court did not reject the submission that benefit under Section 436-A was available only during trial, thereby impliedly refusing to apply it to an appeal proceeding. On realising the ratio of **Hussain** (supra), learned counsel for the applicant has fairly submitted that he would not say anything more in reply. It is now clear that decisions in **Pradip** (supra) and **Mudassir Hussain** (supra), really do not present correct legal position, though in **Pradip** (supra), we must say, the Division Bench has not categorically held that the provision of Section 436-A of the Code is applicable to an appeal proceeding. It was only observed that in view of provisions of Section 436-A of the Code coupled with the fact that as the Bench was not in a position to take up the appeal immediately for final hearing in near future, the Bench would grant bail. This is suggestive of

the fact that the Division Bench appears to have drawn inspiration from the principles stated in Section 436-A of the Code and chose to apply them together with other relevant circumstances so as to effectuate the right of a convict regarding expeditious disposal of a criminal appeal. Following the consistent view taken by the Apex Court since the case **Hussainara** (*supra*) till date, we are inclined to say that the principles stated in Section 436-A of the Code can be used by an appellate court while considering application of a convict filed under Section 389 of the Code seeking suspension of sentence and bail, as constituting one of the relevant criteria for exercise of its discretion and of course not as a matter of any right or course.

31. Shri R. K. Tiwari, learned counsel for the applicant has also placed reliance upon the cases of ***Bhim Singh Vs. Union of India and Ors.***, (2015) 13 SCC 605, ***Mithu Pasi and Anr., Vs. State of Jharkhand***, (2018) 11 SCC 196, ***Bhagwan Rama Shinde Gosavi and Ors. Vs. State of Gujrat***, 1999 Cri.L.J. 2658 and **the *Supreme Court Legal Aid Committee Representing Under-trial Prisoners Vs. Union of India and Ors.***, (1994) 6 SCC 731.

32. We have carefully perused all these judgments. We are of the view that none of them covers the issue involved here, which fact has also been found by the Division Bench. The Division Bench has found that in **Bhim Singh** (*supra*) various directions were issued for effective implementation of Section 436-A of the Code in relation to under-trial prisoners. It further found that it was not the ratio of the decision in **Mithu Pasi** (*supra*) that provision of Section 436-A of the Code could be made applicable to any appeal proceeding. The Division Bench further found that **Bhagwan Rama** (supra) was a case which was decided prior to introduction of the provision of Section 436-A in the Code. It further noticed that in Supreme Court Legal Aid Committee (*supra*), directions issued pertained to those under-trials who were accused of offences under the N.D.P.S. Act, 1985. Noting these distinguishing features, the Division Bench expressed a view that all these decisions would not render any assistance to the applicant in the present case. Having noted the distinctiveness in these cases, we have no reason to disagree with their Lordships.

33. There is one more case which needs to be referred to here. It was about giving effect to the right relating to

speedy trial and expeditious disposal of appeal. The case was of ***Krishnakant Tamrakar Vs. State of Madhya Pradesh***, (2018) 17 SCC 27***.*** In this case, Supreme Court did not invoke the provisions contained in Section 436-A of the Code, even though it was conscious of the fact that the petitioner therein was in custody for more than ten years, was neither granted bail nor early hearing of his appeal, nor was there an assurance to him that there was likelihood of his appeal being heard by the High Court in the near future. This would only show that the Hon'ble Apex Court has consciously chosen to not take any recourse to Section 436-A of the Code while issuing direction to initiate various measures for expeditious disposal of criminal trials and appeals.

34. With this discussion, the inevitability of our conclusion is writ large and it provides a negative answer to the question referred to us. To be specific, we answer the question in terms that a convict who has challenged his conviction under Section 374 of the Code, is not entitled to the benefit of Section 436-A of the Code.

35. Answered accordingly.

(Sunil B. Shukre, J)

R. K. Deshpande, J :

1. I have gone through an erudite view expressed by my learned Brother Shri Sunil Shukre, J. I am in complete agreement with it. However, I would like to deal with a specific contention raised by Shri Tiwari, the learned counsel for the appellant. Inviting our attention to the provisions of Sections 386(b), 391 and 393 of the Code of Criminal Procedure, it is urged that the conviction recorded attains finality upon dismissal of the appeal against conviction under Section 374 of the Code and the Appellate Court also exercises the power to record the additional evidence. This is an indication to treat the accused, whose application under Section 389 of the Code for suspension of sentence and grant of bail is rejected, as “an under-trial prisoner”. It is also urged that the Appellate Court being the “Court” in the contemplation of Section 436-A of the Code, is competent to exercise the power and confer benefit upon satisfaction of the conditions.

2. In my view, there is no absolute right to get released, conferred upon the under-trial prisoner upon

fulfillment of the conditions specified under Section 436-A of the Code. The first proviso empowers the Court to reject the claim for the reasons to be recorded. Be that as it may, the intention of the Legislature, as has been pointed out by my learned Brother, is to restrict the benefit to an under-trial prisoner. If the contention that an accused, even after the conviction of the trial Court, continues to be an under-trial prisoner upon rejection of his application under Section 389 of the Code is accepted, it would create an anomalous situation. An accused completing the period specified under Section 436-A on the date of filing of appeal may not apply under Section 389 of the Code for suspension of sentence and grant of bail, but he can claim the release from detention even without suspension of sentence. This cannot be the intention of the Legislature. It is, therefore, not possible to agree with the contention that the accused remains an under-trial prisoner during the pendency of the appeal and the Appellate Court is competent to exercise the power under Section 436-A of the Code.

(R. K. Deshpande, J)

DIPANKAR DATTA, CJ.:

1. I have had the benefit of reading the well-researched and well-reasoned opinion of brother Shukre, J. I have also read the short concurring view expressed by brother Deshpande, J. While I am entirely in agreement with the lucid exposition of law by brother Shukre, J. and the reasons assigned by my brethren in support of the conclusion that the referred question should be answered in the negative, I feel tempted to express my views too in very brief.

2. The formative information necessitating constitution of the present Full Bench has been noticed by His Lordship and hence, is not referred to by way of a prologue. However, for facility of appreciation, once again the question referred for an answer is set out below :

> ***"Whether a convict who has challenged his conviction under Section 374 of the Code of Criminal Procedure, 1973 is entitled to the benefit of Section 436 A of the Code ?"***

3. Section 436-A, Cr.P.C. was introduced in Chapter XXXIII of the Code of Criminal Procedure (hereafter “the Cr.P.C.”, for short) by an Amendment Act of 2005 upon instances of accused having remained in custody during the period of investigation, inquiry or trial, in excess of the maximum period of imprisonment provided for the same offence under the law, being noticed. Apart from the enacting part, the section has a couple of proviso and an explanation. The enacting part envisages grant of bail to a person in custody ‘during the period of investigation, inquiry or trial’ under the Cr.P.C. for any offence (except an offence attracting the punishment of death), provided that such a person is in detention for a period extending upto one-half of the maximum period of imprisonment specified therefor in law. As an explanation, it is provided that when the accused has caused delay in the proceeding, such delay is required to be deducted in computing the period of detention suffered by him for the purposes thereof. However, it is to be noted that the relief of bail, even if the pre-conditions of Section 436-A Cr.P.C. are satisfied, does not follow as a matter of course. The Court may, for reasons to be recorded in writing, deny relief if it is of the opinion that further detention is necessary. It is, therefore,

clear that Section 436-A, Cr.P.C. does not envisage an automatic release as in Section 167(2), Cr.P.C., i.e., default made during investigation, but is akin to sub-section (6) of Section 437 thereof. The other part of the section, however, appears to be of mandatory nature requiring release of the under-trial who has been detained for more than the maximum period of imprisonment provided in law. On a plain reading of the enacting part, the first proviso and the explanation together (which are relevant for the purpose of answering the reference) and on a literal interpretation thereof, the law seems to be free from blur, obscurity or absurdity and the conclusion is inescapable that the benefit of Section 436-A, Cr.P.C. is intended for an under-trial prisoner.

4. Having noticed what Section 436-A is all about, the next task is to consider whether the benefit thereof can be extended to a convict who, having challenged his conviction in an appeal under Section 374, Cr.P.C., applies for suspension of execution of sentence under Section 389 thereof and seeks release on bail. The fields of operation of Section 389, Cr.P.C. on the one hand and Sections 436, 437 and 439 thereof on the other are quite different. Section

389 is included in Chapter XXIX of the Cr.P.C., empowering the Courts (to whom the conviction and sentence are carried in appeal), to suspend execution of the sentence and release the appellant/convict on bail pending hearing of the appeal; whereas Sections 436, 437 and 439, Cr.P.C. deal with grant of bail during investigation, inquiry or trial. The words 'during the period of investigation, inquiry or trial' used in Section 436-A and the insertion of the said section in Chapter XXXIII, without insertion of a like provision in Chapter XXIX, clearly restricts its operation to the matter of grant of bail at the trial stage and not at the appellate stage. Further, Section 436-A refers to the maximum period of imprisonment specified for the offence in question, and not to the period of imprisonment actually imposed. As a logical corollary, the question of imposing 'the maximum period of imprisonment specified' for an offence under the law would arise only in case of an under-trial prisoner although it could be so that after recording a conviction, the convict could be sentenced for a term lesser than what is the maximum. Also, having regard to the explanation at the foot of Section 436-A, it can be held without any shred of doubt that the proceeding referred to

therein is referable to the proceeding before the trial court and not the appellate court.

5. The parameters for grant of bail at the stage of trial and for grant of bail upon suspension of execution of sentence at the appellate stage, though well demarcated, are not exactly the same. To wit, in the former, the conviction not having yet been recorded by the competent court, the under-trial/accused would be presumed to be innocent; 'bail is the rule and jail the exception' principle would normally apply at this stage, unless provided otherwise in any special statute. However, in the case of the latter, the appellate court while considering whether execution of the sentence should be suspended or not has to, *inter alia*, bear in mind that upon conviction being recorded (which, of course, is subject to the court's judicial scrutiny in the appeal), there is a rebuttal of the presumption of innocence by reason of the conviction recorded by the trial court. In this connection, the decision of the Supreme Court of recent origin in **Preet Pal Singh vs. The State of Uttar Pradesh and Ors.**, reported in MANU/SC/0591/2020 may be referred to.

6. In my view, Section 436-A, Cr.P.C. is restricted in its operation to grant of bail to an under-trial prisoner ‘during the period of investigation, inquiry or trial’ and does not, *ex proprio vigore*, apply at the appellate stage. I, thus, concur with the *prima facie* view of Their Lordships of the Hon’ble Division Bench expressed in the order dated August 14, 2020 as well as the opinion of learned brothers Deshpande and Shukre, JJ. I also agree with Their Lordships that the reference ought to be disposed of by answering the question referred in the negative.

7. Having so answered, I hasten to observe that in a given situation the spirit of Section 436-A, Cr.P.C. could be considered by an appellate court while it is seized of an application under Section 389, Cr.P.C. and, drawing inspiration from the principle ingrained in the former, to suspend execution of the sentence bearing in mind all relevant factors including the time likely to be taken for disposal of the appeal. The judicial mind in the wise exercise of discretion and by suitable moderation may suspend execution of the sentence and grant bail under Section 389, Cr.P.C., the absence of a provision like Section 436-A, Cr.P.C. in the chapter on appeals notwithstanding. If any authority is required, one may usefully refer to the

decisions in **Kashmira Singh vs. State of Punjab**, reported in (1977) 4 SCC 291, **Babu Singh vs. State of U.P.**, reported in (1978) 1 SCC 579, **Bhagwan Rama Shinde Gosai vs. State of Gujarat**, reported in (1999) 4 SCC 421, **Akhtari Bi vs. State of Madhya Pradesh**, reported in (2001) 4 SCC 355, and **Suresh Kumar vs. State [NCT, Delhi]**, reported in (2001) 10 SCC 338, which are all decisions prior to the birth of Section 436-A in the Cr.P.C. delineating factors that a Court ought to take into account while considering a prayer for bail at the appellate stage.

8. Since the Hon'ble Division Bench has rejected the applicant's prayer for suspension of execution of sentence for the third time, it is highly unlikely that any further prayer in this regard shall be favourably considered. If the appeal is otherwise ready, its hearing ought to be expedited.

CHIEF JUSTICE

Jaiswal/Kirtak