
(2012) 12 KL CK 0090
In the High Court Of Kerala
Case No : B.A. No. 4397 of 2012

Sareena, O.P.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 13-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 354(1)(d), 389(1), 389(3), 436, 437
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 2 BC 273 : (2013) 2 BC 267 : (2013) 1 ILR (Ker) 537 : (2013) 2 RCR(Criminal) 360

Hon'ble Judges : N.K. Balakrishnan, J

Bench : Single Bench

Advocate : S.U. Nazar, for the Appellant; P. Parameswaran Nair (A.S.G. of India), Sri Asaf Ali (Director General of Prosecution) and Smt. Jasmine V.H. (Public Prosecutor), for the Respondent

Judgement

N.K. Balakrishnan, J.—Is Section 437A of Cr.P.C. mandatory in nature? This is the pertinent question that crops up for consideration in this case.

Section 437A of Cr.P.C. reads:

Bail to require accused to appear before next Appellate Court.--(1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

(2) If such accused fails to appear, the bond stands forfeited and the procedure u/s 446 shall apply.

2. Section 437A of Cr.P.C. was introduced as per Criminal Procedure Code (Amendment) Act, 2008 (Act 5 of 2009) which was brought into force with effect

from 31-12-2009. The main object of this section is to secure attendance of the accused at the appellate stage, if any appeal is filed against the verdict of acquittal or for enhancement of the sentence.

3. The learned counsel for the petitioner points out that no specific provision as to the consequence for violation of direction to execute bond in terms of Section 437A has been made. If the accused, who was granted bail by the Court earlier, does not commit breach of any of the conditions stipulated in the bond, how can he be compelled to execute another bond before the conclusion of trial to make the bail bond alive for a further period of six months? If the accused fails to execute the bond in terms of section 437A of Cr.P.C. how can the accused be remanded? How can it be held that the accused has committed breach of the earlier conditions imposed by the Court while granting bail? If the accused fails to execute the bond in terms of Section 437A how can the pronouncement of the judgment be postponed indefinitely? These are some of the questions put by Sri S. U. Nazar, the learned counsel for the petitioner, which could not be properly answered by the respondents.

4. It is also pointed out that no distinction has been made with regard to the category of offences so that as it stands now, Section 437A applies to all offences including bailable offences. The argument advanced by the learned counsel is that in regard to bailable offences, the accused, as of right, is entitled to bail and if he does not commit breach of any of the conditions of the bond originally executed how can he be directed to execute a fresh bond; if he fails to execute a bond how can he be remanded for the simple reason that he failed to execute another bond. If the Court postpones the pronouncement of judgment and if the accused fails to execute the bond on the postponed date/ dates also, how can the court further postpone the pronouncement of judgment. These are also pertinent questions which remain unanswered.

5. It is also worthwhile to note that under Sec. 437A the accused has to execute bail bonds with sureties. Therefore, it may be argued that the bond is to be executed with sureties. In other words, there should be two sureties to execute the bond. As already pointed out, Section 437A makes no difference between bailable and non-bailable offences. Section 436 deals with bailable offences. The proviso thereto reads:

Provided that such Officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

Explanation to that section further says that where a person is unable to give the bail within a week of the date of his arrest, it shall be a sufficient ground for the Officer or the Court to presume that he is an indigent person for the purposes of the proviso to Sec. 436. Therefore, it can be argued that an indigent person is entitled to be released on his executing a bond without sureties. If he is to be

ultimately acquitted of the offence charged against him, how can he be directed to execute a bond with sureties. If so, Sec. 437A will offend the proviso to Section 436.

6. It is pointed out by Sri Nazar that Form No. 45 of Cr.P.C. is the Form in which the bond has to be executed by the accused and the sureties. That bond provides for the attendance of the accused before the police during the investigation and also before the Trial Court till the disposal of that case. Form No. 45 was also amended by Section 32 of the Amendment Act to include in that heading Section 437A also. But the body of the format--Form No. 45 has not been amended to accommodate in it the text of Section 437A. Therefore, unless the format is amended in tune with the requirement of Section 437A, it may not be possible to order that the said bail bond shall be valid not only till disposal of the case but also for a further period of six months from the date of execution of the bond or the date of judgment/order of acquittal. Sri Nazar submits.

7. Not only that, the bond executed in terms of Sec. 437A will have validity only for six months from the date of execution. Therefore, if in Form No. 45, Sec. 437A is simply added, the bond so executed will be valid only for six months from the date of execution. Therefore, mere amendment of Form No. 45 also may not be a practical/workable solution.

8. On the other hand, if Sec. 437A is couched in such a way that bonds executed pursuant to orders passed under Sections 436, 437, 439 etc. would remain in force for a further period of six months or one year from the date of final disposal of the case, in case of acquittal of the accused, then it can be implemented with out offending the Section, causing least inconvenience to the parties. If the accused is to be directed to execute a fresh bond before/after conclusion of the trial there should be a term in the bond (already executed) in tune with Sec. 437A.

9. The Law Commission has observed that the Code is silent on the point of securing attendance of the accused at a later stage after the acquittal in cases where appeals against acquittals have been filed. It was noticed that there were instances where Appellate Courts found it difficult to secure the presence of the acquitted accused even though non-bailable warrants were issued but warrants were returned saying that the police have no information regarding the accused who are the respondents in the appeal and their whereabouts. The Law Commission took note of the decision of the Division Bench of Gujrat High Court in State of Gujarat Vs. Harish Laxman Solanki, by which the Division Bench exercising its power under Sec. 482 of the Code, with a view to secure attendance of the accused persons at the appellate stage, issued directions to all the Subordinate Courts to cover the appeal period also while accepting the bail and bail bonds before the officer-in-charge of the police station or the Court, as provided in Form No. 45 in Schedule II of the Code. It was further directed that the criminal courts should take the bond covering the appellate as well as the revisional stage. The learned counsel for the petitioner would submit that

Solanki's case was later overruled by the Full Bench of the Gujarat High Court in *Omprakash Tekchand Batra and Another Vs. State of Gujarat*, . It was held by the Full Bench as follows:

Thus, when the law has provided in these provisions for a statutory release of an accused tried by a Magistrate if the trial is not over in six months and even for release without surety in case where the trial is concluded by the judgment is not yet delivered and when the Court is of the opinion that there are reasonable grounds for believing that the accused is not guilty of the offence, it would be a travesty of justice to insist on release of the person who has been found to be not guilty and acquitted, on his furnishing a bail bond. In our opinion therefore the mandatory provisions of Section 354 (1) (d) must govern the field in all cases of acquittal and the accused who is acquitted is entitled to be set at liberty without any fetter of being asked to furnish a bail or bail-bond for his release and any contrary direction would be ex-facie without jurisdiction and void.

10. It may be argued that the said decision was rendered by the Full Bench at a time when Sec. 437A was not brought to the statute book and it was because of the absence of such a provision, the Full Bench happened to make the observations as referred to above.

11. According to the learned counsel, the incorporation of Section 437A was recommended by the Law Commission, pursuant to the direction issued by the Division Bench in Solanki's case and since Solanki's case was overruled, Sec. 437A should be set at naught. Though Solanki's case also might have persuaded the Law Commission, to incorporate Sec. 437A, only for the reason that the decision in Solanki's case was later overruled in *Omprakash Tekchand Batra's* case, it cannot be held that Sec. 437A is ultra vires or unconstitutional.

12. If the bond is executed in terms of Section 437A then it would be in force only for six months from the date of execution of the bond. Therefore, it can be contended that if Section 437A is incorporated in the bond originally executed by the accused, then the bond would be in force only for six months from the date of execution of the bond. As stated earlier, though Section 437A states that if the accused fails to appear before the higher court as and when such court issues notice in respect of any appeal or petition filed against the judgment of the respective court that bond will stand forfeited and then the procedure u/s 446 of Cr.P.C. shall apply, it was not stated what would be the consequence if the accused fails to execute a bond before the conclusion of the trial or before the disposal of the appeal, as the case may be.

13. Even though the word "shall" is ordinarily mandatory, in the context or if the intention is otherwise, it can be construed to be directory. The construction of the words would depend upon the provisions itself keeping in view the intendment of the enactment or the context in which the word "shall" has been used and the mischief it seeks to avoid. The learned counsel for the petitioner submits that though the word "shall" has been used in Section 437A in the context in which it

has been incorporated, since the consequence of failure to comply with the requirement of that provision is not provided by the Code itself, the word "shall" has to be construed to be only directory. The purpose of enactment or incorporation of the said provision and the effect of non-compliance thereof having been not specified it is difficult to hold that the word "shall" should be treated as mandatory. According to me, giving due consideration to the object, design, purpose and scope of the provision, the word "shall" appearing in Sec. 437A is to be construed and interpreted only as directory.

14. It was held by the Constitution Bench of the Supreme Court in *Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur*, thus:

(7) The question whether a particular provision of a statute which on the face of it appears mandatory--in as much as it uses the word "shall" as in the present case--or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other consideration which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

It was also held in *Board of Directors of A.K.G. Memorial Co-operative Dispensary Society Ltd. Vs. Joint Registrar of Co-operative Society and Others* thus:

The question whether a particular provision is mandatory or directory depends not on its form, not on the language in which it is couched, but upon the intent of the legislature. The meaning and intention of the legislature must govern and there are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it the one way or the other [Crawford on Statutory Construction, quoted with approval in *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others*, and *Owners and Parties interested in Owners and Parties interested in M.V. "ValiPero" Vs. Fernando Lopez and Others*, . The word "shall" in its ordinary import is no doubt obligatory. But it does not conclude the matter, it is not conclusive or determinative of the question whether the provision is absolute or directory. Illustrations abound when the words "shall" and "may" have been treated as interchangeable. The word "shall" need not be treated as obligatory in each and every case and the provision can be treated as directory depending upon the purpose which the legislature intended to achieve as disclosed by the object, design, purpose and scope of the statute.

Similar view was taken by the Supreme Court in the following decisions:

1. Gopal Chandra Ghosh Vs. Renu Bala Majumdar (Smt) and Another, .
2. Shibu Chandra Dhar Vs. Pasupati Nath Auddya, .
3. Dr. Ram Deen Maurya Vs. State of U.P. and Others, and
4. Delhi Airtech Services Pvt. Ltd. and Another Vs. State of U.P. and Another, .

Therefore, in the particular context in which "shall" is used it can reasonably be construed, as directory. The Court cannot rewrite, recast or re-frame the legislation. It is also true that the Court cannot add words to a statute or read words which are not there. Even if there is defect or omission in the statute, the Court cannot correct the defect or supply the omission. Interpretation is the process of ascertaining the mind of the legislature. The presumption is that every legislation legislates for the benefit of its subject. Hence, the Court has to interpret the same to subserve to the objectives of the provision yielding to the legislative intent. But if the provision has exacerbated or created complexities, the attempt of the Court should be to simplify it making it more feasible or workable without offending the spirit behind the provision so introduced. The nature of the mischief that the legislation seeks to prevent and the scheme and purpose of the Act will have to be taken into consideration while interpreting the provision. Sincere effort should be made to reconcile the provision bearing in mind the context in which the said provision was introduced. The mischief which the provision is intended to remedy must also be borne in mind. Thus, it may be argued that instead of making or holding Section 437A nugatory or meaningless, a reasonable interpretation has to be given bearing in mind the object of the legislation as well. Therefore, it may also be argued that to achieve the object sought to be achieved it would suffice if suitable amendment is made to the bail bond to be executed by the accused. Instead of making the parties to execute the bond twice, it would be proper that the text of the bond is so couched to make the bond valid for a period of six months/one year from the date of judgment of acquittal or disposal of the case, as the case may be.

15. But a comprehensive bond taking in Sec. 437A as well may not be strictly in tune with Sec. 437A. By adding Sec. 437A in Form No. 45 as per the amendment Act it can be found that the Parliament thought of directing the accused to execute a comprehensive bond. But if we are to strictly interpret Sec. 437A, then the accused has to be directed to execute a bond before the conclusion of trial. If so, it would be unworkable because if that bond is not executed the accused cannot be remanded because a person who is on bail and who has not committed breach of the conditions of the bond cannot be remanded as there is no forfeiture of the bond. Simply issuing a direction by the court that while granting bail, the bond to be executed should cover the period stated in Sec. 437A also may not be in tune with Sec. 437A. If so stated, it may be said that the Court is supplying an omission. It may be possible only if Sec. 437A is suitably amended by the Parliament.

16. The learned counsel for the petitioner would submit that if the accused is convicted by the Trial Court and a sentence of imprisonment for a term not exceeding 3 years is passed and, if the accused applies for bail the court shall grant bail u/s 389 (3) of the Code unless there are special reasons for refusing the bail, for such period as will afford sufficient time to the convict to present the appeal and obtain orders of the Appellate Court. But if the court insists that the accused should execute a bond in terms of Sec. 437A, it would be giving a hint or indication that he is going to be acquitted by the court. It may be argued that Sec. 437A does not specifically say that the bond has to be executed only in cases which are to end in acquittal. But that argument may not be acceptable. The words occurring in Sec. 437A "shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court" would make it amply clear that the appeal should be one filed against the accused challenging the verdict of acquittal. It does not postulate a case which ends in conviction. If the accused is convicted and sentenced, if he does not opt to suffer the sentence, he may have to apply for suspension of sentence as provided under Sec. 389 (3) Cr.P.C., unless it is a case where the sentence awarded is exceeding three years. If the accused files appeal before the appellate court he can get the sentence suspended, filing application u/s 389 (1) Cr.P.C. Therefore the bond required to be executed u/s 437A cannot be understood as a bond to be executed by all the accused persons whether the case ends in acquittal or conviction. The very object of the provision is to secure the presence of the accused before the higher Court if an appeal is filed challenging the acquittal.

17. Therefore, if the accused is directed to execute the bond before the conclusion of the trial and before the order of acquittal is passed and as the direction is to execute bond under Sec. 437A then certainly that would be giving a hint that the accused is going to be acquitted by the Court.

18. In a highly contested case if such a direction is given before the conclusion of trial it is likely to be misused by some parties and it would also be embarrassing for the trial Magistrate/Judge, to issue such directions, the learned counsel for the petitioner submits.

19. As observed earlier, if the accused fails to execute bond in terms of Sec. 437A, the court cannot remand the accused for non-compliance of the direction since the bond executed by him earlier during crime stage or after his appearance before Court does not require him to execute a further bond. That apart, as pointed out earlier, no consequence has been provided for the noncompliance of the execution of bond in terms of Sec. 437A.

20. It may be reasonable to suggest that instead of directing the sureties and accused to execute a fresh bond, if a specific term in Form No. 45 is incorporated to the effect that the bond executed shall be in force not only till the disposal of the case but also thereafter for a further period of six months, then it would

obviate the difficulty and the unnecessary burden that may be cast on the accused to bring the sureties again to execute the bond even in cases where the accused is entitled to be acquitted. Therefore, in order to lessen the hardship to all, it may be just and reasonable to incorporate in Form No. 45, a condition to make the bond alive for a further period of six months or one year in terms of Sec. 437A but still it may be contended that unless the Section is suitably amended, it cannot be done because what is not required to be done by the provision cannot be got done by simply amending the form.

21. It must also be said that the execution of such a bond can only be directory and not required to be executed in all cases irrespective of the case, that a verdict of acquittal is to be given because of total absence of evidence. There may be cases where accused has to be acquitted because of total absence of evidence. There may be cases where the prosecution has not collected any material to prove the complicity of the accused. In such cases bond under Sec. 437A may be absolutely unnecessary. The necessity of execution of the bond u/s 437A may arise only in cases where the prosecution has led some evidence in support of the prosecution but the court trying the case may not find it sufficient to enter a verdict of conviction. In such cases there would be scope for appeal.

22. The object of Sec. 437A is to secure the attendance of the accused in cases where appeals have to be filed challenging the verdict of acquittal. Quite often, once the accused is acquitted it would be practically impossible to secure the attendance of the accused during the appellate stage. Therefore, it cannot be said that such a provision is totally unnecessary but it may have to be suitably amended to meet the requirement.

23. In the case on hand the petitioner is the accused in a case filed under Sec. 138 of the Negotiable Instruments Act, 1881. She was on bail. After conclusion of trial, she was directed by the learned Magistrate to execute a bond in terms of Sec. 437A of Cr.P.C. She failed to execute the bond. Hence the learned Magistrate cancelled the bail granted earlier and issued non-bailable warrant against the petitioner. That order is challenged in this petition. An interim order was already passed by this Court granting bail to the petitioner and the non-bailable warrant was directed to be recalled. Hence, considering the scope of this petition, it is not necessary to go deeper into other aspects. In the light of what is stated above, I hold that the direction to execute a bond as mentioned in Sec. 437A is not mandatory. Since no consequence on failure of execution of the bond under Sec. 437A has been provided it is practically not possible for the Court to insist execution of the bond by the accused under Sec. 437A before conclusion of the trial or before disposal of the appeal, as the case may be. Hence, if the Magistrates/Trial Judges or the appellate Judges, as the case may be, do not insist the accused to execute a bond under Sec. 437A, the Magistrates/Judges cannot be found fault with.

This petition is disposed of as above.