

(2008) 03 MP CK 0100
In the Madhya Pradesh High Court
Case No : Writ Petition No. 4537 of 2007

Ashwni @ Kamlesh Sahu

APPELLANT

Vs

State of M.P. and Another

RESPONDENT

Date of Decision : 10-03-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438, 439

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 8

Citation : (2008) 2 MPJR 18

Hon'ble Judges : S.C. Sharma, J

Bench : Single Bench

Advocate : V.K. Bharadwaj, with Mr. A.V. Bhardwaj, for the Appellant; Praveen Newaskar, Dy.G.A., for the Respondent

Judgement

S.C. Sharma, J.

Challenge in this petition under Article 227 of the Constitution is made to an order dated 3rd July, 2007 passed by the District and Sessions Judge, Guna on a reference made by the Special Court under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) in respect of exercising the powers to hear the bail applications u/s 438 and 439 Cr.P.C.

The facts essential on the basis of which the District Judge and Sessions Judge, Guna (hereinafter referred to as the District Judge) has arrived at a conclusion in respect of the matters of NDPS Act, are that the word used in the NDPS Act, the "Court" not only necessarily means the Special Court constituted under the NDPS Act. It has been held by the District Judge that other Courts, i.e., Sessions Court apart from the Special Court is empowered to hear the applications filed u/s 438 and 439 Cr.P.C., when an offence is registered u/s 8/20 of the NDPS Act.

The learned senior counsel for the Petitioner at the very outset has submitted that once the provisions of the NDPS Act are applicable and the Special Courts are notified and constituted, there appears to be no justification for holding that

the other Sessions Judge are empowered to hear the bail applications u/s 438 Code of Criminal Procedure. The learned senior counsel in support of his contention has referred to various provisions of the NDPS Act. The Petitioner has also relied upon the following judgments on the question of maintainability of the writ petition:

(i) *Ratanji Mulji v. Vinod Rati Lal Gandhi and Anr.* 1991 Cr.L.J. 276

(ii) *Rahmatulla v. State of U.P. and others*, 1994 Cr.L.J., NOC 174 wherein it has been held that in the criminal cases also the High Court can entertain writ petitions under Article 227 of the Constitution.

The learned Counsel for the Respondents has only objected to the maintainability of the petition and his contention is that only a petition u/s 482 Code of Criminal Procedure (hereinafter referred to as the Code) is maintainable or at the best a revision petition under the provisions of the Code, can be made and the cognizance of the matter cannot be taken both under Article 227 of the Constitution and under the Code.

Learned Counsel for the parties were heard and perused the record.

The first question which has to be decided in this petition is whether a writ petition under Article 227 of the constitution is maintainable in respect of the criminal matters ?

The Apex Court in the case of *State of Haryana and Ors. v. Bhajan Lal and others*, 1992 Supp (1) SCC 335, while dealing with a question of quashing. First Information Report has decided the issue regarding maintainability of the writ petition by the High Court while exercising the power under Article 226 of the Constitution. The Apex Court has held that under Article 226 or under the inherent powers u/s 482 of the Code, the High Court can exercise powers either to prevent abuse of the process of any court or to secure the ends of justice.

The matter relating to scope and power of the High Court to quash the criminal proceedings in exercise of the powers under Article 226 and 227 of the Constitution or 482 of the Code of Criminal Procedure was again subjected to judicial scrutiny by the Apex Court in the case of *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others*, and in paragraphs 22 and 26 of the judgment.

I am of the opinion that writ petition under Article 226/227 of the Constitution is maintainable in the present case, accordingly, the objection raised by the learned Counsel for the Respondents is rejected.

The second question involved in this petition is in respect of bail application whether the words "Court" used in Section 37 of the NDPS Act, does it mean the only Special Court constituted under the NDPS Act or not"?

This Court while dealing with almost identical situation in a case arising out of an offence punishable under the Schedule Castes and Scheduled Tribes (Prevention

of Atrocities) Act, 1989 has held that Section 439 Code of Criminal Procedure does not confer the jurisdiction to the Sessions Judge to grant bail. It has been observed that the power confers on the Court of competent jurisdiction and it would be proper to interpret the words "Sessions court" in Section 439 of Cr.P.C., as the "Special Court" in relation to which the offence has been committed under the Act. See *Mirchi Alias Rakesh Jain v. State of M.P.*, reported in 2003 (1) MPJR 140.

The controversy involved in the present case is almost identical. The NDPS Act was enacted with an aim and object to curb the illicit drug trafficking and drug abuse at national and international level and to provide deterrent penalties to meet the challenges of well organised gangs of smugglers. It is a special Act providing a well defined procedure to be followed in dealing with the persons committing various offences enumerated in the Act.

After carefully going through the aim and object of the NDPS Act and the relevant sections for grant of bail, it is evident that it is only the Special Court notified under the NDPS Act empowered to deal with the bail applications under Sections 438 and 439 Cr.P.C., which is subject-matter of this petition. In the present case, Ganja which is about 900 grams was recovered from the accused. Ashwani alias Kamlesh, and therefore, it was treated as a small quantity as per the table under Sub-clause 7A and 23-A of Section 2 of the NDPS Act and the punishment provided for this offence u/s 8/20(III)(A) is six months imprisonment or fine of Rs. 10,000/- or both. The punishment to be imposed is less than three years imprisonment it is triable by the Magistrate and not triable by the Special Court constituted under the NDPS Act. It was so observed by the designated Special Court on the application preferred by the Petitioner u/s 438 Code of Criminal Procedure. It was also observed by the Special Court that the Special Court having jurisdiction to try the cases except the cases which are triable by the JMFC. It was further observed by the Special Court that the Special Court does not have power to hear the matter and accordingly the bail application was referred to the District Judge. It has been erroneously held by the District Judge that the Sessions Judge or the Additional Sessions Judge are empowered to hear the applications as the offence is triable by the Judicial Magistrate First Class.

The District Judge as indicated hereinabove has answered the reference erroneously and the reason assigned in paragraph 11 of the order was that the "Court" does not mean only the Special Court constituted under the NDPS Act but also the Sessions Court and the Court of Additional Sessions Judge who is competent to hear and decide the bail applications u/s 438 Code of Criminal Procedure is contrary to the provisions of the NDPS Act.

In view of the above, this Court is of the considered opinion that it is only the Special Court constituted under the NDPS Act which is empowered to decide the bail applications under the provisions of the NDPS Act.

Petition stands disposed of with the aforesaid. No order as to costs.