

(1985) 12 GAU CK 0005

In the Gauhati High Court

Case No : Criminal Orgl. Application No. 183/85

Deepak Hazarika and Others

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 06-12-1985

Acts Referred:

Arms Act, 1959 — Section 25, 26, 27, 28, 29
Constitution of India, 1950 — Article 14
Criminal Procedure (Assam Amendment) Act, 1983 — Section 435, 436, 437(1), 437(2), 439
Criminal Procedure Code, 1973 (CrPC) — Section 167(2)
Explosive Substances Act, 1908 — Section 3, 4, 5, 6
Penal Code, 1860 (IPC) — Section 120B, 121, 121A, 122, 124A

Citation : (1986) 1 GLR 54

Hon'ble Judges : Manisana, J

Bench : Single Bench

Advocate : P.C. Kakati, R. Saikia, S. Rahman and D. Das, in Criminal Orgl. appln. No. 183/85 and J.M. Choudhury and A. Deka, in Criminal Orgl. appln. No. 184/85, for the Appellant; Y.K. Phukan, A.G. and Public Prosecutor in Criminal Orgl. Appln. No. 183 and 184 of 1985, for the Respondent

Final Decision : Dismissed

Judgement

Manisana, J.—The Criminal Application No. 183 of 1985 can be disposed of along with the Criminal Original Application No. 184 of 1985 by a common judgment and order in the nature and in the circumstances of the case.

2. The Petitioners in both the cases have been arrested in connection with Chandmari P.S. Case No. 89 of 1985 (GR Case No. 1216 of 1985 u/s 396, IPC). The learned Magistrate rejected the prayers of the Petitioners for releasing them on bail, hence these petitions.

3. Shri P.C. Kakati, learned Counsel for the Petitioners has submitted that the Petitioners are entitled to bail under Proviso (a) to Sub-section (2) of Section 167, Code of Criminal Procedure (for short the "Proviso") as the chargesheet

has not been submitted within 90 days from the date of first remand; and that the proviso is mandatory therefore the Court has no discretion to refuse bail; and that the proviso is for the protection of the personal freedom. The learned Advocate General has submitted that Section 439A was brought into force in the State of Assam by the Assam Act III of 1983, Code of Criminal Procedure (Assam Amendment) Act, 1983 and that in view of the Section 439A, the Petitioners are not entitled to be released on bail.

4. The question which arises for consideration is what is the effect of Section 439A. Mr. Kakati has contended that the Proviso is independent of Section 439A and that the Proviso is not controlled by Section 439A. He has referred to a decision of this High Court reported in Ved Kumar Seth and Another Vs. The State of Assam, In that case, it has been held that the mandatory provision in proviso (a) to Sub-section (2) of Section 167 to the effect that on the expiry of the period of sixty days in custody, the accused person shall be released on bail if he is prepared to and does furnish bail, is not controlled by provisions of Section 437(1). The provision of Sub-section (1) of Section 437 is applicable only in the case of an accused person whose period of detention in custody has not completed sixty days.

5. The provision of Section 439A is as follows:

439A (1) Notwithstanding anything contained in this Code, no person-

(a) who, being accused or suspected of committing an offence under any of the following Sections, namely. Sections 120B, 121, 121A, 122, 124A, 153A, 302, 303, 304, 307, 326, 333, 363, 364, 365, 367, 368, 392, 394, 395, 396, 399, 412, 433, 437, 449, and 450 of the Indian Penal Code, 1860, Sections 3, 4, 5 and 6 of the Indian Explosive Substances Act, 1908 and Sections 25, 26, 27, 28, 29, 30 and 31 of the Arms Act, 1959 is arrested or appears or is brought before a Court, or

(b) who, having any reason to believe that he may be arrested on an accusation of committing an offence as specified in Clause (a) has applied to the High Court or Court of Sessions for a direction for his release on bail in the event of his arrest, shall be released on bail, or as the case may be, directed to be released on bail, except on one or more of the following grounds, namely:

(i) that the Court including the High Court or the Court of Sessions for reasons to be recorded in writing is satisfied that there are reasonable grounds for believing that such person is not guilty of any offence specified in Clause (c);

(ii) that such person is under the age of sixteen years or a woman or a sick or an infirm person;

(iii) that the Court including High Court or the Court of Session for reasons to be recorded in writing is satisfied that there are exceptional and sufficient grounds to release or direct the release of the accused on bail.

(Emphasis added)

6. The expression "Notwithstanding anything contained in this Code in Section 439A" means notwithstanding any law in the Code to the contrary, relating to bail. Therefore u/s 439A, notwithstanding any law the Code (Code of Criminal Procedure) to the contrary, relating to bail, no person accused of or suspected of the commission of any offences specified in Clause (a) of Sub-section (1) of Section 439A is arrested or appears or is brought before a Court shall be released on bail except as provided there under. The offences specified in Section 439A include some bailable offences, for example, Sections 463, 431, IPC etc.

7. u/s 436 where a person accused of a bailable offence is arrested or detained without warrant by an officer incharge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail. That is, in bailable offence, the Court or police officer is to release the accused on bail, if the conditions provided therein are satisfied. Therefore, Section 436 is a law in the Code, which is contrary to Section 439A. But in respect of any bailable offence specified in Section 439A, such a person shall not be released on bail in view of the provision u/s 439A except as provided there under.

8. The proviso reads:

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding, - (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purpose of that Chapter.

9. The Proviso relates to bail and every person released on bail under the Proviso shall be deemed to have been released under the Provisions of Chapter XXXIII of the Code for the purpose of that Chapter. The Chapter XXXIII relates to the "Provisions as to Bail and Bonds. In Chapter XXXIII, Sections 435 and 437 are in respect of bail for bailable and non-bailable offences respectively, Section 439 provides special powers of the High Court or the Court of Session regarding bail.

10. If the Proviso or Section 436 is read independently and conditions mentioned therein are satisfied, an accused is entitled to bail as of right. But such a person

accused of any bailable offence specified in Section 439A is not entitled to bail as of right if Section 436 is read with Section 439A.

11. The next question which arises for consideration is whether a person accused of any offence specified in Section 439A will be entitled to bail under the Proviso. The Proviso relates to bail and the bail granted under the Proviso can be cancelled in suitable case. See *Bashir and Others Vs. State of Haryana*, In *Basir* (supra), the Supreme Court has also held that it is necessary that a Court should proceed on the basis that the accused is to be deemed to have been released u/s 437(1) and/or (2), Section 439A relates to bail and the Proviso is also another Provision of the Code relating to bail. Therefore, the Proviso is a law which is contrary to Section 439A in respect of the offences described therein. Section 439A is to dispense with the laws relating to bail, namely Sections 436, 437, 439 etc. including the Proviso with regards to the offences mentioned in Section 439A, Therefore the effect, of Section 439A is that the entitlement or the right of an accused person to be released on bail under the Proviso and other provisions of bail in the Code with regard to the offences specified u/s 439A has been excluded; and that the power of the Court regarding bail will only be governed by Section 439A notwithstanding any law to the contrary in respect of the offences specified in Section 439A.

12. In view of the above discussion, the decision in *Ved Kumar Seth and Another Vs. The State of Assam*, is not applicable to the present case. In that case, provision of Section 439A which came into force in 1984 was not available for discussion. In this view of the matter, the contention of the Petitioner must fail.

13. Mr. Kakati has drawn my attention to a decision of this Court passed in Criminal Original Application No. 146 of 1985 in connection with Chandmari P.S. Case No. 89 of 1985 in which the Petitioners are also involved. In that case, it was ordered: "the Chief Judicial Magistrate Gauhati is directed to release the Petitioner, Kamadev Sharma on bail if he was arrested on 15.5.1985 or if the Proviso (a) to 167(2) is attracted". The order was passed by me. The learned Chief Judicial Magistrate released Kamadev. Mr. Kakati has submitted that in view of the order passed by the learned Chief Judicial Magistrate releasing Kamadev, the refusal to grant bail of the other accused Petitioners involved in the same case is violative of Article 14 of the Constitution of India. In the said order the provision of Section 439A was not discussed. It is also not known on what grounds Kamadev has been released on bail. Therefore, I am of the view that I need not clarify my said order and also give a decision on the submissions of the learned Counsel.

14. I have perused the records and also perused the orders, of the learned Magistrate. I do not feel discussing any further, as I am not inclined to grant bail at this stage.

15. For the foregoing reasons, the petitions are dismissed. Let a copy of this order be placed in the record of Criminal Original Application No. 184 of 1985.