

(2001) 10 AP CK 0025

In the Andhra Pradesh High Court

Case No : Criminal P. No's. 4247, 4340, 4341, 4343, 4398, 4399, 4400 and 4446 of 2001

Gopu Ilaiah and Others

APPELLANT

Vs

The State of A.P.

RESPONDENT

Date of Decision : 11-10-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 437(1), 439
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 37, 37(1)

Citation : (2002) 1 RCR(Criminal) 660

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : A. Prabhakar Rao, for the Appellant; Public Prosecutor, for the Respondent

Judgement

T. Ch. Surya Rao, J.—The petitioners who are accused of the offences enumerated in the Narcotic Drugs & Psychotropic Substances Act, 1985 (for brevity "the Act") seek bail in these petitions. Since common questions of law are involved, all these petitions can be disposed of together. Needless to consider the factual matrix, inasmuch as the provisions of Section 37 of the Act and Section 437 of the Criminal Procedure Code ("the Code" for brevity) have fallen for interpretation in these batch petitions. The Act is a self-contained Code and has clearly envisaged the provision for granting bails. Section 37 of the Act is very much germane for consideration in the context and may be extracted hereunder for brevity and better understanding of the matter thus:

"Offences to be cognizable and non-bailable:- (1) Notwithstanding anything contained in the Code of Criminal Procedure 1973 -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment or imprisonment of five years or more under this Act shall be released on bail or on

his own bond unless -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail"

2. From a glance at the above provision it is obvious that every offence punishable under the Act is cognizable offence. It is further clear that no person who is accused of an offence punishable for a term of imprisonment for five years or more shall be released on bail unless the limitations contained in clauses (i) and (ii) of clause (b) of sub-section (1) are satisfied. The first limitation is that notice to the Public Prosecutor shall be issued to give an opportunity to oppose the bail application. The real limitations are contained in clause (ii). In the event of such opposition by the Public Prosecutor, the Court should satisfy about the existence of reasonable grounds for believing that the accused is not guilty of such offence. The Court should further satisfy that the accused is not likely to commit any offence while on bail. These two are two important limitations which the Court shall take into consideration to grant bail. Sub-section (2) of Section 37 reads that the limitations contained in sub-section (1) are in addition to the limitations enjoined under the Code or any other law for the time being in force on the point of granting of bail. From a perusal of sub-section (2) it is obvious that the limitations contained in clause (b) of sub-section (1) are in addition to the limitations contained in the Code or elsewhere and certainly not in derogation to the limitations contained in other provisions. Therefore, the limitations contained elsewhere shall have to be read along with limitations in clause (b) of sub-section (1) of Section 37 of the Act, so long as they are not inconsistent with the later. The apex Court in *NARCOTIC CONTROL BUREAU v. KISHAN LAL*¹ has made it clear that the provisions of Section 37 of the Act have overriding effect over the provisions of Section 439 of the Code in the case of any inconsistency between them. Although Section 439 does not contain any limitations on the power conferred upon the Sessions Court or High Court as the case may be to grant bail in any manner, but limitations contained in clause (b) of sub-section (1) of Section 37 would still operate on such power of the Sessions Court or High Court as the case may be.

3. Looking at the two limitations contained in Section 37 which ordain that in no case bail could be granted by the Sessions Court or the High Court inasmuch as it is difficult for the Court to arrive at a reasonable conclusion by perusing the record of the prosecution's case that there exists reasonable ground for believing that accused is not guilty of such offence under the Act. It must be a

case where prima facie the record discloses no case as against the accused. As regards the second condition it is not reasonably possible to vouchsafe that the accused, if let off on bail, is not likely to commit any offence or misuse the bail. It is reasonable to impose any condition so as to prevent the person being let off on bail from resorting to any offence henceforth. But to arrive at a conclusion that he is not likely to commit any offence or misuse the bail, is well nigh an impossible one. Much depends upon the mental condition of the person who is accused before the Court, the environment in which he is residing, and other surrounding circumstances. The second condition enjoined under clause (ii) of Clause(b) of sub-section(1) of Section 37 of the Act cannot be satisfied in any case in view of the nature of the condition.

4. The apex Court in INTELLIGENCE OFFICER, NARCOTICS C. BUREAU v. SAMBHU SONKAR² held that unless the conditions enjoined under clause (b) of sub-section (1) of Section 37 of the Act are satisfied, bail cannot be granted. The relevant observations made by the apex Court in para 5 of the judgment may be extracted hereunder:

"The scheme of Section 37 reveals that the exercise of the power to grant bail by the Special Judge is not only subject to the limitations contained u/s 439 Cr. P.C., but is also subject to limitations placed by Section 37 which commences with non obstante clause"

5. That is an indicia that Court has to consider the limitations contained in Section 437 or Section 439 of the Code and also the limitations contained in Section 37 of the Act. Ultimately the test is that even if the limitations contained in Section 437 of the Code are satisfied, unless the limitations contained in Section 37 are satisfied, bail cannot be granted. In para 9 the apex Court ruled out the possibility of accepting the contention that liberal interpretation should be given in view of the fact that liberty of the individual is involved. The apex Court observed as follows:

"In our view, considering the legislative intent of curbing the practice of giving bail on technical ground in a crime which adversely affects the entire society including lives of number of persons and the object of making stringent provisions for control of illicit traffic in narcotic drugs and psychotropic substances, there is no reason to accept the construction of the section which its language can hardly bear"

6. In BABUA ALIA TAZMUL HOSSAIN v. STATE OF ORISSA³ in para 3 the apex Court observed thus:

"At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The

other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court, and the validity of Section 37(1) having been upheld, we cannot take any other view".

7. It is not the intention of the Parliament that no bail can be granted. The fact that certain conditions have been imposed for granting bail would show that bail could be granted in appropriate cases and it is not certainly a case where no bail could be granted in any event. What are those cases where bail could be granted by the Court is the next question. At this juncture it is appropriate to consider Section 437 of the Code in so far as it is relevant for the present purpose as it is one section in the Code which contains limitations for granting bail:

"Section 437:- When bail may be taken in case of non-bailable offence:

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail but -

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence;

Provided that the Court may direct that a person referred to Clause (i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm;

Provided further that the Court may also direct that a person referred to in Clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason;

. . .

(2) . . .

8. A perusal of the said provision shows that, the Code contains limitations on the power of the Court to grant bail in respect of those persons who can reasonably be believed to have committed an offence punishable with death or imprisonment for life or who have been convicted previously for an offence involving the penalty of death or imprisonment for life or imprisonment for seven

years or more or who has been previously convicted on two or more occasions for other non-bailable offences. Rest of the persons though have been accused of or suspected to have committed any offence which is non-bailable can be enlarged on bail under the 1st proviso to sub-section(1) of Section 437 of the Code. Notwithstanding those limitations contained in the section the Court can grant bail if such person is under the age of 16 years or is a woman or is sick or infirm person. Under the second proviso the Court can also grant bail in respect of a person though he has been previously convicted for an offence punishable with death or imprisonment for life or convicted on two or more occasions for non-bailable and cognizable offence, if the Court is satisfied that it is just and proper so to do for any special reason.

9. The discretion of the Court to consider whether it is a case to grant or not to grant bail has been saved under the clause while incorporating certain conditions on the power of the Court to grant bail. In view of the fact that the limitations contained in clause (b) of sub-section (1) of Section 37 of the Act are in addition to the limitations contained in Section 437 of the Code, the two provisos incorporated in sub-section (1) of Section 437 of the Code in my considered view would operate. Inasmuch as the limitations contained in Section 437 are in addition to the limitations contained in Section 37 of the Act and not in derogation to the same, and while considering those limitations, if the Court in appropriate cases and for valid reasons can invoke the proviso under sub-section (1) of Section 437 of the Code there is no reason as to why the same proviso cannot be invoked in respect of the petitions for bail u/s 37 of the Act. The apex Court in the judgments referred to supra did not hold that the two provisos incorporated under sub-section(1) of Section 437 would not apply at all. I see no inconsistency in this regard in between that provision of the Code and Section 37 of the Act. The non-obstante clause used in Section 37 of the Act, would operate certainly, in the event of any inconsistency between the provisions of the Code as well as the Act. Therefore, even in the case where the two tests incorporated u/s 37(1)(b) are not satisfied, if the accused can be squarely brought under the first proviso to sub-section (1) of Section 437 of the Code, the Court can invoke the proviso and grant bail. Take for instance, the beneficial provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 where the accused is a juvenile, he shall not be sent to jail nor he can be ultimately sentenced to any imprisonment. When that Act is a beneficial Act meant to benefit the juvenile children, the provisions contained therein will have an overriding effect over the provisions contained in the NDPS Act. If a juvenile is accused of an offence under the provisions of the NDPS Act, certainly he is entitled to the necessary benefits under the special enactment namely Juvenile Justice Act. When that is the case there is no reason for refusing to invoke the first proviso u/s 437(1) of the Code. The intention of the legislature in having incorporated the stringent provisions u/s 37 of the Act, is obviously in the greater interest of the society, that a person accused of an offence under the Act shall not ordinarily be let off, so that he may not again perpetrate such offence on the society, but certainly it is not the

intention of the legislature that under any circumstances that person cannot be let off.

10. Viewed in that angle, I am of the considered view that the first proviso to sub-section(1) of Section 437 of the Code can be invoked in fit cases, but care shall be taken to see the letter and spirit of Section 437 is borne in mind while invoking that provision in extraordinary circumstances.

11. Coming to the individual cases all the petitions are allowed as follows:

CRL.P.4247 of 2001:

Petitioner who is aged 60 years is accused of for raising Ganja plants in his field. From the facts there appears no reasonable ground to conclude that he is the owner of the field inspected by the authorities. Even otherwise, he being aged 60 years, his request for bail may be considered.

The petitioner shall be enlarged on bail on his executing a bond for Rs.5000/- (Rupees five thousand) with two sureties for a like sum each to the satisfaction of the Special Judicial Magistrate of First Class, Prohibition and Excise Cases, Warangal.

CRL.P.No.4340 of 2001:

Petitioner is accused of having grown 22 Ganja plants in an extent of Ac.1-05 guntas. He is aged about 30 years. There is no evidence to conclude that he is the owner of the land where the Ganja plants are found. However, the other condition that if he is let off, he is not likely to commit any offence will not also come in the way when once it is considered that there are reasonable grounds to see that he is not guilty of the offence. Having regard to these circumstances the request of the petitioner for bail may be considered.

The petitioner shall be enlarged on bail on his executing a bond for Rs.5000/- (Rupees five thousand) with two sureties for a like sum each to the satisfaction of the Special Judicial Magistrate of First Class, Prohibition and Excise Cases, Warangal.

CRL.P.4341 of 2001:

The petitioner is alleged to have grown 23 ganja plants in his field admeasuring Ac.2-00 gts. There are no reasonable grounds to conclude that he is the owner of the said field and he has grown in that extent of land 23 ganja plants. Hence his request for bail may be considered.

The petitioner shall be enlarged on bail on his executing a bond for Rs.5000/- (Rupees five thousand) with two sureties for a like sum each to the satisfaction of the Special Judicial Magistrate of First Class, Prohibition and Excise Cases, Warangal.

CRL.P.No.4343 of 2001:

Petitioner is alleged to have grown 52 ganja plants in an extent of Ac.2.00 gets. There are no reasonable grounds to conclude that he is the owner of the said land. Therefore his request for bail may be considered.

The petitioner shall be enlarged on bail on his executing a bond for Rs.5000/- (Rupees five thousand) with two sureties for a like sum each to the satisfaction of the Special Judicial Magistrate of First Class, Prohibition and Excise Cases, Warangal.

CRL.P.No.4398 of 2001:

Petitioner is alleged to have grown 280 ganja plants in the cotton field. There are no reasonable grounds to conclude that he is the owner of the said land since the investigating agency failed to gather any evidence in that regard. Therefore his request for bail may be considered.

The petitioner shall be enlarged on bail on his executing a bond for Rs.5000/- (Rupees five thousand) with two sureties for a like sum each to the satisfaction of the Special Judicial Magistrate of First Class, Prohibition and Excise Cases, Warangal.

CRL.P.No.4399 of 2001:

The petitioner is accused of raising 320 ganja plants in an extent of Ac.1.05 gets. But there is no evidence gathered by the investigating officer connecting the petitioner to the land. Therefore his request for bail may be considered.

The petitioner shall be enlarged on bail on his executing a bond for Rs.5000/- (Rupees five thousand) with two sureties for a like sum each to the satisfaction of the Special Judicial Magistrate of First Class, Prohibition and Excise Cases, Warangal.

CRL.P.No.4400 of 2001:

The petitioner is accused of raising 513 ganja plants in an extent of Ac.1.17 gts. But there is no evidence gathered by the investigating officer connecting the petitioner to the land. Therefore his request for bail may be considered.

The petitioner shall be enlarged on bail on his executing a bond for Rs.5000/- (Rupees five thousand) with two sureties for a like sum each to the satisfaction of the Special Judicial Magistrate of First Class, Prohibition and Excise Cases, Warangal.

CRL.P.No.4446 of 2001:

The petitioner is accused of raising ganja plants in his field. But no evidence has been gathered to connect the land to the petitioner. Therefore his request for bail may be considered.

The petitioner shall be enlarged on bail on his executing a bond for Rs.5000/- (Rupees five thousand) with two sureties for a like sum each to the satisfaction

of the Judicial Magistrate of First Class, Bodhan, Nizamabad District.