
(2014) 09 MAD CK 0369
In the Madras High Court
Case No : Criminal Appeal No. 377 of 2014

Ragini	Vs	APPELLANT
State		RESPONDENT

Date of Decision : 23-09-2014

Acts Referred:

Arms Act, 1959 — Section 25(1)
Criminal Procedure Code, 1973 (CrPC) — Section 439
Explosives Act, 1884 — Section 3, 4
Penal Code, 1860 (IPC) — Section 120B, 124(A), 147, 148, 307
Prevention of Terrorism Act, 2002 — Section 34, 49(6), 49(7), 60, 7

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Hon'ble Judges : S. Rajendran, J; P.N. Prakash, J

Bench : Division Bench

Judgement

P.N. Prakash, J.—This is an appeal under Section 34 of the Prevention of Terrorism Act, 2002 [in short POTA], against the order dated 21.04.2014 in Cr.M.P.SR. No. 191/2014 in Spl. Case No. 1/2009 passed by the Special Court for Bomb blast Cases and POTA offences, Poonamallee, returning the bail application filed by the appellant herein on the ground that, a second bail application before the Special Court is not maintainable, as this Court had already considered the bail application of the appellant in CrI.A. No. 758/2013 and had dismissed the same on 07.01.2014.

2. At the outset, we feel that the trial Court should not have returned the bail application, because it is trite law that the principles of res judicata will not apply to application for bail and any number of bail applications can be filed before the trial Court or superior Courts. On this short score alone, we can set aside the order of the trial Court and remand the matter back to the trial Court for fresh consideration on merits. We do not propose to take this course in view of the fact that, the appellant has been in detention for over one year and from the reading of Section 49(6) and (7) of POTA it appears to us that, if a person has been under detention for more than a year, the rigors imposed by the Act for grant of

bail will be inapplicable. Section 49(6) and (7) of POTA reads as under:

"49. Modified application of certain provisions of the Code.-

6. Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless the Court gives the Public Prosecutor an opportunity of being heard.

7. Where the Public Prosecutor opposes the application of the accused to release on bail, no person accused of an offence punishable under this Act or any rule made thereunder shall be released on bail until the Court is satisfied that there are grounds for believing that he is not guilty of committing such offence.

Provided that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of sub-section (6) of this section shall apply."

From a mere reading of the proviso to Section 49(7), one can observe that there is a manifest error. The word "not" should find place between "shall" and "apply", otherwise, it does not make sense. This was noted by the Hon'ble Supreme Court in Union of India (UOI) Vs. Association for Democratic Reforms and Another, . Therefore, we would read the word "not" in proviso to sub section 7 and hold that, if a person is in incarceration for over one year, the conditions imposed under Section 49(6) will not apply and this Court will have the discretionary jurisdiction to consider the bail application under Section 439 of the Code, because the source of power to grant bail flows from Section 439 Cr.P.C. and Section 49(6) to (9) of POTA only places certain limitations in the power to grant bail.

3. Coming to the facts of this case, it is alleged by the prosecution that the petitioner and her husband Duraisingavel are members of "RYL", which is a front Organisation of Communist party of India [Marxist-Leninist], which has been declared as a Terrorist Organisation, vide Entry No. 24 in the Schedule to the POTA. It is further alleged that some time in 2002, the police on information that some Naxallites were hiding in Salaijogipatti mango grove within the range of Kallani Police Station, surrounded the area to nab them. During this operation, there was exchange of fire between the police and Naxalites, in which one Balan was injured. It is alleged that Duraisingavel and Bharathi, the petitioner herein, were there at that time and they escaped being caught by the police. In respect of this, a case in Kallavi Police Station Cr. No. 434/2002 under Sections 147, 148, 332 and 307 IPC r/w 25(1) A of the Indian Arms Act and Sections 3 and 4 of the Explosives Act, was registered. The case was transferred to the "Q" Branch police and was registered under the POTA case and a final report against 35 persons was filed before the Special Court by the "Q" Branch police on 19.05.2013, which was taken on file as C.C. No. 5 of 2013. In that case, the petitioner herein has been shown as A-35/Bharathi.

4. In the meantime, Duraisingavel and other persons were caught and after some time, they were all released on bail by this Court on earlier occasions. While so, on 14.06.2013, one Ragini, wife of Duraisingavel was arrested by the police in Dharmapuri Police Station Cr. No. 383/2013 u/s. 124(A), 353 IPC r/w 7(1)(a) of the Criminal Amendment Act. During the course of investigation in that case, it came to light that the accused Ragini is none other than Bharathi, who has been shown as absconding accused in Spl. Case No. 5/2003 [which was later split up as Spl. Case No. 1/2009 as against Bharathi [A35] as she was absconding]. The appellant, Ragini was remanded to judicial custody in Dharmapuri Police Station Cr. No. 383/2013 and was lodged in Central Prison, Salem. While she was in judicial custody, the appellant was formally arrested by the respondent police in Spl. Case No. 1/2009, by serving on her the grounds of arrest in the presence of the Superintendent of Prison and thereafter, the police obtained a Prisoner Transfer Warrant from the Special Court and produced her for being remanded to judicial custody in Spl. Case No. 1/2009. Now she is in the judicial custody on the valid orders of remands having been passed by the Special Court for POTA Cases, Poonamalee in Spl. Case No. 1/2009 [old number Spl. Case No. 5/2003]

5. Mr. R. Sankarasubbu, strenuously contended that the detenu is only Ragini and she is not Bharathi and there are no materials to connect her to the crime. This point was raised by him in the first bail application before us in CrI.A. No. 758/2013 and after considering the same, we have dismissed this plea by our detailed order dated 07.01.2014. We have clearly held that people involved in such underground movements will have several aliases and their identification in the Court during trial by the witnesses who had seen them involved in the occurrence, will only be substantive and material evidence. We are reiterating that and we are rejecting the arguments by Mr. R. Sanakarasubbu on this aspect.

6. It is admitted by Mr. R. Sankarasubbu that Duraisingavel, one of the accused in Spl. Case No. 5/2003 is the husband of the petitioner [Be it Bharathi or Ragini]. It is also admitted by the State that since the release on bail, Duraisingavel has been regularly appearing before the Special Court proceedings and had not absconded. Bearing this aspect in mind, we are also taking into consideration the fact that the petitioner has been under incarceration for over a year. In Shaheen Welfare Association Vs. Union of India and others, while dealing with the cases under TADA, a forefather of POTA, the Supreme Court has given the following counsel in para 12.:

"12. The proper course is to identify from the nature of the role played by each accused person the real hardcore terrorists or criminals from others who do not belong to that category; and apply the bail provisions strictly insofar as the former class is concerned and liberally in respect of the latter class. This will release the pressure on the courts in the matter of priority for trial. Once the total number of prisoners in jail shrinks, those belonging to the former class and, therefore, kept in jail can be tried on a priority basis. That would help ensure

that the evidence against them does not fade away on account of delay. Delay may otherwise harm the prosecution case and the harsh bail provisions may prove counter-productive. A pragmatic approach alone can save the situation for, otherwise, one may find that many of the undertrials may be found to have completed the maximum punishment provided by law by being in jail without a trial. Even in cases where a large number of persons are tied up with the aid of Section 120-B or 147, IPC, the role of each person can certainly be evaluated for the purpose of bail and those whose role is not so serious or menacing can be more liberally considered. With inadequate number of courts, the only pragmatic way is to reduce the prison population of TADA detenus and then deal with hardcore undertrials on priority basis before the evidence fades away or is lost. Such an approach will take care of both the competing interests. This is the approach which we recommend to courts dealing with TADA cases so that the real culprits are promptly tried and punished."

7. In this case, the allegation against the petitioner is that, she was part of the group in the mango grove of one Murugesan, who was also made an accused in the case. A Review Committee was constituted under Section 60 of the POTA, which went into the cases of the accused in Spl. Case No. 5/2003 and found that there was no prima facie case against Murugesan and directed that he should be de-linked from the case. Aggrieved by the recommendations of the Review Committee, the State Government has filed W.P. No. 9395/2005 and the same is pending till date.

8. As regards the findings of the Review Committee that there are materials as against the other accused, they have filed W.P. Nos. 38873/2005 and 5386/2007 before this Court and all the cases are pending. This has resulted in the trial not proceeding further before the Special Court. Applying the test recommended by the Supreme Court in Shaheen case, we find that the allegation against this petitioner is not very serious and she seems to have run away when the police encircled them. Therefore, we are of the opinion that this is a fit case in which the appellant could be enlarged on bail. By granting bail to the appellant, we are applying a soothing balm with a fond hope that, the appellant and her husband would resort to peaceful methods for realising their goals. The philosophy, "Power flows from the barrel of gun" will become dysfunctional in this land of Mahaveera Buddha and Mahatama Gandhi. It is recorded history that, all violence that began for protecting a cause, ultimately had ended up in annihilating the very spirit of the cause, whereas, Gandhian methods of peace and dialogue had never failed. The standing example being the reconciliation brought about by Nelson Mandela in South Africa.

9. In the result, the Criminal Appeal stands allowed. The order passed by the Special Court for Bombblast cases and POTA offences, Poonamallee in Crl.M.P.S.R. No. 191 of 2014 in Spl. Case No. 1.2009 on 21.04.2014 is set aside. The appellant is directed to be released on bail on her executing a bond for a sum of Rs. 10,000/- (Rupees ten thousand only) with two sureties each for a

likesum to the satisfaction of Special Court for Bomb blast cases and POTA offences, Poonamallee. After release, the appellant shall report before the respondent/Police at 10.30 a.m. every day, except on the hearing dates before the Court, until further orders.