

(1991) 06 MAD CK 0023

In the Madras High Court

Case No : Criminal Original Petition No. 5281 of 1991

Seemairaj and others

APPELLANT

Vs

Asstt. Collector of Central Excise

RESPONDENT

Date of Decision : 27-06-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 437, 439
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 21, 23, 29, 36A

Citation : (1993) CriLJ 844

Hon'ble Judges : Pratap Singh, J

Bench : Single Bench

Advocate : T. Sudanthiram, for the Appellant; P. Rajamanickam, Central Govt. Public Prosecutor, for the Respondent

Judgement

1. Petition under S. 167(2)(a)(ii) and under S. 439 of Criminal Procedure Code for bail.

2. For possession of 30 kilograms of ganja which is an offence punishable under S. 20(b) of N.D.P.S. Act, the petitioner was arrested on 3-4-91.

Since then he is in jail. More than 60 days have passed and till now complaint has not been filed. Hence the petitioner prays that he should be

released under S. 167(2) Criminal Procedure Code.

3. Mr. T. Sudanthiram, the learned counsel appearing for the petitioners contended that the petitioners were arrested on 3-4-91 for offence

punishable under S. 20(b) of N.D.P.S. Act for alleged possession of 30 kilograms of ganja that more than 60 days have passed and charge-sheet

was not yet laid and hence under S. 167(2)(a)(ii) Criminal Procedure Code, the petitioners are entitled to bail.

4. Per contra, Mr. M. P. Rajamanickam, the learned Public Prosecutor, contended

that petitioners have no absolute right to get bail under S.

167(2)(a)(ii) Criminal Procedure Code, in this case since the petitioners were allegedly in possession of 30 kilograms of ganja and hence are liable

to be punished under S. 20(b) of N.D.P.S. Act and the punishment is rigorous imprisonment for five years or more. He further contended that

under S. 37, of N.D.P.S. Act the petitioners are not entitled to bail unless they satisfy the requirements of S. 37(b) of the said Act.

5. To appreciate the rival contentions, it becomes necessary to extract S. 167 Criminal Procedure Code, S. 439 Criminal Procedure Code and S.

37, of N.D.P.S. Act. Section 167 Criminal Procedure Code reads as follows :

167. Procedure when investigation cannot be completed in twenty-four hours -

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of

twenty-four hours fixed by S. 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the

police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest

Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to

such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has not jurisdiction to try the case, from time to

time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if

he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded

to a Magistrate having such jurisdiction :

Provided that -

(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 total period exceeding -

(i) ninety days, where the investigation relates to an offence punishable with

death, imprisonment for life or imprisonment 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 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;

(b) no Magistrate shall, authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation 1 - For the avoidance of doubts, it is hereby declared that notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation 2 - If any question arises whether an accused person was produced before the Magistrate as required under para (b), the production of the accused person may be proved by his signature on the order authorising detention.

Section 439 Criminal Procedure Code reads as follows :

439. Special powers of High Court or of Session regarding bail. (1) A High Court or Court of Session may direct -

(a) that if any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-sec. (3) of S.

437, may impose any condition which it considers necessary for the purpose mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable

exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to

the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody".

Section 37 of N.D.P.S. Act reads as follows :

37(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 of five years or more under this Act shall be released on bail or on his

own bounds unless -

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

(ii) where the Public Prosecutor opposes the 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-sec. (1) are in addition to the limitations under the Code of Criminal Procedure,

1973 or any other law for the time being in force on granting of bail.

6. The learned Public Prosecutor relied upon the ruling reported in Narcotics Control Bureau Vs. Kishan Lal and others, . In that case, the apex

Court had to consider the Division Bench ruling of the Delhi High Court which held that limitations placed on the special court under S. 37(2) of

the N.D.P.S. Act cannot be read as fetters on the High Court in exercise of the powers under S. 439 Criminal Procedure Code for granting bail.

The petitioners before the High Court in two different cases were arrested for offences under various Sections of the N.D.P.S. Act. They were

refused bail and remanded to judicial custody. On the basis of the report the Magistrate concerned took cognizance and remanded them to

judicial custody. The petitioners filed a writ petition as well as a criminal miscellaneous petition seeking bail firstly on the ground that they are

entitled to be released on bail as required under

S. 167(2) of the Code of Criminal Procedure as the charge sheet was filed at a belated stage and secondly on the ground of illness. A learned

single Judge referred this matter to a Division Bench and the Division Bench by

the impugned order held that the limitations placed on the Special Court under S. 37(2) of the N.D.P.S. Act cannot be read as fetters on the High Court in exercise of powers under S. 439 Criminal Procedure Code for granting bail. The limited question which came up for decision before the apex court was whether the view taken by the Delhi High Court was right or wrong. The apex court has held as follows :

As already noted, S. 37 of the N.D.P.S. Act starts with a non-obstante clause stating that notwithstanding any thing contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein are satisfied. Consequently the power to grant bail under any of the provisions of Cr.P.C. should necessarily be subject the conditions mentioned in S. 37 of the N.D.P.S. Act.

After discussing the rulings on analogous provisions in other Acts, the apex court has finally held as follows :

For all the aforesaid reasons we hold that the powers under S. 439 of the Code of Criminal Procedure 1973, are subject to the limitations contained in the amended S. 37 of the N.D.P.S. Act and the restrictions placed on the powers of the Court under the said Section are applicable to the High Court also in the matter of granting bail.

So the powers to grant bail under any of the provisions of Criminal Procedure Code should necessarily be subject to the conditions mentioned in

S. 37 of N.D.P.S. Act.

7. The learned counsel for the petitioners relied upon the decision of the Supreme Court in Rajnikant Jivanlal and Another Vs. Intelligence Officer,

Narcotic Control Bureau, New Delhi, to drive hold the point that the powers of S. 167(2) Criminal Procedure Code is applicable even for

prosecution under N.D.P.S. Act. The latest pronouncement of the apex court has specifically considered the scope of S. 37 of N.D.P.S. Act vis-

a-vis S. 439 Criminal Procedure Code and concluded that the power of the High Court to grant bail under S. 439 Criminal Procedure Code is

subject to the limitations placed under S. 37 of N.D.P.S. Act. The apex court has also considered the powers to grant bail under any of the

provisions of Criminal Procedure Code and has held that the power to grant bail under any of the provisions of Criminal Procedure Code should

necessarily be subject to the conditions mentioned in S. 37 of the N.D.P.S. Act. I have already extracted the observations of the Supreme Court in

para 6 above. In Rajnikant's case, the provisions of S. 37 of N.D.P.S. Act had not been considered and discussions relates to the powers under

Criminal Procedure Code. Since the power to grant bail under any of the provisions of Criminal Procedure Code vis-a-vis S. 37 of the N.D.P.S.

Act has been considered in Narcotics Control Bureau Vs. Kishan Lal and others, . I have no hesitation in holding that the latest binding

pronouncement will apply to this case.

8. The learned Public Prosecutor relied upon the ruling of the Bombay High Court in Mrs. Shashibala Nair v. Intelligence Officer Narcotics

Control Bureau Bombay in Criminal Application No. 1564/89 : (reported in 1990 MLJ 457). In that case, the petitioner was arrested on or before

20-3-89 on a charge of possession and export of five kilograms of heroin and was charged for offences punishable under Ss. 8(3) read with 21,

23, 29 of the N.D.P.S. Act. She was in custody since then, she made an application for bail before the learned Sessions Judge. The application

was rejected on 22-6-89. Then she filed petition under S. 439 Criminal Procedure Code against the said order. During the course of arguments,

the learned counsel for the petitioner contended that petitioner has been in custody for more than 90 days and since no charge or complaint has

been filed, by virtue of proviso to S. 167(2), Cr.P.C. she is entitled to be released on bail.

Per contra, the learned counsel appearing for the Narcotics Control Bureau contended that proviso to S. 167(2) Cri.P.C. will have no application

and that there is no question of granting bail to such an accused person, even though investigation has not been completed by then and no

complaint has been filed by them so far. The Bombay High Court has upheld the contention put forth by the learned counsel appearing for the

Narcotics Control Bureau. In para 8, Justice Suresh has held as follows :

Under Section 37, sub-sec. (2), what is stated is that the limitations on granting of bail as provided under Clause (b) of sub-sec. (1) are in addition

to the limitation under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail. These are words of

limitation and not of any expansion.

They circumscribe the scope of the considerations for granting bail. Under the Act bail can be granted only on the grounds mentioned under S. 37,

sub-sec. (1) and subject to such limitations as may have been provided under the Code of Criminal Procedure 1973 - sub-sec. (1) and subject to

such limitations as may have been provided under the Code of Criminal Procedure 1973, or any other law for the time being in force on granting

bail. The proviso to sub-sec. (2) of S. 167 Cr.P.C. is not a limitation for the purpose of grant of bail, but only a technical lever enabling the release

of an accused person where a charge sheet has not been filed within 90 days, if the offence is punishable with life sentence or sentence of ten years

or above, irrespective of the fact whether investigation is still pending or not. In my opinion, if one reads the provisions of S. 36A and S. 37

together and, particularly sub-sec. (2) thereof, it becomes clear that the proviso to sub-sec. (2) of S. 167 of the Code of Criminal Procedure will

have no application in such cases where a person had been charged under any of the offenses falling within the scope of the N.D.P.S. Act".

9. The preamble to N.D.P.S. Act shows that the object of the Act was to amend the law relating to Narcotic Drug and to make stringent

provisions for the control and regulation of operations relating to

Narcotic Drug and Psychotropic Substances Act etc. The act deals with the offences which have got the potential to cause serious injury to the

society as a whole, as compared to any other offences under other law. There can be no laxity in the enforcement of the provisions of the Act. The

offence investigated in a case under this Act, has national and international ramifications and it is not easy to complete the investigation and file a

complaint within a time bound schedule of 90 days or so. If therefore in spite of this awareness, the accused person is allowed to go on bail on any

technical plea such as the one canvassed before me, that would defeat the very object of law.

10. In view of the above, I am clear that proviso to S. 167(2) Criminal Procedure Code is not applicable to such cases covered by S. 37 of

N.D.P.S. Act. In such cases, only if the requirements of S. 37(b) of the Act are satisfied, the accused can be released on bail. In the instant case

before me, apart from the technical plea that the petitioner is entitled to bail by virtue of Ss. 167(2) Criminal Procedure Code, no other material

has been placed before me to show that there are reasonable grounds for believing that petitioner is not guilty of any such offence and is not likely to commit any such offence while on bail. Hence this petition praying or bail has to necessarily fail.

11. Hence the petition shall stand dismissed.

12. Petition dismissed.