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Court : Guwahati

Decided On : Jun-23-2003

Judge : P.P. Naolekar, C.J. and Amitava Roy, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 438 and 439; Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 36A, 36B, 36A(3) and 37

Appeal No. : B.A. Nos. 246 and 464 of 2003

Appellant : Baljit Singh

Respondent : State of Assam

Advocate for Def. : P. Bora, PP

Advocate for Pet/Ap. : B.K. Mahajan and R.K. Pradhan, Advs.

Judgement :

Amitava Roy, J.

1. A short question of considerable moment has been referred to this Division Bench following a difference in opinion of two Single Benches of this Court. The question which pleads to be answered can be paraphrased as follows.

2. Whether an application for grant of bail under Section 438, of the Code of Criminal Procedure, 1973, (hereinafter called 'the Code') before the High Court is maintainable for offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, (as amended)(for short 'the Act') in the face of Section 36A(3) thereof?

3. We have heard Mr. B.K. Mahajan, learned counsel for the petitioner in BA No. 246/2003 and Mr. G.N. Sahewala, learned counsel for the petitioner in BA No. 464/2003 as well as Mr. P. Bora, learned Public Prosecutor, Assam.

4. These applications have been filed under Section 438 of the Code, the Bail Application No. 246/2003 relates to CID PS Case No. 52/2003 under Section 20(b)(1)/29 of the Act and the Bail Application No. 464/ 2003 is in connection with SC Case No. 58A/2002 under Section 8/20(b)(i) of the Act.

5. A preliminary objection was taken with regard to maintainability of these applications and upto a particular stage both the applications were heard together. As it transpires from the order sheet of the cases, eventually by the order dated 10.4.2002, the Bail Application No. 464/ 2003 was dismissed on merits and by order dated 9.5.2003 in Bail Application No. 246/2003, the objection was over-ruled but having regard to a different view taken by another Single Bench of this Court in Suresh Dutta v. State of Tripura reported in 2003 (I) GLT 107, the matter has reached us to deal with the question finally.

6. The root of the controversy lies in Sub-section (3) of Section 36A of the Act and it would be apposite to extract the same hereinbelow for ready reference:

'(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 and the High Court may exercise such powers including the power under Clause (b) of Sub-section (1) of that section as if the reference to 'Magistrate' in that section included also a reference to a 'Special Court' constituted under Section 36.'.

7. Before embarking upon the rival contentions of the parties it would be pertinent to notice the Section 36 of the Act in its original form before its amendment by the

Act No. 2 of 1989 with effect from 28.5.1999. The unamended Section 36 of the Act is set out herein below:

'36. Offence to be tried summarily- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under Sections 26, 27 and 32 of this Act may be tried summarily by a Magistrate of the first class.'

8. Following the amendment, the original Section 36 was replaced by a string of Sections 36A, 36B, 36C and 36D. Incidentally, several other sections of the Act were subjected to amendment. Keeping in view the issued involved we are not required to refer to the same for our present purpose.

9. The preliminary objection is to the effect that as Section 36A(3) refers only to the powers of the High Court to grant bail under Section 439 of the Code, by implication, its power to grant pre-arrest/anticipatory bail under Section 438 of the Code has been excluded by the Legislature. Therefore, no prayer for pre-arrest/anticipatory bail under Section 438 of the Code can be entertained by the High Court.

10. This argument found favour with the learned Single Judge in Suresh Dutta (supra) who on a consideration of the aforementioned provision of the Act held that the omission to mention about Section 438 of the Code in Section 36A(3) of the Act signifies exclusion of the power of the High Court to grant pre-arrest/anticipatory bail and, therefore, the power to grant regular bail during investigation/trial of an offence under the Act is only available under Sub-section (3) of Section 36A of the Act. It was, therefore, concluded that the power of the High Court under Section 438(1) of the Code relating to an offence punishable under the Act has been excluded by necessary implication and as such it is not vested with any jurisdiction under the same provision of the Code in such matters.

11. A different view was taken by another Single Bench of this Court in Balajit Singh v. State of Assam, 2003 (II) GLT 151. It was held therein that Section 36A(3) does not refer to Section 438 of the Code as it does not deal with or envisage a case of anticipatory bail, inasmuch as the said provision of the Act

relates only to those cases where a person is detained in custody for having committed offence or offences under the Act. It was, therefore, of the view that on a reading of Section 36A(3) of the Act it could not be held that the power of the Sessions Court or the High Court to grant bail under Section 438 of the Code stood excluded thereby. It was further of the view, with reference to Section 36C of the Act that it would be incongruent to hold that while a Special Court in exercise of powers of the Sessions Court would have the power under Section 438 of the Code but the High Court on the other hand in view of Section 36A(3) of the Act would be denied the same.

12. It is in this background that the arguments advanced have to be tested. Mr. Mahajan has argued that on a reading of Section 36A of the Act it is clear that he same contemplates only post-arrest contingencies and, therefore, it was not necessary to refer to Section 438 of he Code dealing with the power to grant anticipatory/pre-arrest bail by the High Court in Section 36A(3). According to him, if the legislative intention was to exclude the power of the High Court to grant anticipatory/pre-arrest bail it could have been effected by incorporating a specific provision in that regard as contained in Section 20(7) of the Terrorists and Disruptive Activities Prevention Act, 1987. The learned counsel argued that Section 20 of the 1987 Act incorporated the modification subject to which the provisions of the Code were applicable in respect of the offences punishable thereunder and that if in fact the Legislature had intended to exclude the operation of Section 438 of the Code there was no bar for it to incorporate a similar provision in the Act, itself. He maintained that Section 439 of the Code contemplated post-arrest situations and having regard to the scheme of Section 36A with special emphasis on the power of Special Court to deal with a person accused of or suspected of commission of an offence under the Act, a reference to Section 439 of the Code was considered necessary lest it may be mistaken that special power of the High Court thereunder stood excluded.

13. Mr. Mahajan further argued that having regard to Section 36C of the Act which makes the provision of the Code applicable to a proceeding before the Special Court, it would be wholly irreconcilable to conclude in absence of any exclusionary clause in the Act that while the Special Court which is deemed to be a Court of

Sessions, would have the power to grant bail under Section 438 of the Code such power would be lacking in respect to the High Court. Mr. Mahajan, therefore, strongly contended that the omission to mention Section 438 of the Code in Section 36A of the Act in any view of the matter does not imply exclusion of the power of the High Court to grant bail under Section 438 of the Code for commission of an offence under the Act. In support of his submissions, the learned counsel placed reliance on the following decisions reported in Karamachand and Anr. v. The State of MP, 1985 Cri LJ 1561, Suresh Chand and Ors. v. State of Rajasthan, 1985 Cri LJ 1750, B. Kuppa Naidu v. State of AP, 1986 Cri LJ 561, Shri Balchand Jain v. State of Madhya Pradesh, (1976) 4 SCC 572 and Muraleedharan v. State of Kerala, (2001) 4 SCC 638.

14. Mr. Sahewalla while endorsing the arguments advanced by Mr. Mahajan has additionally contended that the purpose of referring Section 439 of the Code in Section 36A(3) of the Act was to underline the fact that even if the Special Court constituted under the Act had been conferred with the exclusive jurisdiction to deal with a person accused of or suspected of commission of an offence under the Act as well as to hold trial of such offences, the special power of the High Court under Section 439 of the Code in a post-arrest situation remains intact. This was also necessary as the power of the Special Court/ Sessions Court under Section 439 of the Code, having regard to the language of Section 36A stood excluded.

15. The learned Public Prosecutor, Assam, however, argued that the Act is a special legislation and each provision thereof has to be strictly construed vis-a-uis the language used therein and no flexibility is permitted in construing the same. He further argued that the Act contemplated stringent provisions to deal with the offences under the Act and having regard to the scheme thereof, the Legislature has purposefully conferred exclusive power and jurisdiction on the Special Court in all matters pertaining to the said offences. According to him, the view taken by the Single Bench of this Court in Suresh Dutta (supra) accords with the legislative edict contained in the Act.

16. Before weighing the arguments noticed hereinabove, we consider it profitable to refer to the other authorities cited at the Bar.

In Karamchand (supra) one of the contentions raised before the High Court of Madhya Pradesh was whether Section 12AA of the Essential Commodities Act, 1955 excluded the operation of Section 438 of the Code more particularly in view of the Clauses (b), (c) and (d) of Sub-section (1). While Clauses (b) and (c) are with reference to Section 167 of the Code, Clause (d) thereof conferred jurisdiction upon the Special Court or the High Court to release a person on bail when he was accused of or suspected of commission of an offence under the said Act. Sub-section (4) of Section 12AA which is in pari materia with Section 36A(3) of the Narcotic Drugs and Psychotropic Substances Act, 1985, saved the special power of the High Court regarding bail under Section 439 of the Code, In that background it was held that the Special Court or the High Court in exercise of powers under Section 438 of the Code could release a person accused of or suspected of commission of an offence under the said Act in the event of his arrest.

17. The same view was expressed by the Rajasthan High Court in Suresh Chand (supra). The relevant excerpt thereof is set out hereineblow :

'There is no bar or prohibition under Section 12AA that Section 438 Cr.P.C. will not apply to cases under the Essential Commodities Act. The Legislature while enacting Section 12AA was fully aware of the existence of Section 438 Cr.P.C. and if they intend that the Special Court or the High Court should not exercise power under Section 438 Cr.P.C. in cases under the Essential Commodities Act, nothing prevented them to make a mention in Section 12AA and the very fact that the Legislature has omitted to specifically debar the jurisdiction of the Special Court or the High Court under Section 438 Cr.P.C. shows that the Legislature never intended to do so. Moreover, reading of Section 12AC makes it quite clear that the provisions of Cr.P.C. (including the provisions as to bail and bonds) shall apply to proceedings before the Special Court. Section 438 Cr.P.C. is also a provision of Cr.P.C. and is applicable to proceedings before a Special Court.

Thus, in our view the answer to the question referred to us is in the affirmative that is, the High Court has power to grant anticipatory bail to a person accused under Essential Commodities Act, but the High Court should exercise its discretion fairly and properly keeping in view the ambit and scope of Section 438 Cr.P.C. as

explained in the judicial pronouncements.'

18. The same question again came up for consideration before the Andhra Pradesh High Court in B Kuppa Naidu (supra) wherein the same view was reiterated observing as follows :

'It is quite apparent from Section 12AA that it does not postulate anticipatory bail at all to be granted and, therefore, the exclusion of the powers conferred under Section 438 Cr.P.C. by the special provision under the Essential Commodities Act, does not arise. Section 12AA provides for release of persons after being apprehended of arrest. An analogous provision is enacted under Section 437 of the Cr.P.C, Therefore, it is quite manifest that the principle of Generalia specialibus non-derogant has no application in this case, inasmuch as, there is no express provision under the Essential Commodities Act to grant anticipatory bail. If that be so, Section 438 will have to be attracted even to those involved in the offence under the Essential Commodities Act which is a special enactment, as not even by implication, the right conferred under Section 438 Cr.P.C. cannot be said to have been taken away by virtue of the provisions under Section 12AA of the Essential Commodities Act. Each has occupied an independent and different field.'

19. In Sri Balchand Jain (supra) the Apex Court was seized with the question as to whether an order of anticipatory bail can be made by a Court of Sessions or the High Court under Section 438 of the Code in case of offence falling under Section 184 of Defence of Internal Security of India Rules, 1971 made under the Defence of Internal Security of India Act, 1971. After examining the historical background of Section 438 of the Code and the language in which it is couched vis-a-vis the contients of Rule 184 of the aforementioned Rules the Apex Court answered it in the affirmative. Noticing that the said Rules mandated that no person accused of or suspected of contravention of the provisions of the said rules or order made thereunder if in custody can be released on bail except on the fulfilment of the conditions set out therein, it held that Rule 184 could not be said to lay down a self-contained Code for grant of bail so that a power to grant bail must be found only in the said Rule and not in the Code. It ruled that Rule 184 deals with a situation at a stage when a person is accused or of suspected of any

contravention of any Rule or order made under the said Rules is in custody and, therefore, if a person not in custody applies for grant of anticipatory bail being under an apprehension of arrest his case would be clearly out side the mischief of Rule 184. It, therefore, concluded that Section 438 of the Code and Rule 184 operate at different stages and there was no overlapping between the two provisions so as to give rise to a conflict between them and thus Rule 184 did not stand in the way of a Court of Sessions or a High Court in granting anticipatory bail under Section 438 of the Code to a person apprehending arrest in contravention of any provision made under the Rules.

20. The appellants before the Apex Court in Murulidharan (supra) was released on bail by the Sessions Court in a case registered under Section 8 of the Kerala Akbori Act. The High Court of Kerala having reversed the order, the matter reached the Apex Court. Referring to Section 41A of the aforementioned Act, the Apex Court, after observing that the provisions thereof was in pari materia with Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (as amended) disapproved the approach of the Sessions Court in granting bail to the appellants on the reasoning that no material could be collected by the investigating agency to connect the appellants with the crime. Having regard to the conditions enumerated in Section 41A of the Kerala Akbori Act subject to which a person accused of an offence under the said Act may be released on bail, the Apex Court observed that it was incomprehensible as to how the rigour of such requirement can be watered down when a person approaches the Court for pre-arrest bail on the apprehension that he may be implicated as an accused.

21. This decision presumably has been relied upon by the learned counsel for the petitioner to emphasise the fact that an application for anticipatory bail under Section 438 of the Code was maintainable for an offence under the Kerala Akbori Act where restrictions for grant of bail as contained in Section 41A of the Act thereof were the same as those in Section 37 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (as amended) and therefore the same analogy could not be drawn in the present case as well.

22. A survey of the judicial precedents as above, clearly highlights the proposition that in absence of any specific provisions to the contrary in any enactment containing the provision for bail, the exclusion of the power of the High Court to grant anticipatory/pre-arrest bail under Section 438 of the Code cannot be readily inferred.

23. Reverting to the case in hand, it is to be notice that Sections 36 and 37 of the Act (as originally enacted) find place under Chapter IV thereof dealing with 'Offences and penalties'. By an amendment of the Act by Act No. of 1989 which has came into force with effect from 29.5.1989 many changes have been introduced in the original Act. In Chapter IV, the amendment, inter alia, relates to Sections 36 and 37, the original Section 36 had been substituted by a new provision and Sections 36A to 36D had been added. Similarly, Section 37 has also undergone a sea change.

24. The amended Section 36 provides for constitution of Special Courts, the Judges whereof are to be appointed by the Government with the concurrence of the Chief Justice of the concerned High Court. Sub-section (3) of Section 36 lays down that a person would not be qualified for appointment as a Judge of Special Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge. Section 36A prescribes that notwithstanding anything contained in the Code an offence under the Act shall be triable only by the Special Court constituted for the area in which the offence has been committed. Clauses (b) and (c) relates to exercise of power under Section 167 of the Code by a Magistrate and the Special Court. It is noticeable that the Magistrate though has the power to detain a person accused of or suspected of commission of an offence under the Act when forwarded to him, he has no power to release him under Section 167 of the Code. It is reserved to the Special Court. Clause (d) authorises the Special Court to take cognisance of an offence under the Act on a perusal of police report of the facts or upon a complaint made by an office of the Central Government or of a State Government authorised in that behalf. Sub-section (3) of Section 36A which is the hub of the present controversy saves the special power of the High Court regarding bail under Section 439 of the Code further specifying that the High Court may also exercise such powers including the power under

Clause (b) of Sub-section (1) of that section pertaining to Section 167 of the Code.

25. Section 36B confers jurisdiction on the High Court to exercise the powers under Chapter XXIX and XXX of the Code regarding appeals, reference and revision as if the Special Court within the local limits of the jurisdiction of the High Court was a Court of Sessions trying cases within the local limits of the jurisdiction of the said High Court.

26. Section 36C, subject to the provisions of the Act, makes the provisions of the Code, including those regarding bail and bonds, applicable to a proceeding before the Special Court, laying down also that the Special Court for the said purpose would be deemed to be a Court of Sessions.

27. Under Section 36D any offence committed under the Act can be tried by a Court of sessions until a Special Court is constituted.

28. Section 37 lays down that notwithstanding anything contained in the Code, every offence punishable under the Act would be cognisable and no person accused of an offence punishable for a term of five years or more shall be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release and if the Public Prosecutor opposes the application, the Court is to be satisfied that there are reasonably grounds for believing that the person is not guilty of such offence and he is not likely to commit any offence while on bail. Sub-section (2) of Section 37 further provides that the limitations to grant bail as above would be in addition to those under the Code or any other law for the time being in force for granting of bail.

29. On a reading of the provisions of the Act under Chapter IV thereof, it is evidently clear that the Legislature has formulated a scheme providing for the forum and the punishments for the offences referred to therein as well as for dealing with the persons accused of or suspected of commission of offence, at the investigation stage. Provisions have also been made with regard to bail as well as for appeal and revision before the High Court. The Code has also been made applicable to the proceeding before the Special Court save as otherwise provided by the Act. It is significant that no where in the said Chapter or in the Act there is a

provision excluding the power of the High Court to grant pre-arrest bail under Section 438 of the Code.

30. A bare reading of Section 36A suggests that the same relate to a post-arrest situation where a person accused of or suspected of an offence under the Act is forwarded to a Magistrate. The said section which stands with a non-obstante clause by Clauses (b) and (c) of Sub-section (1) limits the power of releasing such a person only to the Special Court. It is, therefore, in our view, to obviate a possible misconception that the special power of the High Court regarding bail under Section 439 of the Code is excluded by the precepts contained in Section 36A, that the Legislature in its wisdom incorporated the Sub-section (3) thereof. As Section 36A apparently deals with the post-arrest situations it was thus not felt necessary to refer to Section 438 of the Code pertaining to the power of the High Court to grant pre-arrest bail, in the said subsection. In our considered view, the setting in which Section 36A(3) appears, it is the only plausible interpretation.

31. As alluded above, the provision of the Code including those as to bail and bonds have been save as otherwise provided in the Act made applicable to the proceeding before the Special Court which is deemed to be a Court of Sessions. There is no provision of the Act which excludes the applicability of the Code to the proceeding before the Special Court. Thus, in terms of Section 36C, a Special Court on which the power of Court of Sessions has been conferred, has the jurisdiction to grant pre-arrest bail under Section 438 of the Code. In view of the fact that the High Court has been conferred the power under Chapter XXIX and XXX of the Code relating to appeal, reference and revision, it would be wholly incompatible with the idea that it has been denuded of its power under Section 438 of the Code, more particularly in absence of any specific provision to the contrary. It is incomprehensible that a Special Court which is deemed to be Court of Sessions can exercise the power to grant anticipatory bail whereas the High Court though conferred with the jurisdiction of entertaining the appeals, references and revisions under the Code would be denied the same. It would, therefore, be in conformity with the legislative intent expressed in Section 36B to construe that in the scheme of the Act as envisaged under Chapter IV thereof, the power of the High Court to grant pre-arrest bail under Section 438 of the Code is preserved.

Further, the power of granting anticipatory bail, tracing the history of incorporation of the related provision of the Code, is extraordinary in character and has been conferred on the Courts of higher echelons namely the Court of Sessions and the High Court. It is the power exercisable in cases of anticipated accusation of non-bailable offences and no limit as to the category of the non-bailable offences in respect of which the power can be exercised has as such been prescribed, barring specific legislations to the contrary.

32. In view of the above, the contention that reference of Section 439 of the Code in Section 36A(3) of the Act impliedly excludes the power of the High Court under Section 438 of the Code does not commend to us for acceptance. We are of the opinion that reference of Section 439 of the Code in Sub-sections (3) of Section 36A is in view of the non-obstante clause with which the said section opens and also to avoid any possible delusion that the special power of the High Court to grant bail at the post-arrest stage stands excluded in view of the powers conferred on the Special Court in such matters. This rather confirms the position that the power of the magistrate to release a person accused of or suspected of commission of an offence under the Act stands thoroughly excluded but does not have any bearing on the power of the High Court under Section 438 of the Code. However, having regard to the language of the Section 37 of the Act, we are of the view that the restrictions contained therein for granting bail would also apply while entertaining a request for pre-arrest bail under Section 438 of the Code. We are thus of the opinion that Section 36A(3) of the Act does not in any way affect the power of the High Court under Section 438 of the Code in respect of offences thereunder.

33. One of the fundamental principles relevant for interpreting a statute is that the Legislature does not intend absurd or anomalous results. Therefore, if too literal adherence to the words of an enactment appears to produce absurdity or injustice, it is the duty of the court of construction to ascertain whether the language of the enactment is capable of any other fair interpretation. In doing so a Court would not question the wisdom of the Legislature and if an alternative construction, although not the most obvious, provides a reasonable meaning to the enactment, it ought to adopt it.

34. A passage from Maxwell on interpretation of Statute, 12th Edition looks apposite.

'In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one. 'An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available'. Where to apply words literally would 'defeat the obvious intention of the legislation and produce a wholly unreasonable result' we must 'do some violence to the words' and so achieve that obvious intention and produce a rational construction.'

35. The same view was expressed by Danckawerts L.J. in Artemiou v. Prpcopious, (1965) 3 All ER 539 observing that an intention to produce an unreasonable result is not to be imputed to the statute if there is some other construction available.

36. Lord Reid in Luke v. IRC, (1963) All ER 655, in the same context had observed as hereunder :

'To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. This is not a new problem, though out standard of drafting is such that it rarely emerges. The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail.'.

37. In TATA Engineering Locomotive Ltd. v. State of Bihar, (2000) 5 SCC 346, the Apex Court while dealing with the basic principles of interpretation of statutes had observed that the statues should not be construed as theorems of Euclid but with some imagination of the purposes which lie behind them and to be too literal in the meaning of the words is to see the skin and miss the soul.

38. We respectfully subscribe to the preponderant judicial opinion as well as the exposition of law on the subject. Having regard to the scheme of the Act more particularly Chapter IV thereof, which is a complete Code with regard to the matters contained therein, we are inclined to uphold the contentions advanced on behalf of the petitioner. We affirm the finding and conclusion of the learned Single Judge in Balajit Singh (supra) as above. The decision rendered in Suresh Dutta (supra) does not lay down the correct proposition of law pertaining to the issue in hand. The said decision stands overruled.

39. The upshot of the above discussion is that the applications for pre-arrest bail under Section 438 of the Code before this Court are maintainable in law. As a result, the Bali Application No. 246/2003 stands remitted to the learned Single Judge for consideration thereof on merits. However, as the Bail Application No. 464/2003 has already been rejected by the learned Single Judge on merits by order dated 10.4.2003 no similar direction is called for. It is, however, open for the petitioner in the said Bail Application, if so advised, and if permissible in law, to file a fresh application for pre-arrest bail.

The reference is answered accordingly.

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