

Shashibala Nair Vs. Intelligence Officer, Narcotics Control Bureau and anr.

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Court : Mumbai

Decided On : Aug-03-1989

Reported in : 1989(3)BomCR228; (1989)91BOMLR214

Judge : H. Suresh, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 36 and 37; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 167(2)

Appeal No. : Criminal Application No. 1564 of 1989

Appellant : Shashibala Nair

Respondent : intelligence Officer, Narcotics Control Bureau and anr.

Advocate for Def. : M.K. Patwardhan, Adv. for respondent No. 1 and ;K.H. Chopda, Public Prosecutor, for respondent No. 2

Advocate for Pet/Ap. : M. Mooman, Adv.

Disposition : Petition dismissed

Judgement :

H. Suresh, J.

1. The petitioner was arrested by the Narcotics Control Bureau on or about 20-3-1989 on a charge for possession and export of 5 Kgs. of heroine and has been

charged with offences punishable under sections 8(3), 2(2), 21, 23, 29 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (No. 61 of 1985) hereinafter referred to as the NDPS Act. She has been in custody since then. She made an application for bail before the learned Sessions Judge. The application was rejected by an order dated 22nd June, 1989. The petitioner filed this Criminal Application as against the said Order and also purporting to be an application under section 439 of the Code of Criminal Procedure. The prayer is for release of the petitioner on bail.

3. During the course of the arguments, Mr. Moomen submitted that the petitioner has been in custody for more than 90 days. Since no charge-sheet or complaint has been filed, she is, by virtue of Proviso to sub-section (2) of section 167, Cri.P.C. entitled to be released on bail, irrespective of the fact that the offence is bailable or non-bailable. Mr. Moomen also submitted, a written application to add such a ground in the present petition, which I granted.

4. In reply, Mr. Patwardhan appearing for the Narcotics Control Bureau submitted that having regard to the recent amendment to the NDPS Act, the said Proviso to section 167, 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 them and no complaint has been filed by them so far.

5. Mr. Moomen submitted that the powers of the High Court to grant bail have not been taken away by the Act. He, therefore, submitted that, in any event, this Court can grant bail to the petitioner, if, in the opinion of this Court such a bail can be granted. The relevant provisions after the amendment of the law are as follows :

'36-A. (1) Notwithstanding anything contained in the Code to Criminal Procedure, 1973,---

(a) all offences under this Act shall be triable only by the special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or subsection (2-A) of section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate;

Provided that where such Magistrate Considers---

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973, in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of the offence without the accused being committed to it for trial.'

(3) Nothing contained in this section shall be deemed to effect 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 power 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'.

36-C. Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bail and bonds) shall

apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.'

37. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,-

(a) every offence punishable under this Act shall be cognisable :

(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 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 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-section (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.'

7. Thus it becomes clear that the Magistrate has no power to grant bail at all. It is only the Special Court that can exercise the powers which a Magistrate may exercise under section 167 of the Code of Criminal Procedure, 1973, in relation to an accused person who has been forwarded to him under section 36-A(1)(b). Again, under section 360 it has been provided that, except as otherwise provided under this Act, the Special Court shall be deemed to be a Court of Sessions. Under section 37, as amended, now it is clear that no bail can be granted unless the Public Prosecutor has been given an opportunity to oppose grant of such relief and where the Public Prosecutor opposes the application, the Court is satisfied that there are reasons for believing that he is not guilty of such offence and that he is likely to commit any offence while on bail. In other words, it is only where the

Court is satisfied that there is no material whatsoever to hold that the accused is guilty of an offence under this Act, then only a bail can be granted. If there is some material, having regard to the provisions of section 37, ordinarily no bail can be granted to an accused person under this Act. Mr. Patwardhan pointed out that section 37 begins with a non obstante clause namely, 'Notwithstanding anything contained in the Code of Criminal Procedure, 1973', and on the basis of this, he submits that whatever be the provision of the Code of Criminal Procedure, 1973, no bail can be granted to an accused person charged under this section except as provided under this Act. It is true, under section 36-A, the Special Court has powers to exercise its jurisdiction as provided under section 167 of the Code of Criminal Procedure. But that provision must be understood in its context, in as much as, section 36A also begins with the non obstante clause, namely, 'Notwithstanding anything contained in the Code of Criminal Procedure, 1973'. If, therefore, one reads the two provisions together, it becomes clear that whatever be the provisions of the Code of Criminal Procedure, it is only to the extent that it is provided under this Act, the Special Court can exercise such powers. If the intention of the Legislature is to see that persons charged under this Act, are severely dealt with and are not ordinarily allowed to be released on bail, it must necessarily be held that to the extent that there is no application of the provisions of the Code of Criminal Procedure to this Act, to that extent the accused cannot insist upon any relief.

8. Under section 37, sub-section (2), what is stated is that the limitation on granting of bail as provided under Clause (b) of sub-section (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 section 37, sub-section (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 of bail. The Proviso to sub-section (2) of section 167, Cri.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 chargesheet 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 section 36-A and section 37 together and, particularly, sub-section (2) thereof it becomes clear that the proviso to subsection (2) of section 167 of the Code of Criminal Procedure will have no application in such cases where a person had been charged under any of the offences falling within the scope of the NDPS Act.

9. If one analyses the provisions of the Act, it becomes clear that with regard to investigation, arrest, bail, seizure and trial, it is a complete Code by itself. The Act provides for its own machinery for investigation. The Act make provision with regard to arrest. The Act makes provisions with regard to investigation and recording of statement. The Act also provides for grant of bail and lays down in what cases bail can be granted. All these things have become necessary because the offences under this Act have the potentiality to cause such serious injury to the society as a whole, as compared to any other offences under other laws, that there can be no laxity in enforcement of the provisions of the Act. Very often investigation in a case under this Act has national and international ramifications, and it is not easy to complete the investigation and to file a complaint within a time bound schedule of ninety days or so. If, therefore, inspite of this awareness, an 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 the law. In this connection, Mr. Patwardhan has drawn my attention to Statement of Objects and Reasons behind passing the recent amendments to the Act, which are worth while quoting here:

'In recent years, India has been facing a problem of transit traffic in illicit drugs. The Spill-over from such traffic has caused problem of abuse and addiction. The [Narcotic Drugs and Psychotropic Substances Act, 1985](#) provides deterrent punishments for drug trafficking offences. Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#), the need to amend the law to further strengthen it, has been felt.'

10. Mr. Mooman further submitted that in any case, the powers of the High Court under section 439 of the Code of Criminal Procedure have not been taken away for the purpose of grant of bail. Of course, Mr. Mooman is right. As far as the powers of the High Court are concerned, wherever the offences are committed under this Act, the Court has to take serious view of the matter. In any case it cannot be exercised to defeat the object of the Act, and a technical plea shall be no ground for undeserving liberty under this Act. In the present case the allegations are that the petitioner left Bombay by Flight SQ 024 on 8th March, 1989 for Amsterdam with two pieces of checked in baggage. When she reached Amsterdam, the authorities there found that petitioner's passport was fake and hence they deported her to India on 10-3-1989. She left behind her baggage at Amsterdam. She arrived at Bombay on 10-3-1989 and she was handed over to Sahara Police Station, who arrested her for the violation of passport laws and subsequently produced her before the learned Magistrate, 22nd Court, Andheri. She was released on bail in that matter. On 14-3-1989 when the suitcases were opened, they found five Kgs. of heroin concealed in the false top and bottom of the two suitcases which had earlier been carried by the petitioner from India and had been left behind by her in Amsterdam. This is how she has been charged under this Act also. If these are the facts and allegations, in my view, she deserves no bail whatsoever.

11. Mr. Mooman submitted that the petitioner is a young lady and she is the mother of two children and that she has been falsely implicated in this case. He submitted that the evidence is not sufficient to bring home the charge as against the petitioner and that, therefore, she should be released on bail, if not on any other ground, but on humanitarian grounds I am not inclined to accede to any such request. If she had gone to Amsterdam on a passport which was not genuine and if she had to be sent back to India and if she had left behind her suitcases there at Amsterdam, in which five Kgs. of heroin was concealed, it is a very serious offence and any sympathy that I might show to her would be considered entirely misplaced.

In the result, I pass the following order:

Petition is dismissed. Rule discharged.

At this stage, Mr. Mooman applies for leave to appeal to Supreme Court. I am not inclined to grant such leave.

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