A.V. Dharmasingh and Others Vs. the State of Karnataka by the State Public Prosecutor, Bangalore

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Court : Karnataka

Decided On : Sep-18-1992

Reported in : 1993CriLJ94; ILR1992KAR3137; 1992(4)KarLJ336

Judge : M.M. Mirdhe, J.

Appeal No. : Crl. P. No. 959 and 1064/1992

Appellant : A.V. Dharmasingh and Others

Respondent : The State of Karnataka by the State Public Prosecutor, Bangalore

Advocate for Def. : Sri C.H. Jadhav, G.P.

Advocate for Pet/Ap. : Sri A.K. Subaiah, Adv.

Judgement :
ORDER

1. Criminal Petition 959/92 is filed by the petitioners who are accused in Crime No. 70/92 of Ashoknagar Police Station, Gulbarga and Criminal Petition 1064/92 is filed by the petitioner who is accused in Crime No. 84/92 of Madikeri Town Police Station. Both these petitions have been placed before this Bench for disposal as per the orders of the acting Chief Justice. Since both these petitions involve common questions of law, I have heard them together and I am passing a

common order in them.

2. I have heard the learned counsel for the petitioners and the learned Govt. Pleader for the respondent and perused the records of the case.

3. In Criminal Petition 959/92 the petitioners are the accused in Crime No. 70/92 of Ashoknagar Police Station which is registered for the offence punishable under section 17 of the Narcotic Drugs Act on the allegation that on credible information the police went to the spot and found the petitioners transporting 40 Kgs. of ganja and they were caught red-handed at the Central Bus-stand, Gulbarga. The police have completed investigation of the case and they have filed charge-sheet against the petitioners for the offence punishable under S. 20 of the Narcotic Drugs Act (Which will hereinafter be referred to as the 'Act').

4. The petitioner in Cr.P. 1064/92 is an accused in Crime No. 59/90 (C.C. No. 512/91) for the offence punishable under the Act and the allegation against him is that on 10-4-1990 at about 5.30 p.m. he and the other accused in the case were found selling ganja in small packets in their house at Madikeri Town and 30 Kgs. of ganja was seized from the along with some petty amount. The police have completed investigation and they have filed charge-sheet in this case. There are two accused in this case. One of the accused is a woman and, therefore, she has been granted bail by the trial Court. The learned Govt. Pleader has submitted that the petitioners are not entitled to bail, in view of the special provisions regarding bail enacted in S. 37 of the Act. Section 37 of the Act reads as follows :-

'Section 37. Offences to be cognizable and non-bailable :-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -

(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 bond unless -

(i) the Public Prosecutor has been given an opportunity to appose 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) 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.'

5. The learned Govt. Pleader relied on 1991 Criminal Law Journal 654 : 1991 CriLJ654 (Narcotics Control Bureau v. Kishan Lal) wherein the Supreme Court has laid down as follows at page 656; of Cri LJ :-

'Section 37 as amended starts with a non-obstinate clause stating that notwithstanding anything contained in Criminal P.C. 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The N.D.P.S. Act is a special enactment and it was enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of S. 37 of NDPS Act are in negative terms limiting the scope of the applicability of the provisions of Cr.P.C. regarding bail, it cannot be said that the High Court's powers to grant bail under S. 439, Cr.P.C. are not subject to the limitation mentioned under S. 37 of the NDPS Act. The nonobstante clause with which the section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between S. 439, Cr.P.C. and S. 37 of the NDPS Act, S. 37, prevails. The provisions of S. 4, Cr.P.C. also make it clear that when there is a special enactment in force relating to the manner of investigation, enquiry of otherwise dealing with such offences, the other powers under Cr.P.C. should be subject to such special enactment. In interpreting the scope of such a statute the dominant purpose underlying the statute has to be in mind. Consequently the power to grant bail under any of the provisions of Cr.P.C. should necessarily be subject to the conditions mentioned in S. 37 of the NDPS Act.'

In view of the interpretation of S. 37 by the Supreme Court in the said ruling, the provisions of Cr.P.C. regarding bail are subject to the conditions mentioned in S. 37 of the Act. The learned counsel for the petitioners have argued that S. 37 will be applicable only to a person who is accused of an offence which is punishable for a term of minimum 5 years or more. According to them if the offence is punishable for a term less than 5 years, S. 37 of the Act will not be attracted. The relevant provision of Section 37 of the Act lays down that no person accused of an offence punishable for a term of imprisonment for a period of 5 years or more shall be released on bail unless the conditions laid down in sub-section (b)(1)(2) are satisfied. Now it will have to be seen whether the expression 'an offence punishable for a term of imprisonment of 5 years or more under this Act' means that it refers to an offence for which the minimum punishment is 5 years or more. In : AIR 1988 SC1875 (Dr. Ajay Pradhan v. State of Madhya Pradesh) the Supreme Court while dealing as to how the words in statutes are to be interpreted has laid down guidelines in the following words :-

'A rule must be interpreted by the written text. If the precise words used are plain and unambiguous, the court is bound to construe them in their ordinary sense and give them full effect. The plea of inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of the statute is obscure and there are alternative methods of construction. Where the language is explicit its consequences are for Parliament, and not for the Courts, to consider.'

In : [1955]1SCR158 (Tolaram v. State of Bombay) the Supreme Court has given guidance as to how the penal provisions in an Act are to be interpreted in the following words :-

'If two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature.'

Interpreting the expression 'punishable for a term of imprisonment for 5 years or more' in the light of the Supreme Court ruling quoted above, I am of the opinion

that the expression means that the offence should be punishable with minimum of 5 years or more because the words 'or more' are added only to emphasise that the offences punishable with minimum 5 years or more are to be the offence for which the provision of Section 37 of the Act is made applicable. The said expression means that the offence should be punishable with minimum of 5 years or more. The words 'or more' are to be read with reference to '5 years' in their grammatical meaning. '5 years or more mean that the basis is 5 years and 'or more' is the period that has to be considered with reference to the basis of '5 years'. If the intention of the legislature was to make S. 37 of the Act applicable to the offences which are punishable even up to 5 years or less, then the legislature would not have used the expression '5 years or more'. It could have simply said for any offences. It could not have qualified the word offence in S. 37 with the expression 'punishable for a term of imprisonment for 5 years or more'. Therefore the expression means that the offence must be punishable with the punishment which shall be not less than 5 years, but it can be more. The ruling of the Supreme Court reported in : 1991 CriLJ654 (Narcotics Control Bureau v. Kishan Lal) can be distinguished on the ground that the Supreme Court has not considered this aspect of S. 37 in that ruling.

6. The offence alleged against the petitioner is punishable under Section 20 of the Act with a term which may extend to 5 years and shall also be liable to fine, which may extend to Rs. 50,000/-. The offence alleged against the petitioner is punishable in maximum up to 5 years and not for a term of imprisonment for 5 years or more. The maximum punishment provided is 5 years and Section 37 of the Act applies to the offences punishable with imprisonment which cannot be less than 5 years but it can be more. Therefore the provisions of Section 37 of the Act will not be attracted to the offence under Section 20 of the Act as the maximum punishment provided for the offence is 5 years. If the punishment for the offence under section 20 were to be not less than 5 years but 5 years or more, then S. 37 would have been attracted.

7. The learned counsel for the petitioners have urged that there is no compliance of Sections 42 and 50 of the Act regarding search and seizure in this case and, therefore, the petitioners are entitled to bail. The learned Govt. Pleader submitted

that this question of non-compliance with the provisions of Section 42 and S. 50 is a matter that is required to be considered at the time of the trial but not at this stage. The Bombay High Court in a case reported in 1992 Cri LJ 399 (Lawrence D'Souza v. State of Maharashtra) has held as follows (at page 402 and 403) :-

'The provisions of Sections 41 to 58 of the Act would be applicable right from the inception of the investigation. It would be fallacious and pernicious to leave the question of their compliance to be looked into only at the stage of trial. Such a situation is fraught with the danger of the prosecution agency ignoring altogether the compliance of the provisions which contain in-built safeguards to the accused, with impunity and with ulterior purpose in a given case. That would bring into period the liberty of the citizen guaranteed under Art. 21 of the Constitution. The accused therefore should be entitled to rely upon the infirmities with all its rigour even at the stage of bail. There are stringent limitations on grant of bail under section 37 of the Act. Courts must, therefore, be vigilant to protect the rights of the accused. There can be no quarrel that an offender under the Act must be apprehended, and severely punished, provided, however, that he is found guilty. That possibility has to be found to exist at the stage of bail on prima facie consideration of the matter and only after reaching satisfaction that he is reasonably believed to be guilty. For that purpose, the compliance with procedural requirements must be insisted upon and must be shown, at least, prima facie, at the stage of bail.'

I agree with the view expressed by their Lordships of the Bombay High Court reported in the ruling. Therefore the Court is entitled to look into these contentions regarding non-compliance with the conditions laid down in Section 42 and 50 of the Act regarding search and seizure at the stage of considering the bail application. Section 42 lays down that if any officer mentioned in the section has reason to believe from personal knowledge or from any information that he received that an offence under Chapter IV of the Act has been committed, then he can enter into between sunrise and sunset in any building, conveyance or enclosed place etc. and that Section also lays down that if such an officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the

escape of an offender, he may enter and search building, conveyance or enclosed place at any time between sun set and sun rise after recording grounds of his belief. The learned counsel for the petitioners argued that there is no compliance with the mandatory provisions of Sections 42 and 50 of the Act regarding search and seizure in this case and, therefore, the petitioners are entitled to bail on that ground also. The learned Govt. Pleader submitted that this question of non-compliance with the provisions of Section 42 and 50 is a matter that is required to be considered at the time of the trial not at this stage.

8. It is not disputed in this case that the police officer had not obtained any search warrant for searching the house of the accused in Cr.P. 1064/92. It is also not disputed that the officer who searched the house of the accused in that case has not recorded the grounds of his belief for not obtaining the search warrant or authorisation. Therefore there is no compliance of Section 42 of the Act regarding the search of the accused in Crl.P. 1064/92.

9. Section 50 of the Act lays down the condition under which search of the person shall be conducted. It is laid down that if the accused requires he should be taken without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 of the Act or to the nearest Magistrate. In this case also, there is no material to infer that the petitioners were made aware of this right under Section 50 of the Act and that they were taken to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The learned Govt. Pleader submitted that the person who conducted the search himself was the Gazetted Officer and, therefore, there was compliance with Section 50 of the Act. The purpose for which this condition is laid down in Section 50 is that the person should be searched before a Gazetted Officer on his demand or before the nearest Magistrate so that the search should be before an independent officer. The person arresting the accused cannot be said to be an independent person so as to come within the description 'nearest Gazetted Officer' envisaged in Section 42. Therefore there is no compliance of Section 50 also in this case. The learned Govt. Pleader relied on : 1980 CriLJ429 (State of Maharashtra v. Natwarlal) wherein it has been held by the Supreme Court that (at page 432 of Cri LJ) :-

'Assuming arguendo, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which followed on the complaint of the Assistant Collector or Customs.'

But in : AIR 1986 SC180 (Olga Tellis v. Bombay Municipal Corporation) the Supreme Court has held as follows (at pages 196 and 197) :-

'The procedure prescribed by law for the deprivation of the right conferred by Art. 21 must be fair, just and reasonable. Just as a mala fide act has no existence in the eye of law, so unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform to the norms of justice and fairplay. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law is found to be unreasonable, it must mean that the procedure established by law under which that action is taken its itself unreasonable. The substance of the law cannot be divorced from the procedure whdehorsedt prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down.'

This ruling is of a later date and of a larger Bench than the ruling relied upon by the learned Govt. Pleader and, therefore, the Court will have to follow this ruling in which it is held that the action taken by a public authority which is invested with statutory powers is to be tested by the application of two standards. Firstly the action must be within the scope of the authority conferred by law and secondly it must be reasonable and that the substance of law cannot be dehorned from the

procedure which it prescribes.

10. In : 1979 CriLJ651 (K. L. Subhayya v. State of Karnataka) the Supreme Court has held as follows (at page 652 of Cri LJ) :-

'Both Sections 53 and 54 contain valuable safeguards for the liberty of the citizen in order to protect them from ill-founded or frivolous prosecution or harassment. In the instant case, the inspector who had searched the car of the accused had not made any record of any ground on the basis of which he had a reasonable belief that an offence under the Act was being committed before proceeding to search the car.

Held that the provisions of S. 54 were not at all complied with. This, therefore, rendered the entire search without jurisdiction and as a logical corollary, vitiated the conviction under section 34, Cri.A. No. 221 of 1973, D/- 22-11-1973 decided by Karnataka High Court reversed.'

11. In 1990 Cr LJ 1990 (Mari Appa v. State of M.P.) the Madhya Pradesh High Court has held as (at page 1993) :-

'If the procedure laid down under the Act is not followed, it would not be proper for the Court to refuse bail; particularly when the procedural safeguards violated have a material bearing on trial of the case. Therefore in the instant case non-compliance with the provisions of Sections 42 and 50 entitled the accused to be released on bail.'

This Court in : ILR 1991 KAR1820 has held as follows :-

'Under Section 57 of the Act it is clearly laid down that whenever any person makes any arrest or seizure under this Act he shall within 48 hours next after such arrest or seizure, make a full report of all the particulars of such arrest of seizure to his immediate official superior. In the instant case, there is material enough in the evidence of PW 1 to show that no such report was made by him. He admits that even warrant was not returned to the officer who had issued it ..... Failure to comply with mandatory provisions of Section 57 has certainly resulted in prejudice to the accused.'

In view of the position of law enunciated in the above rulings, non-compliance with mandatory provisions regarding search and seizure under section 42 and 50 of the Act will amount to prejudice against the accused and on that ground also the accused will be entitled to bail. Summarising the position of law in this regard, Section 37 of the Act will be applicable to the offence under the Act only if they are punishable with the imprisonment of 5 years or more and if an offense is punishable with imprisonment which can extend up to 5 years only, Section 37 of the Act will not be applicable. The Court is entitled to look even at the stage of considering bail whether there has been compliance with the mandatory provisions regarding search and seizure and if there is no compliance with the mandatory provisions regarding search and seizure, the accused will be entitled to bail even on that ground.

12. The learned Govt. Pleader submitted that the petitioner in Crl. P. 1064/92 is not entitled to bail on the ground that he is involved in series of cases. The cases in which the petitioner is involved are of the year 1968. There is no proximity in time between the cases alleged to have been committed by him in the year 1968 and the offences alleged against him in this case. Therefore this also cannot be a ground to deny bail to the said petitioner.

13. For the reasons discussed above, I proceed to pass the following :-