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SooperKanoon Citation : sooperkanoon.com/722608

Court : Kerala

Decided On : Dec-23-1983

Reported in : 1984CriLJ949

Judge : U.L. Bhat, J.

Appellant : M.K. Ayoob and ors.

Respondent : Superintendent, Customs Intelligence Unit and anr.

Judgement :

ORDER

U.L. Bhat, J.

1. These are applications for bail under Sections 437, 482 and 167, Cr. P.C. by nine among the accused in a customs cast. Similar applications filed by them before the Chief Judicial Magistrate, Tellichery were dismissed.

2. The Customs Officers received information to the effect that contraband articles were likely to be landed at the Tellicherry coast on the night of 15-9-1983 and therefore they kept the sea-coast under observation. Lorry No. KLN 4936 was found moving from the Tellicherry beach to the main road, driven by one of the accused and three among the accused were found in the lorry. The lorry was stopped and the Customs Officers checked the lorry and found that the lorry contained contraband articles such as electronic and textile goods etc., of the

value of Rs. 56 lakhs. The Customs party also received information that other people were involved in this offence. Tracks of another lorry were found on the beach. On the next day i.e .16-9-1983 lorry MYG 8229 was found in the garage attached to 'Zubaida Manzil', Tellicherry. It was found to contain contraband goods valued at Rs. 50 lakhs. Further information was collected. Accordingly seven among the petitioners were arrested in September, 1983 and produced before the Chief Judicial Magistrate, Tellicherry. The Customs Officer concerned sought their detention in judicial custody. At the same time they moved the court for bail. The Magistrate held that he had no power to remand them to judicial custody and granted them conditional bail. Accordingly they were released. These orders were challenged by the Customs Department before this Court in Crl. M.C. No. 657 of 1983 (reported in 1983 Cri LJ 1860). This Court held that the Magistrate has power to order detention of the arrested persons in judicial custody, that the order granting bail was unsustainable, cancelled the bail and directed them to be taken back into custody. Accordingly these seven persons were taken back into custody. Since then they are being remanded to custody from time to time. In Oct. 1983 two more persons (who are also before this Court) were arrested and duly remanded to judicial custody, after dismissing their bail applications. Fresh applications for bail were also dismissed by the Magistrate. These nine persons have now moved this Court for bail under Sections 437 and 438 read with the proviso to Section 167 of the Code of Criminal procedure (for short, the Code).

3. There is no dispute that all the nine petitioners before me have been in judicial custody for over 60 days. The offence alleged to have been committed by the petitioners is one under Section 135 of the Customs Act, 1962 (for short, the Act). Maximum punishment that could be imposed on them is imprisonment for a term of 7 years and fine. Under proviso a (ii) to Section 167(2) of the Code, detention of the accused in custody for a total period exceeding 60 days cannot be ordered in any case other than a case involving an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. On the expiry of the period, according to the proviso, the accused have to be released on bail and those so released on bail shall be deemed to have been released under the provisions of Chapter XXXIII of the Code. Therefore if Section 167 of the Code applies in the instant case, petitioners would be entitled to be released on bail

since they have already been in detention for over a period of 60 days. It is on this basis that the petitioners seek bail.

3A. Sri M, M. Abdul Aziz, learned Standing Counsel for the Central Government who appeared for the Customs Department in these petitions, does not contend that even if Section 167 or the proviso to Section 167(2) of the Code apply, petitioners are not entitled to bail. That they are so entitled to bail in the event of this Court holding that Section 167(2) of the Code is applicable is beyond controversy. The bail applications are resisted by the Customs Department with the contention that Customs offences, and persons arrested by Customs Officers under Section 103(1) of the Act are not governed by Section 167 or the proviso to Section 167 of the Code and therefore petitioners are not entitled to the benefit of the proviso.

4. In the order passed by this Court in Crl. M.C. No. 657 of 1983, the applicability of the provisions of Section 167 of the Code to Customs offences was not considered, though the contention was adverted to. The decision is reported in *The Superintendent of Customs, C.I.U., Cochin v. P.A. Ummerkutty* 1983 Cri LJ 1860, In that decision this Court held that in the light of Section 3(2) of the Code and Section 103(3) of the Act, the provisions in Section 437 of the Code are rendered applicable to customs offences ' under the Act and that power to grant bail under Section 437 of the Code necessarily implies power to remand or order detention in judicial custody and hence Magistrate dealing with a person arrested under Section 103(1) of the Act and presented before him under Section 103(2) by a Customs Officer has power to grant bail or power to order detention of the arrested person in judicial custody, even without reference to the provisions in Secs. 167 and 309 of the Code. Therefore applicability of Section 167 of the Code to an offence under the Act was not considered in that decision.

5. On certain fundamentals there is no dispute raised before me. A Customs Officer acting under the provisions of the Act is not an officer in charge of a police station as defined in Section 2(o) of the Code. The investigation which a Customs Officer has to hold under the provisions of the Act is not an investigation which a police officer has to conduct under the provisions of the Code. The power of arrest

vesting in a police officer and his further duties after arrest, such as production before the Magistrate, release and bail are matters covered by Sections 41, 44 and 56 - 59 of the Code. The corresponding powers of a Customs Officer are found in Sub-sections (1), (2) and (3) of Section 104 of the Act.

6. Sections 154 - 176 of the Code are found in Chapter XII and the heading of the Chapter is 'Information to the police and their powers to investigate'. Prima facie the Chapter relates to police and police investigation and not to Customs Officers and investigation by them. If here is nothing more emerging on a reading of the provisions of the Act and the Code, the prima facie position has to be affirmed. If that be so, it must follow that Section 167 does not govern the case of a person arrested by a Customs Officer under the Act. The question is whether any provision of the Code or the Act has the effect of rendering the provisions of Section 167 of the Code applicable to the case of a person arrested under the Customs Act by a Customs Officer.

7. This Court in 1983 Cri. L.J. 1860 has taken the view as already stated, that the Magistrate, before whom a person arrested by Customs Officers on suspicion of commission of an offence falling within the purview of the Act is produced, has power to grant or refuse bail to that person. The power to order remand or detention in such custody as a Magistrate deems fit is implicit in Section 437 of the Code. However, it has to be noticed that Section 437 does not lay down any procedure or guideline for passing an order of remand. Can it be said that when a Magistrate dealing with offences under the Indian Penal Code is governed, in the matter of passing an order of remand, by the provisions of Section 167(2) of the Code, he is not so governed when dealing with the matter of passing an order of remand in the case of a person arrested under the Customs Act? Can it be said that while the Magisterial power to pass an order of remand in the case of an offence under the Indian Penal Code is controlled and guided by the provisions of the Code (such as Section 167(2)), such power in relation to a person arrested in connection with Customs, offence is absolute, uncontrolled, unfettered and unguided? In my opinion, these questions are susceptible of only one answer and the answer is that the Court is not entitled to presume that the Magisterial power in any case could be of such an uncontrolled, unfettered or unguided nature.

8. It appears that the modalities in relation to passing an order of remand are contained in Sub-sections (2) and (3) of Section 167 of the Code. Sub-section (2) states that the Magistrate may, from time to time, authorise the detention of the accused in such custody as the Magistrate thinks fit, for a term not exceeding 15 days in the whole. This is a provision by which the term for which remand or detention is to be ordered is limited. The proviso contain a further limitation regarding the total period of detention of any accused person. In the case of grave offences the total period cannot exceed 90 days and in the case of otherofficnces, the total period cannot exceed 60 days, The proviso also says that on the expiry of the said period, the accused shall be released on bail if he is prepared to furnish bail and he shall be deemed to be so released under Chapter XXXIII, (the Chapter containing bail provisions) of the Code. Sub-section (3) requires the Magistrate to record his reasons for authorising detention of an accused person in custody. These are controls and fetters imposed on and guidelines given to the Magistrate when dealing with accused persons who are produced before a Magistrate under the provisions of the Code. It is only reasonable to read these controls, fetters and guidelines into the framework of Section 437 of the Code. In other words, the provisions in Section 167(2) and (3) of the Code must be read into the provisions in Chapter XXXIII of the Code. They must be read together. If so read together, it is obvious that a Magistrate who is competent to grant or refuse bail under Section 437 of the Code to a person arrested under Section 103(1) of the Act and produced before him under S .103(2) of the Act is also competent to order remand or detention of the arrested person in such custody as he thinks fit, and in doing so, he is controlled by the provisions in Sub-sections (2) and (3) of Section 167 of the Code.

9. There is another way of looking at this matter. We have already seen a Customs Officer derives power to arrest a person suspected of having committed an offence under the Customs Act, by virtue of Sub-section (1) of Section 104 of the Act. Besides the Constitutional provision, there is also Sub-section (2) of Section 104 which requires the person arrested to be taken to a Magistrate without unnecessary delay. Sub-section (3) lays down that the Customs Officer has power to grant bail or refuse bail in the same manner and subject to the same provisions of the Code as an officer in charge of a police station has and is subject to under

the Code. There is no provision in the Act which lays down in what manner a Magistrate has to deal with a person produced before him under Section 103(2). That was one of the reasons which led this Court to hold in 1983 Cri LJ 1860 that the provisions regarding bail such as Section 437 would be applicable to the Magistrate dealing with Customs cases also. That is by virtue of the operation of Section 3(2) of the Act. The Act also does not lay down in what manner an arrested person has to be dealt with, if he is not to be granted bail. It is not possible to accept that the legislature intended that a Customs Officer is to arrest a person and produce him before the Magistrate so as only to be let off. The Act does not contain any provision regarding the power to remand vested in a Magistrate; the Act does not lay down in what manner, to what extent and subject to what fetters and controls the power to remand has to be exercised. In other words, the law and procedure dealing with order of detention in such custody as thought fit of a person arrested by a Customs Officer and produced before a Magistrate are not laid down by the Act. That is a field left untouched by the Act.

10. Sub-section (2) of Section 4 of the Code states that all offences under any other law (i. e. law other than the Penal Code) shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions (i. e. the provisions of the Code), but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. This would mean that in the absence of any provision in the Act, touching any such matter as mentioned in Section 3(2) of the Code, the provisions of the Code would apply. Remand or detention of an arrested person, not being provided by the provisions of the Act, the provisions of the Code must govern the matter. It would follow that the provisions of Sub-sections (2) and (3) of Section 167 of the Code must apply in the case of a person arrested under the Customs Act and produced before a Magistrate.

11. Learned counsel for the Customs Department pointed out that Sub-section (1) of Section 167 specifically refers to a person arrested and detained in custody and a case where investigation could not be completed within 24 hours fixed by Section 57 and makes it imperative for the officer in charge of the police station or the police officer making investigation to transmit the arrested person to the

nearest Magistrate with the entries in the diary prescribed under Section 172 of the Code, The argument is that persons arrested by Customs Officers for Customs offences are not persons arrested under the Code, that Section 57 of the Code does not apply to those persons and the Customs Officers are not officers in charge of police station or police officers making investigation and therefore Sub-section (1) will not apply. It is also pointed out that Sub-section (2) refers to the Magistrate to whom an accused person is forwarded 'under this section', that is Section 167. The argument is that therefore Sub-section (2) can apply only to cases governed by Sub-section (1), that is, to persons arrested by police officers under the provisions of the Code and not to persons arrested by the Customs Officers under the provisions of the Act. This argument ignores Section 3(2) of the Code. Section 3(2) of the Code makes all the differences. This provision renders the provisions of the Code applicable in areas not covered by the provisions of the Act. The Code mainly purports to deal with offences under the Indian Penal Code and investigation by police officers or officers in charge of police station. That is why Section 167(1) refers to Section 57 of the Code and officer in charge of police station. This cannot lead to the conclusion that provision of Section 167 of the Code cannot be applied to cases under the Customs Act. In relation to matters of investigation, inquiry, trial or other matter not covered by the provisions of the Act, the parallel provisions of the Code must necessarily be applied. That is the clear effect of the operation of Section 3(2) of the Code. Such operation cannot be negatived merely because a section in the Code uses expressions which are compatible with an offence under penal Code or with investigation being conducted by a police officer. In relation to a person arrested under, the Act, the provisions of Section 167 of the Code must be read suitably, that is, reference to 'officer in charge of a Police Station' must be read as 'Customs Officer'. This view is strengthened by the provision in Sub-section (3) of Section 104 of the Act also.

12. I therefore hold that provisions in Sub-sections (2) and (3) of Section 167 of the Code apply to persons arrested under Section 103(1) of the Act and produced before a Magistrate under Section 103(2) of the Act. The benefit of the proviso to Section 167(2) of the Code is available to them.

13. Admittedly the petitioners have been in detention as ordered by a competent Magistrate for a period of over 60 days. It must necessarily follow, by virtue of proviso to Section 167(2) read with Section 437 of the Code, that the petitioners are entitled to be released, if they are prepared to furnish bail.

In the result it is directed that the petitioners in these three petitions shall be released on bail, as each of them executing bond for Rs. 10,000/- and furnishing the solvent, sureties each in the like amount to the satisfaction of the Chief Judicial Magistrate, Tellicherry. It is further directed that they will make themselves available for interrogation by the Customs Officers, Until further orders, the petitioners shall also appear on every Monday before the Chief Judicial Magistrate, Tellicherry.

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