

Omana Vs. State of Kerala

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Court : Kerala

Decided On : Jul-09-1993

Reported in : 1993(2)ALT(Cri)667; 1994CriLJ686

Judge : K.T. Thomas, J.

Acts : Narcotic Drugs and Pshychotropic Substances Act, 1985 - Sections 20, 36A(1) and 37; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 4, 167(2), 437, 437(1) and 439

Appeal No. : Crl. M.C. No. 957 of 1993

Appellant : Omana

Respondent : State of Kerala

Advocate for Def. : K.C. Peter, Public Prosecutor

Advocate for Pet/Ap. : V.G. Sreedevi, Adv.

Disposition : Application dismissed

Judgement :

ORDER

K.T. Thomas, J.

1. A widowed mother of three little children sets up a case that she is entitled to the special consideration envisaged in the proviso to Section 437(1) of the Code of Criminal Procedure (for short 'the Code') in the matter of bail, although she is involved in an offence under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act'). Smt. V.G. Sreedevi, who advanced the case of the said widow, relied on the decision of a learned single Judge of the Allahabad High Court in Prem Narain Sharma v. State of U.P., (1992) 2 Cur Cri R 2066) in which learned Judge has observed thus : 'I am of the view that in spite of special provisions made under Section 37 NDPS Act, it provided further limitations in grant of bail and the exceptions provided in the first proviso to Section 437, Cr.P.C. are still applicable in such cases'. Learned Counsel also invited my attention to the following observations made by Mirihe, J. of the Karnataka High Court in Kamalabai v. State of Karnataka, 1992 Cri LJ 561 in support of her plea. 'No doubt the offences under the Act (NDPS Act) are of serious menace to the society at large. But while considering the bail application, the court has to take into consideration the liberty of the individual, interest of the State, interest of the society at large'.

2. Learned additional Public Prosecutor contended that the view adumbrated in the above decisions cannot be accepted as correct, since the Parliament, through Section 37 of the Act, conveyed a totally different message. No doubt, a Full Bench of this Court has held in Berlin Joseph v. State of Kerala (1992) 1 Ker LT 514 that Section 37 of the Act does not override Section 167(2) of the Code. The said observation was made with due emphasis to Clause (c) of Section 36A(1) of the Act. The application of Section 167(2) of the Code is a different matter and at a different stage. The said principle cannot be applied during consideration of Section 37 of the Act which reads thus:

37. Offences to be cognizable and nonbailable.-- (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 oppose the application for such release, and

(ii) where the Public Prosecutor oppose 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 (2 of 1974), or any other law for the time being in force on granting of bail.

3. It is significant that the non-obstante clause in the section is followed by words which contain absolute prohibition in granting bail except in contingencies specified in the sub-section. It means that the benefits provided in the Code shall stand at bay while considering the plea for bail for a person involved in an offence mentioned in the section. Sub-section (2) makes the position further clear that 'the limitations on granting of bail' specified in Sub-section (1) are in addition to 'the limitations' under the Code. If Sub-section (2) has been framed with the words 'the benefits' instead of the word 'limitations' the position would have been different and considerations enumerated in the provisos to Section 437 of the Code could have been supplemented with any consideration which Section 37 of the Act would have contained.

4. In the light of the Supreme Court decision in *Narcotic Control Bureau v. Kishan Lal* AIR 1991 SC 558 : (1991 Cri LJ 654) the position seems to be settled. Their Lordships have stated in the said decision thus:

The non obstante 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 Section 439, Cr.P.C. and Section 37 of the NDPS Act, Section 37 prevails. The provisions of Section 4, Cr.P.C. also makes it clear that when there is a special enactment in force relating to the manner of investigation, enquiry or 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 borne 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 Section 37 of the NDPS Act.

In the light of the said clear observations of the Supreme Court I find it difficult to line with the observations made by the learned Judges of the Allahabad and Karnataka High Courts. Therefore, I am of the view that a person involved in any offence envisaged in Section 37(1) of the Act is not entitled to the considerations in the provisos to Section 437 of the Code.

5. The allegation against the petitioner is that she was found in possession of 1.325 Kgs. of dried ganja packed in a plastic bag and she was arrested with the contraband article on 15-2-1993. As the additional Public Prosecutor has opposed the application for bail and as I am not satisfied that there are reasonable grounds for believing that she is not guilty of such offence, I am prevented, by law, from releasing her on bail.

6. CrI. M.C. is, accordingly, dismissed.

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