

Smt. Sosar Vs. the State of Rajasthan

Smt. Sosar Vs. the State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/767113

Court : Rajasthan

Decided On : Apr-25-1994

Reported in : 1995(1)WLC235; 1994(2)WLN587

Judge : Rajendra Saxena and; Raja Ram Yadav, JJ.

Appeal No. : D.B. Criminal Misc. Bail Application No. 348 of 1994

Appellant : Smt. Sosar

Respondent : The State of Rajasthan

Disposition : Appeal dismissed

Judgement :

Rajendra Saxena, J.

1. This Bail Application has been referred to Use Division Bench as the vires of Section 37(1)(b) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (here in after referred to as the Act) has been challenged.

2. Succinetly stated, the relevant facts are that on receiving a telephonic information, the Dy. S.P., Shahpura, District-Bhilwara made a search on the person of Smt. Sosar and it is alleged that from her possession 2.6 Kg. of opium was recovered in four packets concealed inside her petticoat(Ghaghra) and for the possession/transportation thereof she had no licence. Accordingly she was

arrested for the offence punishable Under Section 8/18 of the Act. The learned Special Judge, N.D.P.S. Act Cases, Bhilwara by his order dated 7.10.93 has rejected her bail application.

3. We have heard Shri M.M. Singhvi, the learned Counsel for the petitioner and Dr. S.S. Bhandawat, the learned Additional Advocate General for the State at length and carefully persuade the relevant record.

4. Shri M.M. Singhvi has strenuously contended that the provisions of Section 37 of the Act can not over-ride the provisions of the proviso to Section 437(1), Cr.P.C, which specifically lays down that the court may direct, that the person referred in clause (i) or clause (ii) of the said Section be released on bail, if said person is under the age of sixteen years or is a woman or is sick or infirm. According to him the bar contained in Section 37 of the Act is in conflict with the provisions of Sections 437 & 439 of the Criminal Procedure Code and that the provisions of Section 37 of the Act are also discriminatory and violative of Articles 14 & 21 of the Constitution of India. More-over the provisions of Section 37 of the Act are contrary to the provisions contained in Section 36A(3) of the Act. Therefore, the provisions of Section 37(1)(b) of the Act deserves to be struck down.

5. Dr. S.S. Bhandawat, the learned Additional Advocate General has asserted that the conditions imposed Under Clause (b) of Sub-section (1) of Section 37 of the Act are in consonance with the requirement prescribed Under Clauses (i) & (ii) of Sub-section (1) of Section 437 and Sub-section (3) of that Section. According to him, the Apex Court in the case of Narcotic Control Bureau v. Kishanlal and Ors. : 1991 CriLJ654 has already held that the scope of High Courts power to grant bail Under Section 439 Cr.P.C. is limited to the extent provided Under Section 37 of the Act. According to him the provisions of Section 37 are neither discriminatory not violative of Articles 14 & 21 of the Constitution of India not contrary to the provisions of Section 36A of the Act and, therefore, those are not ultra vires of the Constitution.

6. We have given our most anxious and careful consideration to the rival contentions. To resolve this controversy, it will be fruitful to reproduce Sub-Sections (1) & (3) of Section 437, Section 439 Cr.P.C. and Sections 37 & 36A of

the Act:

437(V Cr.P.C.:

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence;

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special person.

XXXX XXXX XXXX XXXX XXXX XXXX

437(3)Cr.P. C.: When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail Under Sub-section (1), the Court may impose any condition which the Court considers necessary:

- (a) in order to ensure that such person shall with the conditions of the bond executed under this Chapter, or
- (b) in order to ensure that such person shall no commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or
- (c) otherwise in the interests of justice.

439 Cr.P.C.:SPECIAL POWERS OF HIGH COURT OR COURT OF SESSION REGARDING BAIL:

(1) A High Court or Court of Session may direct:

- (a) That any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-section (3) of Section 437, may impose any condition which it considers necessary for the proposes mentioned in the Sub-section:
- (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court of the Court of Session shall, before granting bail to a person who is accused of an offence, which is triable exclusively by the court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.
Section 37 N.D.P.S. Act 1985: Offences to be cognizable and non-bailable:

(1) Not with standing 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 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 bail specified in clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (Act 2 of 1974), or any other law for the time being in force on granting of bail.

Section 36A(3) N.D.P.S. Act:

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 (Act 2 of 1974), and the High Court may exercise 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. A bare reading of Section 37 of the Act reveals that it starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein are satisfied. This section declares every offence punishable under the Act to be cognizable. The N.D.P.S. Act is a special enactment and it has been 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 under-lying object and more so when the provisions of Section 37 of the Act are in negative terms limiting the scope of applicability of the provisions of Cr.P.C. regarding bail, in our considered opinion, it can not be held that the High Court's power to grant bail Under Section 439 Cr.P.C. are not subject to the limitation mentioned Under Section 37 of the

Act. The non-obstante clause with which the section start should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between Sections 437, 439 & Section 37 of the Act, the provisions of Section 37 shall prevail.

8. In *Narcotic Control Bureau v. Kishanlal* (cited supra) interpreting the provisions of Section 37 of the Act and Sections 4 and 439 of the Code of Criminal Procedure, the Apex Court has held that in view of Section 4 Cr.P.C., when there is a special enactment in force relating to the manner of investigation, inquiry or otherwise dealing with such offences, the other powers under the Code of Criminal Procedure should be subjected to such special enactment. It has been further held that in interpreting the scope of such a statute the dominant purpose in construing the statute is to ascertain the intention of the parliament and that one of the well recognised canons of construction is that the legislature speaks its mind by use of correct expression and unless there is ambiguity in the language of the provision the court should adopt literal construction if it does not lead to absurdity. The lordships of the Supreme Court, therefore, has held that scope of High Courts 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 Act, which is a special enactment in view of Section 4 Cr.P.C.

9. Interpreting the provisions of Section 36(3) of the Act, which declare that 'nothing contained in s. 36 shall be deemed to affect the special powers of the High Court regarding bail Under Section 439 of the Cr.P.C. and that the High Court may exercise such powers including the powers of the 'Magistrate' and 'Special Court' constituted Under Section 36', their lordships of the Supreme Court have also held in *Kishanlal's* case (supra) that the powers of the High Court to grant bail Under Section 439 Cr.P.C. are subject to the limitations contained in the amended Section 37 of the Act and that the restrictions placed on the powers of the Court under the said section are also applicable to the High Court in the matter of granting bail. Therefore, the provisions of Section 37(1)(b) of the Act are not contrary to provisions of Section 36A(3) of the Act.

10. Section 37(1)(b) of the Act specifically enjoins upon the Court not to release a person accused of an offence punishable for a term of imprisonment of five years or more under the Act unless:

(a) the public prosecutor has been given an opportunity to oppose the application for such release; and

(b) where that Public Prosecutor opposes the application, if the court is satisfied that there are reasonable grounds for believing that such accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.

Sub clause (2) of Section 37 of the Act further clearly declares that the limitations in granting the 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. Hence from the language of Section 37(1)(b) and (2) of the Act it is crystal clear that the court must adopt a negative attitude towards bail, but turn positive only when it is satisfied that there are reasonable ground for believing that the accused is not guilty of offence under the Act and that he is not likely to commit any offence while on bail. Thus both these tests must be satisfied before bail can be granted and if either of these two conditions is not satisfied the ban operates and the accused can not be released on bail.

11. The Act is designed to deal with the classes of crime, which is entirely distinct from the ordinary offences and the accused involved may be such, who may pursue his unlawful activities in utmost secrecy and clandestine manner without any check or surveillance. Consequently the legislature has imposed stringent conditions for granting of bail to an accused under the Act. Therefore, there is no merit in the contention that the provisions of Section 37(1)(b) of the Act are unreasonable or repugnant to the elementary notions of Criminal Jurisprudence that a person is presumed to be innocent until he is proved to be guilty. As a matter of fact the presumption of innocence is not at all a relevant consideration for grant of bail, because pretrial detention itself is neither an evil nor opposed to the basic presumption of innocence.

12. In *Kartar Singh v. State of Punjab*, vires of the various provisions of the Terrorist & Disruptive Activities (Prevention) Act, 1987 popularly known as TADA including the provisions of Section 20(8)(9) were challenged. Sub-sections (8) & (9) of Section 20 run as under:

(8): Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made there under shall, if in custody, be released on bail or on his own bond unless:

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) 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.

(9) The Limitations on granting of bail specified in Sub-section (8) are in addition to the limitations under the code or any other law for the time being in force on granting of bail.

Thus the provisions of Section 37(1)(b) of the Act and these of Sub-sections (8) & (9) of Section 20 of the TADA are almost analogous.

13. In that case it was contended on behalf of the appellant that the provisions of Sub-sections (8) & (9) of Section 20 of the TADA infringe the under-lying principle of Articles 14 & 21 of the Constitution of India as the manifested intention of the said provision makes it impossible for even an innocent person to get his bail when he is falsely charged with an offence under the TADA. It was further argued that when the salutary principle of criminal justice is that every person is presumed to be innocent till he proved to be guilty, the said provisions under challenge were diametrically contrary to that principle. Negating these contentions, the Apex Court vide paras Nos. 377, 378, 379 & 380 of its judgment has held as under:

377: The conditions imposed Under Section 20(8)(b), as rightly pointed out by the Additional Solicitor General, are in consonance with the conditions prescribed Under Clauses (i) and (ii) of Sub-section (1) of Section 437 and Clause (b) of Sub-

section (3) of that section. Similar to the conditions in clause (b) of Sub-section (8), there are provisions in various other enactments- such as Section 35(1) of Foreign Exchange Regulation Act and Section 104(1) of the Customs Act to the effect that any authorised or empowered officer under the respective Acts, if, has got reason to believe that any person in India or within the Indian customs water has been guilty of an offence punishable under the respective Acts, may arrest such person. Therefore, the condition that 'there are grounds for believing that he is guilty of an offence', which condition in different form is incorporated in other Acts such as Clause (i) of Section 437(1) of the Code and Section 35(1) of FERA and 104(1) of the Customs Act, can not be said to be an unreasonable condition infringing the principle of Article 21 of the Constitution.

378: In view of the detailed discussion made above, we set aside the conclusion of the Punjab and Haryana High Court in Bimal Kaur holding, therefore, the last portion of cl. (b) of Sub-section (8) of Section 20 of the Act, which reads, 'and that he is not likely to commit any offence while on bail' alone is *ultravires*'.

379: No doubt, liberty of a citizen must be zealously safeguarded by the Courts, nonetheless the Courts while dispensing justice in cases like the one under the TADA, should keep in mind not only the liberty of the accused but also the interest of the victims and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution.

380: It is true that on many occasions, we have come across cases wherein the prosecution unjustifiably invokes the provisions of the TADA with an oblique motive of depriving the accused persons from getting bail and in some occasions when the Courts are inclined to grant bail in cases registered under ordinary criminal law, the investigating officers in order to circumvent the authority of the Courts invoke the provisions of the TADA. This kind of invocation of the provisions of TADA in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police. Unless, the public prosecutors rise to the occasion and discharge their onerous responsibilities keeping in mind that they are prosecutors on behalf of the public but not the police and unless the Presiding

Officer of the Designated Courts discharge their judicial functions keeping in view the fundamental rights particularly of the personal right and liberty of every citizen as enshrined in the Constitution to which they have been assigned the role of sentinel on the qui vive, it can not be said that the provisions of TADA Act are enforced effectively in consonance with the legislative intendment.

14. The Apex Court, therefore, held that Sub-section (8) of Section 20 of TADA imposing the ban relating to bail of a person accused of any offence punishable under the said Act or any rule made thereunder, but diluting the ban only on the fulfilment of the two conditions mentioned in Clause (a) & (b) of the Sub-section did not infringe the principle of adumbrated in Article 21 of the Constitution.

15. The provisions of Section 37(1)(b) of the Act are almost analogous & similar with those of Sub-section (8) of Section 20 of the TADA. Hence, keeping in view the law laid down in Kartar Singh's case (cited supra), we are of the considered opinion that provisions of Section 37(9)(b) of the Act do neither impose any unreasonable condition infringing the principle of Article 21 of the Constitution nor it is violative of provisions of Article 14 of the Constitution of India. The provisions of Section 37(1)(b) of the Act are also not contrary to the provisions of Section 36A of the Act. Therefore, the contention of Shri Singhvi on this count is devoid of any substance and the same is hereby foiled down.

16. In our considered opinion the first proviso to Section 437(1) Cr.P.C. cannot over ride the provisions of Section 37(1)(b) of the Act. Therefore, simply because a person arrested Under Section 8/18 of the Act is a woman or a sick or infirm he/she will not be entitled to bail until and unless the conditions mentioned in Section 37(1)(b) of the Act are fulfilled.

17. A persual of the recovery memo prima facie projects that 2.6 Kg. of opium was recovered from the possession of the petitioner, who is under going trial before the learned special Judge. Thus, at this stage, there do not exist reasonable grounds for believing that she is not guilty of the offence punishable Under Section 8/18 of the Act.

18. Accordingly we dismiss this bail application. However, the learned Special Judge, N.D.P.S. cases, Bhilwara is directed to expedite the trial of this case at his earliest convenience, and decide the case within a period of six months from the date of the receipt of this order. A copy of this order be also sent to him for compliance.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com