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Court : Chennai

Decided On : Apr-26-1994

Reported in : 1994CriLJ3318

Judge : N. Arumugham, J.

Appeal No. : Criminal Original Petition No. 2315 of 1994

Appellant : Abdul Nazeer

Respondent : State

Advocate for Def. : R. Reghupathi, Addl. Public Prosecutor

Advocate for Pet/Ap. : G. Krishnamurthy, Adv.

Judgement :
ORDER

1. The facts are that on 18-12-1993, while a Maruti car driven by the petitioner herein along with three others was intercepted by the respondent and checked up, it was found to contain contraband of 5 kgs. of Ganja, a substance notified under the N.D.P.S. Act, and 15 bags of illicit distilled arrack chests, which were seized under the cover of Mawhazar followed by the interrogation and recording the statement of the petitioner and securing of the other three accused subsequently. A case was registered for the offence under Section 20(b) of the N.D.P.S. Act and under section 4 of the Tamil Nadu Prohibition Act by the respondent and the case

is being investigated. The only contention strenuously place before me, by Mr. Krishnamurthy, learned counsel appearing on behalf of the petitioner is that, though the petitioner was arrested on 18-12-1993 and committed to judicial custody, till now the respondent has not completed the investigation and laid the final report within the maximum period of 90 days as contemplated under section 167(2) of the Code of Criminal Procedure, and that therefore, the petitioner is entitled to be released on bail automatically, and that in support of the said contention, the Bar has relied on the case laws held by the Supreme Court also.

2. Mr. Regupathi, learned Additional Public Prosecutor, while admitting the factual aspects of the case and the position of law as culled out from the various provisions of the Code, would submit that, though the Code of Criminal Procedure has fixed the maximum period for the remanding of the accused for the offence punishable for more than ten years as 90 days, within which time the investigation is to be completed that does not automatically give a right to any accused to go on bail as matter of right or legality. However, releasing him on bail is subject to the provisions of law provided under the special statute. Therefore, the learned Additional Public Prosecutor objects the bail very strenuously.

3-4. In the light of the above position, the only point that arises for consideration in this case is, as to whether in the context of the respondent investigating agency has not filed the charge sheet within the maximum period of 90 days, the petitioner is entitled to be released on bail automatically as provided under section 167(2) of the Code

5. The conspectus of the facts involved in this case points out no controversy among the parties herein. For the petitioner having been arrested and committed to judicial custody on 18-12-1993, the respondent police is bound to complete the investigation and lay the charge sheet on or before 18-3-1994, that is, within the maximum period of 90 days, as provided by Section 167(2) of the Code, which I have extracted as hereunder :

'167. Procedure when investigation cannot be completed in twenty-four hours. - (1) Whenever any person is arrested and detained custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by

Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of Sub-Inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody to such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding, -

(i) ninety days, where the investigation relates to an offence punishable with death imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.'

6. Since the other sub-sections are not germane to the adjudication of the case on hand, I do not propose to advert to the same.

7. The period 90 days and 60 days provided in sub-section (a)(i) and (ii) to sub-clause (2) of Section 167 thus refers to two categories of offences. The term of 90 days is meant for such of the offences punishable with an imprisonment for life or imprisonment for a term of not less than ten years. The other refers to other offences. But the phraseology and the language employed in the sub-section (ii) of the proviso, viz., 'the accused person shall be released on bail if he is prepared to and does furnish bail and every person released on bail under this sub-section shall be deemed to be released .....' would clearly mean and project the fact that, on the expiry of 60 days or 90 days respectively depending upon the gravity of offence, the court is bound to release such person on bail, provided the accused furnishes bail and on getting satisfied with regard to the bail procedure under Chapter XXXIII, then alone he can be released. It is, thus, made clear that though the petitioner is bound to be released on bail on the non-completion of the investigation and filing of the charge sheet within the fixed period, the accused is entitled to be released on bail by the court only on furnishing the bail as provided under Chapter XXXIII of the Code. In short, it can be understood that the accused cannot have the privilege of having the bail as an automatic one in the context of not filing the charge sheet of report within 60 days or 90 days as the case may be. The minimum understanding of the phraselogy language employed in the above section of law clinches the said fact and the Bar has no dissenting view on the above score.

8. Reliance was placed on a case law held by the Supreme Court in Rajnikant v. Intelligence Officer, Narcotic Control Bureau, New Delhi, : 1990 CriLJ62 . While dealing with the scope of Section 167(2) and the power under section 439(2) of the Code. His Lordship of the Supreme Court has held as follows at page 64; of Cri LJ :

'As order for release on bail under proviso (a) to S. 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody

should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds. The accused cannot therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled.'

9. In support of his contention, the Bar has cited also a Full Bench decision of the Kerala High Court in Berlin Joseph v. State 1992 (2) Crimes 353 for the following proposition :

'Sub-section (1) of Section 167 of the Code enjoins a duty on the police officer arresting an accused to forward him to the nearest magistrate within 24 hours. Sub-section (2) casts obligations on such Magistrate to decide, inter alia, whether the accused so forwarded should be kept in further custody, and if so, in which place. Such custody shall not exceed 15 days in the whole. Then comes the proviso which consists of three limbs. In the first limb, the Magistrate can authorise detention of the accused beyond 15 days (not in police custody). Second limb consists of a prohibition that no Magistrate shall authorise detention of the accused person in custody for a total period exceeding 90 days or 60 days depending on gravity of the offence. The third limb contains the legislative command that on the expiry of 60/90 days (as the case may be) an accused 'shall be released on bail' if he is prepared to and does furnish bail. If the conditions in Section 37 of the N.D.P.S. Act have to be complied with before releasing an accused on bail even after the expiry of 60/90 days the legislative directive contained in Section 167 loses its commanding force. Either Section 37 of the N.D.P.S. Act has to yield to the proviso in Section 167(2) of the Code or Section 37 must override the other.

What would be the consequence, if Section 37 of N.D.P.S. Act overrides Section 167 of the Code. We pointed out that under Section 167 of the Code a Magistrate has no power to authorise detention of any person beyond a period of 60/90 days.

If such an accused person can be released on bail, at the said stage, only on compliance with the stringent conditions contained in Section 37, practically no accused can be released on bail even after the said period of 60/90 days. Unless he is set free, he will continue to remain in detention. But how long Perhaps the policy may take many months (if not years) to finalise the report. The accused will have to languish in custody without a trial like a 'Pappilone' for considerably long period.

In Rajnikant v. Intelligence Officer, Narcotic Control Bureau, : 1990 CriLJ62 Jagannatha Shetty, J. siting as vacation Judge, has held that the right to bail under section 167(2) proviso (a) to the Code is absolute and is a legislative command and not the discretion of the court. Although the accused in the said case was involved in offences under sections 21, 23 and 29 of the N.D.P.S. Act, the said decision was rendered when N.D.P.S. Act remained before its amendment by Act 2 of the 1989. So, that decision is of no help in deciding the question now posed. Nor does the Supreme Court decision in Narcotics Control Bureau v. Krishnan Lal, : 1991 CriLJ654 help us in resolving the present question because in that decision the question considered was whether Section 37 would control Section 439 of the Code. That is a different question altogether.

For deciding this aspect, we have necessarily to go into the contours of Section 36A of the N.D.P.S. Act. It contains three sub-sections. In the first sub-section, after providing that offences under N.D.P.S. Act shall be tried by special court constituted by the Government, it enables a Magistrate to order detention of the accused forwarded to him under section 167(2) of the Code. Here the same powers as contained in Section 167(2) of the Code are repeated with the only alternation that the court to which the accused is to be forwarded next is the Special Court constituted under the N.D.P.S. Act. Clause (c) of the said sub-section is important in this context. It reads thus :

'(c) the Special Court may exercise, in relation to the person forwarded to it under Clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to

him under that section.'

The said clause is clear indication that the directive contained in Section 167(2) proviso is intended to be issued at the appropriate stage even if offences under N.D.P.S. Act are involved. If Section 37 of the N.D.P.S. Act is allowed to control or restrict the application to proviso to Section 167(2) of the Code, the latter proviso would become ineffective and a dead letter.

A Division Bench of the Calcutta High Court has considered the same question in Md. Abdul v. State of West Bengal, 1991 2 Crimes 741. Their Lordships held that 'since proviso to Section 167(2) lays down that no person can be remanded to custody under authority of that section for a period beyond 90/60 days the proviso to sub-section (2) of Section 167 is automatically attracted and the learned special Judge has no option but to release the person on bail'. The Division Bench has considered how far Section 37 would come into play in such a situation and found that Section 167 of the Code will stand unfettered.

The result of the discussion is that Section 167(2) would operate even for offences under the N.D.P.S. Act and then Section 37 of the N.D.P.S. Act has no application. In other words, Section 37 of the N.D.P.S. Act does not override Section 167(2) of the Code.'

10. In Narcotics Control Bureau v. Kishan Lal, : 1991 CriLJ654 , two learned Judges of the Supreme Court, while dealing with the scope and the power vested in the High Court under Section 439 of the Code, having held as follows at page 656 of Cri LJ :

'Section 37 as amended 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 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 Section 37 of N.D.P.S. 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 section 439, Cr.P.C. are not subject to the limitation mentioned under section 37 of N.D.P.S. Act. 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 S. 37 of the N.D.P.S. 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 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 great bail under any of the provisions of Cr.P.C. should necessarily be subject to the conditions mentioned in S. 37 of the N.D.P.S. Act.'

11. However, considering the submissions made by learned Additional Public Prosecutor, the view held in several other cases in this regard cannot be overlooked, and amongst which the latest one in which a learned single Judge of this Court has dealt with the matter very elaborately is Seemairaj v. Asst. Collector of Central Excise Hd. Qrs. Preventive Unit, Madras 34, 1992 Mad LW (Cri) 387. After having an elaborate discussion, the learned single Judge held the final view which is extracted as hereunder :

'In view of the above, I am clear that proviso to Section 167(2), Criminal Procedure Code is not applicable to such cases covered by Section 37 of N.D.P.S. Act. In such cases, only if the requirements of Section 37(b) of the Act are satisfied, the accused can be released on bail. In the instant cases before me, apart from the technical plea, that the petitioner is entitled to bail by virtue of Section 167(2), Criminal Procedure Code, no other material has been placed before me to show that there are reasonable grounds for believing that petitioner is not guilty of any such offence and is not likely to commit any such offence while on bail. Hence this petition praying for bail has to necessarily fail.'

12. It was brought to my notice a Full Bench decision of the Orissa High Court in Banka Das v. State of Orissa, : 1992(II)OLR395 for the position which is extracted

as hereunder at page 451 :

'Section 167(2) proviso of the Code is subject to Section 37 of the Act, which also open with a non-obstante clause excepting all provisions of bail contained in the Code and making it clear that a person shall not be released on bail unless the conditions stipulated are satisfied. Therefore, even if by operation of Section 167(2) proviso, an accused becomes entitled to bail, yet he shall not be released on bail until the Court is further satisfied that the conditions stipulated in S. 37 are satisfied. Section 37 of the Act overrides Section 167(2) of the Code because it is a special statute.'

12A. The view held by a Division Bench of this Court in Oliver Fernando, P.T. v. Assistant Collector of Madras, 1990 Mad LW (Cri) 357 was however held by the Supreme Court in Narcotics Control Bureau v. Kishanlal, 1991 Mad LW (Cri) 53 as no longer a good law.

13. In Harendra alias Hari Singh v. State of Rajasthan, a learned single Judge of the Rajasthan High Court while dealing with the scope and power vested under section 167(2) and Section 439 of the Code for the purview of Section 37 of the N.D.P.S. Act has observed as follows :

'Under proviso (a) to Section 167(2), Cr.P.C. order for release on bail is an order on default and if the investigating agency fails to file charge sheet before the expiry of 90/60 days as the case may be accused in custody should be released on bail but at that stage merits of the case are not to be examined as it is a legislative command and not court's discretion. It is also undisputed that for the offence other than N.D.P.S. Act the accused is entitled to bail if 90 days period expired, which begins from the date of order of remand and not from date of arrest. But at the same time if the accused has not made application for his release on bail after expiry of the period prescribed by the proviso (a) to Section 167(c) and before filling of the charge-sheet final report, he cannot be released solely on the ground that the charge-sheet final report was not submitted within the prescribed period and where the prayer for bail is to be considered after submission of charge-sheet the question of granting bail does not arise under section 167(2), Cr.P.C. Where the petitioner did not move for bail after expiry of

period of 90 day and prior to filing of challan, he cannot take advantage of default on the part of investigating agency. Solely on the ground that the challan was filed after 90 days particularly when such case relates to the offence under the N.D.P.S. Act. Because power to grant bail under any of the provisions of Cr.P.C. should necessarily be subject to provisions under Section 36A and the conditions mentioned in Section 37 of the N.D.P.S. Act.'

14. If the view expressed by the Supreme Court in Rajnikant's case, : 1990 CriLJ62 is followed and as held by the various other High Courts, that if the filing of the charge sheet after completing the investigation, within 60 days or 90 days under Section 167(2) of the Code, is not done, then the accused is to be enlarged on bail as a legislative command. With great constraint, I may perceive that Section 37 of the N.D.P.S. Act also has been enacted by the Legislature with a view to provide a total check and decrease the crime facile of the drug trafficking and psychotropic substance which is an increasing menace in the current international sphere, and keeping that in mind the Legislature thought it fit of providing stringent punishment by amending the original Act in the year 1989. Therefore, if Section 167(2) provides bail to an accused for the default or for the inability of the investigating agency, and taken as a legislative command, I see the same rationale and logic can be made applicable to Section 37 of the N.D.P.S. Act. The Bar is not able to produce any authority or case law to show that Section 37 of the N.D.P.S. Act does not override the power vested with the Code of Criminal Procedure. The Supreme Court even in Narcotics Control Bureau v. Kishan Lal, : 1991 CriLJ654 does not say that Section 37 is subservient to Section 167(2) of the Code.

15. If the accused is remanded to judicial custody for the offence under the N.D.P.S. Act which is cognizable in nature and if the investigating agency is not able to complete the investigation within 60 days or 90 days as provided under section 167(2) of the Code, no doubt, the accused can ask for bail and is entitled to be enlarged on bail, provided on furnishing sufficient sureties and bonds as specially contemplated under Chapter XXXIII of the Code. Section 37 of the N.D.P.S. Act provides for the granting of bail and except the said provision, the Act contains no provision at all for the granting of bail for the offences under the

N.D.P.S. Act. Once for the default or otherwise, if the accused for an offence said to have been committed under the N.D.P.S. Act, is entitled to ask for a bail, then, in my considered view he can come under the purview of Section 37(b) of the N.D.P.S. Act. While exercising the power under section 37 for the purpose of granting bail, the court has to look into the ingredients fulfilled as provided under the said Section of law, viz., giving notice to the Public Prosecutor, taking his view of objection and then identify the serious prejudice caused to the accused or the presumptive prejudice made available to such of the person and if the court is satisfied, then by imposing certain conditions as provided under the section of law, the accused for the offences under the N.D.P.S. Act can be released on bail, otherwise, in my considered and respectable view, he cannot be so released.

16. If this ratio is followed, then no mandatory violation has been placed before me while seeking the bail for the petitioner in the case on hand. Only one ground has been taken, that Section 50 of the Act has not been followed. But, however, the Bar has not addressed any of the argument on the said ground. Even assuming that non-compliance of Section 50 of the N.D.P.S. Act is there, then as decided by the Supreme Court in State of Punjab v. Balbir Singh, 1994 (1) Crimes 753 on factual aspects, the alleged interception of the vehicle in question, search, seizure and arrest made in the case in hand are not on the basis on any prior information and that therefore, Section 50 has not become mandatory in this case.

17. Thus, having considered every aspects of this case in the light of the case laws cited before me, I am constrained to hold that this is not a fit case for granting bail to the petitioner and accordingly, this petition is dismissed.

18. Petition dismissed.

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