

Narcotics Control Bureau

Vs

Kishan Lal

Criminal Appeals Nos. 810-811 of 1989

(S. P. Pandian, K. Jayachandra Reddy JJ)

29.01.1991

JUDGEMENT

K.JAYACHANDRA REDDY, J.:-

1. The High Court of Delhi by a common order in two petitions filed under the Narcotic Drugs & Psychotropic Substances Act, 1985 ('NDPS Act for short) held that the restrictions placed on the powers of the Court to grant bail in certain offences under the amended S. 37 of the NDPS Act are not applicable to the High Court. Aggrieved by the said order, the Narcotics, Control Bureau has filed these two appeals.
2. The petitioners before the High Court in two different cases were arrested for offences under various Sections of the NDPS Act. They were refused bail and remanded to judicial custody. On the basis of the report the Magistrate concerned took cognizance and remanded them to judicial custody. The petitioners filed a writ petition as well as a criminal miscellaneous petition seeking bail firstly on the ground that they are entitled to be released or! bail as required under Section 167(2) of the Code of Criminal Procedure as the charge-sheet was filed at a belated stage and secondly on the ground of illness, A learned single Judge referred this matter to a Division Bench and the Division Bench by the impugned order held that the limitations placed on the Special Court under S. 37(2) of the NDPS Act cannot be read as fetters on the High Court in exercise of powers under Section 439, Cr.P.C. for granting bail. The only limited question to be decided in these appeals is whether the view taken by the High Court is right or wrong and we may also mention that leave was granted only to this limited extent.
3. The learned counsel appearing for the appellants submitted that the High Court has misconstrued the provisions of Ss. 36-A and 37 of the NDPS Act and that latter Section as amended starts with the non obstante clause limiting the scope of the provisions of the Cr.P.C. in the matter of granting bail and as such the High Court has no untrammelled powers to grant bail inasmuch as the provisions of the amended Section 37 of the NDPS Act override the provisions of Section 439, Cr.P.C.
4. We may at this stage note the relevant provisions of NDPS Act. Preamble to the NDPS Act shows that the object of the Act is to consolidate and amend the law relating to narcotic drugs and to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances etc. Ss. 15 to 35 deal with various offences and penalties. Section 36 provides for constitution of Special Courts and empower the Government to constitute Special Courts and a person shall not be qualified for appointment as a Judge of the Special Court, unless he is immediately before such appointment a Sessions Judge or an Additional Sessions Judge. Section

36-A enumerates the offences triable by Special Courts and also deals with the procedure regarding the detention of the accused when produced before a Magistrate. Sub-section (b) of Section 36-A lays down that if the Magistrate to whom an accused is forwarded under S. 167, Cr.P.C. considers that the detention of such person for fifteen days is unnecessary he shall forward him to the Special Court having jurisdiction who shall take cognizance and proceed with the trial. Sub-section (3) of S. 36-A reads thus:

"Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under S. 439 of the Code of Criminal Procedure 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of subsection (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."
@page-SC560 Now let us note Section 37 as amended in the year 1989 and the same is in the following terms :

"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."

Now it becomes necessary to extract S. 439, Cr. P. C. which reads as under:

" 439. Special powers of the 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 subsection (3) of Sec. 437, may impose any condition which it considers necessary for the purposes mentioned in that subsection;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;

Provided that the High Court or 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."

5. The High Court having taken into consideration sub-section (3) of Section 36-A took the view that the limitations placed on the Special Courts cannot be read as fetters in its exercise of the powers under Section 439, Cr. P.C. In this context, the Division Bench referred to sub-sections (8) and (9) of Section 20 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ('TADA Act' for short) which are similar to Section 37 of NDPS Act and also relied on a judgment of this Court in *Usmanbhai Dawoodbhai Memon v. State of Gujarat*, (1988) 2 SCC 271: (AIR 1988 SC 922: 1988 Cri LJ 938), a case which arose under the TADA Act. We shall refer to this judgment at a later stage after analysing the scope and effect of Section 37 of the NDPS Act.

6. 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 NDPS Act is a special enactment and as already noted 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 NDPS Act are in negative terms limiting the scope of the applicability of the provisions of Cr. P.C. regarding bail, in our view, it cannot be held that the High Court's powers to grant bail under Sec. 439, Cr. P.C. are not subject to the limitation mentioned under Section 37 of NDPS Act. The non obstante clause with which the Section starts should be given its @page-SC561 due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between Sec. 439, Cr. P.C. and Sec. 37 of the NDPS Act, Section 37 prevails. In this context Section 4, Cr. P.C. may be noted which reads thus:

"(4) Trial of offences under the Indian Penal Code and other laws -(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, 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."

It can thus be seen 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. In *Lt. Col. Prithi Pal Singh Bedi v. Union of India*, (1983) 1 SCR 393 : (AIR 1982 SC 1413), regarding the mode of interpretation the Supreme Court observed as follows at page 1419 of AIR:

"The dominant purpose in construing a statute is to ascertain the intention of Parliament. One of the well recognised canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision, the Court should adopt literal construction if it does not

lead to an absurdity."

As already noted, Section 37 of the NDPS Act 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. 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.

7. We shall now refer to some of the decisions of this Court dealing with the analogous provision in other special enactments. Rule 184 of the Defence and Internal Security of India Rules, 1971 which is analogous to Sec. 37 of the NDPS Act runs as follows:

"Rule 184. Notwithstanding anything contained in the Code of Criminal Procedure 1898 (V of 1898) no person accused or convicted of a contravention of these Rules or orders made thereunder shall, if in custody, be released on bail or his own bond unless -

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

(b) where the prosecution opposes the application and the contravention is of any such provision of these Rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention.

The Rule commences with a non obstante clause and in its operative part imposes a ban on release on bail of a person accused or convicted of a contravention of the Rules. It imposes fetters on the exercise of the power of granting bail in certain kinds of cases. In *Balchand Jain v. State of Madhya Pradesh*, (1977) 2 SCR 52 : AIR 1977 SC 366, a question arose whether the power to grant anticipatory bail under Section 438 can stand side by side with Rule 184 or whether former provision is overridden by the latter. This Court held that Rule 184 does not stand in the way of Court of Sessions or High Court granting anticipatory bail on the ground that the two provisions operate at two different stages. Of course, in the instant case, we are not concerned with Section 438 but the observations regarding the scope of Rule 184 are relevant which read 'thus: @page-SC562

"But even if Rule 184 does not apply in such a case, the policy behind this Rule would have to be borne in mind by the Court while exercising its power to grant anticipatory bail' under Sec. 438. The rule-making authority obviously thought offences arising out of contravention of Rules and orders made there under were serious offences as they might imperil the defence of India or civil defence or internal security or public safety or maintenance of public order or hamper maintenance of supplies and services to the life of the community and hence it provided in Rule 184 that no person accused or convicted or contravention of any Rule or order made under the Rules, shall be released on bail unless the prosecution is given an opportunity to oppose the application for such release and in case the contravention is of a Rule or order specified in this behalf in a notified order, there are reasonable grounds for believing that the person concerned is not guilty of such contravention. If these are the conditions provided the Rule-making authority for

releasing on bail a person arrested on accusation of having committed contravention of any Rule order made under the Rules, it must follow a fortiori that the same conditions must provide the Guidelines while exercising the power to grant anticipatory bail 'to a person apprehending arrest on such accusation, though they would not be strictly applicable."

(Emphasis Supplied)

Fazal Ali, J. in his concurring judgment also held thus at page 379 of AIR:

"(4) that in cases covered by R. 184 of the Rules the Court exercising power under S. 436 or S. 438 of the Code has got to comply with the conditions mentioned in clauses (a) and (h) of R. 184 and only after the Court has complied with those conditions that an order under any of these sections of the Code in respect of such offences could be passed."

In Usmanbhai's case, AIR 1988 SC 922 a question whether the provisions of subsections (8) and (9) of Section 20 of the TADA Act limit the scope of Sections 437 and 439, came up for consideration. The language of sub-secs. (8) and (9) of Section 20 is analogous to Section 37 of NDPS Act and they read thus:

"(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder 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."

It may be noted at this stage that the power of the High Court or the Sessions Court to grant, anticipatory bail has been completely taken away under Section 20(7) of the TADA Act. The contention was that the source of power of a designated court to grant bail is under Section 437 subject to some limitations under Section 20(8) and that it does not in any manner affect the power of the High Court independently under Section 439 to grant bail. It is also contended that to take away the power of the High Court would tantamount to strike at the very foundation of an independent judiciary free from executive control. After considering these submissions this Court held that:

"Though there is no express provision excluding the applicability of Section 439 of the Code similar to the one contained in Section 20(7) of the Act in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow. It is true that the source of power of a Designated

Court to grant bail is not Section 20(8) of the Act as it only places @page-SC563 limitations on such power. This is made explicit by Section 20(9) which enacts that the limitations on granting of bail specified in Sec. 20(8) are 'in addition to the limitations under the Code or any other law for the time being in force'. But it does not necessarily follow that the power of a Designated Court to grant bail is relatable to Section 439 of the Code. It cannot be doubted that a Designated Court is a Court other than the High Court or the Court of Session' within the meaning of Section 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations placed by Section 20(8) of the act .

(Emphasis supplied)

Having held so, the learned Judges proceeded to consider the controversy as to the power of the High Court to grant bail under Section 439, Cr. P. C. Having regard to the explicit bar under Section 19(2) of the TADA Act excluding the jurisdiction of the High Court to entertain an appeal or revision against the judgment of the designated Court, it is held that the High Court had no jurisdiction to entertain an application for bail under Section 439 or Sec. 482 of the Code of Criminal Procedure. However, regarding the construction of non obstante clause in Sec. 20(8) of the Act, this Court held as under:

"The controversy as to the power of the High Court to grant bail under Section 439 of the Code must also turn on the construction of Section 20(8) of the Act. It commences with a non obstante clause and in its operative part by the use of negative language prohibits the enlargement on bail of any person accused of commission of an offence under the Act, if in custody, unless two conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application for such release and the second condition is that where there is such opposition, the Court must be 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. If either of these two conditions is not satisfied, the ban operates and the person under detention cannot be released on bail. It is quite obvious that the source of power of a Designated Court to grant bail is not, Section 20(8) of the Act but it only places limitations on such powers. This is implicit by Section 20(9) which in terms provides that 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. It therefore follows that the power derived by a Designated Court to grant bail to a person accused of an offence under the Act, if in custody, is derived from the Code and not from Section 20(8) of the' Act. "

It can thus be seen that even in Usmanbhai's case, AIR 1988 SC 922, also there is no observation supporting the view taken by the High Court in the impugned judgment. As a matter of fact in Usmanbhai's case, Sen, J. who spoke for the Bench, after referring to the ratio laid down in Balchand Jain's case, AIR 1977 SC 366, observed thus at page 932 of AIR 1988:

"The view expressed in Balchand Jain case is not applicable at all for more than one reason. There was nothing in the Defence and Internal Security of India Act or the Rules framed thereunder which would exclude the jurisdiction and power of the High Court altogether. On the contrary, Section 12(2) of that Act expressly vested in the High Court the appellate jurisdiction in certain specified cases. In view of the explicit

bar in Section 19(2), there is exclusion of the jurisdiction of the High Court. It interdicts that no appeal or revision shall lie to any court, including the High Court, against any judgment, sentence or order, not being an interlocutory order, of a Designated Court. The Act by Section 16(1) confers the right of appeal both on facts as well as on law to the Supreme Court. Further while it is true that Chapter XXXIII of the Code is still preserved as otherwise the Designated Court would have no power to grant bail, still the source of power is not Section 439 of the Code but Section 437 being a Court other than the High Court or the Court of Session. Any other view would lead to an anomalous situation. If it were to be @page-SC564 held that the power of a Designated Court to grant bail was relatable to Section 439 it would imply that not only the High Court but also the Court of Session would be entitled to grant bail on such terms as they deem fit. The power to grant bail under Section 439 is unfettered by any conditions and limitations like Section 437. It would run counter to the express prohibition contained in S. 20(8) of the Act which enjoins that notwithstanding anything in the Code, no person accused of an offence punishable under the Act or any rule made thereunder shall, if in custody be released on bail unless the conditions set forth in clauses (a) and (b) are satisfied."

(Emphasis supplied)

The High Court in the impugned judgment, however, referred to Usmanbhai's case, AIR 1988 SC 922, and held that the limitations placed under Section 37 of the NDPS Act are exactly similar to the ones in sub-sections (8) and (9) of Section 20 of the TADA Act and they are applicable only to special Courts. But we may point out that in paragraph 16 in Usmanbhai's case, AIR 1988 SC 922, it is observed at page 929 of AIR:

"As a matter of construction, we must accept the contention advanced by learned Counsel appearing for the State Government that the Act being a special Act must prevail in respect of the jurisdiction and power of the High Court to entertain an application for bail under Section 439 of the Code or by recourse to its inherent powers under S. 482."

However, as already mentioned, the learned Judges held that the view expressed in Balchand Jain's case, AIR 1977 SC 366, is not applicable to the facts in Usmanbhai's case, AIR 1988 SC 922, and the same is clear from the observations made in Usmanbhai's case, AIR 1988 SC 922, which read as under at page 932 of AIR:

"Lastly both the decisions in Balchand Jain and that in Ishwar Chand turn on the scheme of the Defence and Internal Security of India Act, 1971. They proceed on the well recognised principle that an ouster of jurisdiction of the ordinary courts is not to be readily inferred, except by express provision or by necessary implication. It all depends on the scheme of the particular Act as to whether the power of the High Court and the Court of Session to grant bail under Sections 438 and 439 exists. We must accordingly uphold the view expressed by the High Court that it had no jurisdiction to entertain an application for bail under Section 439 or under Section 482 of the Code."

From the above discussion it emerges that in Usmanbhai's case, AIR 1988 SC 922, the Supreme Court did not express anything contrary to what has been observed in Balchand Jain's case, AIR

1977 SC 366, and on the other hand at more than one place observed that such enactments should prevail over the general enactment and the non obstante clause must be given its due importance. For all the aforesaid reasons we hold that the powers of the High Court to grant bail under Section 439 are subject to the limitations contained in the amended Section 37 of the NDPS Act and the restrictions placed on the powers of the Court under the said Section are applicable to the High Court also in the matter of granting bail. The points of law is ordered accordingly.

8. The two accused respondents in these two appeals have been on bail pursuant to the order of the High Court, for a long time. The learned Counsel appearing for the Narcotics Control Bureau, the appellant herein, is also not pressing cancellation of the bail. Therefore, we are not remitting the matters to the High Court for fresh consideration. Pending the proceedings, they would continue to be on bail. Subject to the above clarification of law, the appeals are disposed of

Appeals allowed.

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