

A

STATE OF KERALA ETC.

v.

RAJESH ETC.

(Criminal Appeal Nos. 154-157 of 2020)

B

JANUARY 24, 2020

[INDU MALHOTRA AND AJAY RASTOGI, JJ.]

- Narcotic Drugs and Psychotropic Substances Act, 1985 – s.37 & ss.2(viia), (xxiiia), 20(b)(ii)(c), 29 – Scheme of s.37 – In Crime No.14/2018, accused persons (A1 to A3) were found in joint possession of 10.202 kgs of hashish oil and currency notes worth Rs. 13,50,000/- – Allegation against the accused respondent-A5 was that he entrusted hashish oil to A1 through A-2 for sale in international market – Additional Sessions Judge rejected A5's application for post-arrest bail – Granted by High Court – Further, in Crime No.19/2018, case of prosecution is that accused respondent-A1 (who is A5 in Crime No.14/2018) along with two other persons including A3 were found to be in possession of 1.800 kg of hashish oil – Post -arrest bail of both the accused was dismissed by Sessions Judge – Granted by High Court – On appeal, held: Hashish oil is shown at Sl. No. 13 in notification dtd. 19.10.01 issued by Central Government in exercise of power u/s.2(viia) & (xxiiia), NDPS Act – Hashish oil above 1 kg is commercial quantity – Jurisdiction of Court to grant bail is circumscribed by provisions of s.37, NDPS Act – Scheme of s.37 reveals that the exercise of power to grant bail is not only subject to the limitations contained u/s.439, CrPC, but is also subject to the limitation placed by s.37 which commences with non-obstante clause – Operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied – First condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that person accused is not guilty of such offence – High Court completely overlooked the underlying object of s.37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of*

H

bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for – Single Judge failed to record a finding mandated u/s.37, NDPS Act, a sine qua non for granting bail to the accused under NDPS Act – Further, the consideration that prevailed upon the Court to grant bail to the other accused persons (in Crime No.14/2018) will not absolve the act of the accused respondent-A5 from the rigour of s.37, NDPS Act – Impugned order passed by the High Court releasing the respondents on bail is set aside – Code of Criminal Procedure – s.482.

A

B

C

D

E

F

G

H

Allowing the appeals, the Court

HELD: Hashish oil is shown at Sl. No. 13 in the notification dated 19th October, 2001 issued by the Central Government in exercise of power under Section 2(viia) and (xxiiia) of the NDPS Act. Hashish oil above 1 kg is commercial quantity. The jurisdiction of the Court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. It can be granted in case there are reasonable grounds for believing that accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. [Paras 17, 18][354-D-E]

Union of India v. Ram Samujh and Ors. 1999 (9) SCC 429 : [1999] 2 Suppl. SCR 76 – relied on.

Satpal Singh v. State of Punjab (2018) 13 SCC 813 : [2018] 3 SCR 739 – referred to.

1.2 The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail

- A operates. The Single Judge failed to record a finding mandated under Section 37 of the NDPS Act which is a *sine qua non* for granting bail to the accused under the NDPS Act. The impugned order passed by the High Court releasing the respondents on bail is set aside. The trial Court is directed to proceed and expedite the trial. [Paras 20, 22 and 26][356-E-F; 357-B; 358-D]

B

Case Law Reference

[2018] 3 SCR 739	referred to	Para 12
------------------	-------------	---------

[1999] 2 Suppl. SCR 76	relied on	Para 19
------------------------	-----------	---------

C

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 154-157 of 2020.

From the Judgment and Order dated 12.06.2019 of the High Court of Kerala at Ernakulam in Crl. M. Appln. No. 2 of 2019 in Bail Appl. No. 2765 of 2019, Crl. M. Appln. No. 2 of 2019 in Bail Appl. No. 2996

D

of 2019, Crl. M. Appln. No. 2 of 2019 in Bail Appl. No. 3229 of 2019.

Ranjith Kumar, Sr. Adv., G. Prakash, Jishnu M.L., Ms. Priyanka Prakash, Ms. Beena Prakash, Advs. for the Appellants.

Basant R., Sr. Adv., Shinoj K. Narayanan, K. Rajeev, Advs. for the Respondents.

E

The Judgment of the Court was delivered by

AJAY RASTOGI, J.

1. Leave granted.

2. The appellant-prosecution has challenged the discretion

F

exercised by the learned Single Judge of the High Court of Kerala in granting post-arrest bail to the accused respondents without noticing the mandate of Section 37(1)(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985(hereinafter being referred to as “NDPS Act”) under the order impugned dated 10th May, 2019 followed with 12th June,

G

2019 rejecting the application filed by the appellant under Section 482 of the Code of Criminal Procedure(hereinafter being referred to as “CrPC”) for recalling the order of post-arrest bail dated 10th May, 2019.

3. It may be noticed that accused respondent Shajimon is (A-5) in Crime No. 14/2018 and (A-1) in Crime No. 19/2018 and another accused

H

respondent Rajesh is (A-3) in Crime No. 19/2018.

Facts of Crime No. 14/2018

A

4. The prosecution case is that on 25th May, 2018 at 5.30 p.m. in the parking area of the Hotel Aquarock situated at Mannanthala, accused A-1 to A-3 were found to be in joint possession of 10.202 kgs of hashish oil and currency notes worth Rs. 13,50,000/-. The Circle Inspector of Excise, Thiruvananthapuram arrested all of three accused A-1 to A-3 and seized the hashish oil, money and the vehicles which were used by them for transporting oil. The allegation against the accused respondent (A-5) was that he entrusted hashish oil to A-1 through A-2 for sale in the International market and Crime No. 14/2018 was registered against him for the offences punishable under Sections 20(b)(ii)(c) and Section 29 of the NDPS Act and after investigation, charge-sheet was filed on 10th May, 2019.

B

C

5. On an application filed for post-arrest bail by accused respondent(A-5), learned Additional Sessions Judge while noticing the mandate of Section 37(1)(b)(i) and (ii) of the NDPS Act observed that there was a *prima facie* material to presume that the accused committed the offence punishable under Section 20(b)(ii)(c) and Section 29 of the NDPS Act and rejected the application for post-arrest bail vide order dated 21st February, 2019 which came to be challenged at the instance of the accused respondent filing bail application before the High Court.

D

6. Learned Judge of the High Court without even noticing Section 37 of the NDPS Act and taking note of the fact that other accused persons in Crime No. 14/2018(A-1 to A-4) since have been released on bail, granted him post-arrest bail under the order impugned dated 10th May, 2019 which is a subject matter of appeal before us.

E

Facts of Crime No. 19/2018

F

7. The accused respondents in Crime No. 19/2018 are registered at excise circle office, Thiruvananthapuram alleging commission of the offence punishable under Section 20(b)(ii)(c) of the NDPS Act. It may be noticed that A-5 in Crime No. 14/2018 is A-1(Shajimon) in Crime No. 19/2018 and other accused, i.e. Rajesh is A-3. The case of prosecution is that on 25th October, 2018 at about 5.45 PM at Aristo Junction, Thiruvananthapuram, accused respondent (Shajimon-A1) along with two other persons including A-3(Rajesh) were found to be in possession of 1.800 kg of hashish oil. They were arrested on 25th October, 2018 for offence punishable under Section 20(b)(ii)(c) of the NDPS Act. After

G

H

- A investigation, charge-sheet was filed on 17th April, 2019. Both the accused respondents(A-1 and A-3) filed their respective post-arrest bail application before the Sessions Judge, Thiruvananthapuram which came to be dismissed after assigning cogent reasons under Order dated 21st February, 2019 and both of them preferred their bail application before the High Court. The High Court vide its order dated 10th May, 2019 granted bail to A-1 and A-3 in Crime No. 19/2018 and observed that both the accused have completed 195 days in judicial custody and their further detention is not necessary as nothing remains to be investigated against them. Although Section 37 of NDPS Act has been referred to by the learned Single Judge in the impugned order not for the purpose of showing its
- B compliance, but to justify due application of mind in taking decision to grant post-arrest bail under Order dated 10th May, 2019.

8. It may also be noticed that respondent(A-5) was earlier convicted under Section 55(a) of Abkari Act in S.C. 235/2005. At the same time, for threatening witness in Crime No. 14/2018, a separate

- D Crime No. 38/2018 has been registered against him.

9. Immediately after the post-arrest bail was granted by the learned Single Judge, miscellaneous application was filed by the appellant under Section 482 CrPC for recalling the orders of grant of post-arrest bail to the accused respondents dated 10th May, 2019. The learned Single Judge

- E after noticing the submissions made in paragraph 16, that even if it was an erroneous order and it did not involve application of mind, still it was not open for the Court to reconsider the facts invoking Section 482 CrPC and expressed its view that the remedy of the State lies in assailing the orders of the Court before the superior forum, if so advised, and dismissed the application vide order dated 12th June, 2019 which is also a subject
- F matter of challenge before us.

10. Mr. Ranjit Kumar, learned senior counsel for the appellant submits that the High Court has committed an apparent error in exercising discretion in favour of the accused respondents in granting post-arrest bail to them without taking note of the mandate of Section 37(1)(b)(ii) of

- G the NDPS Act.

11. Learned senior counsel further submits that negation of bail is the rule, and its grant is an exception under Section 37(1)(b)(ii) of the NDPS Act. For granting bail, the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for

- H

believing that the accused is not guilty of the offences with which he has been charged, and further he is not likely to commit any offence while on bail. A

12. Learned senior counsel further submits that the conditions for granting bail, specified in Section 37(1)(b)(ii) are in addition to the limitations provided under the CrPC, or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the NDPS Act is uncalled for. In support of his submission, learned senior counsel has placed reliance on the judgment of the three-Judge Bench of this Court reported in *Satpal Singh Vs. State of Punjab* 2018(13) SCC 813. B

13. Per contra, Mr. R. Basant, learned senior counsel for the respondents, while supporting the order passed by the High Court impugned in the proceedings submits that in Crime No. 14/2018, accused nos. 1 to 4 were granted post-arrest bail by the High Court vide Orders dated 4th October, 2018, 20th February, 2019 and 25th February, 2019 and the prosecution has not taken any steps to challenge the grant of bail to all other accused persons. In the given circumstances, the post-arrest bail which has been granted to respondent(A-5) in Crime No. 14/2018 (Shajimon) does not call for any interference. C

14. Learned senior counsel further submits that so far as Crime No. 19/2018 is concerned, they have been falsely implicated by the batchmates of the excise official, Babu Varghese, who was convicted in a corruption case on the trap being laid down by respondent-Shajimon who after trial, was convicted under Section 7 and Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act vide judgment dated 26th November, 2014 and later acquittal by the High Court may not be of any significance. D

15. Learned senior counsel further submits that charge-sheet has been filed in both the cases, i.e. Crime No. 14/2018 and Crime No. 19/2018 and the matter is fixed for framing of charge. No further investigation is required from the accused respondents, and the learned Single Judge under the impugned judgment has put stringent conditions while granting post-arrest bail to the respondents, which has neither been misused nor violated and after affording due opportunity of hearing and noticing Section 37 of the NDPS Act, satisfaction has been recorded that the accused respondents deserve post-arrest bail. Once the discretion F

E

G

H

- A has been exercised by the learned Single Judge based on the facts on record, interference with the discretion exercised in favour of the accused respondents is not warranted.

16. Learned senior counsel further submits that the High Court was cognizant of the fact that the respondents had initiated prosecution

- B under the Prevention of Corruption Act against the batchmate of the detecting officer and that such batchmate was convicted of the offence under the Prevention of Corruption Act. The High Court was obviously cognizant of the fact that it could be a case of false implication on account of a prior animosity of the detecting officer-colleagues convicted under C the Prevention of Corruption Act on the complaint of the respondent.
- C There being no prior case against the respondent under the NDPS Act, except these two cases, and the judicial discretion having been exercised, no interference is called for by this Court.

17. It may be noticed that Hashish oil is shown at Sl. No. 13 in the notification dated 19th October, 2001 issued by the Central Government

- D in exercise of power under Section 2(viia) and (xxiiia) of the NDPS Act. Hashish oil above 1 kg is commercial quantity.

18. The jurisdiction of the Court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. It can be granted in case there are reasonable grounds for believing that accused is not guilty of

- E such offence, and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. At this juncture, a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and non-bailable. It reads thus:-

- F “37. *Offences to be cognizable and non-bailable.*—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence punishable under this Act shall be cognizable;

- G (b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] 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

- H

(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. A

(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." B

(emphasis supplied)

19. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In Union of India Vs. Ram Samujh and Ors. 1999(9) SCC 429, it has been elaborated as under:- C

“7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secy., Union Territory of Goa* [(1990) 1 SCC 95)] as under: D

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and G

H

- A eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.
- B **8.** To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,
- C (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and
- (ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.”
- D
- E 20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless
- F twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.
- G 21. The expression “reasonable grounds” means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the
- H

case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

22. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a *sine qua non* for granting bail to the accused under the NDPS Act.

23. The submission made by learned counsel for the respondents that in Crime No. 14/2018, the bail has been granted to the other accused persons(A-1 to A-4), and no steps have been taken by the prosecution to challenge the grant of post-arrest bail to the other accused persons, is of no consequence for the reason that the consideration prevailed upon the Court to grant bail to the other accused persons will not absolve the act of the accused respondent(A-5) from the rigour of Section 37 of the NDPS Act.

24. The further submission of the learned counsel for the respondents that they have been falsely implicated in Crime No. 19/2018 for the reason that the batchmates of the excise official, Babu Varghese was convicted in the corruption case on the trap being laid down by the respondent-Shajimon(A-1) is only a conjecture of self-defence, and no inference could be drawn of false implication, more so when in Crime No. 19/2018 and 14/2018, charge-sheets have been filed after investigation and the matter is listed before the learned trial Judge for framing of the charge where the accused respondents certainly have an opportunity to make their submissions.

25. That apart, in the application which was filed before the learned Single Judge of the High Court by the appellant under Section 482 CrPC, the learned Single Judge has also *prima facie* accepted that error has been committed in granting bail to the accused respondents as observed in para 16 of the impugned judgment as under:-

“On going through the orders granted on 10.5.2019 allowing bail applications of A1 and A3 on the one hand and 5th accused on the other hand in NDPS crime Nos. 19/2018 and 14/2018 respectively, I find that the bail was granted by the Court after being cognizant of the principles laid down in Section 37 of the Act whether it

A

B

C

D

E

F

G

H

- A ultimately turned out to be right or wrong. May be as regards 3rd accused was concerned, order was passed under misconception of facts. Likewise, the criminal antecedents concerning the first accused did not fall to the notice of this Court. What could at the most be said of the order passed by this Court is that it was erroneous or it did not involve application of mind. But then the question arises is whether the same court could under law reconsider the facts invoking Section 482 of the Code. I am of the opinion that the remedy of the State lay in challenging the orders of this Court, if it was really aggrieved, before a superior forum and not before the same court. Therefore, accepting the argument of the learned counsel for the accused, I hold that none of the applications seeking to recall the order of this Court is maintainable under law.”
- B
- C

(emphasis supplied)

- D 26. In the result, the appeals are allowed and the impugned order passed by the High Court releasing the respondents on bail is hereby set aside. Bail bonds of the accused respondents stand cancelled and they are directed to be taken into custody. The trial Court is directed to proceed and expedite the trial.

27. Pending application(s), if any, stand disposed of.

Divya Pandey

Appeals allowed.