

Jarin Khan vs State Of Rajasthan on 16 October, 1992

Equivalent citations: 1993(1)WLC173, 1992(2)WLN506

JUDGMENT

N.K. Jain, J.

This miscbail application Under Section 439 Cr.P.C. is directed against the orders of the learned Sessions Judge, Pratapgarh dt. 25.7.92 and the order of learned Munsif and Judicial Magistrate 1st Class, Pratapgarh dt. 16.7.92 whereby they have declined to issue a direction for bail Under Section 167(2) Cr.P.C. in the matter arising out of F.I.R. No. 7/92 for the offences Under Section 8/18 and 8/21 of the NDPS Act.

1. Brief facts which give rise to this bail application are that the petitioner Jarin Khan was arrested on 30.3.92 at village Siya Khedi with a few-sachets weighing 26 gms. of brown sugar. The petitioner moved an application for bail, before the learned Munsif and Judicial Magistrate, Pratapgarh on the ground that more than 90 days have been passed from the date of his arrest but no challan has been filed. The learned Magistrate rejected his application vide order dt. 16.7.92. Thereafter, the petitioner moved an application for bail before the learned Sessions Judge, Pratapgarh but that too was rejected on 25.7.92. Hence, this application for bail Under Section 439 Cr.P.C.

2. Mr. Bhargava, learned Counsel for the non-petitioner has raised a preliminary objection that before approaching this Court, the petitioner Cr.P.C. before the learned Sessions Judge instead of filing revision. In support of this contention he has placed reliance on Manzoor Ahmed v. State of Rajasthan 1985 (2) WLN-22

3. Mr. Mehta, learned Counsel for the petitioner has submitted that the petitioner moved before the learned Sessions Judge for granting bail and prayer was also made to this effect but due to inadvertence it was mentioned as revision, so only on a technical point it cannot be said that it was a revision and not an application for bail before the learned Sessions Judge.

4. It is true that the petitioner ought to have filed a bail application Under Section 439 Cr.P.C. before the learned Sessions Judge and no second revision is maintainable but in this case as the petitioner made a prayer for bail which is also evident from the perusal of the order of the learned Sessions Judge itself, therefore, only on the basis of nomenclature the application filed by the petitioner cannot be said to be a revision only before the Court below. In view of this, it cannot be treated as second revision, and as such not barred by Section 397(3) Cr.P.C. Under the circumstances, the preliminary objection has no substance.

5. Mr. Mehta, learned Counsel for the petitioner has submitted that the petitioner is entitled for bail as mandatory provisions of Section 167 Cr.P.C. have not been complied with, though it can be

cancelled on filing challan. He has placed reliance on Rajnikant Jivanlal Patel and Anr. v. Intelligence Officer, Narcotics Control Bureau, New Delhi , Kalua v. State of Raj 1991 RCC 538 and Berlin Joseph v. State 1992 (II) Crimes-353.

6. On the other hand, Mr. Bhargava, learned Counsel for the non-petitioner has opposed the submission of M Mehta. He has placed reliance on Prahalad v. State of Maharashtra Cr. Ap. No. 1084 of 1989 and Narcotics Control Bureau v. Kishanlal and Ors. Cr.L.R. (S.C.) 1991-178.

7. I have heard learned Counsel for the parties and perused the relevant provisions of law carefully and the case law cited at Bar In Rajnikant Jivanlal Patel and Anr. v. Intelligence Officer, Narcotic Control Bureau, New Delhi (decided on 26.6.89), it has been held as under:

An order for release on bail under proviso (a) to Section 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 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.

In Kalua v. State of Rajasthan 1991 RCC 538 (decided on 11.7.91), as the charge-sheet was filed after 90 days, this Court while relying on Rajnikant Jivanlal Patel v. Intelligence Officer allowed the application and directed the CJM. Bharatpur to release the petitioner on bail Under Section 167(2) proviso (a) to the Code of Criminal Procedure if the petitioner is prepared to and does furnish bail bond as may be directed by the CJM.

In Beriin Joseph v. State 1992 (II) Crimes-353 (decided on 24.2.92) two questions for interpretation before the Full Bench of the Kerla High Court were as follows:

(1) Whether the High Court can suspend the sentence passed on an accused convicted of an offence under NDPS Act during pendency of his appeal before the High Court?

(2) Whether the conditions in Section 37 of the NDPS Act for granting bail have overriding effect on the proviso to Section 167(2) of the Code of Criminal Procedure (For short "the Code)?

It has been held that High Court has no power to suspend the sentence of a convicted person either during the pendency of his appeal or revision, unless it relates to the offence Under Section 27. As regard the second question, the Full Bench of the Kerla High Court while relying on Md. Abdul v. State of West Bengal 1991 (II) Crimes-741 held that Section 167(2) would operate even for offences under the NDPS Act and then Section 37 of the NDPS Act has no application. In other words, Section 37 of the NDPS Act does not override Section 167(2) of the Code.

In Prahlad v. State of Maharashtra Cr.App. No. 1084/89 (decided on 15.3.90), the question for consideration was regarding applicability of proviso to Sub-section (2) of Section 167 of the Code of Criminal Procedure (the Code) in the matter of grant of bail under Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It has been held that the applicant, therefore, cannot claim a benefit of being released on bail for the offence punishable under Section 20 of the Act of 1985 by taking resort to these provisions as contained in Section 167 of the Code since the prosecution failed to complete the investigation and file charge-sheet within a period of 60 days.

In Narcotics Control Bureau v. Kishanlaland and Ors. 1991 Cr.L.R. (S.C.) 171 (decided on 29.1.1991), the facts in brief were that a writ petition as well as a criminal miscellaneous 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 were filed before the High Court. A learned Single Judge referred that matter to a Divisional Bench and the Division Bench held that the limitation placed on the Special Court under Section 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 Narcotic Control Bureau filed appeals before the Supreme Court. Their lordships of the Supreme Court held as under: 'From the above discussion it emerges that in Usmanbhai's case the Supreme Court did not express anything contrary to what has been observed in Balchand Jain's case and on the other hand at more than one place observed that such enactments should prevail over the general enactment and the non-obstinate 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 subjection to the limitations contained in the amended Section 37 of the NDPS Act and the restrictions placed of the Court under the said section are applicable to the High Court also in the matter of granting bail.

Attention may also be drawn to Imam and Ors. v. C.B.I. New Delhi 1992 Cr.L.R. 290 decided on 15.7.92 wherein it has been observed that the petitioners are entitled to be released on bail because of the default on the part of the prosecution. As regards the Kishanlal's case 1991 Cr.L.R. (S.C.)178, the learned Judge has observed that in that case "The Supreme Court was not dealing with a case where the challan was not presented within 90/60 days as the case may be and further observed that the observations made in Kishanlal's case 1991 Cr.L.R. (S.C.)178) will be applicable, if the petitioners ask bail on merit but as the petitioners are not seeking bail on merits and only on the ground of default, the right of bail is automatic while placing reliance on Rajnikant Jivanlal Pate v. Intelligence Officer AIR 1992 S.C. 71.

8. The NDPS Act was originally enacted in the year 1985 as there was a need to make a comprehensive legislation as narcotic drugs and psychotropic substances and to make a provision for implementation to international contravention relating to such drugs and substances. Later on

the the amendment Act No. 2 of 1989 some sections were added to the parent Act and Section 37 was drastically remoulded. The relevant

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;

(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 bonds 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 it 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) or 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.

A perusal of amended Section 37 of the NDPS Act shows that it starts with a non-obstante clause stating that nothing having contained in the criminal procedure code, 1973 no person accused of an offence prescribed there in shall be released on bail unless the conditions contained therein were satisfied.

According to Section (2) of the Code of Procedure. Code 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.

9. Now, I proceed to deal with the contention advanced by the learned Counsel for the petitioner that the petitioner has a right to be released on bail as there is a non-compliance of Section 167(2) of the Code of Criminal Procedure which also applied to the NDPS Act. Mr. Mehta, in support of his contention has submitted that if the legislature was of the view to exclude applicability of Section 167(2) Cr.P.C. it could have make specific provision taking away power of the High Court to grant bail excluding the jurisdiction of the High Court as has been done in the TADA Act. He has further submitted that in Narcotic Control Bureau v. Kishanlal 1991 Cr.L.R. (S.C.) 1991-178 their lordships have not observed anything regarding applicability of Section 167(2) Cr.P.C. so the petitioner may be enlarged on bail without satisfying the conditions of Section 37 of the NDPS Act.

10. On the contrary Mr. Bhargava does not dispute the power of the High Court to grant bail under the NDPS Act but he has submitted that the petitioner can only be enlarged on bail if the conditions provided Under Section 37 of the NDPS Act are satisfied. He has also submitted that the case of Rajnikant Jivanlal Patel v. Intelligence Officer AIR 1990 S.C. 71 is not applicable and the present case is fully covered by the decision of their lordships in Narcotics Control Bureau v. Kishanlal

Cr.L.R. (S.C.) 1991-178.

11. At the very threshold it may be stated that as regards the power of High Court in grant bail is concerned, there is no dispute but it is subject to Section 37 of the NDPS Act and depends upon the facts of its own.

The only question which requires consideration in this bail application is whether on account of non-compliance of proviso to Sub-section (2) of Section 167 Cr.P.C. the petitioner can be released on bail without satisfying the conditions mentioned in Section 37 of the NDPS Act ?

It is no doubt true that the provisions of Section 167 has been inserted with a purpose and object to complete investigation promptly and within the statutory framework. The Supreme Court has observed that it is not the discretion of the Court but Section 167(2) has issued a legislative command to the court to release the accused on bail in the eventuality of default to complete investigation within the specified period. The order to release on bail, so made under the proviso (a) to Section 167(2) Cr.P.C. has been termed as an order on default and further the right to bail under this proviso is absolute. This section intends to minimise the harassment to the accused in the custody in the case of prolonged investigation and also converts a privilege on accused to claim release on bail in case of default. On the other hand the statement of object and reasons of the Act of 2 of 1989 by which the Section 37 of the NDPS Act has been remoulded drastically while certain other provisions were added to the parent Act solemnly declares that "Even though major offences are non-bailable by virtue of the level of punishment, on technical ground, the drugs offenders were being released on bail. The amending Act has aimed to strengthen the existing law." It received the assent of the President on 6.1.89. As stated above Section 37 starts with a non-obstante clause which does not permit the applicability of Code to the matters enumerated therein. Clause (b) of Sub-section 1 of Section 37 unequivocally denies grant of bail for certain offences, unless conditions laid down in Sub-section (i) and (ii) are fulfilled. Sub-section (2) proclaims that these limitations are in addition to those others provided under the Code and in any other law. Therefore, after taking into consideration the entire scheme, it is explicit clear that the legislature has consciously adopted certain provisions under the Code for regulating specific matters under the Act. The adoption of the Code is not with a general applicability but for a restricted purpose and only for the aspects and subjects as specifically indicated under the corresponding provisions of the Act and refrained the general applicability of the Code of the offences, trial and other materials under the Act. In view of this, I am of the opinion that the privilege under Section 167(2)(a) of the Code of Criminal Procedure cannot ipso facto be extended in the matter of bail Under Section 37 of the NDPS Act.

12. As regards the case law cited by the learned Counsel for the petitioner is concerned, in *Berlin Joseph v. State* 1992 (II) Crimes-353, the Full Bench of the Kerala High Court has observed that the Supreme Court decision in *Narcotics Control Bureau v. Kishanlal* 1991 Cr.L.R. (S.C.) 178 does not help in resolving the present controversy because in that decision the question considered was whether Section 37 would control Section 439 of the Code and further observed that is a different question altogether. So also in *Imam's case* 1991 Cr.L.R. (S.C.) 178 it has been observed that the Supreme Court in *Kishanlal's case* was not dealing with a case wherein challan was not presented within 90/60 days. But as observed in the judgment in *Narcotics Control Bureau v. Kishanlal* 1991

Cr.L.R. (S.C.) 178 the petitioners sought bail before the High Court on the grounds of Section 167(2) Cr.P.C. as of right and illness. The High Court extended the interim bail holding that limitation in Section 37(2) of the NDPS Act cannot be read as fetters in exercise of power under Section 439 of the Code. In appeal the Supreme Court held that the power of the High Court is subject to the conditions mentioned in Section 37 of the NDPS Act. It is true that the Apex Court has not mentioned Section 167(2) Cr.P.C. but when the sole ground was of Section 167(2) Cr.P.C. along with the ground of illness which is clear from the perusal of the judgment itself, therefore, it cannot be said that the point of Section 167(2) Cr.P.C. was not in issue otherwise, their lordships could have answered in terms of Section 167(2) without discussing Section 37 of the NDPS Act. As such the suggestion of the learned Counsel for the petitioner that the aforesaid case of Narcotics Control Bureau is not applicable cannot be accepted rather in that case it has been observed in the operative part of the Order that "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." This observation goes to show that an accused person cannot be released on bail on the ground of Section 167(2) Cr.P.C. without satisfying the conditions of Section 37 of the NDPS Act. In view of this, in my humble opinion, their lordships have considered the point of Section 167(2) as the charge- sheet was filed at a belated stage and held that the power to grant bail Under Section 439 Cr.P.C. is subject to limitations contained in Section 37 of the NDPS Act, which is fully applicable to the facts of the present case and the cases of *Berlin Joseph v. State* 992(II)Crimes-353 and *Imam v. C.B.I. New Delhi* 1992 Cr.L.R. 290 are not helpful to the petitioner.

The case of *Rajnikant Jivanlal Patel v. Intelligence Officer* has no application as in that case offence relates to prior to amendment of Section 37 of the NDPS Act and further the said Rajnikant's case is not applicable in view of the recent majority view expressed by their lordships of the Supreme Court in *Aslam Babalal Desai v. State* Cr.Appel No. 559/92 (decided on 21.9.92 wherein their lordships while agreeing with the view taken in *Bashir and Ors. v. State of Haryana* 1978 (1) SCR-585 and *Raghubir Singh and Ors. v. State of Bihar* clarified the observations made in Rajnikant's case holding that unless there are special and strong grounds for cancellation of the bail, the bail once granted cannot be cancelled on mere production of the charge- sheet. Therefore, the argument of Mr. Mehta that the petitioner is entitled for bail ipso-facto as challan was not filed in time and the bail so granted Under Section 167(2) Cr.P.C. will be cancelled as it is co-terminus with the filing of challan has no substance.

13. The case of *Kalua v. State* 1991 RCC 538 is also not applicable as that decision was rendered by this Court while placing reliance on Rajnikant Jivanlal Patel's case, which is distinguishable with the facts of present case as stated above. Under the circumstances, Section 37 of the NDPS Act being a special enactment and starts with a non- obstante clause which should be borne in mind while dealing with such cases. Further in view of Section 4 of the Cr.P.C. Section 37 of the NDPS Act prevails over the general enactment and the non- obstante clause must be given due importance and, therefore, the petitioner cannot claim any right of being released on bail for the offence Under Section 8/18 and 8/21 of the NDPS Act by taking resort to the provisions of Section 167 ipso-facto. The same view has been expressed in *Mabia Bibi v. State of West Bengal* 11 decided on 11.4.91 At the same time it is not out of place to mention here that the prosecution also must see that the accused

should not languish in jail due to its slackness.

14. Therefore, under the circumstances, as discussed above, the question posed is answered against the petitioner and it is held that only on account of non-compliance of Section 167 Cr.P.C. the petitioner cannot be released on bail automatically without satisfying the conditions mentioned in Section 37 of the NDPS Act in view of the decision of their lordships in Kishanlal's case to which I am bound to follow under Article 141 of the Constitution of India.

15. Learned Counsel for the petitioner has now moved an application to withdraw the bail application as the counsel appearing in the trial court has informed him that he has moved a fresh bail application assuming it to be a second revision and placed reliance on Shaik Hussian & Sons v. M.G. Kannaiah and Ors. 1981¹¹¹ SCC-71 Mr. Bhargava has opposed the application and submitted that since the matter has already been heard at length no permission to withdraw can be granted and the case cited by the counsel for the petitioner pertains to writ jurisdiction and no applicable, particularly when this application is pending before this Court and finally heard and that too when preliminary objection has been over-ruled. This Court can accord permission to withdraw but under the circumstances of the case when the matter has already been heard at length, I am not inclined to allow the petitioner to withdraw the bail application at this stage and the said case of Shaik Hussain 1981 III SCC-71 is not helpful. However, the dismissal of this bail application will not debar the petitioner to move an application for bail on merits.

16. Accordingly, the application for bail filed by the petitioner Jarin Khan is dismissed.