
Mohammed, T.A. and Another Vs State of Kerala

B.A. No. 1337 of 2010

Court: High Court Of Kerala

Date of Decision: March 5, 2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 167, 167(2), 437, 439#Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€” Section 21, 29, 36, 36A, 36A(4)

Citation: (2011) 263 ELT 202

Hon'ble Judges: K.T. Sankaran, J

Bench: Single Bench

Advocate: P. Vijayabhanu and Thomas J. Anakkallunkal, for the Appellant; Tekchand, Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.T. Sankaran, J.

This is an application for bail u/s 439 of the Code of Criminal Procedure. Petitioners are accused Nos. 2 and 3 in C.R.

No. 8 of 2009 of the Excise Enforcement and Ann"" Narcotic Squad, Kottayam.

2. The offences alleged against the Petitioners are under Sections 21(c), 29 and 49 of the Narcotic Drugs and Psychotropic Substances Act,

1985.

3. The prosecution case is that on 24-7-2009, accused Nos. 1 to 3 were found transporting 1.47 kgs. of Hashish oil in an autorickshaw driven by

accused No. 4. It was found that the Hashish oil was kept in the dashboard of the autorickshaw. Accused Nos. 1 to 4 were arrested on 24-7-

2009. The prosecution case is that accused Nos. 5 and 6 had supplied the Hashish oil to the other accused.

4. The Petitioners are in judicial custody since 24-7-2009. The learned Counsel for the Petitioners submitted that the Petitioners are entitled to get

default bail under the proviso to Section 167(2) of the Code of Criminal Procedure, since no application was filed by the prosecution to enlarge

the period of 180 days mentioned in the proviso to Sub-section (4) of Section 36A of the NDPS Act. The Counsel also relied on the decision in

Union of India (UOI) Vs. Thamisharasi and Others, . The learned Counsel for the Petitioners submitted that as per the order dated 22-2-2010 in

B.A. No. 872 of 2010, bail was granted to accused No. 4. While granting bail to accused No. 4, this Court held thus:

4. The Petitioner is injudicial custody since 24-7-2009. The period of 180 days is over. The investigation is not complete and final report is not

filed. It is submitted by the learned Counsel for the Petitioner that Sub-section (4) of Section 36A of the Narcotic Drugs and Psychotropic

Substances Act, 1985 read with the proviso to Section 167(2) of the Code of Criminal Procedure would entitle the Petitioner to get default bail,

since no application was filed by the prosecution to enlarge the period of 180 days mentioned in the proviso to Sub-section (4) of Section 36A of

the Narcotic Drugs and Psychotropic Substances Act, 1985. The learned Counsel for the Petitioner also relied on the decision in Union of India

(UOI) Vs. Thamisharasi and Others, ; wherein it was held that the limitations on granting of bail specified u/s 37(1) of the Narcotic Drugs and

Psychotropic Substances Act, 1985 are in addition to the limitations provided u/s 437 of the Code of Criminal Procedure and they do not exclude

the applicability of the proviso to Section 167(2) of the Code of Criminal Procedure.

5. Taking into account the facts and circumstances of the case, the duration of the judicial custody undergone by the Petitioner, the nature of the

offence and the present stage of investigation and also taking note of the fact that the period of 180 days from the date of arrest of the Petitioner is

over, I am of the view that bail can be granted to the Petitioner.

5. The Petitioners moved for bail before the learned Sessions Judge. The applications filed by the Petitioners were dismissed by the order dated

27-2-2010. It would appear that the order in B.A. No. 872 of 2010 was brought to the notice of the learned Sessions Judge. However, the

learned Sessions Judge brushed aside the contentions put forward by the Petitioners and held thus:

11. It is also contended on behalf of the Petitioners that the 4th accused has already moved a bail application No. 872/2010 before the Hon"ble

High Court of Kerala and as per the order dated 22-2-2010 he was granted bail on certain conditions. It is vehemently argued that since the

Hon"ble High Court granted bail to A-4 the Petitioners are also entitled to get equal treatment and hence they are entitled to bail. On this aspect, I

am of the view that the Hon"ble High Court of Kerala while granting bail to A-4 has not specifically held the question whether 37(ii) need not be

looked into and ignoring 37(ii) bail has to be granted. As per para 5 of the order of Hon"ble High Court of Kerala in bail application No.

872/2010 it can be seen that bail is granted taking note of the fact that 180 days is already over. Since application of Section 37(ii) is not

specifically excluded by the Hon"ble High Court of Kerala I am of the view that the spirit of the said order cannot be applied in these applications.

6. The learned Sessions Judge appears to have interpreted the decision of the High Court according to his own imagination. The High Court had

relied on the decision of the Supreme Court in Union of India (UOI) Vs. Thamisharasi and Others, . The learned Sessions Judge did not say

anything about the decision of the Supreme Court in Union of India (UOI) Vs. Thamisharasi and Others, . I am of the view that the learned

Sessions Judge was not justified in ignoring the decision of the Supreme Court and in misinterpreting the order passed by the High Court in the

manner in which it was done in paragraph 11 of the order passed by him. Astuteness in making an order is understandable. But, that does not

enable a judicial officer to disregard the binding precedents. Even assuming that the order passed in B.A. No. 872 of 2010 need not be treated as

a precedent, what about the decision of the Supreme Court referred to in the order passed by the High Court? Did the learned Sessions Judge

refer to it? How could the learned Sessions Judge bypass the decision of the Honourable Supreme Court? I am of the view that the binding

precedents should be respected and followed by the subordinate courts. The order passed by the learned Sessions Judge (Sri V.T. Raghunath)

does not appear to reflect a healthy trend in the judicial hierarchy.

7. In Union of India (UOI) Vs. Thamisharasi and Others, , the submission made by the learned Additional Solicitor General was referred to in

paragraph 5 of the judgment which reads as follows:

5. The submission of the learned Additional Solicitor General is that by virtue of the special provisions in the NDPS Act and particularly Sections

36 and 37 thereof, the application of the proviso to Sub-section (2) of Section 167 Code of Criminal Procedure is excluded in the case of a

person accused of any offence punishable under the NDPS Act. On the other hand, Shri Ram Jethmalani, learned Counsel for the Respondents

contends that the scheme of the NDPS Act supports the applicability of the proviso to Sub-section (2) of Section 167 Code of Criminal

Procedure instead of indicating its exclusion in such cases.

8. These contentions were dealt with by the Honourable Supreme Court and it was held thus:

8. ...The clear reference to the power of the Magistrate u/s 167 Code of Criminal Procedure, particularly Sub-section (2) thereof, is an indication

that no part of Sub-section (2) of Section 167 of the Code is inapplicable in such a case unless there be any specific provision to the contrary in

the NDPS Act.... Except for Section 37 of the NDPS Act, no other provision of the NDPS Act is relied on to contend that there is any

inconsistent provision in the NDPS Act to exclude the applicability merely of the proviso to Sub-section (2) of Section 167 Code of Criminal

Procedure when Sub-section (2) of Section 167 of the Code is made expressly applicable by Section 36A of the NDPS Act.

9. The question, therefore, is: Whether Section 37 of the NDPS Act is an inconsistent provision of this kind to exclude the applicability merely of

the proviso to Sub-section (2) of Section 167 Code of Criminal Procedure when Sub-section (2) of Section 167 is expressly made applicable by

the NDPS Act? The non obstante Clause at the beginning of Sub-section (1) of Section 37 indicates that the provisions in Clauses (a) and (b)

thereof are inconsistent with the corresponding provisions of the Code. Clause (a) makes every offence punishable under this Act to be cognizable.

Clause (b) imposes limitations on granting of bail specified therein which are in addition to the limitations under the Code of Criminal Procedure on

granting of bail as stated in Sub-section (2) of Section 37. Clause (b) of Sub-section (1) specifies the two limitations on granting of bail, namely,

(1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for

believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The learned Additional Solicitor

General contends that these limitations on granting of bail specified in Clause (b) of Sub-section (1) of Section 37 indicate that the applicability of

the proviso to Sub-section (2) of Section 167 Code of Criminal Procedure is excluded in such cases. We are unable to accept this contention.

* * * * *

14. In our opinion, in order to exclude the application of the proviso to Sub-section (2) of Section 167 Code of Criminal Procedure in such cases

an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary

implication. As shown by us, there is no such provision in the NDPS Act and the scheme of the Act indicates that the total period of custody of the

accused permissible during investigation is to be found in Section 167 Code of Criminal Procedure which is expressly applied. The absence of any

provision inconsistent therewith in this Act is significant.

9. In view of the decision of the Supreme Court in *Thamisharasi*'s case, I am of the view that the finding in paragraph 11 of the order passed by

the learned Sessions Judge is in clear disregard of the law laid down by the Honourable Supreme Court.

10. A judicial officer may have his own views on questions of law. Those views need not necessarily be in consonance with the decisions of the

superior courts. But such personal views should not be reflected in the judicial orders passed by a judicial officer, if the same runs contra to the law

laid down by the superior courts. If a judicial officer is allowed to do so, there is no meaning in the hierarchy of courts and the powers of the

Supreme Court and High Court in the matter of interpreting provisions of law and in laying down the principles. The subordinate courts are not

entitled to ignore a binding precedent of the Supreme Court or of the High Court and to misinterpret any such binding precedent in the manner it

was done by the learned Sessions Judge. Such practice is liable to be condemned.

11. The Petitioners shall be released on bail on their executing bond for Rs. 50,000 each with two solvent sureties for the like amount to the

satisfaction of the Court of the Special Judge for NDPS Act cases, Thodupuzha, subject to the following conditions:

(a) The Petitioners shall report before the investigating officer between 9 a.m. and 11 a.m. on all Mondays and Thursdays, till the final report is

filed or until further orders;

(b) The Petitioners shall appear before the investigating officer for interrogation as and when required;

(c) The Petitioners shall surrender their passports, if any, before the Court of the Special Judge for NDPS Act cases, Thodupuzha, within a period

of one week. If any of the Petitioners does not hold an Indian Passport, an affidavit sworn to by him shall be filed before the Court of the Special

Judge for NDPS Act cases, Thodupuzha, within one week;

(d) The Petitioners shall not try to influence the prosecution witnesses or tamper with the evidence;

(e) The Petitioners shall not commit any offence or indulge in any prejudicial activity while on bail;

(f) In case of breach of any of the conditions mentioned above, the bail shall be liable to be cancelled.

The Bail Application is allowed as above.