

(2012) 05 DEL CK 0593

Delhi High Court

Case No: Writ Petition (Criminal) 338 of 2012 and Criminal M.A. 2824 of 2012

Minnie Khadim Ali Kuhn

APPELLANT

Vs

State Nct of Delhi and Others

RESPONDENT

Date of Decision: May 8, 2012

Acts Referred:

- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1973 (CrPC) - Section 436, 438, 5
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 19, 2, 20, 21, 24
- Penal Code, 1860 (IPC) - Section 4(1)

Hon'ble Judges: S.P. Garg, J; S. Ravindra Bhat, J

Bench: Division Bench

Advocate: Nitya Ramakrishnan with Ms. Sushasini Sen and Mr. Rahul Kriplani, for the Appellant; Dayan Krishnan, ASC on behalf of State, for the Respondent

Judgement

Mr. Justice S. Ravindra Bhat

1. The writ petitioner, in these proceedings under Article 226 of the Constitution, seeks a direction that her son's detention by the respondents and refusal to grant bail, was unlawful. He seeks a direction to quash his detention, and further consequential proceedings. The facts leading to the filing of the present writ are that on 01.03.2012 at around 12 PM a police official of P.S Maurice Nagar went to the office of the Principal, St. Stephen's College (hereafter "the college") with a bag that he claimed he had found in the Kamla Nehru Ridge. The Vice Principal of the college was asked about the contents of the bag and a statement was recorded, which said that the bag contained some black substance; by 8 PM other police officials had reached the college. It is alleged that the bag containing the black substance belonged to the petitioner's son. It is alleged that the police officials repeatedly stated in the presence of the College Vice Principal, teachers, lawyers and

other students that there was 100 gms of charas. The petitioner asserts that it was not known whether any testing of the substance was done. The police refused to take on record a bail application or a representation drafted by Ms Nitya Ramakrishnan, Advocate. A call was made by her, to the DCP North from her mobile number 9818099045 and the DCP maintained that no one arrested for an offence punishable under Narcotic Drugs and Psychotropic Substances Act ("NDPS") could be released on bail.

2. It is alleged that an FIR was registered at PS Maurice Nagar at about 18:45 on 01.03.2012; however a copy of the FIR was not given to the Petitioner till after 09:00 AM. The petitioner filed the present writ for habeas corpus for production of her son as he was not released on bail despite having been arrested for a bailable offence. He was released on bail by the Metropolitan Magistrate on 02.03.2012. It was submitted, on behalf of the petitioner, that these proceedings should continue as they raise important issues. It was submitted that the release of the detenu by the Magistrate does not take away the illegality of the detention. It was submitted that this Court should declare that whenever possession of a small quantity of "charas" under Sections 20 and 21 of the NDPS Act is alleged, the offence is bailable, and the suspect is entitled to be enlarged on bail, by the police as in the case of any other petty offences.

3. It was argued on behalf of the petitioner that he was arrested for the offences punishable under Sections 20 and 21 of the NDPS Act. Each of those offences is punishable with imprisonment which may extend to six months, or with fine, or with both. The FIR revealed that there were two packets of charas of 60 gms and 40 gms i.e. 100 gms. The quantity (100 gms of Charas) is a small quantity in terms of Section 2 (xxiia) of the NDPS Act and is therefore not governed by the provisions of Section 37 of the NDPS Act, which impose restrictions on the court's power to grant bail, by imposing additional norms.

4. Counsel for the petitioner submitted that the stringent conditions for grant of bail prescribed in Section 37(1)(b) are applicable only to offences punishable under Sections 19, 24 and 27A as well as offences involving "commercial" quantities. The conditions in Section 37 do not apply to any other offence. The Counsel urged that the Section 37 does not declare that all offences under the NDPS Act are non-bailable offences. Even though the title/heading of Section 37 is "Offences to be cognizable and non-bailable" the body of the section does not reflect such unqualified intention. Section 37(1)(a) states that, every offence punishable under the Act "shall be cognizable;" yet the provision nowhere (apart from the title/heading), declares all offences to be non-bailable. Counsel for the petitioner relied on the decision in [Frick India Ltd. Vs. Union of India \(UOI\) and Others](#), where the Supreme court observed that:

It is well settled that the headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to for the purpose of

construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision.

Reliance was also placed on the decision reported as [Raichurmatham Prabhakar and Another Vs. Rawatmal Dugar](#), where the Supreme Court emphasized the "heading or title of a section a limited role to play in the construction of statutes. " The Court further held importantly, that

In case of conflict between the plain language of the provision and the meaning of the heading or title, the heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder.

5. It was argued that the Bombay High Court, where an identical question arose, in *Stefan Mueller vs. State of Maharashtra*, 2010 112 (7) Bom.L.R. 2990, the Court observed,

5. The heading or the marginal note of Section 37 reads "Offences to be cognizable and non-bailable". On the first reading of this marginal note, one may get an impression that all the offences under the NDPS Act are cognizable and also non-bailable. However, on reading the language of Section 37, it becomes clear that in Clause (a) to Sub-section (1), the legislature has unequivocally declared that notwithstanding anything contained in the Code of Criminal Procedure, every offence punishable under this Act shall be cognizable. If this provision would not have been there, certain offences under the NDPS Act punishable with imprisonment for less than three years or with fine, would be non-cognizable in view of Part II of Schedule to Cr.P.C., but they are made cognizable because of the specific provision in Clause (a) of Section 37(1). If the marginal note or the heading of Section 37 is kept aside for a moment, nowhere Section 37 specifically declares that every offence punishable under the NDPS Act shall be non-bailable.

6. It was submitted that in view of these observations, the heading or title in Section 37 had limited role to play; in the body of the Section, Parliament declared that all the offences under the Act shall be non-cognizable, but consciously refrained from similarly declaring that all offences under the Act shall be non-bailable. Clause (b) only speaks about the limitations on granting of bail in addition to the limitations under the Cr.P.C. while granting bail. Therefore, the provisions of Cr.P.C. will have to be looked into to find out whether offences under the NDPS Act are bailable or not. Therefore, argued Counsel for the petitioner, the police were wrong in detaining the petitioner's son and he ought to have been given bail as the provisions of Part B of the First Schedule to the Criminal Procedure Code, classifies the offence as a bailable since the penalty is imprisonment for a term less than 3 years.

7. The learned Additional Standing Counsel, Mr. Dayan Krishnan, argued that Parliamentary intention to override the normal provisions which enable grant of bail, are made explicit on a cumulative reading of Section 37 of NDPS Act. It was contended that the Court should not read the title to the provision, but also the enacting part which begins with a non-obstante clause, amply clarifying that the law makers intended that even in cases where the offence was bailable in terms of provisions of the Criminal Procedure Code, the special provision of Section 37, by way of additional conditions had to be complied with by the court. It was argued that the Court should not premise its conclusion on a narrow analysis of the provision, but also take into account the overall purpose and objective of the enactment, the harm it seeks to address and the circumstance that it is a special provision in every manner of the term. Such being the case, its provision, and intent, to deny the accused the "normal" entitlement of bail, and also impose additional restrictions on the power of the court, by enacting the conditions u/s 37 (2) has to be given effect. The provision of Section-37 (2) is to be complied with in every case where the accused is alleged to have committed any of the offences under the Act, regardless of the quantities involved (commercial, intermediary or small). It was argued that even though the offence in this case alleged against the petitioner's son is punishable by a prison term which can extend for a period of 6 months, i.e. less than 3 years, it is yet non-bailable.

8. For a proper appreciation of the controversy in this case, it would be necessary to recollect the history of relevant provision, which the court has to consider, i.e. Section 37. As it was originally enacted, in 1985, the said provision read as follows:

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 bond unless -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(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.

(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.

The provisions of the enactment, as originally brought into force, provided for stringent punishment, of offences relating to manufacture, possession, sale and purchase of drugs (Section 21, rigorous imprisonment for at least ten years,

extendable up to 20 years and a heavy fine); manufacture, possession, sale and purchase of psychotropic substances (Section 22 rigorous imprisonment for at least ten years, extendable upto 20 years and a heavy fine).

9. The provisions of the NDPS Act were amended by the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001) (w.e.f. 02.10.2001), By the Amending Act, the sentencing became nuanced. 'Small quantity' and 'commercial quantity' were defined u/s 2 (xxiia) and Section 2(via). Sections 21 and 22 were substituted; it provided for proportionate sentencing for possession of small, intermediate and commercial quantities of offending material. Entry 23 of the Notification dated 19.10.2001 (issued by the Central Government) deals with "Cannabis, cannabis resin, CHARAS and HASHISH...". This defines small quantity as 100 gms (of the substance) and commercial quantity is defined as one kilogram. The Statement of Objects and Reasons for the Amending Act of 2001 is as follows:

Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years" rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery.

Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

10. The relevant provisions of the NDPS Act, post amendment are extracted for facility of ready reference, after the amending Act No. 9 of 2001. Section 2 (via) enacts that:

Commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette.

Section 2(xxiia) states that:

Small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette.

Section 21, which provides for punishment for possessing inter alia, small quantities of drugs, reads as follows:

Punishment for contravention in relation to manufactured drugs and preparations

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable, -

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees; (c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

The all important provision, Section 37 too was amended in 2001. The material part, i.e Section 37(1) (b) and 37 (2), as originally enacted, read as follows:

(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 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.

(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."

After amendment, the same provisions read as follows:

(b) no person accused of an offence punishable for [offences u/s 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

(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."

(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.

11. It is evident that Parliamentary intent underwent a significant change, in respect of the sentencing policy, (in that a graded response was thought of, by introducing a quantitative approach, i.e. "small" and "commercial" quantities - and by implication the "in-between" or "intermediate" quantity). This policy and legislative change was also automatically reflected in the bail regime. Instead of the previous classification of offences which were punishable with less than five years, (which alone apparently qualified for a liberal view), Parliament now restricted the category of offences where bail could be granted after applying additional norms to "offences u/s 19 or section 24 or section 27A and also for offences involving commercial quantity". Section 37 begins with a non obstante clause; the provision dealing with bail begins with a negative mandate ("no person accused of an offence), by way of emphasizing or underlining the importance which the law sought to attach on the conditions to be imposed.

12. A non-obstante clause is a well-known legislative device, used to emphasize the overriding nature of the subject matter, or the particular provision. It is fairly commonplace for legislatures to use it, in order to ensure that known, or even unidentified provisions, in the same or other enactment, which can potentially conflict with the enacted part, are overridden. The courts have evolved settled rules for interpreting the scope of such clauses. In [The Dominion of India and Another Vs. Shrinbai A. Irani and Another](#), it was held that

Although ordinarily there should be a close approximation between the non-obstante clause and the operative part of the section, the non-obstante clause need not necessarily and always be co- extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof a non-obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment.

In [ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others](#), it was held that the wide amplitude of a non-obstante clause must be kept confined to the legislative policy and it can be given effect to, to the extent the Parliament intended and not beyond

it and that in construing the provisions of a non-obstante clause, it is necessary to determine the purpose and object for which it is enacted. In [Central Bank of India Vs. State of Kerala and Others](#), the Supreme Court held that:

When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. 'A search has, therefore, to be made with a view to determining which provision answers the description and which does not'

13. The above discussion shows that the decisions of the Supreme Court (in Frick India Ltd. and Raichurmatham Prabhakar) as well as the applicable rules of statutory construct instruct the Court to look beyond the heading or title of a provision, and see what is actually enacted by it. In other words, what is described in the heading is not necessarily the law; it is the enacted and substantive provision which has to be applied by the Court. Therefore, the Section heading to Section 37 that all offences under the NDPS Act are non-bailable does not bind the court.

14. So far as the non-obstante clause u/s 37 (1) goes, it is clear, from the decisions in ICCI Bank, Central Bank of India, and The Dominion of India that the true meaning of the non-obstante clause is to be discerned from what it seeks to override, and the legislative policy which underlies the enactment. In this case, what must not be forgotten is that all offences, regardless of their nature or gravity, are made cognizable, - a clear purpose for which the non-obstante clause was put in place. The specific reference in Section 37 (1) (b) to only three provisions, i.e. Sections 19, 24 "or" 27, and the offences dealing with commercial quantities, clearly points to those offences and no other, being the subject matter of additional bail conditions. Section 37 (2) is also instructive, in that it says that the conditions in respect of offences covered by Section 37 (1) (b) are in addition to other provisions of the Code of Criminal Procedure.

15. While on the subject, it is useful to recollect the decision in [Pankajbhai Nagjibhai Patel Vs. The State of Gujarat and Another](#), where the Supreme Court observed that:

10. The second contention depends upon the construction of Section 5 of the Code. Before that Section is considered it is advantageous to have a look at the preceding section which is in a way cognate to the provision cited. Section 4(1) of the Code concerns only with offences under the Indian Penal Code but sub-section (2) says that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions of the Code unless any other enactment contains provisions regulating the manner or place of such investigation, inquiry or trial or how otherwise such offences should be dealt with. This means, if another enactment does not regulate the manner or place of trial etc of any particular offence the provisions of the Code will continue to control the investigation or inquiry or trial of such offence. Now Section 5 of the Code has to be

seen.

5. Saving.- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

11. Non-application of the Code on "any special jurisdiction or power conferred by any other law for the time being in force" is thus limited to the area where such special jurisdiction or power is conferred..."

16. In the area of bail, Courts should not impose restrictions which are not mandated by the legislature as it adversely implicates the liberty of the citizen. This rule was emphasized (although in the context of Section 438, Cr. PC, the provision for anticipatory bail) by the Supreme Court in *Gurbaksh Singh Sibbia v. State of Punjab* AIR 1980 AIR 1632 in the following observations:

since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions.

17. The First schedule to the Criminal Procedure Code classifies offences. The offences listed are dealt with for the purpose of showing whether they are cognizable and bailable. Part I deals with offences under the Indian Penal Code. Part II deals with offences under other laws. Item 3 in the list (in Part II of the First Schedule) provides that if the offence concerned (under the other law) is punishable with imprisonment for less than 3 years, it is bailable and non-cognizable. Now, the offence of possession of a small quantity (upto 100 gms) of charas, u/s 21 of the NDPS Act, if proved, can lead to a sentence up to six months, and fine. By virtue of Section 37 (1) of the NDPS Act, it is cognizable. However, this class of offence is clearly bailable. In this case, the FIR - a copy of which was produced- shows that two packets were allegedly seized, one weighing 40 gms and the other, 60 gms. The total amount allegedly seized was 100 gms, which is a small quantity .Therefore, the petitioner's son was entitled to be released, without his applying for bail in court, once he showed willingness to give bail, in terms of Section 436, Cr.PC. Since the suspect in this case has been released on bail, this Court does not deem it appropriate to pursue the matter further.

18. This court, in view of the above analysis, is therefore, of the opinion that except in respect of offences specifically enumerated u/s 37, i.e. offences punishable under Sections 19, 24 and 27, and those cases involving commercial quantities, the normal law, i.e. the Criminal Procedure Code is applicable whenever the question of bail arises. Thus, if the offences are punishable - like in the case of possession of small quantities of the concerned substance or drug, u/s 21 and 22- the suspect or accused is entitled to bail, and if she or he is prepared to give, has to be granted bail, in terms of Section 436 of the Criminal Procedure Code, without the necessity of his (or her) seeking it in the Court. This Court hereby directs the Police Commissioner to issue necessary guidelines and instructions to all police officials bringing to their notice the effect of this judgment, so that they are suitably instructed in future cases, wherever offences are bailable, to release the suspects wherever bail is offered in terms of Section 436, Cr. PC, read with Item 3 of Part II to the First Schedule of the Act, and any other class of offences deemed bailable by the Code. The writ petition is disposed of in terms of the above directions.