

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.10.2015

Coram

THE HON'BLE MR. JUSTICE B.RAJENDRAN

Criminal Revision Case Nos. 613 and 614 of 2015

Mohamed Imran Mansoori ...Petitioner in Crl.R.C.613/15

Akil Ahamad ...Petitioner in Crl.R.C.614/15

-Vs-

Intelligence Officer
NCB South Zone
Chennai-90. ... Respondent in both revisions

Criminal Revision Cases filed under Section 397 read with 401 of Cr.P.C. against the order made in Crl.M.P.No.465 of 2014 in C.C.No.40 of 2014 in Crime No.48/1/05/2014-NCB/MDS on the file of the Additional District Judge/Presiding Officer, Special Court for Essential Commodities Act Cases, Coimbatore, dated 30.09.2014.

For Petitioners : Mr.G.Murugendran
in both revisions
For Respondent : Mr.N.P.Kumar
in both revisions Special Public Prosecutor
for NCB Cases

COMMON ORDER

The petitioners were arrayed as accused Nos.1 and 2 respectively in C.C. No. 40 of 2014 on the file of the learned Additional District Judge/Presiding Officer, Special Court for Essential Commodities Act Cases, Coimbatore. The petitioners were arrested on 25.03.2014 for the offences under Section 8 (c) r/w. 21(c), 23, 25, 27, 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act"), alleging that they were found in possession and involved in trafficking of commercial quantity of the drug "Heroin". The accused were brought for remand extension on 27.08.2014, but, there is no presiding officer for the Special Court for EC

Act and NDPS Act Cases, Coimbatore. The Special Judge for C.B.I. Court was incharge for the same and as he was leave on that date and hence, the accused were produced before the Special Judge for Mahila Court for the remand extension. The Special Judge for Mahila Court has observed in the order dated 27.08.2014 that since, the remand extension report was not filed, the accused are entitled for bail subject to producing sureties and thereafter, for want of sureties, extended the remand and posted the matter on 10.09.2014. Since, the respondent police did not turn up with a report for the remand extension, on 10.09.2014, bail was granted to the petitioners by the Special Judge for C.B.I. Court, incharge for EC Court, with a condition directing the petitioners to execute a bond for Rs.10,000/- with two local sureties and sign before the Special Court daily at 10.00 a.m., until further orders. Thereafter, the respondent police had filed a memo on 15.09.2014 seeking for cancellation of bail, but, the same was not accepted by the Special Court. Thereafter, the respondent police had filed a petition seeking cancellation of bail under Section 437 (5) r/w. 439 (2) Cr.P.C. The Additional District Judge/Presiding Officer, Special Court for Essential Commodities Act Cases, Coimbatore, has allowed the petition on 30.09.2014, thereby, cancelling the bail granted to the accused, on finding that the allegations against the accused are serious in nature and the offence is heinous in nature. Aggrieved against the same, the petitioners/ accused Nos. 1 and 2 have preferred these Criminal Revision Cases.

2. Mr.G.Murugendran, the learned counsel appearing for the petitioners would submit that the main grievance of the petitioners is that on 27.08.2014, when the petitioners were brought for remand extension, the concerned Special Judge was on leave or on other duty, therefore, the matter was posted before another Judge viz., Special Judge, Mahila Court and the accused were taken to Mahila Court only for the task of the remand extension. Since, the respondent police has not turned up with the report for remand extension, has rightly observed in its order that the accused are entitled for bail and for want of sureties, extended the remand till 10.09.2014 and on that date, the Special Judge for C.B.I.Court, incharge for EC Court, has rightly granted bail, but, since, no sureties were produced, they were in jail. To substantiate his contention that though, bail was granted to the petitioners, they have not come out on bail and therefore, the petition filed under Section 437 (5) r/w. 439 (2) Cr.P.C. for cancellation of bail is too premature and it is not maintainable, because, the question of cancellation of bail will not arise when the accused have not at all been released on bail, he would rely on the judgment of the Bombay High

Court reported in 1991 Cri.L.J. 552, B.S.Rawat, Assistant Collector of Customs, Bombay vs. Leidomann Heinrich and another. He would further add that it is only because of the failure on the part of the respondent police to be present in Court along with the remand extension report, the Special Judge for C.B.I.Court, incharge for EC Court, did not extend the remand against the petitioners and granted bail. Thereafter only, the respondent police had filed a memo, which is not legally sustainable and therefore, it was rightly rejected. Thereafter, the petition was filed by the respondent police seeking for cancellation of bail, which was allowed, thereby, cancelling the bail granted to the petitioners, which is not legally correct. He would further add that as per the judgment cited supra, only if there is any violation of condition or wrong committed subsequent to the grant of bail, the bail can be cancelled in accordance with law. When the petitioners were not even released on bail, the question of violation of condition does not arise. He would further contend that the remand is not by way of an automatic extension unless, it is sought for by the prosecution by filing remand extension report. He would further contend that the petitioners were already in jail for 170 days as on 10.09.2014, therefore, the bail was granted, because of the non-filing of the chargesheet and the remand extension report even after the lapse of 170 days of remand. When the respondent police has not filed the report seeking for the remand extension, there is no impediment in granting bail even under NDPS Act Cases, therefore, the learned counsel would contend that the order cancelling bail is not correct.

3. Mr.N.P.Kumar, learned Special Public Prosecutor appearing for NCB Cases would submit that the accused were not granted regular bail under Section 167(2) Cr.P.C., but, the bail has been granted to the petitioners, because of the failure on the part of the respondent police to give a report for extension of remand, which is not legally correct and permissible. Apart from that, for the simple reason, the concerned Special Judge was on other duty, the accused were taken to another Court, viz., Mahila Court. Since, the respondent police has not turned up with the report for remand extension, the Special Judge, Mahila Court, has observed in the order that the accused are entitled for bail and for want of sureties, extended the remand till 10.09.2014 and on that date, the Special Judge for C.B.I.Court, incharge for EC Court, has granted bail. At that point of time, the Special Public Prosecutor was not informed nor the respondent police was called for to submit his reply. The non-filing of the report for remand extension is not a bar for the Court to extend the remand, in fact, the Court itself is vested with

power to extend the remand, in view of the fact that no sureties were produced and without exercising such power, merely for the non-filing of the report for the remand extension, the Special Judge for C.B.I.Court, incharge for EC Court, ought not to have granted bail to the petitioners, when there is a specific bar under the NDPS Act Cases. When the accused were found in possession of commercial quantity of the heroin, the Special Judge for C.B.I.Court, incharge for EC Court, ought not to have granted bail to the petitioners, that too, without hearing the Special Public Prosecutor. If the Court finds a reason for granting bail ought to have heard the Special Public Prosecutor and thereafter only ought to have granted bail to the petitioners and therefore, the order granting bail to the petitioners is not correct. Since, it is a technical defect, originally, the prosecution thought it fit to file a memo seeking for cancellation of bail, when that was dismissed without any basis or reason, the prosecution has to necessarily file a petition seeking for cancellation of bail. In the cancellation of bail petition, the learned Additional District Judge/Presiding Officer, Special Court for EC Act Cases, Coimbatore, has taken into consideration one important aspect, viz., which is not only on the ground of violation of condition of bail, but also on the ground that in a case under NDPS Act, the Court has to satisfy that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit an offence in future. Apart from that, the Court below has taken into consideration that for being found in possession of the commercial quantity of Heroin, there is a specific bar under the NDPS Act and therefore, the accused are not entitled for bail automatically. If at all the accused are released on 180th day, they will come under regular bail under Section 167 (2) Cr.P.C., but, in the cases on hand, the bail granted to the petitioners cannot be treated as regular bail under Section 167(2) Cr.P.C., therefore, the cancellation of bail was filed and the said petition was rightly allowed and that these revisions are not maintainable and hence, he prayed to dismiss these revisions. The learned Special Public Prosecutor relied on the judgment of the Hon'ble Apex Court reported in 2011(4) Supreme 197, Prakash Kadam & etc. vs. Ramprasad Vishwanath Gupta & another, to substantiate his contention that if the allegations against the accused are serious in nature and the offence is heinous in nature, the bail granted to him may be cancelled, even if he has not misused the bail granted to him. He also relied on the judgment of the Hon'ble Apex Court reported in [2006] 9 SCC 712, Narcotic Control Bureau vs. Raju @ Natarajan, to substantiate his contention that even if the sample does not contain the presence of Narcotic and Psychotropic Substance and though, the accused

had been in custody for six months, in a crime of this nature, it is not necessary to release the accused on bail.

4. Heard both sides. By consent, both these Criminal Revision Cases are taken up for final disposal.

5. I have carefully considered the entire materials available on record and I have also perused the order passed by the Court below. The main ground of attack made by the learned counsel appearing for the petitioners is that the bail was granted, because of the lack of the report to be filed by the prosecution seeking for remand extension. The report is a mandatory one, which the prosecution has to file for remand extension. If this is to be taken into consideration, no doubt, there cannot be any remand extension, without any report, but, in the cases on hand, what actually has happened is that the concerned Special Judge dealing with the matter was on other duty and was not available in the morning, and hence, the matter was placed before another Judge in the afternoon viz., Special Judge, Mahila Court. The Special Judge for Mahila Court has observed in the order dated 27.08.2014 that since, the remand extension report was not filed, the accused are entitled for bail subject to producing sureties and thereafter, for want of sureties, extended the remand and posted the matter on 10.09.2014. Since, the respondent police did not turn up with a report for the remand extension, bail was granted to the petitioners on 10.09.2014 by the Special Judge for C.B.I. Court, incharge for EC Court, with a condition directing the petitioners to execute a bond for Rs.10,000/- with two local sureties and sign before the Special Court daily at 10.00 a.m., until further orders. Before granting bail to the petitioners, when the matter is going to be taken up is not intimated to the learned Special Public Prosecutor. The learned Special Public Prosecutor is not available in the Court and there is representation from the respondent police. Merely because the report for remand extension was not filed, can it be a reason to grant bail to the accused, when they were alleged to have been found in possession of 1 kg of heroin, which is a commercial quantity. Unfortunately, the case was posted before the Special Judge for C.B.I. Court, incharge for EC Court, only for the purpose of remand extension and if the Court finds a reason to grant bail to the petitioners, is it not incumbent on the part of the Judge to call for the Special Public Prosecutor and give an opportunity of hearing to him and thereafter, to pass an order, because, it was not the regular Court and especially, the matter has been posted before the said Court only due to the fact on that particular date, the Special Judge dealing

with the matter was on other duty. If the bail order has been passed by the regular Court, then the matter would have been different. Further, on the date of remand extension, is it not the duty of the respondent police to be present in the Court along with the report for the remand extension, but, admittedly, the respondent police was not present in the Court along with the report. Thus, it is clear that there is a lacuna on both sides. The Special Judge for C.B.I. Court, incharge for EC Court, should have given one more opportunity to the prosecution in view of the fact that the allegations levelled against the accused are serious in nature and the offence is heinous in nature, even, if there is wrong on the part of the respondent police, because, they were expected to be present in the Court along with the report for the remand extension.

6. Now, I would like to refer to the judgments relied on by the petitioners. Firstly, the learned counsel for the petitioners has relied on the judgment of the Bombay High Court reported in 1991 Cri.L.J. 552, B.S.Rawat, Assistant Collector of Customs, Bombay vs. Leidmann Heinrich and another, wherein, the Bombay High Court has held in paragraph No.10 as follows:-

"10. The judgments of the Rajasthan and Gujarat High Courts upon which reliance is placed by the learned Counsel for the Applicant/Accused, no doubt, support him. Moreover, the language used in sub-sec. (2) of S. 439 of the Cr.P.C. is very clear and explicit. When it uses the expression "any person who has been released on bail", it would mean that the accused is not only granted bail but has availed of the same and is released from his jail custody. It is only then that this Court can direct a person to be arrested and committed to custody as provided in S. 439 (2) of the Cr.P.C. In fact, no question of his rearrest or re-committal to custody can arise unless the Accused is actually released on bail granted to him continues to be in custody and no question of his arrest and committed to custody can therefore arise. Thus, apart from the judgments cited supra, the clear language of sub-sec. (2) of S. 439 of the Cr.P.C. thus supports the submission canvassed on behalf of the Applicant/Accused."

No doubt, as per the judgment cited supra, though, bail was granted to the accused, they have not come out on bail and

therefore, the petition filed under Section 437 (5) r/w. 439 (2) Cr.P.C. for cancellation of bail is too premature and it is not maintainable, because, the question of cancellation of bail will not arise when the accused have not at all been released on bail, but, in the present cases on hand, it is only because of the failure on the part of the respondent police to be present in Court along with the remand extension report, the Special Judge dealing with the matter did not extend the remand against the petitioners and granted bail. Merely because the report for remand extension was not filed, can it be a reason to grant bail to the accused, when the accused were alleged to have been found in possession of 1 kg of heroin, which is a commercial quantity. The Special Judge for Mahila Court has observed in the order dated 27.08.2014 that since, the remand extension report was not filed, the accused are entitled for bail subject to producing sureties and thereafter, for want of sureties, extended the remand and posted the matter on 10.09.2014. Since, the respondent police did not turn up with a report for the remand extension, bail was granted to the petitioners on 10.09.2014 by the Special Judge for C.B.I. Court, incharge for EC Court, however, since, no sureties were produced, the Court has extended the remand, and hence, the decision cited supra is not applicable to the present cases on hand.

7. Nextly, the learned counsel for the petitioners has relied on the judgment of the Hon'ble Apex Court reported in (2014) 10 Supreme Court Cases 754, Abdul Basit @ Raju and others vs. Mohd. Abdul Kadir Chaudhary and another, to substantiate his contention that the order granting bail cannot be reviewed by the Court passing such order and that Section 362 of the Code operates as a bar to any alteration or review of the cases disposed of by the Court. In the present cases on hand, in my considered opinion, the non-filing of the request letter for remand extension is not a bar for the Court to extend the remand, in fact, the Court itself can extend the remand and accordingly, in view of the fact, no sureties were produced the Court has extended the remand, but, at the same time has granted bail. When there is a specific bar under the NDPS Act Cases, when the accused were found in possession of commercial quantity of heroin, the Special Judge for C.B.I. Court, incharge for EC Court, ought not to have granted bail, without hearing the Special Public Prosecutor and if the Court finds a reason for remand extension ought to have heard the Special Public Prosecutor and thereafter only granted the bail, therefore, the order granting bail is not correct. Since, it is a technical defect originally the prosecution thought it fit to file a memo when that was dismissed without any basis or reason, they

have filed a petition seeking for cancellation of bail and by the impugned order, the cancellation of bail was granted on 10.09.2014, in which, I do not find any fault with and the decision cited supra is distinguishable and is not applicable to the present cases on hand.

8. As regards the contention of the learned counsel for the petitioners that the Chemical Analysis Report was not available at that point of time to find out as to whether it is a Narcotic Substance or not. As rightly pointed out by the learned Special Public Prosecutor, in the judgment of the Hon'ble Apex Court reported in [2006] 9 SCC 712, Narcotic Control Bureau vs. Raju @ Natarajan, it was held that even if the sample does not contain the presence of Narcotic and Psychotropic Substance and though, the accused had been in custody for six months, in a crime of this nature, it is not necessary to release the accused on bail. In a bail proceedings, the technicalities or merits of the case cannot be argued. The accused is entitled to regular bail under Section 167(2) Cr.P.C., if they have undergone 180 days of sentence. When the matter was taken up by the Special Judge for C.B.I. Court on 10.09.2014, the petitioners have been in jail for 170 days, ten days are more, but, bail was granted to the petitioners, which itself is wrong. In this back ground, when we proceed further to analyse as to, what is the effect of filing a petition seeking cancellation of bail, as rightly pointed out by the Special Public Prosecutor, memo was filed, but, the same was not accepted and dismissed. Thereafter, the respondent police has come forward with a petition for cancellation of bail. As rightly pointed out by the Hon'ble Apex Court in the judgment relied upon by the learned counsel for the petitioners reported in (2014) 10 Supreme Court Cases 754, Abdul Basit @ Raju & Others vs. Mohd. Abdul Kadir Chaudhary & another, the powers under Section 439 (2) of Cr.P.C., for cancellation of bail is set out to the effect that (i) the accused misused his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. Normally, the cancellation of bail can be considered only within the four parameters of law, where there is violation of conditions as set out above. The explanation of Section 37 of NDPS Act, 1985 of Lawmann's is to the following effect:-

"Cancellation of bail: The Act although is a self contained Code, application of the provisions of the Code, application of the provisions of the Code of Criminal Procedure, 1973, however, either expressly or by necessary implication, have not been excluded. There exists a distinction between an appeal from an order granting bail and an order directing cancellation of bail. While entertaining an application for cancellation of bail, it must be found that the accused had misused the liberty granted to him as a result whereof:

- a) he has attempted to tamper with evidence;
- b) he has attempted to influence the witnesses;
- c) there is a possibility of the accused to abscond and, therefore, there is a possibility that the accused may not be available for trial."

9. Upon considering the above explanation given in the NDPS Act itself, it is clear that the cancellation of bail can arise in three ways viz., the first one is an attempt to tamper with evidence; the second one is an attempt to influence the witnesses; and the third one is possibility of the accused to abscond, therefore, there is possibility that the accused may not be available for trial. Apart from that, the Court has to satisfy that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit an offence in future. At this stage, this Court cannot come to a conclusion, that too, one for a crime under NDPS Act Cases, especially, when there is recovery of Heroin, that too, commercial quantity, whether the accused are entitled to bail or not. If the accused are to be let out on bail, the Court has to satisfy that the accused may not indulge in tampering with the evidence and the accused may not again commit the similar offence, which is a heinous crime, which has serious consequences.

10. The learned Additional District Judge/Presiding Officer, Special Court for Essential Commodities Act Cases, Coimbatore, relied on the judgment of the Hon'ble Apex Court reported in (2004) 3 Supreme Court Cases 549, Collector of Customs, New Delhi vs. Ahmadalieva Nodira, and has ultimately come to the conclusion that under Section 37(1)(b)(2) of NDPS, an opportunity has to be given to the Special Public Prosecutor to oppose and it is a mandatory requirement, but, in the present cases, that is violated and therefore, the Special Court for EC Act Cases has rightly come to the conclusion to cancel the bail granted to the petitioners. As

rightly pointed out by the learned Special Public Prosecutor, as per the judgment of the Hon'ble Apex Court reported in 2011(4) Supreme 197, Prakash Kadam & etc. vs. Ramprasad Vishwanath Gupta & another, if the allegations against the accused are serious in nature, the bail granted to the accused may be cancelled, even if the accused has not misused the bail granted to him. In this case, admittedly, the petitioners have not even come out on bail, but, the allegations against them are serious in nature and the offence is heinous in nature. Hence, I do not find any reason to interfere with the reasoned order of the Additional District Judge/Presiding Officer, Special Court for EC Act Cases, Coimbatore (FAC), dated 30.09.2014. These Criminal Revision Cases are dismissed.

11. At this juncture, it is represented by the learned Special Public Prosecutor that the trial itself has started and hence, the Trial Court is directed to expedite the trial of the case in C.C.No.40 of 2014 and dispose of the case, on merits and in accordance with law, as expeditiously as possible, preferably within a period of six months from the date of receipt of a copy of this order.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

paa

To

1. The Intelligence Officer
NCB South Zone
Chennai-90.T

2. The Additional District Judge/
Presiding Officer,
Special Court for Essential Commodities Act Cases,
Coimbatore.

+2cc's to Mr.G.Murugendran, Advocate, S.R.No.56806 & 56805

Cr1.R.C. Nos. 613 and 614 of 2015

CA(CO)
CA(26/11/2015)