

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.11.2019

Pronounced on : 21.11.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

Crl.O.P.No.9750 of 2019

The Intelligence Officer
Directorate of Revenue Intelligence (DRI)
27, G.N.Chetty Road, T.Nagar,
Chennai - 600 017.

... Petitioner

Vs.

M.Ravindran
S/o. Mayandi

... Respondent/Accused 11

Prayer: Criminal Original Petition filed under Section 439(2) Cr.P.C. to set aside and cancel the bail granted by the learned 1st Additional Special Judge, Special Court for Exclusive Trial of Cases under the NDPS Act, Chennai in Crl.M.P.No.131 of 2019 in R.R.No.09 of 2017 dated 05.02.2019 to the respondent/Accused 11 herein.

For Petitioner : Mr.N.P.Kumar, Special Public
Prosecutor for DRI cases

For Respondent : Mr.G.Murugendran

ORDER

This petition had been filed under Section 439(2) of Code of Criminal Procedure to cancel the bail granted on 05.02.2019 by the First Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai, in Crl.M.P.No.131 of 2019 in R.R.No.09 of 2017 pending before the said Court.

2. The complainant, Intelligence Officer, Directorate of Revenue Intelligence, has filed the present Petition seeking to cancel the bail of the 11th accused/M.Ravindran. The 11th accused/M.Ravindran was granted bail by the First Additional Special Judge, Special Court for Exclusive Trial of Cases under NDPS Act, Chennai in Crl.M.P.No.131 of 2019 in R.R.No.09 of 2017 on 05.02.2019.

3. Among other grounds seeking cancellation of bail, it had been stressed that on the date when the bail was granted, an application had been filed on behalf of this accused under Section 167(2) Cr.P.C., seeking to release the said accused on bail. Simultaneously, the prosecution had also filed an application seeking to file a further complaint. The learned Special Judge, who took into consideration both the applications, on hearing both the counsels, had thought it fit to grant bail to this accused. The relevant portion of the order in which the learned Judge had given his reasons for grant of such bail is as follows:

"18.As such the filling of the complaint as against the petitioner by the respondent after filing this petition by the petitioner would not stand in any way to defeat the rights of the petitioner in getting default bail as he has already offered to exercise his indefeasible right and willing to furnish bail bonds as directed by this Court. As the petition has been filed only for default bail, the merits and seriousness of the case and the twin conditions stipulated in Section 37 of NDPS Act will not come into play while dealing with this petition as per the findings of the Hon'ble Apex Court stated above. Considering the above stated circumstances and in the interest of justice, this Court finds that this petition is to be allowed and the point is decided accordingly. As the case is involved international link some stringent condition can be imposed for ensuring the strict attendance and co-operation of the accused for conducting smooth trial in this case."

4. When the matter came up for consideration, this Court had expressed a view whether bail can be cancelled under Section 439(2) Cr.P.C., even though this accused had been granted the bail under Section 167(2) Cr.P.C. It was also felt that since it is a detailed order granting bail, whether the proper procedure would be to file a revision against the said order and whether an application under Section 439(2) would be maintainable.

5. Arguments were advanced on the maintainability of the petition. Finally by order dated 01.10.2019, after examining the ratio laid down in (i) AIR 1990 SC 71 [Rajnikant Jivanlal Patel and another Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi], (ii) 2006 (0) Supreme (Mad) 409, The Central Bureau of Investigation Vs. Louis Jaly @ Muthukrishna, (iii) 1978 1 SCC 118, Gurcharan Singh and Others Vs. State (Delhi Administration), and (iv) (2008) 17 SCC 745, Dnyanu Khot Vs. State of Maharashtra, this Court had held by detailed order that the Court can exercise its jurisdiction under Section 439(2)

Cr.P.C., and examine the grounds seeking cancellation of bail. Thereafter, further arguments were advanced by Mr.N.P.Kumar, learned Special Public Prosecutor, for DRI cases and G.Murugendran, learned counsel for the respondent/A11.

6. The brief facts of the case are that the respondent/A11 was arrested by the officers of DRI on 04.08.2018 and was remanded to judicial custody for the offence punishable under Section 8(c) read with Sections 22(c), 23(c), 25A and 29 of NDPS Act, 1985. It is an admitted fact that the applicant herein had not filed any final report on or before 31.01.2019 and the learned Special Public Prosecutor has also not filed any petition for extension of time to file final report on or before 31.01.2019 on which date the 180 days of remand was completed.

7. On 01.02.2019, respondent/A11 filed a petition under Section 167(2) Cr.P.C., seeking bail. This was filed in the morning at 10.30 a.m before the learned Sessions Court. On the same day at 04.25 p.m., the prosecution filed an additional complaint in which they have also included as accused No.11, M.Ravindran @ Praveen @ Rex S/o. Mayandi and as accused No.12, G.Prathap @ Mike S/o. Late Chiranjeevi. They have also stated about the further investigation on information received from DRI Mumbai Zonal Unit regarding the involvement of A11 and A12 in facilitating a syndicate involved in illicit manufacture of Narcotics at Mumbai. They conducted search at the residence of A11 at Chennai and seized indiscriminating documents. The statements were also recorded from A11, M.Ravindran and he was arrested on 04.08.2018 and remanded to judicial custody. Thereafter, on information provided by A11, A12 was also summoned under Section 67 of the NDPS Act, 1985 and his statements were also recorded relating to his role in the seizure of Ketamine and Pseudo Ephedrine and relating to his knowledge of illegal manufacture of Narcotic drugs and its transport to Mangadu and further packing of the illegal drugs for illegal export out of India. It was also stated that substantial further information were received and he was also arrested and remanded on 29.09.2017. It was also stated in the additional complaint that further witnesses were also examined and the mobile phones used by A11 and A12 had been forwarded through the Court to the Director of Forensic Science, Gandhinagar, Gujarat, to carry out forensic analysis and that report is awaited. The said additional complaint was filed along with annexures including the memo of evidence, original documents submitted to the Court, material objects already submitted to the Court and the documents relied upon as Annexure- I to IV.

8. The petition under Section 167(2) Cr.P.C., filed by the accused and the additional complaint filed by the prosecution were both taken up for consideration by the learned Special Judge for NDPS cases for consideration and by order dated,

05.02.2019, the learned Special Judge, granted bail to the respondent/All herein under Section 167(2) of Cr.P.C. The present petition has been filed seeking to cancel the bail.

9. A perusal of the order of the learned Special Judge, shows that he was primarily concerned with the fact that the prosecution had not filed any petition seeking extension of time to file final report. However, the learned Judge had completely overlooked to examine the contents of the additional complaint filed by the prosecution. No discussion had been made on the effect of the additional complaint, since two further accused had been included and whether process is to be served on them or not and whether additional documents can be taken into consideration or not. The learned Judge only examined the petition under Section 167(2) of Cr.P.C., which itself was filed only on the 181st day and stating that an indefeasible right had accrued to the respondent/All, the learned Judge had granted bail.

10. Before this Court reliance has been placed on 1994 5 SCC 410, Sanjay Dutt V. The State, though C.B.I., Bombay, wherein the Honourable Constitution Bench of the Supreme Court had held in similar circumstances where the challan was filed, that the indefeasible right does not survive once challan had been filed, if already not availed of. Paragraph 50 is as follows:

"We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C., ceases to apply." [Emphasis Supplied]

11. The term if already not availed has been further examined in 2001 (2) SCC 453, Uday Mohanlal Acharya V. State of Maharashtra. In the said judgment, the Hon'ble Supreme Court had

finally recorded their conclusions as follows:

"1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

2. Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated. [Emphasis Supplied]

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of" used by this Court in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression "availed of" if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with the law laid down by this Court in the case of Mohd. Iqbal v. State of Maharashtra [(1996) 1 SCC 722 : 1996 SCC (Cri) 202].

"

[Emphasis Supplied]

12. It is argued by the learned counsel for the respondent that since the application had been filed in the Morning at 10.30 a.m and since the prosecution had filed their additional complaint only in the Evening at 04.25 p.m., the bail granted is correct since the accused had already availed of his remedy to be released under Section 167(2) Cr.P.C. However, in the Criminal Rules of Practice and Circular Orders, 1958, as made by the High Court for guidance of all criminal Courts in this State, definition of hours of sitting is as follows:-

"2.Hours of sitting.-The Court shall ordinarily be from 10.00 a.m to 5.30 p.m with an interval for lunch from 1.15 p.m to 2.00 p.m.

Every Sessions Judge and Magistrate shall ordinarily commence the sitting not later than 11.00 a.m each day and unless work of the day is disposed of earlier shall not rise

except for a brief interval of luncheon before 05.00 p.m. If circumstances such as pressure of work so require, the Court may commence the sittings by 10.00 a.m and continue until such hour as may be necessary:

Provided that no Court shall, on any day, be held before 7.30 a.m.:

Provided further that the existing Rules made by District managements for the guidance of Benches in their several districts as to the times and places of sitting shall continue in force until modified or withdrawn."

13. Thus the Court of Sessions conducts work from the time it sits till the time it rises. No specific advantage, can be taken that a petition filed at 10.30 a.m should be taken into consideration first and a complaint filed at 04.25 p.m should be rejected, only because it was filed later in the evening. The entire reasoning cannot stand scrutiny. I am not deliberately going into facts of the case but since the prosecution had filed an additional complaint, on the same date when the accused had also availed of his remedy under Section 167(2) Cr.P.C., implicating two further accused, enclosing further documents and further statements and also stating that the mobile phones had been recovered which have been forwarded to forensic the indefeasible right which had accrued to the accused, the learned Judge was wrong in granting bail. Accordingly, I hold that this Criminal Original Petition must be allowed and the bail granted by the learned Sessions Judge in Crl.M.P.No.131 of 2019 is cancelled and the Investigating Officer is directed to take the accused into custody forthwith.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The I Additional Special Judge,
First Additional Special Court
for exclusive Trial of cases,
Under NDPS Act, Chennai.

2.The Public Prosecutor,
High Court, Madras-104.

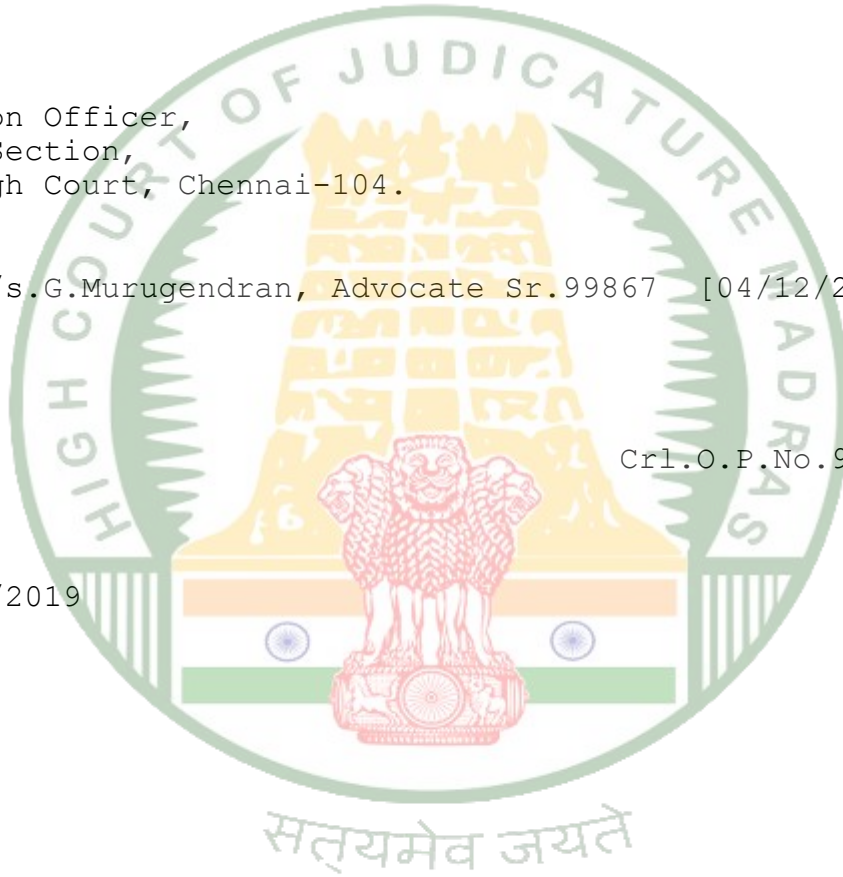
Copy to

The Section Officer,
Criminal Section,
Madras High Court, Chennai-104.

+1cc to M/s.G.Murugendran, Advocate Sr.99867 [04/12/2019]

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