UNION OF INDIA

v.

RATTAN MALLIK @ HABUL

(Criminal Appeal No. 137 of 2009)

JANUARY 23, 2009

[D.K. JAIN AND R.M. LODHA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985:

ss. 8/27A, 8/29 and 37 – Conviction for offences under provisions of the Act – Grant of bail to accused and suspension of sentence by High Court – Held: When prosecution/conviction is for offence(s) under a special statute and that statute provides specific provision for dealing with matters arising thereunder, the provisions cannot be ignored- Grant of bail, being without keeping in view the mandatory requirements of s.37, not sustainable – Matter remitted to High Court – Code of Criminal Procedure , 1973 – s. 439.

s.37 (1) (b) and (2) – Grant of bail – To the offender for offences under the Act – Parameters for – discussed.

High Court, by the impugned order had suspended the sentence awarded by trial Court to the respondent for having committed offences u/ss. 8/27A and 8/29 of Narcotic Drugs and Psychotropic Substances Act, 1985. Respondent was released on bail.

The question for consideration in appeal to this Court was whether High Court, while accepting the prayer for grant of bail, had kept in view the parameters of s.37 of the Act.

Allowing the appeal and remitting the matter to High Court, the Court

A HELD: 1.1. When a prosecution/conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, these provisions cannot be ignored while dealing B with such an application. In the present case, the respondent has been convicted and sentenced for offences under the Act and therefore, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for offences under C IPC, the relevant provision in the said special statute in this regard had to be kept in view. [Para 11] [539-A-D]

1.2. The impugned order having been passed ignoring the mandatory requirements of Section 37 of Narcotic Drugs and Psychotropic substances Act, 1985, D it cannot be sustained. In the present case, the circumstances which have weighed with the High Court to conclude that it was a fit case for grant of bail are : (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years and E (iii) that there is no chance of his appeal being heard within a period of seven years. The stated circumstances may be relevant for grant of bail in matters arising out of conviction under the IPC etc. but are not sufficient to satisfy the mandatory requirements as stipulated in sub- F clause (b) of sub-section (1) of Section 37 of the Act. Merely because, according to the Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and G convicted. It seems that the provisions of the Act and more particularly Section 37 were not brought to the notice of the Judge. [Paras 15 and 16] [541-E-H; 542-A-B]

2.1. It is clear from a bare reading of the non-obstante H

clause in Section 37 of the Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the Act is not only subject to the limitations imposed u/s. 439 Cr.P.C., it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. [Para 13] [540-D-F]

2.2. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression `reasonable grounds' has not been defined in the Act but means something more than *prima facie* grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of satisfaction on both the aspects is *sine qua non* for granting of bail under the Act. [Para 13] [540F-H]

Union of India v. Shiv Shanker Kesari **(2007) 7 SCC 798, relied on.**

2.3. While considering an application for bail with reference to Section 37 of the Act, the Court is not called upon to record a finding of `not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether

or not the accused has committed offence under the Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail. [Para 14] [541-A-D]

Dadu alias Tulsidas v. State of Maharashtra **(2000) 8 SCC 437, referred to.**

Case Law Reference:

(2000) 8 SCC 437	**referred to**	**Para 8**
(2007) 7 SCC 798	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 137 of 2009.

From the Judgment and Order dated 13.11.2006 of the High Court of Judicature at Allahabad in Crl. Appeal No. 662 of 2006.

A. Sharan, A.S.G., Sunita Sharma, S.N. Terdol and Sushma Suri for the Appellant.

A.K. De, Rajesh Dwivedi, V.P. Tripathi and Dipak Kumar Jena for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J.1. Delay condoned.

2. Leave granted.

3. Challenge in this appeal, by the Union of India, is to the order dated 13th November, 2006, passed by the High Court of Judicature at Allahabad suspending the sentence awarded

by the trial Court to the respondent for having committed offences under Sections 8/27A and 8/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') and granting him bail. A

4. Since in this appeal we propose to deal with the short question, viz. whether the High Court, while accepting the prayer for grant of bail, had kept in view the parameters of Section 37 of the NDPS Act, we deem it unnecessary to advert to the facts of the case against the respondent in greater detail. It would suffice to note that the case of the prosecution against the respondent was that he was involved in financing and trading in 14.900 kilograms of heroin, recovered from a specially made cavity above the cabin of a truck. Upon consideration of the evidence adduced, the Trial Court came to the conclusion that the prosecution had successfully proved the charges against the respondent and three others. On conviction, the Trial Court sentenced the respondent to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1 lac under Section 27A of the NDPS Act and undergo rigorous imprisonment for ten years and a fine of Rs.1 lac under Section 29 of the NDPS Act, with default stipulation. B C D E

5. Being aggrieved, the respondent preferred an appeal to the High Court along with an application for suspension of sentence and grant of bail till his appeal was finally decided. The High Court, by the impugned order, has allowed the bail application and has ordered that the respondent shall be released on bail on his executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the concerned Court. F

6. The considerations which weighed with the High Court for suspension of sentence and grant of bail are brief and for the sake of ready reference are extracted below: G

"The appellant has been convicted under Sections 8/27-A and 8/29 N.D.P.S. Act for ten years R.I and also fine. H

A Nothing has been found from his possession. Besides the appellant is in jail since 5.9.2003. Three years have already lapsed. There is no chance of the appeal being heard within a period of seven years."

B 7. Aggrieved thereby, the Union of India has preferred this appeal.

8. Mr. A. Sharan, learned Additional Solicitor General of India, strenuously urged that the High Court has committed a grave error of law in granting bail to the respondent, ignoring C the mandatory provisions of Section 37 of the NDPS Act. The learned counsel contended that the High Court lost sight of the restrictions and limitations imposed by Section 37 of the NDPS Act. According to the learned counsel, the grant of bail to the respondent, without recording any finding on the conditions as D stipulated in Section 37(1)(b)(ii) of the NDPS Act, the order suspending the sentence is ex facie illegal and therefore deserves to be set aside, with a direction to the respondent to surrender to custody forthwith. In support of the proposition that suspension of sentence by the appellate Court has to be within E the parameters of law, prescribed by the Legislature, the learned senior counsel placed reliance on a three judge Bench decision of this Court in *Dadu alias Tulsidas v. State of Maharashtra*[1].

F 9. Learned counsel appearing on behalf of the respondent, on the other hand, supported the impugned order and submitted that if the impugned order is read as a whole, it can be inferred therefrom that the learned Judge was conscious of the provisions of Section 37 of the NDPS Act. It is, thus, urged that the order granting bail to the respondent being G discretionary, this Court should be loath to interfere with it in exercise of its jurisdiction under Article 136 of the Constitution.

10. Having carefully gone through the impugned order, we

H 1 (2000) 8 SCC 437.

are constrained to observe that while dealing with the application for bail, the learned Judge appears to have lost sight of the mandatory requirements of Section 37 of the NDPS Act and thus, the impugned order is clearly unsustainable. A

11. The broad principles which should weigh with the Court in granting bail in a non-bailable offence have been enumerated in a catena of decisions of this Court and, therefore, for the sake of brevity, we do not propose to reiterate the same. However, when a prosecution/conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, these provisions cannot be ignored while dealing with such an application. As already noted, in the present case, the respondent has been convicted and sentenced for offences under the NDPS Act and therefore, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for offences under the Indian Penal Code, 1860 the relevant provision in the said special statute in this regard had to be kept in view. B C D E

12. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 with effect from 29th May, 1989 with further amendment by Act 9 of 2001 reads as follows:

> "37. *Offences to be cognizable and non-bailable.*- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)- F
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for offences under Section 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- G H

A (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 C (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (12 of 1974), or any other law for the time being in force on granting of bail."

13. It is plain from a bare reading of the non-obstante D clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause E (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, F have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression 'reasonable grounds' has not been defined in the said Act but means something G more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused H is not guilty of the alleged offence. [Vide *Union of India v. Shiv*

Shanker Kesari[2]] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act. A

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail. B C D

15. Bearing in mind the above broad principles, we may now consider the merits of the present appeal. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are : (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Indian Penal Code, 1860 etc. but are not sufficient to satisfy the mandatory requirements as stipulated in sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Merely because, according to the Ld. Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of E F G

2. (2007) 7 SCC 798. H

A the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the Ld. Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the B notice of the learned Judge.

16. Thus, in our opinion, the impugned order having been passed ignoring the mandatory requirements of Section 37 of the NDPS Act, it cannot be sustained. Accordingly, the appeal is allowed and the matter is remitted back to the High Court C for fresh consideration of the application filed by the respondent for suspension of sentence and for granting of bail, keeping in view the parameters of Section 37 of the NDPS Act, enumerated above. We further direct that the bail application shall be taken up for consideration only after the respondent D surrenders to custody. The respondent is directed to surrender to custody within two weeks of the date of this order, failing which the High Court will take appropriate steps for his arrest.

17. The appeal stands disposed of accordingly.

E K.K.T. Appeal disposed of.