CRIMINAL MISCELLANEOUS

Before P. S. Pattar, J.

THE STATE OF HARYANA,—*Appellant.*

versus

RAJINDER NATH,—*Respondent.*

Criminal Misc. No. 3859-M of 1975.

November 14, 1975.

Code of Criminal Procedure (2 of 1973)—*Sections* 167(2) *and* 439(2)—*Accused released on bail under proviso* (a) *to section* 167(2)—*Application for cancellation of bail after filing of the challan*—*Whether competent.*

Held, that if a person has been released on bail under proviso (a) to section 167(2) of the Code of Criminal Procedure 1973 for having remained in custody for more than 60 days and the challan has not been filed, then after the filing of the challan the prosecution has a right to make an application to cancel the bail of such an accused on the ground that on merits of the case he was not entitled to be released on bail. Although according to the proviso to section 167(2), after sixty days of detention an accused person is to be released on bail under the provisions of Chapter XXXIII of the Code, but it is not an order passed on the merits of the case. It, therefore, does not mean that after the filing of the challan the bail of the accused cannot be cancelled if he is not otherwise entitled to be released on bail on merits.

(Paras 11 and 12)

Application under section 439(2) *of the Code of Criminal Procedure, praying that bail granted to the respondent by Shri N. S. Rao, Sessions Judge, Ambala, in Bail Application No.* 194 *of* 1975 *on* 4*th September,* 1975, *be cancelled and he be committed to custody in accordance with law.*

Hari Narain Mehtani, Deputy Advocate-General, Haryana, *for the appellant.*

H. L. Sibal, Senior Advocate with A. K. Goel Advocate, *for the respondent.*

ORDER

(1) P. S. Pattar, J.—By this order the following petitions filed by the State of Haryana under section 439(2), Criminal Procedure Code,

for cancellation of the bail of the respondents in these petitions will be decided as common questions of law are involved therein:—

(1) Cr. Misc. No. 3859-M/1975	...	State of Haryana vs. Rajinder Nath.
(2) Cr. Misc. No. 3860-M/1975.	...	State of Haryana vs. Pt. Jagan Nath and others.
(3) Cr. Misc. 3861-M/1975.	...	State of Haryana vs. Mohinder Parkash Gupta.

(2) Against the respondents in cases mentioned at Serial Nos. (1) and (2) above, the first information reports were lodged on 5th July, 1975, under rule 33 of the Defence of India Rules, and the respondents were arrested on the same date. However, in the third case *State* vs. *Mohinder Parkash Gupta,* the case under rule 33 of the Defence of India Rules was registered on 7th July, 1975, and the accused were arrested on that date.

(3) The Haryana Government issued notification under clause (b) of rule 184 of the Defence of India Rules, 1971 (hereinafter called the Rules), wherein rule 33 was specified and the same was published in the Gazette on 8th July, 1975. The accused in all these three cases were admittedly arrested prior to 8th July, 1975. The learned Sessions Judge, Ambala, held in his order dated 4th September, 1975, in case *State* vs. *Rajinder Nath* (supra), that since the accused was arrested prior to the issuance of the above-mentioned notification on 8th July, 1975, by the State Government, therefore, he is entitled to be released on bail and he ordered that he should be released on bail on his furnishing a bond in the sum of Rs. 3,000 with one surety in the like amount to the satisfaction of the Illaqa Magistrate. Similar orders releasing the accused on bail in the other two cases mentioned at Serial No. (2) and (3) above were passed on 30th August, 1975, and 5th September, 1975, respectively. The State of Haryana filed these petitions to cancel the bail granted to the accused in these cases on the allegations that on the dates when the orders granting bail were passed by the Sessions Judge, the notification under clause (b) of rule 184 of the Rules had already been issued and, therefore, in accordance with the provisions of rule 184, the accused could not be released on bail and the orders of release being illegal may be set aside and the accused may be arrested and committed to custody

Notices of these petitions were issued to the respondents and they contested the same. Since common questions of law are involved in these petitions, therefore, these petitions will be decided by this order.

(4) Mr. H. N. Mehtani, the learned counsel for the State, argued, that according to the provisions of rule 184 of the Defence of India Rules, the respondents could not be released on bail, and, therefore, the orders, passed by the Sessions Judge are illegal and may be set aside and they may be committed to custody. There is no dispute regarding the facts of these cases mentioned above. The law regarding the grant of bail is a matter of procedure and the order of bail is to be passed in accordance with the law prevailing at the time when the order is passed. Rule 184 of the Defence of India Rules reads as follows:—

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), no person accused or convicted of a contravention of these rules or orders made thereunder shall, if in custody, be released on bail on his own bond unless—
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> (a) the prosecution has been given an opportunity to oppose the application for such release, and
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> (b) where any such provision of these rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention."

In the instant cases the Sessions Judge passed the orders granting bail to the respondents in these cases long after the issuance of the notification under clause (b) of rule 184 of the Defence of India Rules. He also did not give any finding that there were reasonable grounds for believing that they are not guilty of the contravention of rule 33 of the Rules. Therefore, the orders passed by the Sessions Judge cannot be sustained.

Under section 439(2), Criminal Procedure Code, the High Court has ample power to set aside an order which is against the express

provisions of law. This section says that the High Court may direct that any person who has been released on bail under this Chapter may be arrested and commit him to custody. Rule 184 of the Rules lays down a special procedure for grant of bail to the accused who are being prosecuted for contravention of these rules or orders made thereunder. Unless the conditions laid down in this rule 184 were satisfied, the Sessions Judge had no jurisdiction to pass the impugned orders granting bail to the accused.

(5) Mr. H. L. Sibal, the learned counsel for the respondents, argued that the Notification No. 4026-3H-75/20497, dated 8th July, 1975, published in the Extraordinary Haryana Government Gazette dated 8th July, 1975, was issued under clause (b) of rule 184 of the Defence of India Rules, 1971, wherein rule 33 of the Defence of India Rules was specified for the purpose of rule 184, but in exercise of the powers conferred by section 3 of the Defence and Internal Security of India (Act No. 32) of 1971, the Defence of India Rules, 1971 were amended and it was directed that for the words, "Defence of India Rules", the words "Defence and Internal Security of India Rules" shall be substituted. He then contended that the above-mentioned notification dated 8th July, 1975, has no force as it was not issued under clause (b) of rule 184 of the Defence and Internal Security of India Rules, 1971, and consequently rule 184 of the said Rules does not apply to these cases. Under clause (b) of rule 184, the notification can also be issued by the Central Government. During arguments, Mr. H. N. Mehtani, the counsel for the State, produced copy of the notification dated 9th July, 1975, issued by the Central Government and published in the Gazette of India Extraordinary on 9th July, 1975, under clause (b) of rule 184 of the Defence and Internal Security of India Rules, 1971, wherein rule 33 of the said rules was specified for the purpose of the said rule. In view of this notification of the Central Government, there is no force in the contention of the counsel for the respondents and the same is rejected.

(6) Further, it was held in *M/s. Titagarh Paper Mills Ltd.* vs. *Orissa State Electricity Board and another*, (1), that if an authority takes action which is within its competence, it cannot be held to be invalid, merely because it purports to be made under a wrong provision, if it can be shown to be within its power under any other provision. A mere wrong description of the source of power cannot

(1) (1975) 2 Supreme Court Cases 436.

invalidate the action of an authority, if it is otherwise within its power. In the instant case, it is undisputed that the Haryana Government has got jurisdiction to issue notification under clause (b) of rule 184 of the Defence and Internal Security of India Rules, 1971, to specify any of the rules for the purpose of the said rule 184. The Haryana Government Notification as mentioned above is dated 8th July, 1975. The notification by the Central Government under section 3 of the Defence and Internal Security of India Act, 1971, was issued on 1st July, 1975, wherein the words, "Defence and Internal Security of India Rules, 1971," were substituted for the words, "Defence of India Rules, 1971.". It seems that this notification was not in the knowledge of the Haryana Government when the above-mentioned notification was issued. The Haryana Government had power to issue the notification and the mere fact that the correct name of the Rules was not mentioned therein would not invalidate the notification. Therefore, on this score also, the contention of the learned counsel for the respondents is repelled.

(7) The opening words of rule 184 of the Rules are that "notwithstanding anything contained in the Code of Criminal Procedure, 1898, no person.....". The counsel for the respondents argued that since this rule has not been amended after the coming into force of the Code of Criminal Procedure, 1973, with effect from 1st April, 1974, therefore, the provisions of the new Code are not applicable to these petition. This contention is also not correct. The Code of Criminal Procedure, 1973, has repealed the old Criminal Procedure Code, 1898, Mr. Mehtani, the learned counsel for the State, contended that by virtue of section 8 of the General Clauses Act, 1897, this rule 184 must be deemed to have been amended and for the words, "Notwithstanding anything contained in the Code of Criminal Procedure, 1898", the words, "Notwithstanding anything contained in the Code of Criminal Procedure, 1973, be deemed to be substituted. This contention is correct and must prevail. Clause 8(1) of the General Clauses Act, 1897, reads as follows:—

> "8(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provisions so re-enacted."

According to this clause 8(1) of the General Clauses Act, after the commencement of the Code of Criminal Procedure, 1973, the reference in rule 184 of the Rules has to be made to this Code and not to the old Code, which has been repealed by the new Code. In this respect reference may be made to *Jagat Singh* v. *Gurminder Singh and another*, (2) *and New Central Jute Mills Co. Ltd.* v. *The Assistant Collector of Central Excise*, (3). Therefore, the above contention of the learned counsel for the respondents has also no force and is repelled.

(8) The learned counsel for the respondents then contended that according to proviso (a) to section 167(2) of the Code of Criminal Procedure, 1973, no Magistrate can authorise the detention of the accused person in custody for a period exceeding sixty days and on the expiry of this period the accused shall be released on bail if he is prepared to and does furnish bail. This proviso reads as follows:—

> "(a) The Magistrate may authorise detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding sixty days, and on the expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter."

(9) In *Baldev Singh* v. *State of Punjab*, (4) it was held by a Full Bench of this Court that according to the proviso to section 167(2), Criminal Procedure Code, 1973, no application for bail by the accused need be made and the Magistrate is himself duty bound to release him on bail if he has already been in custody for a period of sixty days and is prepared to furnish the bail. After the expiry of sixty days' detention the Judicial Magistrate has no jurisdiction to grant judicial or police custody of the accused person.

(2) 1970 P.L.J. 534.
(3) A.I.R. 1971 S.C. 454.
(4) 1975 P.L.R. 534.

(10) There is no mention of this provision in the orders of bail passed by the Sessions Judge, Ambala. Mr. H. L. Sibal, the learned counsel for the respondents, contended that the bail was correctly granted under the provisions of law and, therefore, it cannot be cancelled unless it is alleged and proved that the accused is likely to hamper the investigation or to tamper with the evidence or he is likely to run away to a foreign country or go underground or would commit acts of violence, in revenge, against the police and the prosecution witnesses etc. as laid down in *The Public Prosecutor* v. *George Williams,* (5). In the instant case, the orders of the Sessions Judge do not show that the respondents were released on bail under the provisions of proviso (a) to section 167(2), Criminal Procedure Code, 1973. In the orders it is simply mentioned that the provisions of rule 184 of the Defence of India Rules are not applicable because the notification under clause (b) of the said Rules was issued on 8th July, 1975, after the arrest of the respondents. However, Mr. Sibal argued that in *State of Haryana* v. *Rajinder Nath,* (6) and *State of Haryana* vs. *Mohinder Parkash Gupta,* (7) the accused were released after more than sixty days of detention and, therefore, in view of the law laid down in the above-mentioned Full Bench case, they must be deemed to have been released under proviso (a) to rule 167(2), Criminal Procedure Code. He, however, conceded that in case Criminal Miscellaneous re. *State of Haryana* vs. *Jagan Nath and others* (8), the accused were released on bail before the expiry of sixty days and consequently this proviso does not apply to this case.

(11) Even if it be assumed that in the two cases Criminal Miscellaneous Nos. (6) (*supra*) and (7) (*supra*) the accused may be deemed to have been released on bail under proviso (a) to section 167(2), Criminal Procedure Code, even then it is not a bail granted on merits after complying with the conditions laid down in rule 184 of the Rules. This proviso (a) to section 167(2) (*supra*) contains a technical rule to release a person from custody if he is in detention for sixty days. Therefore, he is not to be considered to have been granted bail on merits. After the challan has been filed, the State has got a right to make an application under section 439(2), Criminal Procedure

(5) A.I.R. 1951 Madras 1042.
(6) Cr. Mis. 3859/75 decided on 14-11-75.
(7) Cr. Mis. 3861 M-75 decided on 14-11-75.
(8) GM 3860 M-75 decided on 14-11-75.

Code, to the High Court that the accused person may be arrested and committed to custody. This section reads as follows:—

> "(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

While granting bail, the Court has to look to the nature and seriousness of the offence, the circumstances which are peculiar to the accused and reasonable apprehension of evidence being tampered with besides the large interest of the public or the State has to be seen. Although according to the proviso to section 167(2), after sixty days of detention an accused person is to be released on bail under the provisions of Chapter XXXIII of the new Code of Criminal Procedure, but it is not an order passed on the merits of the case i.e. whether the accused is entitled to be granted bail. This proviso (a) applies even to murder cases, which are punishable with death or imprisonment for life. In a murder case if the challan has not been filed, after the expiry of sixty days of the arrest of the accused, he is entitled to be released on bail. But, it does not mean that after the filing of the challan the bail of the accused cannot be cancelled if he is not otherwise entitled to be released on bail on merits. As stated above, in the present cases, the respondents were not granted bail on merits after complying with the conditions laid down in rule 184 of the Rules.

(12) For the reasons given above, I am of the considered view that if a person has been released on bail under proviso (a) to section 167(2), Criminal Procedure Code, for having remained in custody for more than sixty days and the challan has not been filed, then after the filing of the challan, the prosecution has a right to make an application to cancel the bail of such an accused on the ground that on merits of the case he was not entitled to be released on bail. Therefore, the above contention of the learned counsel for the respondents is rejected.

(13) Lastly, the counsel for the respondents argued that the allegations made against the respondents in these cases do not show any contravention of rule 33(3) of the Rules and they are entitled to be released on bail even if rule 184 of the Rules, is held to be applicable. This contention is not correct. After reading the first information reports in these cases and the statements of the witnesses made under

section 161, Criminal Procedure Code, it cannot be said at this stage that there are reasonable grounds for believing that they are not guilty of contravention of that rule.

(14) For the reasons given above, all these three petitions are allowed and the bail granted to the respondents is cancelled and they are ordered to be arrested and committed to custody. The respondents are ordered to surrender to their bail bonds. It is, however, directed that the decision of the cases against the respondents be expedited.

H.S.B.

APPELLATE CIVIL

Before Prem Chand Jain and Rajindra Nath Mittal, JJ.

SARDARA SINGH ETC.,—*Defendants—Appellants.*

versus

HAKAM SINGH ETC.,—*Respondent.*

Regular Second Appeal No. 380 of 1971.

November 21, 1975.

Punjab Land Revenue Act (XVII of 1887)—Sections 3(6), (7) and (8), 86, 88, 89 and 158—Lambardar not collecting land revenue—Whether a 'defaulter'—Land of such Lambardar sold to recover arrears of land revenue—Suit challenging the sale—Whether triable by a Civil Court—Purchase money not deposited within the prescribed period—Sale—Whether a nullity.

Held, that if any amount as arrears of land revenues is due from a land owner and the same could not be recovered by any other processes, in the first instance, his holding in respect of which the arrear is due, is to be sold and thereafter his other property. The word 'defaulter' in the various sections has been used for the land owner from whom the arrears of land revenue are actually due. There is no provision in the Punjab Land Revenue Act from which it can be inferred that the word 'defaulter' would include a Lambardar. A 'defaulter' is a person who is liable for arrears of land revenue and a Lambardar as such cannot be held to be liable for payment of arrears of land revenue of the land owners in the estate/portion of the estate of which he is a Lambardar and is therefore not included in the definition of the term 'defaulter'. Even after the amendment of the