

(1994) 09 MAD CK 0035

In the Madras High Court

Case No : Criminal O.P. No"s. 6928 and 6936 of 1994

Arul and another

APPELLANT

Vs

Inspector of Police and others

RESPONDENT

Date of Decision : 20-09-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2), 439
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 36A, 36A(1), 37, 37(1)

Citation : (1995) 1 ALT(Cri) 319 : (1995) 75 ELT 44

Hon'ble Judges : Thangamani, J

Bench : Single Bench

Advocate : T.K. Sampath, T.K. Sampathy and N.G. Narendran, for the Appellant;
Mr. S. Shanmighavelayutham, Assistant Public Prosecutor, for the Respondent

Judgement

1. The petitioners are charged u/s 21(b) of NDPS Act for having been found in possession of 2 grams and 30 grams respectively of herion

powder. They seek bail under proviso (a)(i) to Section 167(2) of Cr.P.C. on the ground that no charge sheet has yet been filed even though they

are in custody for more than 90 days. They also plead that the delay in sending the property to Court entitles them to be released on bail.

2. The main argument of learned counsel for the petitioners is that on the failure of the prosecution to lay the charge sheet within 90 days they have

to be released on bail u/s 167(2) Cr. PC. They point out that u/s 167(2) no Magistrate shall authorise the detention of the accused person in

custody for a total period exceeding ninety days, where the investigation relates to an offence punishable with death, imprisonment for life

imprisonment for a term of not less than ten years. And the accused person shall be released on bail if he is prepared to and does furnish bail. They

argue that Arts. 21 and 22 of the Constitution of India cannot be subjected to presumptions and limitations contained in the section of NDPS Act.

As per their contention, though Section 36(A) of the NDPS Act commences with a non-obstinate clause ""Notwithstanding anything contained in

the Code of Criminal Procedure, 1973"" sub-section (3) of Section 36(A) provides that nothing contained in that section shall be deemed to affect

the special powers of the High Court regarding bail u/s 439 of the Code of Criminal Procedure, 1973. So Section 37 of the NDPS Act does not

limit the powers of the High Court and the powers of this court are unlimited. Besides if we go into the contours of Section 36(A) of NDPS Act

we find that it contains three sub-sections. In the first sub-section, after providing that offences under NDPS Act shall be tried by special court

constituted by the Government, it enables a Magistrate to order detention of the accused forwarded to him u/s 167(2) of the Code. Here the same

powers as contained in Section 167(2) of the Code are repeated with the only alteration that the court to which the accused is to be forwarded

next is the special Court constituted under the NDPS Act. Clauses (c) of the said sub-section is important in this context. It reads thus :-

(c) the Special Court may exercise, in relation to the person forwarded to it under Clause (b), the same power which a Magistrate having

jurisdiction to try a case may exercise u/s 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case

who has been forwarded to him that section.

The said clause is clear indication that the directive contained in Section 167(2) proviso is intended to be issued at the appropriate stage even if

offences under NDPS Act are involved. If section 37 of the NDPS Act is allowed to control or restrict the application to proviso to S. 167(2) of

the Code, the latter provision would become ineffective and a dead letter.

3. In support of their plea, learned counsel has placed reliance of Berlin Jospeh @ Ravi v. State 1992 1 Crimes 1221 and Md. Abdul v. State of

West Bengal 1991 2 Crimes 741. In the first case of Full Bench of the Kerala High Court has held that conditions in Section 37 of the NDPS Act

for granting bail do not have any overriding effect on the provision to Section 167(2) of the Code of Criminal Procedure. In the next case a

Division Bench of the Calcutta High Court has laid down that in cases where

clause (c) to Section 36(A)(1) of the NDPS Act is attracted, Section 167 of Cr. PC will apply and in all cases where charge has not been submitted and cognizance of the offence has not been taken by Special Judge the provisions of Section 167 of the Code have to be complied with. Though learned counsel for the petitioners maintained that this court had no occasion so far to consider the question involved in the present petitions learned Additional Public Prosecutor brought to my notice two recent decisions of learned Single Judges. In Seemairaj and others Vs. Asstt. Collector of Central Excise, Pratap Singh, J. has held that the provision to Section 167(2) Cr. PC is not applicable to cases covered by Section 37 of the NDPS Act. In such cases, only if the requirements of Section 37(b) of the Act are satisfied, the accused can be released on bail. The proviso to sub-section (2) of Section 167 Cr. PC is not a limitation for the purpose of grant of bail, but only a technical lever enabling the release of an accused person where a charge sheet has not been filed within 90 days, if the offence is punishable with life sentence or sentence of ten years or above, irrespective of the fact whether investigation is still pending or not. If one reads the provisions of Sections 36A and 37 of the NDPS Act together and particularly sub-section (2) thereof, it becomes clear that the proviso to sub-section (2) of Section 167 will have no application in such cases where a person had been charged under any of the offences falling within the scope of the NDPS Act. In Sanjeevi v. State (1993) Mad LW. (Cri) 76 Ali Mohammed, J. has followed the said judgment and dissented from the Full Bench decision of the Kerala High Court. He held that the proviso to Section 167(2) Cr. PC is not applicable to cases covered by Section 37 of the NDPS Act. I am in respectful agreement with the view expressed by the two learned Judges that conditions in Section 37 of the NDPS Act have to be complied with before releasing an accused on bail even after expiry of 90 days.

4. Further, in Narcotics Control Bureau Vs. Kishan Lal and others, the Supreme Court has laid down that the NDPS Act is a special enactment and it was enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of Section 37 of NDPS Act are in negative terms limiting the

scope of the applicability of the provisions of Cr.PC regarding bail, in our view, it cannot be held that the High Court's powers to grant bail u/s

439 Cr. PC are not subject to the limitation mentioned u/s 37 of the NDPS Act. It can thus be seen that when there is special enactment, in force

relating to the manner of investigation, enquiry or otherwise dealing with such offences, the other power under Cr. PC. should be subject to such

special enactment. In interpreting the scope of such a statute the dominant purpose underlying the statute has to be borne in mind. Section 37 of the

NDPS Act starts with a non-obstante clause stating that Notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person

accused of an offence prescribed therein shall be released on bail unless the conditions contained therein are satisfied. Consequently the power to

grant bail under any of the provisions of Cr. PC. should necessarily be subject to the conditions mentioned in Section 37 of the NDPS Act. The

powers of the High Court to grant bail u/s 439 are subject to the limitations contained in the amended Section 37 of the NDPS Act and the

restrictions placed on the powers of the Court under the said Section are applicable to the High Court also in the matter of granting bail.

5. Learned counsel for the petitioners also placed reliance on Aslam Babalal Desai Vs. State of Maharashtra, . This decision deals with

cancellation of bail and I find no relevancy of the same to the present controversy. The observation therein at page 827 that when the Legislature

made it obligatory that the accused shall be released on bail if the charge sheet is not filed within the outer limit provided by proviso (a) to Section

167(2), it manifested concern for individual liberty Notwithstanding the gravity of the allegation against the accused is of not much help to the

present petitioner, since the mandate contained in Section 167(2) Cr. PC in relation to Section 37 of the NDPS Act was not under consideration

of their Lordships in that case. The Supreme Court has extracted in para 27 at page 894 this passage from Rajnikant Jivanlal and Another Vs.

Intelligence Officer, Narcotic Control Bureau, New Delhi, (page 536)

An order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on

bail on the default of the prosecution in filing charge-sheet, within the prescribed period. The right to bail u/s 167(2) proviso (a) thereto is absolute.

It is a legislative command and not court's discretion : If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be release on bail.

Needless to say this is also of no avail to the petitioner for the reason mentioned earlier.

6. In support of the Second contention the petitioners placed reliance on the decision of Arunachalam, J. dated 11-5-1993 in CrI OP No. 6012 of

1993. There the petitioner was arrested on 8-4-1993 for having been found in possession of 1.1 gram of heroin powder. The property was sent to

Magistrate only on 12-4-1993. Government Advocate present in Court was unable to give out any reason for the delayed despatch. On those

facts, learned Judge was inclined to hold that the petitioner was not guilty of offence. And since no bad antecedents had been placed before him

the Court prima facie concluded that the petitioner was not likely to commit any offence while on bail, and so ordering released him on bail.

Whereas in the present case learned Additional Public Prosecutor who opposes the bail plea points out that the property CrI. OP No. 6928 of

1994 was sent to the court of XIV Metropolitan Magistrate, Egmore on the very same day of seizure which was 24-4-1994. Learned Magistrate

had initialled in Form No. 91 acknowledging the receipt of the property and ordered the same to be produced before the Special Court on the

next working day. And records disclose that the Special Court received the property on 3-5-1994. In the other case the property had been

produced before the very same Magistrate on 12-5-1994 and as per his orders it was received in Special Court on 18-5-1994. So, there is

absolutely no delay in sending the property to Court in these cases. And no materials have been placed for the Court to be satisfied that there are

reasonable grounds for believing that the petitioners are not guilty of the offences alleged against them and they are not likely to commit any offence

while on bail. The requirements of Section 37(1)(b)(ii) are not complied with.

7. In the result, both the applications are dismissed.

8. Petitions dismissed.