

(1994) 09 MP CK 0047

In the Madhya Pradesh High Court

Case No : Miscellaneous Cri. Case No. 1706 of 1994

Gauri Shankar Gopilalji Patidar

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 20-09-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2)

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 8

Citation : (1995) J LJ 47 : (1995) 40 MPLJ 358 : (1995) MPLJ 358

Hon'ble Judges : J.G. Chitre, J

Bench : Single Bench

Advocate : Jaisingh, for the Appellant; G. Desai, Dy. G.A., for the Respondent

Final Decision : Allowed

Judgement

J.G. Chitre, J.

Applicant Gaurishankar is hereby making a prayer for release on bail by this application. Applicant has been charged for commission of offence punishable under provision of Section 8 read with section 18 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S. Act). It is the contention of the applicant that the charge sheet has not been submitted against him in the Court by the investigating agency within period of 90 days from the date of his arrest. He is entitled to be released on bail in view of provisions of Section 167(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Code").

As this application is revolving around the sole point of the right of the applicant to get released on bail in view of provisions of Section 167(2) of the Code, it is not necessary to state prosecution allegation against him. It is admitted fact that applicant has been arrested by the police on the charge of commission of offence punishable u/s 8/18 of the N.D.P.S. Act. It is also admitted fact that the charge sheet has not been submitted against him in the Court for the said offence within

the period of 90 days from the date of his arrest.

Learned counsel for the applicant Shri Jaisingh placed reliance on the judgment of the Supreme Court in the matter of Rajnikant Jivanlal and Another Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi, wherein the Supreme Court has held -

"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 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 released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate to the accused to furnish the requisite bail bonds. The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed the bail granted under proviso (a) to Section 167(2) could be cancelled."

Learned counsel Shri Jaisingh also placed reliance on the judgment of Supreme Court in the matter of Director of Enforcement v. Deepak Mahajan and ano. judgment reported in 1994 SCC 785, wherein the Supreme Court observed :

"A conjoint reading of Section 57 (corresponding to Section 61 of the Old Code) and Section 167(1) and (2) barring the provisos to sub-section (2) of the Code together manifestly shows that the legislature has contemplated that the investigation of the offence in case of a person arrested without a warrant should be completed in the first instance within twenty four hours and if the investigation cannot be completed within that period then the Magistrate can authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days. The present proviso (a)(i) and (ii) of Section 167(2) empowers the Magistrate to authorise the detention of the accused person otherwise than in the custody of the police beyond the period of 15 days. If the investigation is not completed within the prescribed period, the accused is entitled to bail as embodied in the statute itself provided the accused person is prepared to and does furnish bail and the person released on bail u/s 167(2) of the Code should be deemed to have been so released under the provisions of Chapter XXXII for the purposes of that Chapter."

The Supreme Court further observed in the same matter -

"Though Section 167(1) refers to the investigation by the police and the transmission of the case diary to the nearest Magistrate as prescribed under the Code etc. the main object of sub-section (1) of Section 167 is the production of an arrestee before a Magistrate within 24 hours as fixed by Section 57 when the investigation cannot be completed within that period so that the Magistrate can

take further course of action as contemplated under sub-section (2) of Section 167."

The Supreme Court further observed that provisions of Section 167(1) and (2) of the Code, are attracted in a case where the accused has been produced before a Magistrate for offence punishable u/s 35 of the FERA or Section 104 of Customs Act. Supreme Court observed in the same matter that "person arrested" can be detained by the Magistrate in exercise of his power u/s (2) of the Code. Supreme Court held in other words person arrested under "FERA or "Customs Act" is assimilated with the characteristic of "accused" within the range of Section 167(1) and as such is liable to be detained u/s 167(2) of the Code by Magistrate when produced before him. In the same matter the Supreme Court also held that -

"The combined operation of Section 4(2) r/w 26(b) of the Code is that the offence complained of should be investigated or inquired into or tried according to the provisions of the Code where the enactment which creates the offence indicates no special procedure. Section 4(2) r/w Section 26(b), Criminal Procedure Code which governs every criminal proceeding as regards the course by which an offence is to be tried and as to the procedure to be followed renders the provisions of the Code applicable in the field not covered by the provisions of the FERA or Customs Act".

Supreme Court further held that -

"Section 4 is comprehensive and Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In short, the provisions of the Code would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Code. The second limb of Section 4(2) itself limits the application of the provisions of the Code."

In the same matter the Supreme Court held that -

"Therefore, the conclusion is that a Magistrate before whom a person arrested by the competent authority under the FERA or Customs Act is produced can authorise detention in exercise of his powers u/s 167. Otherwise the mandatory direction u/s 35(2) of FERA or Section 104(2) of the Customs Act, to take every person arrested before the Magistrate without unnecessary delay when the arrestee was not released on bail under sub-section (3) of those special Acts, will become purposeless and meaningless and to say that the courts even in the event of refusal of bail have no choice but to set the person arrested at liberty by folding their hands as a helpless spectator in the face of what is termed as "legislative casus omissus" or legal flaw or lacuna, it will become utterly illogical and absurd."

Thus, relying on these observations of the Supreme Court in the matter of

Deepak Mahajan's case (supra) learned counsel Shri Jaisingh argued that the judgment of the Full Bench of this High Court in the matter of Ramdayal v. Central Narcotic Bureau, reported in 1992 MPLJ 834 is overruled. He argued that the applicant is now entitled to be released on bail as a matter of right by the default of the investigating agency when it did not submit the charge-sheet against the applicant in the Court.

Learned Dy. G. A. Shri Desai for the State, submitted that in the matter of Ramdayal's case (supra) the Full Bench of this High Court has held that -

"Section 167(2) proviso Criminal Procedure Code is not applicable to a proceeding under Narcotic Drugs and Psychotropic Substances Act. Even if charge-sheet is filed after 90 days of the arrest of the accused on that ground itself the person charged u/s 18 of the Act is not entitled to get bail from the High Court. "Special Court" and High Court are equally placed in respect of competence u/s 37 of the Act in the matter of grant of bail to a person accused of an offence under the said Act. Irrespective of the date of submission of the charge-sheet it will be open always to the "Special Court" and the High Court to consider the prayer u/s 37 and both the courts are required to dispose of the prayer in terms only of the said provision because no power outside that is invocable by a person accused under the Act to be released on bail".

Learned Dy. G. A. pointed out that in that in para 19 of the Full Bench decision of this High Court has observed in the matter of Ramdayal's case (supra) that -

" "Limitations" contemplated u/s 37(1) make it sole repository of bail power of the Special Court and High Court in respect of a person booked for an offence committed under the Act. However, there may be cases when these "limitations" may be inoperative. Such as, when the arrest giving rise to the confinement is challenged as contravening any mandatory provision of the Act and of the entire proceeding under the Act suffering jurisdictional infirmity. In other words the question would be of an inbuilt jurisdictional bar operating to the proceeding under the Act continuing pursuant to the arrest. In such a case the bail power has to be found outside Section 37(1) and in terms of sub-section (2) provisions of Criminal Procedure Code, Chapter XIII, have to be resorted to and the "limitations" are to be ignored. Obviously it will depend on the type of the bar corresponding to the nature of infraction and the provision infringed. If the arrest leads to seizure of any substance possession of which is an offence, the scope of legislative authority and manner of use of that authority may raise jurisdictional questions impinging on lawful continuity of the subsequent proceedings."

Pointing out these observations of the Full Bench decision of this High Court, Shri Desai, learned Dy. G. A. submitted that the judgment of Supreme Court in Deepak Mahajan's case (supra) has not overruled the decision of Full Bench decision of this High Court in Ramdayal's case (supra) wherein the Full Bench has held that -

"a person who has been charged for committing offence punishable under the

provisions of N.D.P.S. Act can be released on bail only within a limitation pointed by Section 37 of the N.D.P.S. Act."

Shri Desai, Dy. G. A. further submitted that in the matter of Deepak Mahajan's case (supra) the Supreme Court dealt with the power of the Magistrate in respect of a person who has been produced by investigating agency. He pointed out that in the said judgment the Supreme Court held that -

"Though the officers doing the investigation in FERA and Customs Act, are not police officers they are bound to produce such offenders before the Magistrate within 24 hours of their arrest and in that case in view of provisions" of Section 167 of the Code, the Magistrate can remand such persons to the custody."

He argued that in the said judgment the Supreme Court has not said anything about the power of the Magistrate to release such an offender on bail after the default committed by investigating agency in not submitting the charge-sheet in the court within the period 60/90 days. Shri Desai, further submitted that in view of all this position of law, the bail application preferred by the applicant deserves to be dismissed.

A recent judgment of the Supreme Court is available dealing with the subject matter of controversy and that is the judgment in the matter of Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, The said judgment is dated 12-7-1994. In this judgment the Supreme Court has dealt with the provisions of Section 167(2) of the Code as well as provisions of Section 20(4)(b) and Section 20(8) of the TADA in context with the grant of bail to an accused brought before the Designated Court on account of default in submitting the charge-sheet. After considering the provisions of Section 3(1) of TADA and considering the necessity of the provisions of TADA in view of "terrorism", "terrorist" the Supreme Court has considered provisions of Section 167 in relation to Section 20(4) of TADA, while dealing with the said provisions, the Supreme Court has observed in Hitendra Vishnu Thakur's case (supra) that - "It is essentially to treat such a criminal and deal with him differently than an ordinary criminal capable of being tried by the ordinary courts under penal law of the land."

Keeping in view the seriousness of the offence under TADA and the necessity of enacting TADA, the Supreme Court has made certain observations in respect of the right of the accused to get bail on account of default in view of provisions of Section 167 of the Code.

The Supreme Court observed in matter of Hitendra Thakur's case (supra) -

"The object behind the enactment of Section 167 of the Code was that the detention of an accused person should not be permitted in custody pending investigation for any unreasonably longer period. However, realising that it may not be possible to complete the investigation in every case within 24 hours or even 15 days, as the case may be, even if the investigating agency proceeds

with utmost promptitude, Parliament introduced the proviso to Section 167(2) of the Code prescribing the outer limit within which the investigation must be completed."

The proviso to sub-section (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the prescribed period, the accused would be free to seek release on bail and if he is prepared to and thus furnishes bail, the Magistrate shall release him on bail and such release shall be deemed to be granted bail under Chapter XXXIII of the Code.

The Supreme Court further observed in the said judgment :-

"Section 167 r/w Section 20(4) of TAD A, thus, strictly speaking is not a provision for "grant of bail" but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-sheet if necessary, in the Court. The proviso to Section 167(2) of the Code read with Section 20(4)(b) of TAD A, therefore, creates an indefeasible right in the accused person on account of the "default" by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. Such order is generally termed as an "order-on-fault" as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period."

Supreme Court further observed :

"With the amendment of clause (b) of sub-section (4) of Section 20 r/w proviso to sub-section (2) of Section 167 of Criminal Procedure Code, an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law u/s 173, Criminal Procedure Code. An obligation, in such a case, is cast upon the Court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section 20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf."

It was further observed that -

"Once the period for filing the charge-sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20, TADA r/w 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnishes the requisite bail."

In the same matter the Supreme Court has observed that Constitution of India

as well as the Code of Criminal Procedure exposes that an arrested person, who has been detained in custody, shall not be kept in detention for unreasonable delay and that the investigation must be completed as far as possible within 24 hours. Hence, the police is obliged to forward the accused along with the case diary to the nearest Magistrate for further remand of the accused person. The Magistrate, on the production of the accused, must scrutinise the same carefully and consider whether the arrest was legal and proper and whether the formalities required have been complied with and then may grant further remand, if the Magistrate is so satisfied. The law enjoins upon the investigating agency to carry out the investigation in a case where a person has been arrested and detained, with utmost urgency and complete the investigation with great promptitude, in the prescribed period. The object behind the enactment of Section 167 of the Code was that the detention of an accused person should not be permitted in custody pending investigation for any unreasonably longer period. However, realising that it may not be possible to complete the investigation in every case within 24 hours, or even 15 days, as the case may be, though the investigating agency proceeds with utmost promptitude.

I have quoted the observations of Supreme Court in the matter of Deepak Mahajan's case and Hitendra Thakur's case (supra) only for the purposes of demonstrating that though the offences which are contemplated by provisions of FERA, Customs Act and TADA are very serious in nature, the Supreme Court has held that provisions of Section 167(1) and (2) are applicable in view of the provisions of Section 4 of the Code. It is to be noted here that the offences which are punishable under FERA and Customs Act are creating danger to the fiscal policies and economy of the country. The offender committing the crime under provisions of those special enactments are creating far reaching danger to the country or the nation. Even then in view of the provisions of Section 4, provisions of Section 167(1) and (2) are applicable as it has been held by the Supreme Court in Deepak Mahajan's case (supra). There cannot be any controversy that the activities which are committed by the offender indicted for the offences punishable under TADA, are creating danger to the safety of the citizens, to the safety of public property, to the maintenance of law and order not only that but to the security of the nation also. But in those cases also the Supreme Court as held in Hitendra Thakur's case that such an accused is entitled to get the bail in view of provisions of Section 167(2) proviso, for default of the investigating agency in filing the charge-sheet within the prescribed period. The intention of quoting the observations of the Supreme Court in detail as above is for coming to the conclusion whether the judgment of the Full Bench of this High Court in Ramdayal's case has been overruled by the Supreme Court or otherwise.

Section 36-A of the N.D.P.S. Act provides -

"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

(a) all offences under this Act shall be triable only by the Special Court

constituted for the area in which offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) of sub-section (2-A) of Section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise detention of such person in such custody as he thinks fit for a period not exceeding 15 days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate :

Provided that where such Magistrate considers-

(i) when such person is forwarded to him as aforesaid; or (ii) upon or at any time before the expiry of the period of detention authorised by him;

that, the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(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 (in relation to an accused person in such case who has been forwarded to him under that section);

(d) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognisance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

(3) Nothing contained in this 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 and the High Court may exercise such powers including the power u/s 1(b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted u/s 36."

Provisions of Section 36(c) provide that -

"Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a "Special Court" shall be deemed to be a Public Prosecutor."

Section 36-D provides -

(1) Any offence committed under this Act on or after the commencement of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988, until a Special Court is constituted u/s 36, shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973, be tried by a Court of Session.

Section 37 of the N.D.P.S. Act provides -

(1)(a) That notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under this Act shall be cognisable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless -

(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 limitation on granting of bail specified in Clause (b) of sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail."

Sub-section 2 of Section 4 of the Code provides :

"All offences under any other law shall be investigated, inquired into, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences."

Thus, it is obvious that the offence punishable under provisions of N.D.P.S. Act have to be dealt with provisions of the Code and in view of the observations made by the Supreme Court in Deepak Mahajan's case and Hitendra Thakur's case, the offender indicted for the offence under the Special Acts like FERA, Customs Act and TADA are to be dealt with, keeping in view the provisions of Section 167 of the Code as and when necessary.

The learned Dy. G. A. Shri Desai, argued that in view of Ramdayal's case (supra) the offender who has been indicted for an offence under the provisions of N.D.P.S. Act cannot be released on bail unless permitted by provisions of Section 37 of the N.D.P.S. Act. He submitted that the offences which are punishable under provisions of N.D.P.S. Act are connected with drug trafficking and, therefore, need complicated and longer investigation. He submitted that in view of the special nature of investigation to be done in respect of the offences punishable under N.D.P.S. Act, the provisions of Section 167(2) proviso, should not be used for releasing the offender on bail.

So far as his objection in context with Section 37 of NDPS Act is concerned, it has no relevance to the matter with which I am dealing. This matter is revolving around the right of accused to get bail on default on the part of the investigating agency. It revolves around the default of non-submission of the charge-sheet within the prescribed period of 90 days and not around the merit of the case and discretion of the Court u/s 37 of the N.D.P.S. Act will come in play only when such delay application is to be decided on merits. In view of the observations made by the Supreme Court in the matter of Deepak Mahajan's case and Hitendra Thakur's case, the accused gets bail under provisions of Section 167(2) of the Code not on merits but on default. It is the bail which the accused gets not on the merit of the matter not by use of discretion but as the mandate of law. Only one thing is to be considered and that is whether the investigating agency has filed the charge-sheet against the accused in the Court within a period of 90 days. If not, the accused gets the bail, as the mandate of law, and not by touching the merits of the case, discretion of the Court.

So far as the arguments in respect of the complicated nature of the investigation required to be done for the offences pointed by provisions of N.D.P.S. Act are concerned, it is to be noted that in each and every case longer and complicated investigation is not necessary and not required to be done. In many cases in which the accused are charged for possessing smack for small quantity, charged for selling small quantity of narcotic drug, are not connected with a big agency or agencies engaged in drug trafficking. It is experienced that the police or officers of Central Bureau of Narcotics, do not do the investigation upto the point of tracing their connection with "big bosses" or "agency" "manning" the "drug trafficking" and correlated activities. It is true that if the case is connected with probing of link of offender/offenders with international agencies, the person dealing with manufacturing, selling, trafficking of the drug and other correlated activities, the investigating agency may need some time for completing the investigation. But even then, in such case question arises as to for how long such offender or offenders are to be detained in custody ? Should the investigating agency be permitted to detain such offender or offenders for unlimited period in custody? Such a permission to detain the offender or offenders in custody for unlimited period would be definitely against the mandate of Constitution. It has been observed by the Supreme Court that the provisions of Section 167 to have been specially enacted for the purposes of ensuring promptitude on the part of the investigating agency for completing the investigation within the reasonable time. In proper cases the investigating agency can pray for cancellation of bail by producing such material before the Court which would satisfy the Court that for the purposes of such complicated investigation, the bail of the accused needs to be cancelled. In such cases the right of investigation agency to get the custody of such offender or offenders has not been totally uprooted. The hitch is that in such cases the investigating agency will have to come before the Court with convincing material for cancellation of bail. If there is such a genuine need, the Court would definitely consider it if necessary in view of Judgment of Supreme

Court in Aslam Babalal Desai Vs. State of Maharashtra,

The Dy. G. A. Shri Desai, argued that the observations of Supreme Court in the matter of Deepak Mahajan 's case are related to the power of Magistrate to remand the accused to the custody only and it does not speak of the right of the Magistrate to release accused on bail, under proviso to Section 167(2) of the Code. I am unable to agree with him because the enactment has to be read as a whole. It cannot be dissected and read conveniently for a particular party in the litigation. The body cannot function properly if the limbs are dissected indiscriminately. The intention of the legislature has to be interpreted correctly by keeping in view the spirit behind enacting a particular enactment or provision of enactment. What was the intention of the legislature in enacting Section 167 of the Code? Obviously, to restrict lethargy, capriciousness, callousness on the part of the investigating agency in completing the investigation within reasonable period. For the purposes of avoiding unnecessary long detention of the accused indicted for an offence, I am of the opinion, provisions of Section 167(2) of the Code have been enacted, and it has been ensured that in any case the detention of the accused shall not be permitted beyond prescribed period.

Article 141 of the Constitution makes it clear that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. Therefore, it will have to be held that by the observations made by the Supreme Court in the matter of Deepak Mahajan's case and Hitendra Thakur's case (supra), the judgment of the Full Bench of this High Court in Ramdayal's case (supra) stands impliedly overruled, so far as applicability of Section 167 of the Code is concerned and the right of the accused to get the bail under that provision of the Code is concerned.

Thus, summing up all, I hereby allow this bail application and release the applicant on bail u/s 167(2) of the Code on account of default of the investigating agency in submitting the charge-sheet against him in the Court within the prescribed period, as mandate of law. The applicant shall furnish security to the extent of Rs. 15,000/- (fifteen thousand) with one surety and PR bond to that extent before the Chief Judicial Magistrate, Mandsaur in respect of Crime No. 2/94. The applicant shall not threaten, contact or induce any of the prosecution witnesses.