
(1990) 12 RAJ CK 0015

In the Rajasthan High Court

Case No : Habeas Corpus Writ Petition No's. 4963, 5007 and 5051 of 1990

Shri Alimuddin and Others

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 21-12-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 289, 309, 344, 439
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 21, 22, 26, 27

Citation : (1990) 1 RLW 603 : (1990) WLN 148

Hon'ble Judges : N.K. Jain, J; Jasraj Chopra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.K. Jain, J.—These three habeas corpus petitions raise, a common question of law and, therefore, they were heard together and are being disposed of by a common order.

2. In Habeas Corpus Petition No. 4963 of 1990, filed by Shri Alimuddin, one Mohammed Rafiq son of Shri Shaft Mohammad resident of Kasaiyon-ki-kui, Nimbahera Paschhim, Distt. Chittorgarh was arrested by the S.H.O., Police Station, Nimbahera and the Dy.S.P. of that circle, as 14 Kgs. of opium was found in his possession. Although, it is alleged that the room which is situated in the field was always kept open but the allegation of the police is that this room was locked and its lock was opened by Shri Mohammed Rafiq himself, He was arrested on 16.10.1990 and was produced before the learned Munsif & Judicial magistrate, Nimbahera, who remanded him to police custody upto 25.10.1990. He was again produced before the learned Munsif & Judicial Magistrate, Chittorgarh, who remanded him to Judicial custody on 26.10.90 and thereafter, he was further remanded to judicial custody on 8.11.1990, 19.11.90, 26.11.90 and 12.12.90. A challan was filed and cognizance was taken against him by the learned Judicial Magistrate, Chittorgarh for the offence u/s 8/18 of the Narcotic

Drugs and Psychotropic Substances Act, 1985 (for short "the Act" herein).

3. In Habeas Corpus Petition No. 5007 of 1990, filed by petitioner Saleh Mohammed, it is alleged that his father Guman Khan was found in possession of 5 Kilo and 990 grams of Charas near the Bus Stand, Pali on 10.9.1990. He and his father, both were arrested and a case Under Sections 21 and 22 of the Act was registered against them. On 11.9.1990, they were produced before the Chief Judicial Magistrate, in which, it is alleged that the petitioner Saleh Mohammed gave information for the recovery of 5 kgs Chases from his house. Thereafter, the petitioner and his father were remanded to police custody on 11.9.90 and 17.9.1990 and were further remanded to Judicial custody on 1.10.1990, 15.10.1990, 29.10.1990 and 12.11.1990: It is alleged that still they are in Judicial custody.

4. In Habeas Corpus Petition No. 5051 of 1990, filed by petitioner Sanjay Kumar, it is alleged that the petitioner was found in possession of 1 Kilo and 285 grams of Heroine on 19.9.90 and, therefore, he was arrested and was produced before the Chief Judicial Magistrate, Pali on 20.9.1990, who remanded him to police custody on 26.10.1990. Thereafter, he was remanded to Judicial custody on 1.10.1990, 15.10.1990, 20.10.90 and 12.11.1990. A case Under Sections 8/21 and 22 of the Act was registered against him. He is still in Judicial custody.

5. Learned Counsel appearing for the petitioners have submitted that S. 36A of the Act has been added to the Act by Act No. 2 of 1989 with effect from 29.5.1989 and according to this section, the Judicial Magistrate has power to remand the accused to police and judicial custody for a period not exceeding fifteen days in the whole. According to them a remand beyond that period cannot be granted by a Judicial Magistrate and, therefore, the custody of these accused-persons is illegal and they deserve to be set at liberty. It was argued that the Act is a complete Cede in itself and, therefore, this being a special Act, it overrides the provisions of Section 167 Cr. P.C. and so, the Judicial Magistrate has no power to remand the accused-persons to police custody exceedig the period by and fifteen days. The only option left to the Judicial Magistrate is to forward the accused- persons to the special Court having jurisdiction to try the case and if the investigation is not completed and the Police wants further time for investigation beyond fifteen days of his custody, that can only be ordered by the Special Judge.

6. In the petitions filed by the petitioners Saleh Mohd. and Sanjay Kumar, one more point was raised that the accused-persons have been arrested by the persons below the rank of S.H.O. and, therefore, their custody is illegal. However, that contention was abandoned by Mr. Moinudeen, the learned Counsel appearing for the petitioners. He has submitted that these cases may be decided on the ground that the detention of these accused persons beyond the period of fifteen days under the orders of the learned Munsif & Judicial Magistrate, Nimbahera and the Chief Judicial Magistrate, Pali is illegal and, therefore, these accused-persons should be set at liberty. In the petitions that have been filed by

Saleh Mohammed and Sanjay Kumar, notices have not been issued to the State of Rajasthan but when the contention as regards the illegal arrest of the accused-persons by an unauthorised Officer was abandoned, Mr. K.L. Jasmatiya, the learned Govt. Advocate has accepted the notices on behalf of the State of Rajasthan. Hence, all these three habeas corpus petitions were argued on merit on 10.12.1990.

7. Mr. M.M. Singhvi and Mr. Moinudeen, the learned Counsel appearing for the petitioners have reiterated their contention that Section 36A of the Act, which was introduced by Act No. 2 of 1989 with effect from 29.5.1989 is a complete Code by itself regarding trial of the offences under this Act and the provisions of this section override the powers given to a Judicial Magistrate for remand of accused-persons u/s 167 Cr. P.C. According to them, this being a special Act, will override the provisions of the General Act and hence, the accused-persons deserve to be set at liberty.

8. Mr. K.L. Jasmatiya, the learned Government Advocate appearing for the State has submitted that clause (b) of sub-section(1) of Section 36A of the Act only relates to the police custody. According to him, a Magistrate has power to remand the accused to police custody for a period not exceeding fifteen days but it does not affect his power to send the accused to Judicial custody beyond the period of fifteen days. He has further submitted that this sec. only supplements the provisions of s. 167 Cr. P.C. It was argued by him that although Section 36A of the Act starts with the Words "Notwithstanding anything contained in the Code of Criminal Procedure, 1973" but that only means that if the provisions of this particular section are in any way contradictory to the provisions of the Code of Criminal Procedure then these provisions will carryweight and to that extent, the provisions of the Code of Criminal Procedure will not be applicable but it does not mean that where this particular section is silent, the powers will not be exercised by a Magistrate u/s 167 Cr. P.C. According to him, the accused- persons have been arrested for committing very serious offences pertaining to the Narcotic Drugs and Psychotropic Substances and, therefore, they do not deserve any liberty.

9. We have given our best anxious considerations to the rival submissions made at the bar.

10. Here, it will be very useful to quote the provisions of Section 36A, 36C and 36D of the Act, which read as follows:

Section 36A. Offences triable by Special Courts:-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974):

(a) all offences under this Act shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts then the 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) or Sub-section (2-A) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) Such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen 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 (2 of 1974), 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 Govt. or a State Govt. authorised in this behalf, take cognizance 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 (2 of 1974) be charged at the same trial.

(3) Nothing contained in this action shall be deemed to affect the special powers of the High Court regarding bail u/s 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power Under Clause (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.

Section 36C. Application of Code to proceedings before a Special Court:--Save as otherwise provided in this Act the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)(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 Sessions and the persons conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

Section 36D. Transitional Provisions-(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 (2 of 1974), be tried by a Court of Session:

Provided that offences punishable Under Sections 26, 27 and 32 may be tried summarily.

(2) Nothing in Sub-section(1) shall be construed to require the transfer to a Special Court of any proceedings in relation to an offence taken cognizance of by a Court of Sessions under the said Sub-section(1) and the same shall be heard and disposed of by the Court of Sessions.

11. Section 36A of the Act starts with a non-obstante clause "that notwithstanding anything contained in the Code of Criminal Procedure, 1973" which means that the provisions of Section 36A of the Act will override the provisions of the Code of Criminal Procedure, 1973 and if those provisions are repugnant to the provisions of Section 36A of the Act then those provisions will not be applicable to the investigation and trial of the case pertaining to the offences mentioned in the Act. Section 36(1)(b) of the Act provides that 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) or Sub-section(2-A) of s.167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days, in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate.

12. The contention of Mr. M. M. Singhvi and Mr. Moinudeen, the learned Counsel appearing for the petitioners is that the Judicial Magistrate is authorised to detain such person in custody as he thinks fit for a period not exceeding 15 days. According to the such custody relates to police and Judicial custody, both.

13. On the other hand, it was contended by Mr. K.L. Jasmatiya, the learned Government Advocate appearing for the State that the words "such custody" used in Section 36A(1)(b) of the Act only relate to police custody. We are unable to agree with this submission of Mr. Jasmatiya, because if that was the intention of the legislature, then it should not have used the words "such custody as he thinks fit" but it should have used the words "Police custody as he thinks fit". The provision of s. 36A(1)(b) of the Act are almost akin to the provision of Section 167(2) Cr. P.C., where too the Judicial Magistrate has been given power to remand an accused to such custody for a term not exceeding fifteen days in the whole.

14. It will be very useful to quote the provisions of s. 167(2) of the Code of Criminal Procedure, 1973, which reads as follows:

Section 167(2)--The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from

time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the 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 paragraph for a total period exceeding,

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case may be, 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 sub-section shall be deemed to be so released Under the provisions of Chapter XXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

(Explanation-I) For the evidence of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody as long as he does not furnish bail. (Explanation-II) If any question arise whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

Thus, it is clear that even in Section 167(2) Cr. P.C., the words used are "such custody" and that means "police and judicial custody both". If the use of the words "such custody" in Section 167(2) Cr. P.C. only related to the Police custody then it could not have been provided in proviso(a) to Sub-section(2) of s.167 Cr. P.C. that the Magistrate may authorise the detention of the accused, otherwise than in the 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 paragraph for a total period exceeding ninety days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and for a total period exceeding sixty days, where the

investigation related to any other offence. Thus, a Magistrate has power to remand the accused to police custody at the most for a period of fifteen days and beyond that period, he cannot grant him a remand of police custody but he has power u/s 167(2) Cr. P.C. to remand him to Judicial custody beyond the period of fifteen days, if he satisfies that adequate grounds exist for doing so. It was contended by Mr. Singhvi that this particular provision has not been made applicable to the offences relating to the Narcotic Drugs and Psychotropic Substances. Here, Section 36A of the Act only says that if an accused is forwarded to a Magistrate Under Sub-Section(2) or Sub-section(2-A) of Section 167 Cr. P.C. the Judicial Magistrate can authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole. It was contended by the learned Counsel appearing for the petitioners that if it was the intention of the legislature to grant such powers to a Judicial Magistrate as are contained in provision (a) to Sub-section (2) of Section 167 Cr. P.C. it would have provided for that and, therefore, the use of words "notwithstanding anything contained in the Code of Criminal Procedure, 1973" carry weight.

15. The proviso to s. 36A(1)(b) of the Act provides that where such Magistrate considers that such person is forwarded to him as aforesaid or upon or at any time before the expiry 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. According to the learned Counsel appearing for the petitioners there is no option left to Magistrate to forward an accused to the Special Court if the detention of such accused beyond fifteen days is considered essential and, thereafter, the Special Judge may exercise in relation to the person forwarded to him Under Clause (b), the same powers 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.

16. Our attention was drawn to clause (d) of Sub-section (1) of Section 36A of the Act wherein it has been provided that the Special Court may upon a perusal of police report of the fact constituting an offence under this Act or upon a complaint made by an officer of the Central Govt. or a State Govt. authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial. On the strength of clause (d) of Sub-section(1) of s. 36A of the Act, it was contended by the learned Counsel appearing for the petitioners that in Sessions case, challan has to be filed before a Magistrate and then the Magistrate commits the accused to, the court of Sessions for trial but under the provisions of this Act, direct cognizance has been provided Under Clause (d) of Sub-section (1) of s. 36A of the Act. It was submitted that it was in this context that it was provided in clause (b) of Sub-section (1) of Section 36A of the Act that the Magistrate has only authority to remand the accused to police and judicial custody for a period of fifteen days and if he wants that custody is to be extended beyond that period then he has no option but to forward the accused to the Special Court for obtaining further orders.

17. It was argued by Mr. M.M. Singhvi and Mr. Moinudeen the learned Counsel appearing for the petitioners that the Court including the High Court will have no inherent powers of remand of an accused to any custody unless the power is conferred by law. In this respect, reliance has been placed on a decision of their lordships of the Supreme Court in *Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa*, . The same view has been reiterated by a Division Bench of the Patna High Court in *Raradeo Mahto Vs. State of Bihar*,

18. Our attention was also drawn to a decision of their lordships of the Supreme Court In *Re, Madhu Limaye* AIR 1969 SC 1014 wherein it has been observed that those who feel called upon to deprive other persons of liberty in the discharge of what they conceive to be their duty must, strictly and scrupulously, observe the forms and rules of law. Whenever that is not done, the petitioner would be entitled to a Writ of Habeas Corpus directing his release. In this decision, their lordships of the Supreme Court have followed their earlier dictum rendered in *Ram Narayan Singh Vs. The State of Delhi and Others*, , wherein it was laid down that the Court must have regard to the legality or otherwise of the detention at the time of the return. This very similar view has been expressed In *Re Madhu Limaya's* case (supra) wherein it was observed that the detention must be illegal at the time of return filed by the parties in the Habeas Corpus Petition. Here, it will be useful to notice a decision of their lordships of the Supreme Court in *Talib Hussain Vs. State of Jammu and Kashmir*, wherein it was observed that in Habeas Corpus proceedings, for issue of writ, the Court has to consider legality of detention on the date of hearing and no writ can be issued if detention on that date is valid.

19. Our attention was also drawn to a decision of this Court in *Shamsher Singh and Others Vs. State of Rajasthan and Others*, wherein it has been observed that before the Executive can take away the liberty of a citizen, it must have the authority of law and under our Constitution, it is for the Legislature to make the laws for the executive to carry out those laws, but it is the exclusive jurisdiction of the Courts to interpret the laws. The rule of law is evolved by the legislature making the laws and the Courts interpreting the laws by judicial decisions.

20. From the aforesaid decisions, it is clear that illegal detention has to be judged either on the date when the return is filed or on the date when the hearing takes place. It cannot be related to the date of filing of the habeas corpus proceedings.

21. The learned Counsel appearing for the petitioners have argued that the detention of the accused-persons beyond the period of fifteen days unauthorised, the learned Magistrate had no power to remand the accused-persons to further custody. In this respect, reliance has been placed on the following observation of their lordships of the Supreme Court in *Ram Narayan Singh's* case (supra):

Detention of a person in custody after the expiry of remand order, without any

fresh order of remand committing him to further custody while adjourning the case u/s 344 Cr. P. C. is illegal.

On the basis of the aforesaid observations by informence, it was contended that the authority to send an accused to custody must have its origin under some statutory provisions and if that is not there, the custody becomes illegal. We shall deal with this aspect of the matter.

22. In this respect, reliance has been placed on a Full Bench decision of the Patna High Court in Babu Nandan Mallah Vs. The State, wherein per Majority, it was observed as follows:

Whatever hardship and harassment, the first proviso to Sub-section (1-A) of s. 344 may cause, there is no escape from the position that no Magistrate can violate the command of the Legislature and can remand an accused person to custody u/s 344 for a term exceeding 15 days at a time.

That of course, was a case where the Magistrate could remand an accused to judicial custody but this remand order should not have authorised his detention exceeded fifteen days. Here, as per Mr. Singhvi, the Magistrate is only authorised to remand the accused to police and judicial custody for a period not have exceeding fifteen days in the whole and therefore, if any remand has been granted by him beyond the period of fifteen days then that remand is not authorised.

23. It was also contended that a period during which the petitioner is in illegal detention then he may have his legal remedy including the remedy of habeas corpus available to him against such illegal detention. May be that beyond that period, if the custody is later on regularised, he will not have that opportunity but till that the custody continues to be illegal and not authorised by law, such an accused had right to move this Court by a habeas corpus petition for his release. In support of his submission, Mr. Singhvi has placed reliance on a decision of this Court in Mahesh Chand v. State of Raj. 1984 RLR 697 wherein a Full Bench of this Court beserved:

There is no perovision in the New Code which, even if it were to be liberally construed, may be said to be conferring a right on the accused to be released on bail by reason of the more fact that his custody was for same period either unauthorised or not validly authorised by the Magistrate. If the Magistrate is guilty of any act of omission of commission in the exercise of his powers of remanding an accused to custody Under Sections 167, 289 or 309 of the New Code, the accused may be justified in complaining that his detention was illegal during the relevant period and he may have his legal remedies including the remedy of habeas corpus, against such illegal detention.

In this connection, lastly reliance has been placed on a Single Bench decision of the Bombay High Court in Suryakant Ramdas More v. State of Maharashtra 1990(1) EFR 119. In that case the accused was in custody for an offence

pertaining to Narcotic Drugs and Psychotropic Substances and the question that arose for consideration was the interpretation of Section 36 and Section 36A of the Act as amended by Act of 1988. A learned Single Judge of the Bombay High Court in para 5 of the Judgment has observed:

By virtue of ss. 36 and 36A read together, a Magistrate will not have a jurisdiction to take cognizance of the offences where a Special Court is constituted. Even otherwise, the provisions of Section 36A clearly must the jurisdiction of the Magistrate to authorise the detention beyond the period of 15 days and to take cognizance.

It was further observed in para 9 of the Judgment as follows:

In the present case, it is apparent that the learned Metropolitan Magistrate went beyond his powers in authorising detention for a period exceeding 15 days and not considering the application for bail which was filed on 12th July 1989. On the date on which the application for bail was made, the applicant's detention was unauthorised and though it may be possible for the learned Addl. Sessions Judge after taking cognizance of the offence to authorise the detention, if the circumstances justified such a course until the cognizance is taken that detention which was unauthorised could not be cured on the date - by which bail application was filed and the applicants who were under unauthorised detention were entitled to be released on bail.

It may be stated that this Judgment completely supports the submissions made by the learned Counsel appearing for the petitioners. On the strength of this authority, it was argued that these petitions be accepted and the accused-persons be released forthwith.

24. These submissions of the learned Counsel appearing for the petitioners were stoutly opposed by Mr. K.L. Jasmatiya the learned Govt. Advocate appearing for the State. He has submitted that the view expressed by the Bombay High Court is contrary to the provisions of the Act and that has no binding force on this court. According to him, this view taken by the learned Single Judge of the Bombay High Court is absolutely wrong. He has submitted that it is true that if the custody of a person is illegal then of course, a habeas corpus petition can lie but in this case, the custody is not at all illegal and, therefore, if the custody is not held to be illegal, no habeas corpus petitions can lie before this Court. In this respect, he has placed reliance on a decision of their lordships of the Supreme Court in Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, wherein It was observed that a Writ of Habeas Corpus cannot be granted when a person is committed to Jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal. In arriving at this conclusion, their lordships of the Supreme Court followed the decision in Col. Dr. B. Ramachandra Rao Vs. The State of Orissa and Others, .

25. Mr. Jasmatiya has further submitted that the provisions of Section 36A starts with a non-obstante clause i.e. "Notwithstanding anything contained in the Code

of Criminal Procedure, 1973". It means that the legislature has only intended that where the provisions of Section 167 Cr. P.C. are repugnant to the provisions of Section 36A of the Act, the provisions of Section 36A of the Act will hold the field but where the Act is silent about a particular thing then of course, the provisions of the Code of Criminal Procedure will be fully applicable. He has submitted that in clause (b) of Sub-section(1) of Section 36A of the Act, it has been provided that where an accused is forwarded to a Magistrate Under Sub-Section(2) or Sub-section(2-A) of Section 167 Cr. P.C. such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate. He has submitted that the reference of sub s.(2) or Sub-section (2-A) of Section 167 Cr. P.C. clearly shows that these provisions are applicable to such proceedings relating to Narcotic Drugs and Psychotropic Substances, to the extent they are not contrary to the provisions of Section 36A of the Act. According to him the provisions of clause (b) of Sub-section(1) of Section 36A of the Act are analogous to the provisions of Section 167(2) Cr. P.C. and, therefore, there is no difference between those two provisions. He has submitted that a proviso has been added to clause (b) of sub- s.(1) of Section 36A of the Act, which provides that where such Magistrate considers when such person is forwarded to him as aforesaid on 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. It means that as and when an accused is brought before a Judicial Magistrate Under Sub-Section(2) or Sub-section(2-A) of s. 167 Cr. P.C. or as and when the Magistrate comes to the conclusion before the expiry of the period of detention authorised by him that the detention of such an accused is unnecessary in his view then he has no option but to forward such an accused to the Special Court having jurisdiction because he has only power to remand to custody but he has no power of release. Release is only authorised by a Special Judge. The Judicial Magistrate or for that matter the Executive Magistrate has no power to grant bail to such an accused and, therefore, the accused has to be forwarded to the Special Court. When such an accused is forwarded to the Special Court, 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. Thus, it is clear that if an accused is forwarded to the Special Court, the Special Court may again remand him to custody and may release him on bail if he deems proper. Simply because the Magistrate thinks that further detention is not proper, the Special Court is not bound to agree with him. He may disagree with the Magistrate and may further remand the accused to Judicial custody and, therefore, the Special Court can exercise all those powers which are contained in Section 167 Cr. P.C.

26. Mr. Jasmatiya has further contended that clause (b) of Sub-section(1) of Section 36A of the Act nowhere provides that if a Magistrate considers further detention essential then also he will have to forward the accused to the Special Court. He has therefore, argued that if the Magistrate feels that the matter needs further investigation, then he has all authority to remand the accused to judicial custody and allowed the investigation to take its own course. Clause(d) of Sub-section(1) of Section 36A of the Act only provides that the Investigating agency can directly file the challan before the Special Court and Special Court can take cognizance directly without the accused being committed to it for trial. According to Mr. Jasmatiya, the learned Govt. Advocate that clause (d) of Sub-section(1) of Section 36A of the Act is only an enabling provision. It does not prohibit the filing of a challan before the Magistrate. According to Mr. Jasmatiya, both these courses are open to the Investigating Officer i.e. that he may either file the challan before the Magistrate, who may commit the accused to the court of Special Judge or trial and he may also file a challan directly in the Special Court and it can directly take cognizance. These two interpretations can very well be given to clause(d) of Sub-section(1) of Section 36A of the Act on account of the use of words "take cognizance of that offence without the accused being committed to it for trial".

27. We are also in agreement with the view expressed by Mr. K.L. Jasmatiya, the learned Govt. Advocate that two courses are open to the Investigating-Officer i.e. either to file the challan before the Magistrate, who may commit the accused to the Special Court for trial and it may also file a challan directly in the Special Court and it can directly take cognizance. We are unable to agree with the learned Counsel appearing for the petitioners that filing of a challan before the Magistrate is totally prohibited because if that was the intention of the legislation then there was no necessity to use the words "take cognizance of that, offence without the accused being committed to it for trial" in clause(d) of Sub-section(1) of Section 36A of the Act.

28. It was next argued by Mr. K.L. Jasmatiya, the learned Govt, Advocate that the I proviso and the clause (b) of Sub-section(1) of Section 36A of the Act indicate that in cases where the Judicial Magistrate feels that further detention is not necessary, he can forward the accused to the Special Court because he has no power to grant him bail but if he feels that further detention is essential, he has all powers to remand the accused to custody u/s 167(2) Cr. P.C. as powers u/s 167(2) Cr. P.C. have not been taken away. According to Mr. Jasmatiya, Proviso(a) to Sub-section(2) of s. 167 Cr. P.C. provides that the Magistrate may authorise the detention of the accused-person otherwise than in the custody of the police beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so.

29. We have given our most anxious consideration to the submission made by Mr. K.L. Jasmatiya, the learned Government Advocate and Mr. M.M. Singhvi and Mr. Moinudeen, the learned Counsel for the petitioners. We are of the view that

the submissions of Mr. Jasmatiya have great substance. If it was the intention of the legislature in all cases where the detention of the accused for further investigation may be essential or may not be essential, the accused has to be forwarded to the Special Court beyond the period of fifteen days, then after the use of words "not exceeding fifteen days in the whole" in clause(b) of Sub-section(1) of Section 36A of the Act, the legislature should have provided that thereafter the accused in all cases will have to be forwarded to the Special Court by the Judicial Magistrate. But when that contingency is not specifically provided then what will happen, if the Judicial Magistrate considers further detention of the accused in custody to be necessary for proper investigation of the case. In our considered opinion, in that contingency, the silence of Section 36A to give any specific direction about it clearly indicates that the legislature very much intended that the provisions of Section 167 Cr. P.C. will certainly come into operation and the Judicial Magistrate has all powers to remand the accused to the Judicial custody till the challan is filed.

30. The expression "notwithstanding anything contained in a particular Act" came up for consideration before their lordships of the Supreme Court in Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd., wherein their lordships of the Supreme Court have observed that the words "notwithstanding" in clause (1) take effect on the ground that the special excludes the general and further they take effect when in that particular case in which those expressions were used in regard to entry in List-I to the extent notwithstanding anything contained in Entry in List-II. Further more, their lordships observed that the words "notwithstanding" in clause (1) also means that if it is not possible to reconcile the two entries, the entry in List-I will prevail. But before that happens, attempt should be made to decide in which list a particular legislature fails. Before deciding under which entry a particular legislation falls, the theory of "pith and substance" has been evolved by the Courts. We are not concerned with the pith and substance of the two provisions. What has to be taken note of is that the Courts, before they exclude any entry in any provisions, they must try to reconcile the two provisions and exclusion should only be made in cases where the entry cannot be reconciled. Thus, an effort should be made firstly to reconcile both the entries and exclusion should not be taken for granted by the use of the words "notwithstanding anything contained in Section 167 Cr. P.C. in ipso facto. It can only be inferred if the language of Section 167 Cr. P.C. cannot be reconciled in any way with the language of Section 36A of the Act. Keeping these guidelines in view, we are firmly of the view that the provisions of Section 167 Cr. P.C. to the extent that they are not inconsistent with the provisions of Section 36A of the Act, they will be applicable in cases of grant of remand as regards powers of the Magistrate are concerned.

31. We are unable to agree with the view taken by Bombay High Court in Surya Kant Ramdeo More's case (supra) that the Judicial Magistrate has no such powers because if that be so, the legislature should have provided that even if the detention of such person is necessary to complete the investigation properly

after fifteen days, he will have no option but to forward the accused to the Special Court for obtaining further remand to Judicial Custody beyond 15 days. However, what has been provided in the proviso and clause(b) of Sub-section(1) of Section 36A of the Act is that the Magistrate will forward the accused to the Special Court only when he considers his detention unnecessary. It does not say that if the Magistrate considers his detention necessary then also he will have to forward him (the accused) to the special court. It is cardinal principle of interpretation that the words which are not used by the legislature cannot be supplied to it and a harmonious contradiction has to be made of the language that has been used by the legislature. If the legislature intended that the accused v, person has been forwarded to the Special Court by the Judicial Magistrate after the expiry of fifteen days. Whether the detention of such person was necessary or unnecessary then there was no necessity of making a specific provision for forwarding of such an accused to If the Special Court by the Judicial Magistrate in cases where detention of such person was held to be unnecessary. It clearly indicate the intention of the legislatute that when further detention of such person is necessary in the view of the Judicial Magistrate then he has all rights to detain him for the reasons to be recorded, which must be based on his judicial satisfaction and if that is done then it does not offend the provision of Section 36A of the Act. We are, therefore, firmly of the view that the proviso and clause (b) of Sub-section(1) of Section 36A of the Act read with Section 167 Cr. P.C. clearly authorises a Judicial Magistrate to grant remand to an accused to Judicial custody beyond the period of fifteen days, if the Magistrate satisfied that adequate grounds exist for remanding him to Judicial custody of the accused- persons is not illegal and, therefore, no relief can be granted to these accused- persons in these habeas corpus petitions as per the decision of their lordships of the Supreme Court in Kanu Sanyal's case (supra).

32. In the result, these habeas corpus petitiones have no force and therefore, they are dismissed on merits.