

(2005) 01 CAL CK 0015
In the Calcutta High Court
Case No : C.R.R. No. 7 of 2005

Tapas Sur

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 28-01-2005

Acts Referred:

Constitution of India, 1950 — Article 141, 21
Criminal Procedure Code, 1973 (CrPC) — Section 428
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 41

Citation : (2005) 2 CHN 683 : (2005) CriLJ 4270

Hon'ble Judges : Amit Talukdar, J

Bench : Single Bench

Advocate : Rupna Bhattacharjee, for the Appellant; Pinki Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

Amit Talukdar, J.—"The horizons of Article 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation", was held by Y.V. Chandrachud, the Hon'ble The Chief Justice of India presiding over a 3-Judge Bench of the Supreme Court in Sher Singh and Others Vs. State of Punjab, .

2. Keeping in mind the aforesaid hallowed observations this Court proceed to evaluate the grievance of the petitioner, who feels that in his case the said fundamental right has stood in breach.

3. This Court is now entrusted with to sort out the agony of the petitioner, who feels that his valuable right under Article 21 of the Constitution has been breached in the proceedings of N-10 of 2000 pending before the learned Special Court (under the N.D.P.S. Act), Barasat as he has been in custody for a period more than what is permissible under the law.

4. Learned Counsel appearing in support of the application has submitted that since the amount involved in the present case is only 3.500 grams the case of the petitioner falls squarely within the definition of small quantity being punishable with a maximum imprisonment for six months in view of the amended provisions of Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "said Act"); but the petitioner has served out more than the maximum limit prescribed under the said provision. She has submitted that the petitioner is in custody since 07.8.04 and was also earlier in custody for a substantial period, which covered the maximum amount of sentence imposable u/s 21(a) of the said Act. According to her the proceeding should be quashed and the petitioner should be released.

5. Learned Counsel for the petitioner further submitted that the impugned order dated 25.11.2004 passed by the learned Special Court, refusing to discharge the petitioner from the case was not in accordance with law in view of the decisions of Subrata Mondal v. State of West Bengal 2004 C Cr. LR (Cal) 287 and In re: Golam Nabi, 2004 C Cr. LR (Cal) 1027. She showed from the said two decisions Subrata Mondal (supra) and In re: Golam Nabi (supra) that this Court on earlier occasions on similar cases which involved "small quantity" had quashed the proceeding on the ground that the accused persons have served out more than the period of detention.

6. Learned Counsel for the petitioner referred to the amended provision of Section 41 of the said Act and submitted that the new amendment came into effect from the year 2001 making the offence in connection with a small quantity of the contraband articles to be punishable by imprisonment for a maximum period of six months. Whereas the incident, in connection with the present case, although took place on 05.3.2000 in view of Section 41 of the said Act the case was pending before the Court and would be accordingly governed by the amendment.

7. Learned Counsel for the petitioner on the basis of the aforesaid position prayed for quashing the impugned proceeding.

8. Learned Counsel appearing on behalf of the State has opposed the contention made on behalf of the petitioners and submitted that as charge has already been framed and witnesses have been examined the trial should be allowed to be completed and no interference is warranted at this stage. He further submitted that the petitioner was found selling the articles and the same were not for his personal consumption and it is evident from the materials that the petitioner had purias and was selling the said articles.

9. As a part of his submission learned Counsel for the State referred to the decision of the Supreme Court in Karim Hossain Sohra Sindhi v. State of Gujarat, 2004 SCC 1059. Placing reliance on the said decision learned Counsel for the State submitted that as the seized amount was not for the personal consumption of the petitioner even it may be a small quantity but as it was kept in several

paper packets (purias) it itself indicates that the said quantity was for sale as further it would be seen that some amount of cash was also recovered which only goes to show the fact of sale.

10. After having heard at length the submissions made at the Bar this Court now proceeds to appreciate the same in the light of the materials available and the decisions cited.

11. With regard to the question of infraction of Section 21 of the Constitution of India this Court feels that the said point, however, fine it cannot have a very taciturn application in the fact situation of the present case. Article 21 of the Constitution cannot be a magic word for an errant accused, who had played hide and seek with the process of law and then when caught on the wrong foot claims shelter under the majestic sweep of the said Article. The position with regard to protraction of a criminal trial has to be understood in view of the ratio of the 7-Judge Bench decision in *P. Ramachandra Rao v. State of Karnataka* 2002(3) CriLR SC 370, which has been taken into account in the latest decision of Supreme Court in *State of Rajasthan v. Iqbal Hussain*, 2004 (4) CriLR (SC) 664. Simply on the ground of delay it would not be permissible to chalk out a perimeter within which all criminal proceedings have to be quashed and in-depth analysis of the cause of delay has to be made.

12. This Court when it was called upon to meet the said provision took utmost care to decipher the agony of the petitioner in this regard and to see as to whether he has suffered the agony of a protracted long criminal trial which has resulted in prejudice and violation of his valuable right to a speedy disposal of a trial as guaranteed under Article 21 of the Constitution of India.

13. From the certified copy of the ordersheet it appears that the petitioner was first brought under arrest before the Court on 13.3.2000. Subsequently he was enlarged on bail by the Order No. 63 dated 11.1.2002 by the Special Court. Thereafter, it is found from Order No. 89 dated Date printed as in the judgment (13.0.2003) that while on Court bail he was absent without taking any steps. As such warrant of arrest was issued against him fixing 05.2.2004 for execution return. However, nearly a year thereafter he could only be apprehended, as evident from Order No. 92 dated 07.8.04.

14. The charge in this case was framed and four (4) witnesses were examined when the petitioner chose to abscond and it is only after issuance of warrant of arrest he could be brought before the process of law (Order No. 94 dated 25.11.2004).

15. In view of the aforesaid position can the accused take benefit of his own wrong where he had acquiesced in the delay by way of absconsion for a pretty length of time? Now, it can never lie in his mouth that he has been denied the valuable right of speedy trial and there has been infraction of Article 21 of the Constitution whereas he has been the architect of his own fortune which has resulted in protraction, if at all, of the trial.

16. From the certified copy of the ordersheet (which will be kept with the record) as produced by the learned Counsel for the petitioner it is found that the learned Trial Court has taken effective steps for achieving speed in the trial and the prosecution also cannot be said to be at fault in causing anguish to the petitioner on account of the delay in the trial, it at all, it can be deemed to be a delay on account of the facts of the present case.

17. Article 21 of the Constitution cannot come to the rescue of a recalcitrant accused, who has jumped bail and his fundamental right in a serious criminal offence where he himself is attributable with culpable negligence cannot be said to be violated. A mathematical calculation of the time length of the Trial is not the main consideration; what is necessary is the mitigating and aggravating circumstances and the Court has to strike a balance to see who is at fault, as found earlier that the learned Special Court as well as the prosecution has done their respective part of the job and the accused only has played with the process of law. The sacrosanct provision of Article 21 of the Constitution does not stand extended to him.

18. The next question that stares at the face of this Court, as has been argued at the Bar, is the impugned order of 25.11.2004 (later) refusing the prayer for discharge of the petitioner from the instant case.

19. The said question has to be discarded ipso facto at the threshold as after a charge has been framed as rightly observed by the learned Special Court there can be no question of discharge (See *Ratilal Bhanji Mithani v. State of Maharashtra* AIR 1979 SC 94).

20. The other question which has been canvassed on behalf of the petitioner that as the accused has already been in custody for a period more than that has been prescribed under the statute automatically he should be discharged and the proceeding should be quashed has to be seen in the light of the discussion with regard to Article 21 of the Constitution.

21. As found earlier that the petitioner himself has contributed to the delay he cannot claim the said right on the one hand; while on the other hand as he has evaded the process of law for a substantial period and it is only after his apprehension that he could be put again in the array of the accused and the prosecution was put back on the rails. The trial is at the stage where further evidence would be held while earlier after conclusion of evidence of the four witnesses the trial came to a grinding halt as the petitioner misused the liberty and absconded. The decision of *In re: Golam Nabi* (supra) of this Court has to be understood in the ratio of the said decision. Therein it was held that the detention of the accused was more than a year (i.e., beyond the statutory period), which was clearly violative of Article 21 of the Constitution of India. The ratio of the said decision of *In re: Golam Nabi* (supra) did not take into account the guidelines laid down in the 7-Judge Bench decision of the Supreme Court in *P. Ramachandra Rao* (supra) and the question that the accused has contributed

to the delay in the trial was not considered in the ratio of the guidelines laid down in the said 7-Judge Bench decision of the Supreme Court.

22. In the latest decision of the Supreme Court in *State of Rajasthan v. Iqbal Hussien* (supra) the Constitution Bench decisions of P. Ramachandra Rao (supra) and Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., , has been quoted and taken into account while dealing with a case under Article 21 of the Constitution.

23. The Constitution Bench in Abdul Rehman Antulay's case (supra) at para 29 categorised several delays which "are to be totally ignored in giving effect to the plea of denial of speedy trial" amongst which -- "Delay caused by the accused himself not merely by seeking adjournments but also by legal devices which the prosecutor has to counter" and "Delay is usually welcomed by the accused. He postpones the delay of reckoning thereby. It may impair the prosecution's ability to prove the case against him. In the meantime, he remains free to indulge in crimes. An accused cannot raise this plea if he has never taken steps to demand a speedy trial. A plea that proceedings against him be quashed because delay has taken place is not sustainable if the record shows that he acquiesced in the delay and never asked for an expeditious disposal. In India the demand rule must be rigorously enforced. No one can be permitted to complain that speedy trial was denied when he never demanded it." is also included.

24. The Constitution Bench in Abdul Rehman Antulay's case (supra) has also been noted with approval in the latter Constitution Bench decision of P. Ramachandra Reddy (supra) wherein Their Lordships in the said 7-Judge Bench decision held that: "The dictum in A.R. Antulay case is correct and still holds the field." and amongst other pronouncements Their Lordships held:

"The guidelines laid down in A.R. Antulay case are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a strait-jacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made."

25. In the ratio of the decision of *State of Rajasthan v. Iqbal Hussien* (supra), which has relied on the two earlier Constitution Bench decisions, simply delay will not be the sine qua non in invoking the majestic provisions of Article 21 of the Constitution of India. It has to be seen that whether there has been an actual delay and who is at fault.

26. The ratio of the decisions of the two Constitution Benches (A.R. Antulay [supra] and P. Ramachandra Rao [supra]) and of *State of Rajasthan v. Iqbal Hussien* (supra) have not been taken into account in *In re: Golam Nabi* (supra).

27. That way this Court is of the most humble opinion the said decision *In Re: Golam Nabi* (supra) cannot act as a binding precedent on this Court while acceding to the prayer of the petitioner in the facts and circumstances of the

present case.

28. Very recently the Supreme Court in Punjab National Bank v. R.L. Vaid and Ors. 2004 SCC 2055, held:

"Disposal of cases by merely placing reliance on a decision is not proper. Precedent should be followed only so far as it marks the path of justice, but you must cut out the dead wood and trim off the side branches else you will find yourself lost in thickets and branches, said Lord Denning, while speaking in the matter of applying precedents."

29. Similarly, in Rudrappa Ramappa Jainpur and Ors. v. State of Karnataka 2004 SCC 1954, the Supreme Court further held that each case must rest on its own facts and mere similarity of the facts in once case cannot be used to determine a conclusion of fact in another.

30. The ratio of a particular decision has to be appreciated on the background of the factual matrix of a particular case and has to be seen as to whether the factual situation fits in with the case at hand. The 3-Judge Bench decision of the Supreme Court in the Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, [B.N Kirpal (as the learned Chief Justice then was), K.G. Balakrishnan and Arijit Pasayat, JJ.] speaking through Arijit Pasayat, J in paragraphs 19, 20, 21 and 22:

"19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but as the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Norton 1951 AC 737, Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not, to detract from the great weight to be given to the language actually used by that most distinguished Judge."

20. In Home Office v. Dorset Yacht Co. 1970(2) All ER 294, Lord Reid said, "Lord Atkin's speech...is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J. in 1971(1) WLR 1062 observed: "one must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board 1972(2) WLR 537, Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

21. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

22. The following words of Lord Denning in the matter of applying precedents have become locus classicks:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

XXX XXX XXX "Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it." "

31. In view of the aforesaid high authorities on the issue of precedent this Court very respectfully feels that the decision of In re: Golam Nabi (supra), which is based on the earlier decision of Subrata Mondal (supra), cannot have any persuasive effect while disposing of this case.

32. Whilst this Court is duty-bound to follow the ratio decidendi of the two earlier decisions of a Co-ordinate Bench but, as has been held by Arijit Pasayat, J. speaking for the Division Bench of the Supreme Court in Nirmal Jeet Kaur v. State of M.P. 2004 SCC 1989:

"To perpetuate an error is no heroism. To rectify is the compulsion of the judicial conscience."

33. There are two situations which act as an exception to the rule of precedents: one is per incuriam, which means a decision rendered in ignorantium and the other is sub silentio, which means a particular point was not perceived or not determined by the Court and does not form the part of the ratio decidendi then in either of the case a particular judgment would have no binding effect.

34. This Court feels that in view of the position discussed hereinabove the decision of In Re: Golam, Nabi (supra) based on the earlier view in Subrata Mondal (supra) is sub silentio as it has not taken into account the aspect of the question with regard to observance of Article 21 of the Constitution as outlined in the foregoing paragraphs. The same cannot have any binding effect. In State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , the Supreme Court has very clearly explained the position in paragraph 40 of the said

judgment which is quoted hereinbelow:

"40. "Incuria" literally means "carelessness". In practice per incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law" is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". (Young v. Bristol Aeroplane Co. Ltd.). Same has been accepted approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Haisri Sahu v. Rajdewan Dubey this Court while pointing out the procedure to be followed when conflicting decisions are placed before a Bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an Appellate Court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub silentio. "A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. the Court did not feel bound by earlier decision as it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority". It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. The Bench held that, "precedents sub silentio and without argument are of no moment". The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Shama Rao v. Union of Territory of Pondicherry it was observed, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity by rigidity beyond reasonable limits is inimical to the growth of law."

35. This position has further been clarified in Arnit Das Vs. State of Bihar, in para 20:

"20. A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has

escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, the technical sense when a particular point of law was not consciously determined. (See State of U.P. v. Synthetics & Chemicals Ltd. SCC para 41.)".

36. That being the position, it is with a heavy heart that this Court with utmost reverence to the said decision of In Re: Golam Nabi (supra) cannot fall in line with the obiter dicta of the same.

37. Further, the question remains as to what would happen to the evidence of the four witnesses, who have already been examined ? Can the same be washed out simply on this ground ?

38. For this purpose this Court has very respectfully with utmost circumspection also perused the decision of Subrata Mondal (supra) on the basis of which the decision of In Re: Golam Nabi (supra) was arrived at. In the said decision of Subrata Mondal (supra) as also of In Re: Golam Nabi (supra) as found from the same it does not appear that the evidence was taken.

39. When in the process of a criminal trial some evidence have already been on record the same cannot be scrapped and the proceeding be quashed for delay which has been occasioned at the first instance of the accused.

40. Another question, which looms large at the face of the Court, after it has taken care of Article 21 of the Constitution of India is with regard to the question u/s 428 of the Code of Criminal Procedure (for short the said Code). This point has to be also taken care of.

41. The provisions of Section 428 of the said Code incorporated in the new Code deals with the provision where an accused has undergone a period of imprisonment during investigation, inquiry or trial the same would be set off from his substantive sentence.

42. Although it is true that the period for which the petitioner in the event of his conviction can be sentenced is limited to six months and the petitioner may have been in and out of custody for more than the said period at best the same can have a set back effect on his duration of prison term in the event of his being found guilty or a mollifying effect on the period of sentence. But that simply cannot act as a rider for his discharge and/or quashment of the trial for whatever term have referred the prayer of the petitioner to be.

43. The decision of Karim Hossain Sohra Sindhi (supra) cited by the prosecution, however, is quite distinguishable and will not be applicable in the present case.

44. From a wholesome analysis of the aforesaid position this Court cannot persuade itself to accede to the prayer of the petitioner for quashing the proceeding of N-19 of 2000 pending before the learned Special Court (under the N.D.P.S. Act), Barasat.

45. Application accordingly rejected.

46. Since the learned Special Court (under the N.D.P.S Act), Barasat is already in seisin of the matter and as it appears that he has in the meantime framed a charge against the accused and following which four (4) witnesses were examined the trial being punctuated by the absconsion of the accused, is fairly at a ripe stage. As such, the learned Special Court (under the N.D.P.S Act), Barasat is requested to proceed expeditiously and take steps to conclude the trial without giving any unnecessary adjournment to either of the parties unless the situation is so emergent that it will not be possible to spurn such prayer.

47. Learned Registrar (Judicial) is requested to see that the order is communicated to the learned Special Court (under the NDPS Act), Barasat forthwith as delay in the same would result in further upsetting the calendar which the learned Special Court (under the NDPS Act), Barasat may have in the meantime fixed.