

Nirmal Kanti Roy, Ganesh Lal Moondra & ... vs State Of West Bengal, S. Dasgupta And ... on 23 April, 1998

Equivalent citations: AIR 1998 SUPREME COURT 2322, 1998 (4) SCC 590, 1998 AIR SCW 2235, 1998 (3) SCALE 232, 1998 CRIAPPR(SC) 203, 1998 CALCRILR 216, 1998 (4) ADSC 290, 1998 SCC(CRI) 1100, (1998) 3 APLJ 53.1, 1998 CRILR(SC&MP) 573, 1998 ADSC 4 290, (1998) 3 JT 436 (SC), (1998) 2 SCR 1147 (SC), 1998 (2) UJ (SC) 121, (1998) 2 RECCRIR 578, (1998) 1 CRIMES 374, (1998) 14 OCR 650, (1998) SC CR R 574, 1998 CRILR(SC MAH GUJ) 573, (1998) 85 CUT LT 2, (1998) 2 EASTCRIC 69, (1998) 2 EFR 180, (1998) 2 MADLW(CRI) 653, (1998) 3 RAJ LW 294, (1998) 2 CURCRIR 251, (1998) 4 SUPREME 209, (1998) 3 SCALE 232, (1998) 37 ALLCRIC 37, (1998) 3 CHANDCRIC 7, (1998) 2 ALLCRILR 571, (1998) 2 CRIMES 267, 1998 (2) ANDHLT(CRI) 6 SC

Bench: Chief Justice, K.T. Thomas, S. Rajendra Babu

PETITIONER:

NIRMAL KANTI ROY, GANESH LAL MOONDRA & ORS.

Vs.

RESPONDENT:

STATE OF WEST BENGAL, S. DASGUPTA AND ANOTHER

DATE OF JUDGMENT: 23/04/1998

BENCH:

CJI, K.T. THOMAS, S. RAJENDRA BABU

ACT:

HEADNOTE:

JUDGMENT:

WITH CRIMINAL APPEAL NO. 476 OF 1998 [Arising out of SLP (Criminal) No. 1705 of 1997] J U D G E M E N T Thomas J.

Leave granted A two judge bench has referred these cases to be decided by a larger bench upon a contention that there is conflict between the ratio in State of West Bengal vs. Falguni Dutta and others [1993 (3) SCC 288] and that in Durgesh Chandra Shah vs. Vimal Chandra Shah [1996(1) SCC 341]. The question relates to the interpretation of Section 167(5) of the Code of Criminal Procedure as amended by the State of West Bengal.

Section 167 of the Code of Criminal Procedure (for short the 'Code') fixes certain time schedule for production of the arrested accused before the Magistrate, for detention of the accused in custody after remand, for completion of investigation into different offences and the consequential orders to be passed in a case where such time schedule is not adhered to etc. West Bengal Legislative Assembly has incorporated some amendmendments in sub-section (5) and sub-section (6) of Section 167 of the Code as per West Bengal Act 24 of 1988. By such amendment those sub- sections now read as follows: -

"(5) If, in respect of -

(i) any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months, or

(ii) any case exclusively triable by a Court of Session or a case under Chapter XVIII of the Indian Penal Code (45 of 1860), the investigation is not concluded within a period of three years, or

(iii) any case other than those mentioned in clauses (i) and (ii), the investigation is not concluded within a period of two years, from the date on which the accused was arrested or made his appearance, the Magistrate shall make an order stopping further investigation into the offence and shall discharge the accused unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the periods mentioned in this sub-section is necessary. (6) Where any order stopping further investigation into an offence has been made and the accused has been discharged under sub-section (5), the Session Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

The facts in the criminal appeal arising from Special Leave Petition (Criminal) No.1609 of 1997 Nirmal Kanti Roy vs. State Of West Bengal are the following: Appellant was involved as accused in an offence under Section 409, Indian Penal Code. During investigation of the case he applied for and got a pre-arrest bail order and surrendered himself before the Additional Chief Judicial Magistrate, Sealdah on 18.3.1993 and was released on bail. As the investigation was not completed within two years therefrom, he moved the said Magistrate on 22.9.1995 for discharging him as provided in Section 167(5) of the Code. The Magistrate dismissed the application pointing out that the case was

triable only by a Special judge under the West Bengal Criminal Law Amendment (Special Court Act 1949) (For short 'the Special Court Act 1949') and hence an order stopping investigation and the consequent discharge order under Section 167(5) could be passed only by that Special Judge concerned. Appellant challenge that order in revision before the High Court of Calcutta. A learned Single Judge of the High Court, while dismissing the revision, held that the Additional Chief Judicial Magistrate was competent to pass the order under Section 167(5) of the Code despite ouster of his jurisdiction to try the offence as per the Special Court Act 1949. Nonetheless, learned Single Judge granted further time to the Investigating Officer, on an application filed by him in that behalf as the said officer satisfied the High Court that he could not complete the investigation within the time schedule on account of his falling sick by jaundice. Charge-sheet was however filed within the extended time.

The question raised is whether time could have been extended without the Investigating Officer moving for such extension before the expiry of the period.

There is no dispute that clause (iii) in Section 167(5) of the Code would apply to the facts of this case as the offence under Section 409 I.P.C. was neither triable by the Magistrate as a summons case nor exclusively triable by a Court of sessions, but triable only by a Special Court in view of the Special Court Act 1949. There is also no dispute that the Charge-sheet was not submitted within two years "from the date on which the accused was arrested or made his appearance." This Court has held in *State Of West Bengal vs. Pranab Ranjan Roy* [JT 1998 (2) SC 364] that:

"The words 'made his appearance' in Section 167(5) are used along with the preceding words which by themselves form into a composite collection as thus: 'From the date on which the accused was arrested or made his appearance. It must be noted that the purpose of the sub-

section is to impose a time schedule for completion of investigation and such time schedule is to commence either 'from the date of arrest of the accused or the date when he made his appearance in Court."

So the two years period mentioned in clause (iii) must be reckoned from 18.3.1993 on which date the appellant surrendered himself in Court.

The order stopping further investigation into the offence and the consequential order of discharge are not intended to be automatic sequel to the failure to complete investigation within the period fixed in the sub-section. The succeeding words in the sub-section confer power on the Court to refrain from stopping such investigation if the Investigating Officer satisfies the Magistrate of the fusion of two premises (1) that in the interest of justice it is necessary to proceed with the investigation beyond the period shown in the sub-section and (2) that there are special reasons to do so.

A reading of sub-section (6) further shows that even in a case where the order stopping investigation and the consequent discharge of accused has been made that

is not the last word on it because the sub-section opens another avenue for moving the Sessions Judge. If the Session Judge is satisfied that "further investigation into the offence ought to be made" he has the power to allow the investigation to proceed. Hence we take the view that the time schedule shown in Section 167(5) of the Code is not to be treated with rigidity and it is not mandatory that on the expiry of the period indicated therein the magistrate should necessarily pass the order of discharge of the accused. Before ordering stoppage of investigation the magistrate shall consider whether, on the facts of that case, further investigation would be necessary to foster interest of criminal justice. Magistrate at that stage must look into the record of investigation to ascertain the progress of investigation thus far registered. If substantial part of investigation was by then over, the magistrate should seriously ponder over the question whether it would be conducive to the interest of justice to stop further investigation and discharge the accused.

Section 167(5) without West Bengal Amendment is only bereft of the duty cast on the Court to discharge the accused. A two judge bench of this Court, while dealing with the un-amended sub-section, has considered the situation where the Magistrate stopped investigation on the expiry of six months. *State of West Bengal vs. Falguni Dutta and another* [1993(3) SCC 288] this Court held thus:-

"If the investigation has been stopped on the expiry of six months or the extended period, if any, by the Magistrate in exercise of power conferred by sub-section (5) of Section 167 of the Code, the investigation comes to an end and, therefore, on the completion of the investigation Section 173(2) enjoins upon the officer in charge of the police station to forward a report in the prescribed form.

There is nothing in sub-section(5) of Section 167 to suggest that if the investigation has not been completed within the period allowed by that sub-section, the officer in charge of the police station will be absolved from the responsibility of filing the police report under Section 173(2) of the Code on the stoppage of the investigation.

Therefore, the Special Court was competent to entertain the police report restricted to six months' investigation and take cognizance on the basis thereof."

In *Durgesh Chandra Saha vs. Bimal Chandra Saha and Others* [1996 (1) SCC 341] the situation considered was one relating to Section 167(5) of the Code as amended by the West Bengal Act. The two-judge Bench held that the consequences envisaged in the sub-section would not befall a case where investigation was completed and charge-sheet was laid, albeit it was only after expiry of the period specified in the sub-section.

In our opinion there is no conflict between the aforesaid two decisions and the ratio was applied on the factual position in each case. Nor is it at variance with the view which we have expressed above.

The fact situation in the other appeal, arising out of S.L.P. (Crl.) No.1705 of 1997 (Ganesh Lal Moondra & Others vs. S. Dasgupta and another), is different. In that case appellant was involved in an offence under Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 ('E.C. Act' for short) for contravention of Clause 17 of the Textile Control Order, 1988. FIR in that case was longed on 27.8.1991. Appellant appeared in the court on 26.11.1993, and was enlarged on bail on the same date. The charge sheet was laid on 6.1.1995.

Obviously the investigation was completed before the expiry of two years from the date of appearance of the accused and hence there is no scope for invoking the consequences mentioned in Section 167(5)(iii) of the Code as per WB amendment. But the contention advanced in that case before the High Court was that the court has no jurisdiction to take cognizance of the offence in view of the bar contained in Section 468 of the Code, which reads thus:

"468. Bar to taking cognizance after lapse of the period of limitation. - (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be -

(a) six months, if the offence is punishable with fine only;

(b) One year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years."

[Sub-section (3) is not relevant here.] When appellant challenged the order by which the court took cognizance of the aforesaid offence the High Court proceeded on the assumption that the offence under Section 7 of the E.C. Act is punishable with imprisonment for a term not exceeding 2 years and therefore found that the period of limitation is 3 years from the date of offence. But the aforesaid assumption made by the High Court is on an erroneous basis because the offence under Section 7(1)(a)(ii) is punishable with imprisonment which may extend up to 7 years. That sub-clause is extracted below:

"7.Penalties.- (1) If any person contravenes any order made under section 3, -

(a) he shall be punishable,-

(i) in the case of an order made with reference to clause (h) or clause (I) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine."

Appellant endeavoured in the High Court to show that the said offence is punishable only up to two years, on the strength of the proviso to clause (f) in Section 12-AA(1) of the E.C. Act. That section stipulated that when a Special Court is constituted under Section 12-A for any area, therefore all offences under the E.C. Act committed within that area shall be triable by that Special Court. Clause (f) of Section 12-AA(1) says that all such offence shall be tried in a summary manner. The proviso that clause read thus:

"Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Special Court to pass a sentence of imprisonment for a term not exceeding two years."

The contention is that the aforesaid limit fixed by the Parliament would have the effect of altering the extent of punishment for the offence under Section 7 of the E.C. Act to imprisonment for a period of two years. We cannot agree that the effect of the said proviso was to amend section 7 by making the offence punishable only up to two years. The effect of the proviso is to limit the jurisdiction of the Special Court in awarding sentence. That is different from understanding the extent of the sentence, whether the offence had been reduced by Parliament through a process other than amendment of the provision. One has to look at the punishing provision to know the extent of the sentence prescribed and not at the limit fixed for a particular court in the matter of awarding sentence; e.g. Section 326 of the Indian Penal Code deals with an offence punishable with imprisonment for life or with imprisonment for a term which may extend to 10 years. But that offence is triable by a magistrate of first class, the upper limit of whose powers in the matter of awarding sentence is restricted by Section 29(2) of the Code as 3 years. By reason of that Section it cannot be assumed that the offence under Section 326 IPC is punishable only with imprisonment for 3 years.

A Division Bench of the Patna High Court had occasion to consider the same question whether the offence under Section 7 of E.C. Act is punishable only up to two years on account of Section 12-AA of that Act and consequently whether a case relating to that offence became a summons case. In *Ram Chandra Pansari vs. State of Bihar* 1989 CrL. Law Journal 1988 = Patna Law Journal Report 623, learned Judges negated this contention. We quote, with approval, the following passage from the said decision:

"The maximum sentence of 7 years as provided under Section 7 of the Act and the proviso to clause (f) to section 12AA imposing a limit of 2 years imprisonment on the power of the Special Judge has to be harmoniously construed and I do not find any difficulty in the same. The offence continues to attract the maximum sentence of 7 years. But the Special Judge trying the case does not have the jurisdiction to impose a sentence of more than 2 years. This does not mean that the offence itself is punishable by 2 years. It only means that although the offence is punishable by 7

years but the trial court cannot give a sentence beyond 2 years and if this construction is given then both section 7 and the proviso to clause (f) to section 12AA get their full play."

AS the offence under Section 7A(1)9(ii) of the E.C. Act is punishable with imprisonment up to 7 years the offence would not attract the bar of limitation under Section 468 of the Code. It is, therefore, unnecessary for us to consider whether the curative provision in Section 473 of the Code should have been invoked.

In the result we dismiss both the appeals.