

Union Of India vs Thamisharasi And Ors on 1 May, 1995

Equivalent citations: 1995 AIR SCW 2543, 1995 (4) SCC 190, (1996) SC CR R 28, (1995) 2 RECCRIR 531, (1995) 2 CURCRIR 150, (1995) 1 FAC 337, (1995) 58 ECR 590, (1995) 2 GUJ LH 244, (1995) 1 SCJ 515, 1995 ALLAPPCAS (CRI) 203, (1995) 2 CHANDCRIC 109, (1995) 2 CRIMES 523, 1995 BLJR 2 1073, 1995 CRILR(SC&MP) 354, (1995) 2 EASTCRIC 191, (1995) 2 EFR 135, (1995) 2 ORISSA LR 85, (1996) 54 ECC 7, (1996) 2 GUJ LR 387, (1996) 1 MADLW(CRI) 44, (1995) 2 OCR 1, 1995 CRILR(SC MAH GUJ) 354, (1995) 2 CRICJ 43, (1995) 3 SCR 905 (SC), (1995) 32 ALLCRIC 503, (1995) 2 ALLCRILR 232, (1995) 1 RAJ LW 87, (1995) 4 JT 253 (SC), 1995 SCC (CRI) 665

Bench: J.S. Verma, Sujata V. Manohar

CASE NO.:

Appeal (crl.) 611-612 of 1995

PETITIONER:

UNION OF INDIA

RESPONDENT:

THAMISHARASI AND ORS.

DATE OF JUDGMENT: 01/05/1995

BENCH:

J.S. VERMA & MRS. SUJATA V. MANOHAR

JUDGMENT:

JUDGMENT 1995 (3) SCR 905 The Judgment of the Court was delivered by J. S. VERMA, J. Leave granted in special leave petitions.

The common question of law for decision is: whether the proviso to sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 can be invoked by an accused arrested for commission of an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the N.D.P.S. Act".) to claim release on bail on the expiry of the total period specified therein if the complaint is not filed within that period? The Madras High Court has answered this question in the affirmative and directed the release on bail of the respondents who were arrested for the commission of offences under the N.D.P.S. Act in default of filing the complaint within that period. Hence these appeals by special leave.

The material facts are only a few. Admittedly, the Narcotics Control Bureau got a tip-off that a consignment of flasks exported from Madras to Israel contained Hashish concealed therein; and

pursuant to this tip-of the consignment was seized at Israel on 8.6.1994. On the bask of information, the premises of the accused Armukham, Nagraj and Arif U. Patel were searched at Madras and their statements recorded by the concerned authorities. These accused were arrested on 27.6.1994 and produced before the Magistrate who granted remand from time to time. We need not mention the facts relating to the orders of preventive detention of the accused under the Prevention of Illicit Traffic in Narcotic Drugs & Psychotropic Substances Act, 1988 since that is the subject matter of a different proceeding wherein the order of preventive detention was challenged. Admittedly, the complaint against the accused was not filed within the maximum period of 90 days of the arrest specified in the proviso to sub- section (2) of Section 167 Cr. P.C. as the total period for which the accused can be remanded to custody during investigation. Accordingly, the accused claimed to be released on bail as of right on expiry of the specified period of 90 days and they have been directed to be released on bail on that ground alone. The High Court has rejected the prayer for cancellation of the bail by the impugned order. Hence, these appeals which involved for decision the aforesaid common question of law.

It may be mentioned that in the meantime, after the aforesaid prescribed period, the complaint has been filed but this subsequent fact is not material for decision of the above question of law. It is common ground that the legality of the impugned order granting bail is to be decided with reference to its date prior to the filing of the complaint. The power to detain the accused on the basis of the material now available on merits or the liability of the accused for preventive detention is a separate question which does not arise for consideration herein, and would remain unaffected by the view taken in these appeals on the sole question for decision.

The submission of the learned Additional Solicitor General is that by virtue of the special provisions in the N.D.P.S. Act and particularly Sections 36 and 37 thereof, the application of the proviso to sub-section (2) of Section 167 Cr. P.C. is excluded in the case of a person accused of any offence punishable under the N.D.P.S. Act. On the other hand, Shri Ram Jethmalani, learned counsel for the respondents contends that the scheme of the N.D.P.S. Act supports the applicability of the proviso to sub-section (2) of Section 167 Cr. P.C. instead of indicating its exclusion in such cases.

The relevant provisions in the Code of Criminal Procedure, 1973 are as under:

"4. Trial of offence under the Indian Penal Code and other laws. - (1) AH offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise deal with ac-cording to the provisions hereinafter contained.

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

"167. Procedure when investigation cannot be completed in twenty-four hours. - (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by

Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(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 exceed-

(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 XXXIII for the purpose of that chapter:

(b).....

(c).....

Explanation I. - For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

xxx xxx xxx The relevant provisions in the Narcotic Drugs and Psychotropic Substances Act, 1985 are as under :

"36-A. 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 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) 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 under Section 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 the section;

xxx xxx xxx (3) Nothing contained in this section shall be deemed to affect that special powers of the High Court regarding bail under Section 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 under Section 36".

"36-C. 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 Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor."

37. Offence to be cognizable and non-bailable - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).

- (a) every offence punishable under this Act shall be cognizable;
- (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 oppose 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.

xxx xxx xxx"

"51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures. - The provisions of the Code of Criminal Procedure 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."

Section 36-A makes it clear that a person accused of or suspected of the commission of an offence under the N.D.P.S. Act is to be forwarded to a Magistrate under sub-section (2) or sub-section (2-A) of Section 167 Cr. P.C.; and the Special Court constituted under Section 36 of the Act exercises, in relation to the person so forward to it, the same power which a Magistrate having jurisdiction may exercise under Section 167 Cr. P.C. in relation to an accused person forwarded to him under that Section. The clear reference to the power of the Magistrate under Section 167 Cr. P.C., particularly sub-section (2) thereof, is an indication that no part of sub-section (2) of Section 167 of the Code is inapplicable in such a case unless there be any specific provision to the contrary in the N.D.P.S. Act. This conclusion is reinforced by some other provisions of the N.D.P.S. Act, Section 36-C says that "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." This also indicates that the provisions in the Code of Criminal Procedure relating to bail and bonds are applicable to the proceedings before a Special Court under the N.D.P.S. Act "save as otherwise provided in this Act." Section 51 also says that the provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act. Except for Section 37 of the N.D.P.S. Act, no other provision of the N.D.P.S. Act is relied on to contend that there is any inconsistent provisions in the N.D.P.S. Act to exclude the applicability merely of the proviso to sub-section (2) of Section 167 Cr.P.C. when sub-section (2) of Section 167 of the Code is made expressly applicable by Section 36-A of the N.D.P.S. Act.

The question, therefore, is: Whether Section 37 of the N.D.P.S. Act is an inconsistent provision of this kind to exclude the applicability merely of the proviso to sub-section (2) of Section 167 Cr.P.C. when sub-section (2) of Section 167 is expressly made applicable by the N.D.P.S. Act? The non-obstante clause at the beginning of sub-section (1) of Section 37 indicates that the provisions in

clauses (a) and (b) thereof are inconsistent with the corresponding provisions of the Code. Clause (a) makes every offence punishable under this Act to be cognizable. Clause (b) imposes limitations on granting of bail specified therein which are in addition to the limitations under the Code of Criminal Procedure on granting of bail as stated in sub-section (2) of Section 37. Clause (b) of sub-section (1) specifies the two limitations on granting of bail, namely, (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The learned Additional Solicitor General contends that these limitations on granting of bail specified in clause (b) of sub-section (1) of Section 37 indicate that the applicability of the proviso to subsection (2) of Section 167 Cr.P.C. is excluded in such cases. We are unable to accept this contention.

The limitations on granting of bail specified in clause (b) of sub-section (1) of Section 37 come in only when the question of granting bail arises on merits. By its very nature the provision is not attracted when the grant of bail is automatic on account of the default in filing the complaint within the maximum period of custody permitted during investigation by virtue of sub-section (2) of Section 167 Cr. P.C. The only fact material to attract the proviso to sub-section (2) of Section 167 is the default in filing the complaint within the maximum period specified therein to permit custody during investigation and not the merits of the case which till the filing of the complaint are not before the court to determine the existence of reasonable grounds for forming the belief about the guilt of the accused. The learned Additional Solicitor General submitted that this belief can be formed during investigation by reference to the contents of the case diary even before the charge-sheet has been filed. This is fallacious. Till the complaint is filed the accused is supplied no material from which he can discharge the burden placed on him by Section 37(1)(b) of the N.D.P.S. Act. In our opinion, such a construction of clause (b) of sub-section (1) of Section 37 is not permissible.

Sub-section (3) of Section 36-A provides that the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure shall not be affected by anything contained in Section 36-A of the N.D.P.S. Act. Sub-section (2) of Section 167 Cr. P.C. has been expressly applied by Section 36-A of the Act and the scheme of the Act is that the provisions of the Code would apply except where there is any inconsistent provision in this Act in relation to arrests made under this Act. It is this context in which Section 37(1)(b) has to be construed wherein are specified the limitations on granting of bail. We must, therefore, look to the corresponding provision in the Code of Criminal Procedure with which Section 37(1) (b) of the Act can be treated to be inconsistent. In the Code of Criminal Procedure, it is Section 437 and not Section 167 which is the corresponding provision for this purpose. The corresponding limitation on grant of bail in case of non-bailable offence under Section 437 is as follows:

"(i) such person shall not be so re-leased if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;"

In other words, under Section 437 of the Code the person is not to be released on bail "if there appear reasonable grounds for believing that he has been guilty of an offence....." while according to Section 37 of the N.D.P.S. Act, the accused shall not be released on bail unless "the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence.....". The requirement of reasonable grounds for belief in the guilt of the accused to refuse bail is more stringent and, therefore, more beneficial to the accused than the requirement of reasonable grounds for the belief that he is not guilty of the offence under Section 37 of the N.D.P.S. Act. Under Section 437 Cr. P.C., the burden is on the prosecution to show the existence of reasonable grounds for believing that the accused is guilty while under section 37 of the Act the burden is on the accused to show the existence of reasonable grounds for the belief that he is not guilty of the offence. In the first case, the presumption of innocence in favour of the accused is displaced only on the prosecution showing the existence of reasonable grounds to believe that the accused is guilty while under the N.D.P.S. Act it is the accused who has to show that there are reasonable grounds for believing that he is not guilty.

The limitation on the power to release on bail in Section 437 Cr. P.C. is in the nature of a restriction on that power, if reasonable grounds exist for the belief that the accused is guilty. On the other hand, the limitation on this power in Section 37 of the N.D.P.S. Act is in the nature of a condition precedent for the exercise of that power, so that, the accused shall not be released on bail unless the Court is satisfied that there are reasonable grounds to believe that he is not guilty. Under Section 437 Cr. P.C., it is for the prosecution to show the existence of reasonable grounds to support the belief in the guilt of the accused to attract the restriction on the power to grant bail; but under Section 37 N.D.P.S. Act, it is the accused who must show the existence of grounds for the belief that he is not guilty, to satisfy the condition precedent and lift the embargo on the power to grant bail. This appears to be the distinction between the two provisions which makes Section 37 of the N.D.P.S. Act more stringent.

Accordingly, provision in Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the corresponding provisions in the Code and imposes limitations on granting of bail in addition to the limitations under the Code of Criminal Procedure as expressly provided in sub-section (2) of Section 37. These limitations on granting of bail specified in sub-section (1) of Section 37 are in addition to the limitations under Section 437 of the Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding the applicability of the proviso to sub-section (2) of Section 167 Cr.P.C. which operates in a different field relating to the total period of custody of the accused permissible during investigation.

In our opinion, in order to exclude the application of the proviso to sub- section (2) of Section 167 Cr. P.C. in such cases an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary implication. As shown by us, there is no such provision in the N.D.P.S. Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 Cr. P.C. which is expressly applied. The absence of any provision inconsistent therewith in this Act is significant.

A comparison with the relevant provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short "the TADA Act") is useful. Section 20 therein provides for modified application of certain provisions of the Code of Criminal Procedure. Sub-section (4) of Section 20 specifies the modification with which Section 167 Cr. P.C. is applied, to a person accused of an offence under the TADA Act. One of the modifications expressly made therein is by the provision for a longer total period of permissible custody during investigation. A corresponding provision is absent in the N.D.P.S. Act. Thereafter sub-sections (8) and (9) of Section 20 are provisions corresponding to sub-sections (1) and (2) of Section 37 of the N.D.P.S. Act. This similarity between the two Acts is striking and in this context the absence in the N.D.P.S. Act of a provision like sub-section (4) of Section 20 of TADA Act assumes further significance and supports the construction we have made of Section 37 of the N.D.P.S. Act. The TADA Act is a stringent statute to meet an extraordinary situation as in the N.D.P.S. Act. It is also significant that notwithstanding the substitution of Section 37 in the N.D.P.S. Act in its present form by Act 2 of 1989 subsequent to the enactment of the TADA Act, there is nothing in Section 37 of the N.D.P.S. Act similar to sub-section (4) of Section 20 of the TADA Act even though there is striking similarity of the provision with sub-sections (8) and (9) of Section 20 of the TADA Act. In our opinion, the legislative intent of not excluding the applicability of the proviso to sub-section (2) of Section 167 Cr.P.C. in cases of arrest made for commission of offences under the N.D.P.S. Act, is quite evident.

It is settled that 'the court will have no power of remand of an accused to any custody unless the power is conferred by law'. (See Natabar Panda Bisnu Charon Panda Batakwhna Panda Babaji Panda v. State of Orissa, [1975] Supp. SCR 137). The power must, therefore, be traced to some provision of the statute. There is clear mention of Section 167 Cr. P.C. in the N.D.P.S. Act for the exercise of this power. Ordinarily, there must also be an outer limit prescribed by specification of the total period of permissible remand during investigation. This too is provided in Section 167. To exclude merely this part of Section 167, an express provision in the statute was necessary, assuming there could be conferment of power of remand unlimited in point of time which, in substance, is the argument of the learned Additional Solicitor General. The effect of the proviso to sub-section (2) of Section 167 Cr.P.C. was stated in Natabar Parida (supra), thus:-

"..... The law as engrafted in proviso (a) to sections 167(2) and section 309(2) of the New Code confers the powers of remand to jail custody during the pendency of the investigation only under the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded..... But then the command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation may still be proceeding. In serious offences of criminal conspiracy - murders, dacoities, robberies by inter-state gangs or the like, it may not be possible for the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the accused released on bail under section 167 will be deemed to be

so released under the provisions of Chapter XXXIII and for the purposes of that Chapter. That may empower the court releasing him on bail, if it considers necessary so to do, to direct that such person be arrested and committed to custody as provided in sub-section (5) of section 437 occurring in Chapter XXXIII. It is also clear that after the taking of the cognizance the power of remand is to be exercised under section 309 of the New Code. But if it is not possible to complete the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a "paradise for the criminals," but surely it would not be so, as sometimes it is supposed to be, because of the courts. It would be so under the command of the Legislature."

(at pages 142-143) (emphasis supplied) The learned Additional Solicitor General placed strong reliance on the decision of this Court in *Narcotics Control Bureau v. Kishan Lal and Others*, [1991] 1 S.C.C. 705. The only thing decided in that case is that the power of the High Court to grant bail under Section 439 of the Code of Criminal Procedure is subject to the limitations contained in the amended Section 37 of the N.D.P.S. Act since those additional limitations are applicable to the High Court also in the matter of granting bail. That is a different question. That decision does not, therefore, answer the question which arises for consideration in the present case. No other decision of this Court has been relied on by either side at the hearing before us to support a different view.

For the aforesaid reasons, these appeals are dismissed resulting in the interim orders made herein being vacated. However, it is made clear that this decision will not affect any other order made in accordance with law which may be in force permitting the continuance in detention of the respondents.

Appeals dismissed.