Tamizharasi And Another vs Assistant Director, Narcotic Control ... on 14 December, 1994

Equivalent citations: 1995(1)ALT(CRI)562, 1996CRILJ208

JUDGMENT

Arunachalam, J.

1. A common question of law has been urged before us in all these three habeas corpus petition and hence it would be better to dispose of all these petitions through a common order. HCP No. 1676 of 1994 is capable of being disposed of on factual material, without legal ramifications, affecting its termination.

2. Facts in HCP No. 1675 of 1994 : Petitioner Tamizharasi is the wife of Arumugham, whose liberty she has coveted in this Habeas Corpus Petition, alleging that he has been kept under illegal detention in Central Prison, Madras, on and after 27-9-1994. The averments in her affidavit show that Arumugham was arrested on 27-6-1994 from his residence. Neither documents nor contraband stood recovered from him. However, it is alleged by the prosecution that he is involved in the export of certain Narcotic Drugs which were seized in a foreign country. Arumugham was remanded to judicial custody on 26-8-1994. Every 14 days, remand was being extended. The period of 90 days expired on 27-9-1994 and even by then the respondent had not preferred any complaint. Arumugham had earlier preferred a bail application seeking his release, but the same was dismissed on 24-7-1994. A second application for bail was moved by him, which was pending at or about the time when the 90 days period expired. According to her affidavit, it was specifically argued before the Special Judge that the detenu was ready to furnish surety and hence he may be enlarged on bail, since the respondent had defaulted in filing the complaint within a period of 90 days. However, the bail plea of the detenu was negatived and remand was extended.

3. Facts in HCP No. 1692 of 1994 : Petitioner Vijayalakshmi is the wife of Y. V. Nagaraj, who has been similarly detained, in Central Prison, Madras, as detenu Arumugham, concerned in HCP No. 1675 of 1994. It is also evident, that Arumugham and Nagaraj are concerned in the same crime. It appears that Nagaraj was preventively detained by an order of detention clamped under the provisions of PIT NDPS Act. We were informed by counsel on either side that the said preventive order has since been quashed by this Court and the respondent had taken up the matter to the Supreme Court. As in HCP No. 1675 of 1994, Y. V. Nagaraj was also arrested on 27-6-1994 and the period of 90 days expired on 27-9-1994. A bail application was preferred on behalf of Nagaraj before the Special Court seeking release on bail on default made by the respondent in filing the complaint. Bail plea was negatived while remand was directed to be continued. The dismissal of the latest bail application was on 12-10-1994. It appears that the learned Special Judge was not inclined to act under the proviso to S. 167(2) of the Code of Criminal Procedure in view of the pronouncement of a

learned single Judge of this Court in Seemsiraj v. Asstt. Collector, Central Excise, (1992) Mad LW (Cri) 387 : (1993 Cri LJ 844) holding that proviso to sub-sec. (2) of S. 167, Cr.P.C. will have no application, where a person has been charged, under any of the offences falling within the scope of Narcotic Drugs and Psychotropic Substances Act.

4. Facts in HCP No. 1676 of 1994 : Petitioner Mohammed Shabeer is the detenu himself. He was arrested on 15-5-1993 for alleged commission of an offence punishable under the NDPS Act. The case of the prosecution appears to be that the petitioner was found travelling in a lorry from which heroin was seized. Arrest memo was served on the petitioner at 11.00 p.m. on 15-5-1993 and he was produced for remand only on 18-5-1993. His remand was extended from time to time. The 90 days period expired on 17-8-1993. Thereafter, the petitioner became entitled to grant of bail under proviso to S. 167(2) of the Code of Criminal Procedure. Petitioner is now incarcerated in Central Prison, Salem. It is not in dispute, that complaint against the petitioner stood filed on 27-9-1993 and till such date, petitioner had not chosen to exercise his right pleading for release on bail on the ground of default made by the prosecution.

5. Mr. B. Kumar, learned counsel appearing on behalf of the concerned petitioner, in each one of these habeas corpus petitions, submitted, that Courts do not possess any inherent power to remand and if at all it must be traced to statutory provisions. According to him, the source of power to grant bail even under the provisions of the NDPS Act will have to be traced to S. 437 or 439 of the Code of Criminal Procedure, as the case may be, and not to S. 37 of the NDPS Act, which tends to contemplate further limitations, while considering the plea for bail, made by a person allegedly involved in the commission of an offence, under the NDPS Act. Mr. B. Kumar emphatically submitted, that on the default committed by the prosecution, in not laying a complaint within 90 days from the date of arrest of the person accused of an offence under the NDPS Act, if such person was prepared to and does furnish bail, he shall have to be released on bail, under the said sub-section thereby putting an embargo on the power of the Magistrate to grant further extension of remand. He urged, that there should not be any linkage between the merits of the case and entitlement of a person accused of an offence punishable under the provisions of the NDPS Act, to be released under the proviso to S. 167(2) of the Code of Criminal Procedure. He further submitted that S. 37 of the NDPS Act, can have no role to play, in that contingency, for the person concerned was sought to be released on bail on the ground of default committed by the prosecution. He further added, that if this was not the test, the whole section would become unconstitutional, in view of the provisions of Art. 21 of the Constitution, for a person allegedly involved in commission of a crime under the NDPS Act can be kept in prison indefinitely. Nextly, he submitted, that the non obstante clause, either in S. 36A of the Act or S. 37 of the Act, does not exclude operation of the provisions of S. 167(2) of the Code of Criminal Procedure. If it were to be held otherwise, apparently the Magistrate will have no power of remand. Several decisions rendered by various Courts have been placed for our scrutiny by Mr. B. Kumar, which we will refer to and consider at the appropriate time.

6. Mr. K. Asokan, learned Additional Central Government Standing Counsel, appearing on behalf of the concerned respondents in HCP Nos. 1675 and 1676 of 1994 submitted, that under the scheme of the Special Acts, though procedure may be traceable to the provisions of Code of Criminal Procedure, the special provisions found under the Special Act, will have to be held as overriding the

general provisions. By a comparison of similar provisions under the TADA Act, Mr. Asokan submitted, that while interpreting S. 36A(1)(c) of the Act, wherein reference has been made to the provisions of S. 167 of the Code of Criminal Procedure, the same may have to be read, in conjunction with, the embargo contained under S. 37 of the NDPS Act. He argued, that since extension of time for laying of the charge sheet, had not been afforded, either simpliciter or at the instance of the Public Prosecutor, as could be done under the provisions of the TADA Act, it must be deemed, that there was no restriction, whatever, under the NDPS Act for laying of a complaint or a charge sheet within any specified time schedule. If at all, release on bail or otherwise can be considered at any stage, only within the frame work of S. 37 of the Act. By referring to the observations of the Supreme Court in Narcotics Control Bureau v. Kishan Lal, , Mr. Asokan contended that the power to grant bail under any of the provisions of the Code of Criminal Procedure must necessarily be subject to the conditions mentioned in S. 37 of the NDPS Act. He then submitted, that TADA Act was not a permanent Act, while the NDPS Act has permanence and therefore irrespective of the stage at which the investigation was pending in a given case, bail, if at all, can be ordered only on merits under S. 37 of the Act, which will have to be read as part of S. 36A of the Act, and therefore it will be idle to contend, that bail on default of the prosecution, could be ordered in view of the provisions of S. 167(2) of the Code of Criminal Procedure. He also submitted that once the detenus concerned had moved the Special Court for bail on the ground of default committed by the prosecution and those petitions stood dismissed, further action by the detenus concerned will only be feasible by challenging the orders refusing bail, before a learned single Judge and an entry cannot be sought into this Court by means of Habeas Corpus Petitions. In his turn, he has placed reliance on certain decided cases which, as stated earlier, we will consider at the relevant context in the course of our discussion.

7. Before commencing his arguments, Mr. Asokan, categorically stated, that since a pure question of law stood involved, in these Habeas Corpus Petitions, concerned respondent in each one of these Habeas Corpus Petitions was not filing any counter affidavit. However, on the second day of hearing, of these Habeas Corpus Petitions, it was mentioned by Mr. K. Asokan, that the respondents concerned in HCP Nos. 1675 and 1692 of 1994 were anxious to file counter affidavits, more so, to avoid comment of non-contradiction of the case of the respective petitioners, on facts, for the legal issues involved have already been extensively argued by him. We find that counter affidavits have also been put into the case bundles, through the receiving section of this Court, on 30-11-1994, though no arguments were advanced on the basis of these counter affidavits.

8. Mr. S. Udayakumar, learned counsel appearing on behalf of the respondent in HCP No. 1692 of 1994 stated that he was adopting the arguments of Mr. Asokan and had nothing further to add.

9. Since we find in the case bundle in HCP Nos. 1675 and 1692 of 1994, counter affidavits sworn to by the same respondent, who is U. Chandrasekaran, we are duty bound to have a quick look into the averments found therein. The respondent has stated that Arumugham is an accused along with six others in an offence involving seizure of 2.5 tons of Hashish at Port Ashodode, Israel. So is Y. V. Nagaraj. It was found that the consignment shipped from Madras contained Hashish concealed in 180 cartons of vacuum flasks, which stood seized at Port Ashodode. Information about involvement of persons concerned in this clandestine export was sought to be collected. On the basis of

information received, certain premises at Madras were searched by the Officers of Narcotic Control Bureau. Search had resulted in seizure of incriminating documents. Persons connected with those searches were summoned to the office of the respondent and their voluntary confession statements were recorded. Those statements indicated their respective roles in drug trafficking. The other part of the counter affidavits detailed the legal provisions and the impossibility of acceptance, of the contentions made on behalf of the petitioners, that the detenus concerned will be entitled to be released on bail on the ground of default made by the prosecution. The counter affidavits also read, that to obtain evidence from seizing agency, a Letter Rogatory has been sent by the Special Court on 16-8-1994, through the Ministry of External Affairs, New Delhi, and a reply is awaited.

10. The main question placed for our decision is as important as it is interesting. There is divergence of judicial opinion on this aspect, which we will be referring to shortly. We have Full Benches of High Court, offering diametrically opposite views, on the applicability of the provisions of S. 167(2) of the Code of Criminal Procedure, to a person concerned in an offence punishable under the provisions of the NDPS Act. Even at the outset, we are bound to state, that the views expressed by some of the High Courts, including two learned single Judges of this Court, that the provisions of Sec. 167(2) of the Code of Criminal Procedure, will not be applicable to offenders under the NDPS Act, may not be very relevant in view of the recent pronouncement of the Supreme Court in Hitendra Vishnu Thakur v. State of Maharashtra, . In that case, provisions of Sec. 167(2) of the Code of Criminal Procedure, were taken note of and considered, in conjunction with Section 20(4)(b) (amended) and Sec. 20(4)(bb) (inserted), modifying thereby the provisions of S. 167(2) of Code of Criminal Procedure, in relation to TADA matters. The Supreme Court had also occasion to consider, the provisions of S. 20(8) of the TADA Act, which, in combination with S. 20(9) of the said Act, are absolutely identical, to the provisions found in S. 37 of the NDPS Act. We will refer to the pronouncement of the Supreme Court, in greater detail, after taking note of the law laid down, by other courts.

11. Initially, it will be relevant and necessary to refer to the judgments, of two learned single Judges of this Court, holding that provisions of S. 167(2), Cr.P.C. will have no application to an offender concerned under the provisions of the NDPS Act. Pratap Singh, J. in Seemiraj v. Assistant Collector, Central Excise, 1992 (2) Mad L W (Cri) 387 : (1993 Cri LJ 844), had the need, to consider the applicability or otherwise of the provisions of S. 167(2) of the Code of Criminal Procedure, to cases of those charged with offences, punishable under the NDPS Act. After extracting the relevant provisions and taking note of the law available till then, Pratap Singh, J., stated as hereunder :

> "Under the Act bail can be granted only on the grounds mentioned under Sec. 37, sub-sec. (1) and subject to such limitations as may have been provided under the Code of Criminal Procedure, 1973, or any other law for the time being in force on granting bail. The proviso to sub-sec. (2) of S. 167, Cr.P.C. is not a limitation for the purpose of grant of bail, but only a technical lever enabling the release of an accused person where a charge sheet has not been filed within 90 days, if the offence is punishable with life sentence or sentence of ten years or above, irrespective of the fact whether investigation is still pending or not. In my opinion, if one reads the provisions of S. 36A and S. 37 together and, particularly sub-sec. (2) thereof, it

becomes clear that the proviso to sub-sec. (2) of S. 167 of the Code of Criminal Procedure will have no application in such cases where a person had been charged under any of the offences falling within the scope of NDPS Act.

The preamble to NDPS Act shows that the object of the Act was to amend the law relating to Narcotic Drugs and to make stringent provisions for the control and regulation of operations relating to Narcotic Drug and Psychotropic Substances Act etc., The Act deals with the offences which have got the potential to cause serious injury to the society as a whole, as compared to any other offences under other law. There can be no laxity in the enforcement, of the provisions of the Act. The offence investigated in a case under this Act, has national and international ramifications and it is not easy to complete the investigation and file a complaint within a time bound schedule of 90 days or so. If therefore in spite of this awareness, the accused person is allowed to go on bail on any technical plea such as the one canvassed before me, that would defeat the very object of law.

In view of the above, I am clear that proviso to Section 167(2) Criminal Procedure Code is not applicable to such cases covered by Section 37 of NDPS Act. In such cases, only if the requirements of Section 37(b) of the Act are satisfied, the accused can be released on bail."

12. S. M. Ali Mohammed, J., in Sanjeevi v. State by Inspector of Police, B1 1993 Mad LW (Crl 176) held, that as laid down by Pratap Singh, J., in Seemiraj v. Assistant Collector, Central Excise 1992 Mad LW (Crl) 387 : (1993 Cri LJ 844), the proviso to Section 167(2), Cr. PC was not applicable to such cases covered by Section 37 of the NDPS Act. In such cases, only if the requirements of Section 37(b) of the Act were satisfied, the accused can be released on bail. In the cases, decided by Pratap Singh, J. and S. M. Ali Mohammad, J., bail was not pleaded for, on the inherent merits of factual details, for the arguments advanced, stood restricted to entitlement of bail, purely on the default committed by the prosecution, in not having laid the final report within 90 days.

13. Before we refer to other decisions, it will be necessary, to extract the relevant portions, of the NDPS Act and the Code of Criminal Procedure. Section 36A(1)(a) to (c) read as hereunder.

"36A. Offence triable by the 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 (2A) 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 that section.

(d) xx xx xx xx xx xx"

It is apparent from Section 36A(1)(b), that the person accused of or suspected of commission of an offence, under this Act, when forwarded to a Magistrate under sub-section (27) or sub-section (2A) of Section 167, Cr.P.C. a Judicial Magistrate may authorise detention of such person, in such custody, as he thought fit, for a period not exceeding fifteen days in the whole, while the maximum period of which an Executive Magistrate would be entitled to direct custody would stand restricted to seven days. Under the proviso to Section 36(1)(b) of the Act, if the Magistrate considered, at two stages contemplated therein, that the detention of such person was unnecessary, he shall have to order production of such person before the Special Court having jurisdiction. Sub-clause (c) of this section is very relevant, for it empowers exercise of same powers, by Special Courts, of the Magistrate having jurisdiction to try a case, in exercise of Section 167 of the Code of Criminal Procedure, in relation to an accused person who had been forwarded to him under the said section. It is clear under this sub-clause, that all the powers exercisable by a Magistrate under Section 167, Cr.P.C. can be exercised by a Special Court in relation to a person forwarded to it under clause (b). There is no exclusion of the provisions of Section 167(2) of the Code of Criminal Procedure under sub-clause (c) aforestated. On the contrary, powers exercisable by the Magistrate under Section 167, Cr.P.C. stand preserved, to be exercised by the Special Court. This is the only power of remand, that we are able to comprehend under the Act, which, in turn, has its foundation, on the provisions of Section 167 of the Code of Criminal Procedure. If it was the intention of the Legislature to provide special powers of remand to Special Courts under the special enactment, it would have specifically stated so, in which event recourse to general law will stand prohibited. Such a contingency does not arise here, for there is no other specific provision for remand of an accused after the expiry of 60 days or 90 days, as the case may be, more so, when the said person is prepared to and does furnish bail.

> We are unable to accede to the submissions made by Mr. Asokan that we have to read into Section 36A(1)(c) of the Act, provisions of Section 37 of the Act, which refer to grant of bail, apparently on the merits of the case. Emphasis was sought to be laid on the following words found in sub-section (c) :
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> "the same power"
>
> "the Special Court may exercise".

According to Mr. Asoken, the Special Court was not bound to exercise its powers under Section 167(2), Cr.P.C. for the word used (is) "may". It was also canvassed that the word "same power" used in sub-clause (c) will not denote all the powers exercisable by the Magistrate, for in that evet the word "an" could have been used instead of the word "same". The dictionary meaning of the word "same" reads as hereunder :

> "not different, of like kind, unchanged, or uniform."

We are unable to find any legislative intent prohibiting the Special Court from exercising the same power which necessarily includes all the powers which a Magistrate having jurisdiction to try a case will be competent to exercise under Section 167(2) of the Code of Criminal Procedure. If we were to uphold the contention of Mr. Asokan, that in view of the use of the word "may" in sub-clause (c), discretion was that of the Magistrate, then the consequence would rather be appalling, for then there would be no guidelines as to the circumstances under which which a Magistrate could exercise his discretionary power and the arena in which he could refuse to exercise such power. If the person concerned does not offer bail, then the position would certainly be different, as has been clarified by Explanation 1 to Section 167(2), Cr.P.C. which reads as follows :

> "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 she does not furnish bail."

It is evident that till bail is furnished, extension of remand is feasible under Section 167(2), of the Code of Criminal Prodecure, While power to extend remand after the specified period under this section in the event of non-filing of final report or a complaint, as the case may be, within that specified period, would entitle the said person to be released mandatorily on bail in the event of his being prepared to and in fact furnishing bail. In such an event, it has to be held, that a Special Court, which will step into the shoes of the Magistrate under Section 36A(1)(c) of the Act, ceases to have any power of extension of remand in such a contingency. If it was the intention of the Legislature that the limitations prescribed under Section 37 of the Act in the process of granting bail, would also have to prevail in case of bail on default, such intention would have been specifically expressed. No doubt, the objects of the Act vis-a-vis stringent provisions enacted, cannot be overlooked by Courts. But, once it has to be conceded on the basis of the law laid down by the highest Court of the land, that at the stage of default bail, merits of the case do not enter into the arena, but only default by the prosecution would be the sole criterion, it would be odd to contend, that provisions of Section 37 of

the Act will have to be read as an in-built provision in Section 36A of the Act.

14. Sub-section (3) of Section 36A reads as follows :-

> "Nothing contained in this section shall be deemed to affect the 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 (c) 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."

On the basis of this sub-section, it was submitted that bail, if at all, can be ordered by the High Court under Section 439 of the Code of Criminal Prodecure, which, in view of the law laid down by the Supreme Court in Narcotic Control Bureau v. Kishan Lal , would get covered by the limitations enumerated under Section 37 of the Act. This sub-section is intended to preserve the powers of the High Court to order bail power of the High Court or the Court of Session regarding bail, which arise out of refusal to be released on bail, or modification, of, or setting aside of conditions imposed, while ordering bail by the Magistrate. Since the Special Court is not a Court of Session, nor a Magistrate, necessarily there was need to enact sub-clause (3) to Section 36A of the Act, to make it clear, that reference to a Magistrate included also a reference to Special Court constituted under Section 36 of the Act.

15. It will be relevant at this stage to take note of the provisions of Section 437 of the Code of Criminal Procedure, which speaks of arrest and detention of a person accused of or suspected of commission of any non-bailable offence, being produced before a Court other than the High Court or the Court of Session and the right of such Court to release the said person on bail. It is evident, that the Special Court is neither the High Court, nor the Court of Session and naturally its source of power for granting bail stems out of 437 of the Code of Criminal Procedure all that Section 37 of the Act takes in its fold is to provide additional limitations in th event of grant of bail. That such is the purpose of Section 37 of the Act is also clear from Section 37(2) of the Act, which reads that limitations of granting bail specified in clause (b) of sub-section (1) were additions to the limitations under the Code of Criminal Procedure or any other law for the time being in force, for granting bail.

16. Since a comparison has been sought to be drawn by Mr. Asokan, between the provisions of the NDPS Act, and the provisions of TADA Act, to contend that the provisions of Section 167(2) of the Code of Criminal Procedure stood excluded under the NDPS Act, it will be necessary to extract relevant provisions of TADA Act, Section 20(4) of the TADA Act before its amendment, on and from 22nd May, 1993 by Act 43 of 1993, read as hereunder :

> "(4) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that -
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> (a) the reference in sub-section (1) thereof to 'Judicial Magistrate' shall be construed as a referenced to 'Judicial Magistrate or Executive Magistrate or Special Executive

Magistrate';

(b) the reference in sub-section (2) thereof to 'fifteen days', 'ninety days' and 'sixty days' wherever they occur shall be construed as reference to 'sixty days', one year' and 'one year' respectively; and

(c) Sub-section (2A) thereof shall be deemed to have been omitted."

By the amending Act (Act 43 of 1993), the periods mentioned in Section 20(4)(b) of the Act stood modified as 180 days, at both places, where the word 'one year' occurred. After clause (b), a new clause (bb) was inserted namely in sub-section (2), after the provisio, the following proviso was inserted :

"Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period upto one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of on hundred and eighty days."

The reduction of the period from one year to 180 days proclaims the intention of the Legislature, that the liberty of a citizen cannot be sought to be curtailed to a very long period and at the same time keeping in view the seriousness of the nature of offences, which led to prosecutions under the TADA Act, the Legislature felt it necessary to insert a new clause, to provide for extension of remand of offenders concerned, upto one year, in the event of the Designated Court choosing to extend the said period upto one year, on the basis of the report of the Public Prosecutor, indicating the progress of investigation and the specific reasons for the detention of the accused beyond the said period of 180 days. When the Legislature was aware of the stringent provisions of the TADA Act and had therefore felt it necessary, that one year was too long a period and therefore a reduction by six months, would further the cause of justice, had brought in necessary amendments, would not have failed, to have brought into the statute book, similar amendments to NDPS Act, if it had thought it necessary and fit, to allow more time for investigation, of the offences under the NDPS Act. That not having been done, the general law will come into operation, and in the present cases, in the event of a complaint not being filed within the expiry of 90 days and the person concerned was willing to offer bail, the Special Court will not have power in law, to remand the accused any further and if at all, such remand power can be exercised only in the event of such offender concerned not offering bail and so long as he does not furnish bail. We are unable to comprehend as to how these provisions under the TADA Act, export any special significance, to the provisions of NDPS Act, to facilitate holding, that the remand powers of Special Court under Section 167, Cr.P.C. are either taken away in view of Secton 36A(1)(c) of the Act or Section 37 of the Act as an in-built provision in the said sub-section. Whenever there was a need to extend the period of limitation for default bail, on the basic plank of general law, the Legislature has obviously chosen to do so. At the risk of repetition, we are bound to state, that such extension had not been sought to be made under the NDPS act and the general law will have to prevail and in that process the Special Court must be deemed to be a Magistrate, and then the provisions of Section 167(2) of the Code will have to work

itself out.

17. It will be apt to notice Section 20(8) and Section 20(9) of the TADA Act at this stage. They read as hereunder :

> "(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless -
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> (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
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> (b) where the Public Prosecutor opposes the application, the Court is satisfied that there was reasonable ground for believing that he is not guilty of such offence that he is not likely to commit any offence while on bail.
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> (9) The limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail."

In this context, it will be necessary to extract Section 37(1)(b) of the NDPS Act, which reads as hereunder :

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -
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> (a) x x x x x x x x x x x x x x x
>
> (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 -
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> (i) The Public Prosecutor has been given an opportunity to oppose the application for such release, and
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> (ii) Where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

A combined reading of these two provisions indicates that these are almost similar in nature and expected operation. Before we refer to the judgment of the Supreme Court in Hitendara Vishnu Thakur v. State of Maharashtra , it will be better to dispose of the contention of Mr. Asokan, that in view of the decision of the Supreme Court in Narcotic Control Bureau v. Kishan Lal, , the power to grant bail under any of the provisions of the Code of Criminal Procedure must necessarily be subject to the conditions mentioned in Section 37 of the NDPS Act. In Narcotic Control Bureau v. Kishan

Lal, , the Supreme Court, has stated, that only limited question to be decided was, whether the view taken by the High Court, that the limitations placed on the Special Court under Section 37(2) of the NDPS Act, cannot be read as fetters on the High Court, in exercise of powers under Section 439, Cr.P.C. for granting bail, was right or wrong. The Supreme Court has further stated, that leave was granted only to that limited extent. Ultimately, the Supreme Court concluded that the powers of the High Court to grant bail under Section 439, Cr.P.C. were subject to the limitations contended in the amended Section 37 of the NDPS Act and the restrictions placed on the powers of the Court under the said section were applicable to the High Court also in the matter of granting bail. While disposing of the two appeals, the Supreme Court, had no occasion to consider the power of remand under Section 167(2) of the Code of Criminal Procedure and the entitlement to bail, of the persons sought to be prosecuted under the NDPS Act, on default committed by the prosecution. As a matter of fact, while limiting the question for consideration, the Supreme Court has made it clear, that though the petitioners had filed, Writ as well as criminal miscellaneous petitions, seeking bail firstly on the ground that they were entitled to be released on bail as required under Section 167(2) of the Code of Criminal Procedure as charge sheet was filed at a belated stage and secondly on the ground of illness, it had chosen to restrict its decision, only to the specific question referred to earlier. Nowhere in the judgment, the Supreme Court had occasion to consider the power of remand vis-a-vis grant of bail under Section 37 of the NDPS Act. Emphasis was laid by Mr. Asokan, on the following observations of the Supreme Court :

> "Consequently the power to grant bail under any of the provisions of Cr.P.C. should necessarily be subject to the conditions mentioned in Section 37 of the NDPS Act."

These observations were made in the context of the non-obstante clause in the commencement of Section 37 of the Act, and not in relation to the power of remand. Under the Code of Criminal Procedure, Chapter XXXIII deals with provisions of bail and bonds. The Supreme Court was therefore referring to Section 439 of the Code of Criminal Procedure, as far as the powers of the High Court were concerned, while making the aforesaid observations. Section 167 appears in Chapter XII, which bears the heading "Information to the Police and their powers to investigate". Apparently, Section 167 of the Code, takes in itsfold remand at the prefinal report stage, contra distinguished from remand at the post chargesheet stage, provided under Section 309 of the Code of Criminal Procedure. At this stage, the categoric observation of the Supreme Court in Hitendra Vishnu Thakur v. State of Maharashtra , will be most relevant. It reads as hereunder :

> "Section 167 read with Section 20(4) of TADA, thus, strictly speaking is not a provision for "grant of bail", but deals with the maximum period during which is a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge sheet, if necessary in the Court".

18. Now, our attention will have to be focused to the law laid down by the Supreme Court in Hitendra Vishnu Thakur v. State of Maharashtra 1994 SC (Crl) 1087 (AIR 1994 SC 263) referred to a few times earlier, in the course of this order. Though the Supreme Court was considering certain provisions under the TADA Act, we have already stated that the provisions with which we are

concerned under the NDPS Act are almost identical to the provisions scrutinised by the Supreme Court in the case of Hitendra Vishnu Thakur v. State of Maharashtra . The Supreme Court, observed as follows :-

> "Section 20(4) of TADA makes Section 167 of Cr.P.C. applicable in relation to case involving an offence punishable under TADA, subject to the modifications specified therein. Clause (a) thereof, provides that reference in sub-section (1) of Section 167 to 'Judicial Magistrate' shall be construed as reference to Judicial Magistrate' or 'Executive Magistrate' or 'Special Executive Magistrates' while clause (b) provided that reference in sub-section (2) of Section 167 to '15 days', 90 days' and '60 days' wherever they occur shall be construed as reference to '60 days', 'one year' and 'one year' respectively. This section was amended in 1993 by the Amendment Act 43 of 1993 with effect from 22-5-1993 and the period of 'one year' and 'one year' in clause (b) was reduced to '180 days' and 180 days respectively, by modification of sub-section (2) of Section 167. After clause (b) of the sub-section (4) of Section 20 of TADA, another clause (bb) was inserted which reads :
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> '(bb) in sub-section 2, after the proviso, the following proviso shall be inserted, namely, 'Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period upto one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and' Section 57 of the Code of Criminal Procedure provides that a person arrested shall not be detained in custody by the police for a period longer than that which is reasonable but that such period shall not exceed 24 hours exclusive of the time necessary for journey from the place of arrest to the Court of the Magistrate in the absence of a special order under Section 167 of the Code. The Constitution of India through Art. 22(2) mandates that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to that Court and that no person shall be detained in custody beyond that period without the authority of the Magistrate. Thus, the Constitution of India as well as the Code of Criminal Procedure expect that an arrested person, who has been detained in custody, shall not be kept in detention for any unreasonable time and that the investigation must be completed as far as possible within 24 hours. Where the investigation of the offence for which accused has been arrested cannot be completed within 24 hours and there are grounds for believing that the accusation or information against the accused is well founded, the police is obliged to forward the accused along with the case diary to the nearest Magistrate for further remand of the accused person. The Magistrate, on the production of the accused and the case diary, must scrutinise the same carefully and consider whether the arrest was legal and proper and whether the formalities required by law have been complied with and then to grant further remand, if the Magistrate is so satisfied. The law enjoins upon the investigating agency to carry out

the investigation, in a case where a person has been arrested and detained, with utmost urgency and complete the investigation with great promptitude in the prescribed period. Sub-section (2) of Section 167 of the Code lays down that the Magistrate to whom the accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that section. The proviso to sub-section (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure. The said Chapter comprises of Section 436 to 450 but for our purposes it is only Sections 437 and 439 of the Code which are relevant. Both these sections empower the Court to release an accused on bail. The object behind the enactment of Section 167 of the Code was that the detention of an accused person should not be permitted in custody pending investigation for any unnecessary longer period. However, realising that it may not be possible to complete the investigation in every case within 24 hours or even 15 days, as the case may be, even if the investigating agency proceeds with utmost promptitude, Parliament introduced the proviso to Section 167(2) of the Code prescribing the outer limit within which the investigation must be completed. Section 167 read with Section 20(4) of TADA, thus, strictly speaking is not a provision for 'grant of bail' but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge sheet, if necessary, in the Court. The proviso to Section 167(2) of the Code read with Section 20(4)(b) of TADA, thereafter, creates an indefeasible right in an accused person on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek and order for his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section 167(2) of the Code read with Section 20(4) of TADA is generally termed as an 'order-on-default' as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (b) of sub-section (4) of Section 20 read with the proviso to sub-section (2) of Section 167 of Cr.P.C. an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173, Cr.P.C. An obligation, in such a case, is cast upon the Court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section 20(4). There is yet another obligation also which is cast on the Court and that is to inform the accused of his right of being released on bail and enables him to make an application in that behalf

(Hussainara Khatoon Case . This legal position has been very ably stated in Aslam Babalal Desai v. State of Maharashtra where speaking for the majority, Ahmadi J. referred with approval to the law laid down in Rajnikant Jivanlal Patel v. Intelligence Officer Narcotic Control Bureau : New Delhi wherein it was held that :

"The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file charge sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds'.

Thus, we find that once the period for filing the charge sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court shall release him on bail if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the Court must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating/prosecuting agency and once such an application is made, the Court should issue a notice to the Public Prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the Court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's 'default'. Similarly, when a report is submitted by the Public Prosecutor to the Designated Court for grant of extension under Clause (bb), its notice should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provides for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between parties. This is a requirement of the principles of natural justice and the issuance of the notice

to the accused or the Public Prosecutor, as the case may be, would accord with fair play in action, which the Courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the Public Prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party we must as already noticed reiterate that the objection to the grant of bail to an accused on account of the 'default' of the prosecution to complete the investigation and file the challan within the maximum period prescribed under clause (b) of sub-section (4) of Section 20 TADA or within the extended period as envisaged by clause (bb) has to be limited to cases where either the factual basis for invoking the 'default' clause is not available or the period for completion of investigation has been extended under clause (bb) and the like. No other condition like the gravity of the case, seriousness of the offence or character of the offender etc., can weigh with the Court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the 'default' of the prosecution.

An application for grant of bail under Section 20(4) has to be decided on its own merits for the default of the prosecuting agency to file the charge sheet within the prescribed or the extended period for completion of the investigation uninfluenced by the merits or the gravity of the case. The Court has no power to remand an accused to custody beyond the period prescribed by clause (b) of Section 20(4) or extended under clause (bb) of the said section, as the case may be, if the challan is not filed only on the ground that the accusation against the accused is of a serious nature or the offence is very grave. These grounds are irrelevant for considering the grant of bail under Section 20(4) TADA. The learned Additional Solicitor General rightly did not subscribe to the arguments of Mr. Madhava Reddy (both appearing for the State of Maharashtra) that while considering an application for release on bail under Section 20(4), the Court has also to be guided by the general conditions for grant of bail as provided under sec. 20(8) TADA. Considering the ambit and the scope of the two provisions, we are of the opinion that it is totally inconceivable and unacceptable that the consideration for grant of bail under Section 20(8) would be applicable to and control the grant of bail under Section 20(4) of the Act. The two provisions operate in different and independent fields. The basis for grant of bail under Section 20(4), as already noticed, is entirely different from the grounds on which bail may be granted under Section 20(8) of the Act. It would be advantageous at this stage to notice the provisions of Section 20(8) and (9) of the Act.

"(8) Notwithstanding anything contained in the Code, no Person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless -

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(9) The limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail'.

As would be seen from the plain phraseology of sub-section (8) of Section 20, it commences with a non-obstante clause and in its operation imposes a ban on release of a person accused of an offence punishable under TADA or any rule made thereunder on bail unless the twin conditions contained in clauses (a) and (b) thereof are satisfied. No bail can be granted under Section 20(8) unless the Designated Court is satisfied after notice to the Public Prosecutor that there are reasonable grounds for believing that the accused is not guilty of such an offence and that he is not likely to commit any offence while on bail. Sub-section (9) qualifies Sub-section (8) to the extent that the two conditions contained in clauses (a) and (b) are in addition to the limitations prescribed under the Code of Criminal Procedure or any other law for the time being in force relating to grant of bail. Strictly speaking Section 20(8) is not the source of power of the Designated Court to grant bail but it places further limitations on the exercise of its powers to grant bail in cases under TADA, as is amply clear from the plain language of Section 20(9). The Constitution Bench in KARTAR SINGH case, while dealing with the ambit and scope of sub-sections (8) and (9) of Section 20 of the Act quoted with approval the following observations from Usmanbhai case, ;.

"Though there is no express provision excluding the applicability of Section 439 of the Code similar to the one contained in Section 20(7) of the Act in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow. It is true that the source of power of a Designated Court to grant bail is not Section 20(8) of the Act as it only places limitations on such power. This is made explicit by Section 20(9) which enacts that the limitations on granting of bail specified in Section 20(8) are in addition to the limitations under the Code or any other law for the time being in force'. But it does not necessarily follow that the power of a Designated Court to grant bail is relatable to Section 439 of the Code. It cannot be doubted that a Designated Court is 'a Court other than the High Court or the Court of Session' within the meaning of Section 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but is also subject to the limitations placed by Section 20(8) of the Act', and went on to add :

"Reverting to Section 20(8), if either of the two conditions mentioned therein is not satisfied, the ban operates and the accused person cannot be released on bail but of

course it is subject to Section 167(2) as modified by Section 20(4) of the TADA Act in relation to a case under the provisions of TADA".

Thus, the ambit and scope of Section 20(8) of TADA is no longer res integra and from the above discussion it follows that both the provisions i.e. Section 20(4) and 20(8) of TADA operate in different situations and are controlled and guided by different considerations".

19. The following significant factors arise out of the aforestated extraction of observations of the Supreme Court.

(1) The law enjoins upon the investigating agency to carry out investigation in a case where a person has been arrested and detained with utmost urgency and complete the investigation with great promptitude, within the prescribed period.

(2) Proviso to sub-section (2) to Section 167 Cr.P.C. fixed the outer limit, within which the investigation must be completed and in a given case, if the same is not completed within the said prescribed period, the accused would acquire a right, to seek to be released on bail, and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure.

(3) The object behind enactment of Section 167 of the Code, was that, the detention of an accused person should not be permitted in custody, pending investigation, for any unreasonably longer period.

(4) Section 167 read with Section 20(4) of TADA Act, thus, strictly speaking is not a provision for grant of bail, but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge sheet, if necessary, in the Court.

(5) Section 167(2) of the Code read with Section 20(4)(b) of TADA Act, therefore, creates an indefeasible right in an accused person on account of default by investigating agency in the completion of investigation within the maximum period prescribed/extended to seek an order for his release on bail.

(6) On the expiry of the period fixed under Section 167(2), Cr.P.C. subject to extensions if any, under the said Act, the accused concerned becomes entitled to bail irrespective of the nature of offence with which he is charged, where the prosecution fails to put up challan against him on completion of investigation.

(7) At the stage of Section 167(2) proviso, merits of the case are not to be examined at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days.

(8) On the expiry of the period during which the investigation is required to be completed, accused is required to make an application if he wishes to be released on bail on account of the default of the investigating/prosecuting agency.

(9) An application for grant of bail under Section 167(2) Cr.P.C. stage, has to be decided on its own merits for the default of the prosecuting agency to file the charge sheet within the prescribed period uninfluenced by the merits or the gravity of the case.

(10) At that stage, the Court has no power to remand an accused to custody beyond the prescribed period or the extended period under the TADA Act if the challan is not filed, only on the ground that the accusation against the accused is of a serious nature or the offence is very grave. These grounds are irrelevant at that stage.

(11) Section 20(4) and Section 20(8) of TADA Act operate in different situations and are controlled and guided by different considerations.

20. On the basis of the principle enunciated in Hitendra Vishnu Thakur v. State of Maharashtra, , it will be idle to contend that persons sought to be prosecuted for offences punishable under NDPS Act are excluded from the operation of the provisions of Section 167(2) of the Code of Criminal Procedure with its appended proviso. As has been stated by the Supreme Court, the object behind this salutary provision is to prevent incarceration of persons accused of offences for an unduly long period without any outer limit.

21. In Natabar Parida v. State of Orissa, , the Supreme Court emphasised that the Court will have no inherent power of remand of an accused to any custody unless the power is conferred by law. Under the NDPS Act such power to remand will have to be necessarily traced to Section 167 of the Code of Criminal Procedure in terms of Section 36A(1)(c) of the Act, Power to remand after laying of charge sheet, will have to be exercised under Section 309 of the Code of Criminal Procedure.

22. Ms. Usha Mehra, J. of Delhi High Court, in Imam v. C. B. I. New Delhi, , has stated as hereunder :-

"Mr. Grover, therefore contended that he is not asking this Court to exercise the discretion for the grant of bail. The provision of Section 37 of the NDPS Act would be attracted if he had come up to ask for the bail on merit and the Court had to use the discretion. In that eventuality the conditions stipulated under Section 37 of the Act would be attracted. But in the case in hand because of default of prosecution he is entitled to be released even if the quantity alleged to have been recovered is excessive. That cannot be a ground for depriving the petitioner the right which has already accrued in his favour because of the default of the prosecution.

On the otherhand, Mr. S. Lal, appearing for the respondent contended that even when the provisions of sub-section (2) of Section 167 Cr.P.C. are to be involved this

Court has to consider the conditions stipulated under Section 37 of the Act. The release would not be automatic. That the NDPS Act was amended to make stringent provisions for the control and regulation of operations relating to NDPS. In fact Section 37 starts with a non-obstante clause stating therein that notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person, accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The NDPS Act is a special enactment and will override the general provision contained in Cr.P.C. This Act was enacted with a view to make stringent provision, therefore the underlying object is in negative terms limiting the scope of the applicability of the provision of code of Criminal Procedure regarding bail. Therefore, even if the petitioners are asking to be released on bail because of the default of the prosecution, still the limitation under Section 37 of the NDPS Act will apply. In this regard he has placed reliance on the decision of the Supreme Court in the case of Narcotics Control Bureau v. Kishan Lal .

So far as the proposition of law in Kishan Lal's case (supra) is concerned there cannot be any quarrel with the same. The very reading of Section 37 of the Act makes it clear that no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein are satisfied. Secondly the power to grant bail under any of the provisions of the Cr.P.C. should necessarily be subject to the condition mentioned under Section 37 of the NDPS Act, meaning thereby that when the Court exercises its power of granting the bail, at that stage limitations prescribed under Section 37 have to be looked into.

But in the facts and circumstances of this case, this Court is not exercising its power or discretion of granting the bail on merits, hence the question of considering the limitation imposed under Section 37 of the Act does not arise. In this case the order of release on bail is on default of the prosecution as was in the case before Supreme Court referred to above, i.e. Rajnikant Jivan Lal Patel. The right to bail under Section 167(2) proviso (a) is absolute. There is no discretion or power left with the Court not to release the petitioner or to direct them to be detained for any further period, particularly when the prosecution has not presented the charge sheet within 90 or 60 days as the case may be. Therefore, on account of legislative mandate given in Section 167(2) proviso (a), the question of considering the conditions or limitations mentioned in Section 37 of the NDPS Act, to my mind, does not arise. The provision of Section 167(2) of the Cr.P.C. will govern all proceedings. There is, in fact, no justification for taking a view that the provisions of Section 167(2), Cr.P.C. will not apply or exclude the arrest and detention of a person under the provisions of NDPS Act. Even at the risk of repetition, I will repeat that this Court is not exercising any power of granting the bail on merit, therefore, the question of invoking the provision of Section 37 of the NDPS Act at this stage does not arise. The Supreme Court in the case of Kishan Lal (supra) was dealing with the power of High Court under Section 439 or under Section 482 of the Cr.P.C. and came to the conclusion that those are subject to the limitation contained in the amendment Section 37 of the NDPS Act.

> The Supreme Court was not dealing with the case where the challan is not presented within 90 or 60 days as the case may be. Of course, if the petitioner had asked for the bail on merit, the observation of the Supreme Court in the case of Kishan Lal (supra) would have applied on all force. As pointed out above the petitioners are not seeking bail on merit nor asking this Court to exercise its power to grant the bail, they are asking their entitlement to be released on bail because of the default on the part of the prosecution".

23. A Full Bench of the Kerala High Court in Berlin Joseph alias Ravi v. State, 1992 (1) Crimes 1221 while deciding an identical question under the provisions of NDPS Act, has stated as follows :

> "We will now proceed to consider the second point whether Section 37 of the NDPS Act over-rides the command contained in the proviso to Section 167(2) of the Code that on the expiry of 90 days or 60 days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail.
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> Sub-section (1) of Section 167 of the Code enjoins a duty on the Police Officer arresting an accused to forward him to the nearest Magistrate within 24 hours. Sub-section (2) casts obligation on such Magistrate to decide, inter alia, whether the accused so forwarded should be kept in further custody and if so, in which place. Such custody shall not exceed 15 days in the whole. Then comes the proviso which consists of three limbs. In the first limb, the Magistrate can authorise detention of the accused beyond 15 days (not in police custody). Second limb consists of a prohibition that no Magistrate shall authorise detention of the accused person in custody for a total period exceeding 90 days or 60 days depending on gravity of the offence. The third limb contains the legislative command that on the expiry of 60/90 days (as the case may be) an accused 'shall be released on bail' if he is prepared to and does furnish bail. If the conditions in Section 37 of the NDPS Act have to be complied with before releasing an accused on bail even after the expiry of 60/90 days the legislative directive contained in Section 167 loses its commanding force. Either Section 37 of the NDPS Act has to yield to the proviso in Section 167(2) of the Code or Section 37 must over-ride the other.
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> What would be the consequence, if Section 37 of NDPS Act over-rides Section 167 of the Code. We pointed out that under Section 167 of the Code a Magistrate has no power to authorise detention of any person beyond a period of 60/90 days. If such an accused person can be released on ball, at the said stage, only on compliance with the stringent conditions contained in Section 37, practically no accused can be released on bail even after the said period of 60-90 days, unless he is set free, he will continue to remain in detention. But how long ? Perhaps the Police may take many months (if not years) to finalise the report. The accused will have to languish in custody without a trial like a 'Pappilone' for considerably long period.

In Rajni Kant v. Intelligence Officer, Narcotic Central Bureau, Jagannatha Shetty, J. sitting as Vacation Judge, has held that the right to bail under Section 167(2) proviso (a) to the code is absolute and is a legislative command and not the discretion of the Court. Although the accused in the said case was involved in offences under Sections 21, 23 and 29 of the NDPS Act, the said decision was rendered when NDPS Act, remained before its amendment by Act 2 of 1989. So, that decision is of no help in deciding the question now posed. Nor does Supreme Court decision in Narcotic Control Bureau v. Kishan Lal, help us in resolving the present question, because in that decision the question considered was whether Section 37 would control Section 439 of the Code. That is a different question altogether.

For deciding this aspect, we have necessarily to go into the contours of Section 36A of the NDPS Act. It contains three sub-sections, in the first sub-section, after providing that offences under NDPS Act shall be tried by Special Court constituted by the Government, it enables a Magistrate to order detention of the accused towarded to him under Section 167(2) of the Code. Here the same powers as contained in Section 167(2) of the Code are repeated with the only alteration that the Court to which the accused is to be forwarded next is the Special Court, constituted in under the NDPS Act. Clause (c) of the said sub-section is important in this context. It reads thus :

"(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 that section".

The said clause is clear indication that the directive contained in Section 167(2) proviso is intended to be issued at the appropriate stage even if offences under NDPS Act are involved. If Section 37 of the NDPS Act is allowed to control or restrict the application to proviso to Section 167(2) of the Code, the latter provision would become ineffective and a dead letter. A Division Bench of the Calcutta High Court has considered the same question in Md. Abdul v. State of West Bengal, 1991 (II) Crimes 741. Their Lordships held that "since proviso to Section 167(2) lays down that no person can be remanded to custody under authority of that section for a period beyond 90/60 days the proviso to sub-section (2) of Section 167 is automatically attracted and the learned Special Judge has no option but to release the person on bail. The Division Bench has considered how far Section 37 would come into play in such situation and found that Section 167 of the Code will stand unfettered.

The result of the discussion is that Section 167(2) would operate even for offences under the NDPS Act and then Section 37 of the NDPS Act has no application. In other words, Section 37 of the NDPS Act does not over-ride Section 167(2) of the Code".

24. In Aslam Babalal Desai v. State of Maharashtra, 1992 SCC (Crl) 870 : (1992 Cri LJ 3712), while considering the scope for cancellation of bail, mainly on the technical ground that cancellation was feasible after filing of the charge sheet, since the earlier grant of bail was on default of the

prosecution, the Supreme Court stated as hereunder at Page 3722; of Cri LJ :-

> "The provisions of the Code, in particular Sections 57 and 167, manifest the legislative laxity that once a person's liberty has been interfered with by the Police arresting him without a Court's order or a warrant, the investigation must be carried out with utmost urgency and completed within the maximum period allowed by the proviso (3) to Section 167(2) of the Code. The role of the Magistrate is to oversee the course of investigation and to prevent abuse of the law by the investigating agency. The proviso to Section 167(2) was introduced in the Code by way of enlargement of time for which the arrested accused could be kept in custody. Therefore, the prosecuting agency must realise that if it fails to show a sense of urgency in the investigation of the caae and omits or defaults to file a charge sheet within the time prescribed, the accused would be entitled to be released on bail. The order of release on bail under the proviso to Section 167(2) is by the deeming fiction provided "therein an order passed under Section 437(1) or (2) or Section 439(1). It, therefore, follows as a natural consequence that the said order can be cancelled under Section 437(5) or Section 439(2_ on considerations relevant for cancellation of an order under Section 437(1) or (2) or Section 439(1) ..... when the Legislature made it obligatory that the accused shall be released on bail if the charge sheet is not filed within the outer limit provided by proviso (a) to Section 167(2), it manifested concern for individual liberty notwithstanding the gravity of the allegation against the accused. The fact that the bail was earlier rejected or that it was secured by the thrust of proviso (a) to Section 167(2) then recedes in the background. It is wrong to think that bail secured by virtue of the proviso (a) to Section 167 is an undeserved one as to so think is to doubt the legislative wisdom in prescribing the outer limit for filing the charge sheet and to ignore the legislative history. It would not be permissible to interfere with the legislative mandate on imaginary apprehensions, i.e., an obliging investigation Officer deliberately not filing the charge sheet in time, as such misconduct can be dealt with departmentally. Once the accused has been released on bail his liberty cannot be interfered with lightly, i.e. on the ground that the prosecution has subsequently submitted a charge sheet. Such a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Sections 57 and 167(2) of the Code. Therefore, once an accused is released on bail under Section 167(2) he cannot be taken back in custody merely on the filing of a charge sheet but there must exist special reasons for so doing besides the fact that the charge sheet reveals the commission of a non-bailable crime. The ratio of Rajnikant case to the extent it is inconsistent herewith does not, with respect, state the law correctly".

In Aslam Babalal Desai v. State of Maharashtra, 1992 SCC (Crl) 870 : (1992 Cri LJ 3712) the Supreme Court, while choosing to uphold the following observations of Jagannatha Shetty, J., in Rajnikant Jivanlal v. Intelligence Officer, 1989 SCC (Crl) 612 : 1990 Cri LJ 62 at Page 64; of Cri LJ.

> "An order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as an order - on default. Indeed, it is a release on bail on the default of the prosecution in filing charge sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file charge sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds".

dissented from the observations extracted down below.

> "The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled", and held that the ratio of Rajnikant' case 1989 SCC (Crl) 612 : (1990 Cri LJ 62) to the extent it was inconsistent with the law laid down in Aslam Babalal Desi's case (1992 SCC (Crl) 870 : (1992 Cri LJ 3712) with respect, did not state the law correctly. It is evident that in all the cases referred to earlier, the Supreme Court has enunciated a principle of law about indefeasible right of an accused not to have his remand extended in the event of default by prosecution if he was prepared to and does furnish bail, for it was, a legislative command and not one of Court's discretion.

25. A Full Bench of the Orissa High Court in Banka Das v. State of Orissa, 1993 Crl LJ 442) stated that Section 167(2) proviso, of the Code was subject to Section 37 of the Act, which also opens with a non obstante clause excepting all provisions of bail contained in the Code and making it clear that a person shall not be released on bail unless the conditions stipulated are satisfied. Therefore, even if by operation of Section 167(2) proviso, an accused becomes entitled to bail, yet, he shall not be released on bail until the Court is further satisfied that the conditions stipulated in Section 37 are also satisfied. In other words, according to Orissa Full Bench, Section 37 of the Act overrides Section 167(2) of the Code, because it is a special statute.

26. In Ram Dayal v. Central Narcotic Bureau, 1993 Crl LJ 1443, a Full Bench of Madhya Pradesh High Court has held that Section 167(2) proviso, of the Code of Criminal Procedure, was not applicable to a proceeding under the NDPS Act. Even if a charge sheet stood filed after 90 days of the arrest of the accused, on that ground itself, the person charged under the NDPS Act was not entitled to get bail from the High Court. Indeed, the Special Court and the High Court are equally placed in respect of competence under Section 37 of the NDPS Act in the matter of grant of bail to a person accused of an offence under the said Act. Irrespective of the date of submission of the charge sheet, it will be open always to the Special Court and the High Court to consider the prayer under Section 37 and both the Courts are required to dispose of the prayer only under the said provision, because no power outside that is invokable by a person accused under the Act to get released on bail. Observations of the Madhya Pradesh High Court in paragraphs 9 and 10 of its judgment may have to

be extracted. They are, as hereunder at Page 1448.

> "9. We take up now question No. 1. It has been submitted to us that Section 167(2) Cr.P.C. is referentially incorporated in Section 36A, NDPS Act; and that in terms of clause (c) of Section 36A(1) the Special Court is invested with the "same power" as a Magistrate possesses under Section 167(2) Cr.P.C. contemplating that 'on the expiry of the period of ninety days or sixty days, as the case may be, the accused person shall be released on bail' by him. The argument, attractive though, is too simplistic and naive. Not only the scheme of the Act, its object and language of the provision discredit the argument; the theory of referential incorporation is inherently fallacious. The 'Special Court' functioning under the Act and the 'Magistrate' functioning under Cr.P.C. have separate powers and jurisdiction being creatures of two different statutes. The deeming provision contemplated under Section 36A(1)(c) is meant to subserve a limited purpose; it is only a general and enabling provision and carries no mandate binding on the Magistrate in the manner Section 167(2), proviso, does. The expressions used in it are 'may exercise' and 'same powers' use of the word 'all' being carefully avoided and the word 'same' being used instead, the legislative intent is made clear thereby that the provision is not meant to include within its ambit all powers exercisable by a Magistrate under Section 167 including the power contemplated under the proviso to sub-section (2) and the use of the word 'may', at the same time, is meant to impart to the power purely discretionary character. The provision obviously is meant to be a directory one and not mandatory. It is well settled that effect of a legal fiction cannot be extended judicially and its scope is to be limited to the purpose it is meant to subserve. (See Bengal Immunity Co. C. I. T. v. Vadilal,).
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> 10. A careful comparison of the two provisos of Section 36A(1)(b), NDPS Act and Section 167(2), Cr.P.C. bears out this point. In specific terms under the proviso to Section 167(2) exercise of bail power is contemplated by expressly providing that 'person released under this sub-section shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter'. Neither sub-section (1)(c) nor sub-section (3) of Section 36A deals with the bail power of Special Court and High Court; they do not take within their fold the bail power contemplated under Section 37 of both Courts. Indeed, reference in sub-section (3) to 'special powers of the High Court regarding bail under Section 439, Cr.P.C. is not meant to limit the scope of Section 37; both provisions are to be read conjointly the expression 'nothing contained in this Section' of Section 36A(3) postulates that High Court's bail power is not to be deemed affected by anything contained in Section 36A only; the fiction is not meant to be extended to Section 37 which is an independent provision contemplating expressly cladding of 'additional limitations' on bail powers when exercised in respect of a person who is in confinement after arrest under Section 52 of the Act. Clause (b) of Section 36A(1) denying expressly in terms of its proviso to the Magistrate the power to take bail and limiting his jurisdiction to order detention for specified periods and thereafter the accused produced before him 'to be

> forwarded to the Special Court having jurisdiction', in terms of clause (c) the legislature could not have contemplated to vest that power in the Special Court and through it in the High Court in terms of sub-section (3). Legislature is supposed to enact sensibly and in any case it is Court's duty to construe statutory provisions in such manner as to void conflict, chaos and cavil. The Common Law maxim utres magis valest quam parent must inform judicial interpretative process. See Rao Shiv Bahadur Singh, , Gur Sahai, etc."

We respectfully disagree with the view taken by the Full Bench of the Madhya Pradesh High Court in Ram Dayal's case, 1993 Crl LJ 1443 based on the use of expressions "may exercise" and "same powers" under Section 36A(1)(c) of the Act. We have already referred to the law laid down by the Supreme Court in Kishnan Lal's case as well as Hitendra Vishnu Thakur's case . We are unable to comprehend any principle of law enunciated in Kishanlal's case which would exclude operation of the provisions of Section 167(2) of the Code of Criminal Procedure, to persons sought to be prosecuted, for having committed offences under the provisions of the NDPS Act. Further, in view of the law laid down in Hitendra Vishnu Thakur's case on identical provisions, it necessarily follows, that the law laid down in Ram Dayal's case 1993 Crl LJ 1443 and Banks Dass' case 1993 Crl LJ 442 may no longer be strictly relevant on this issue.

27. A Division Bench of the Gauhati High Court in Sankar Singh v. State of Assam, 1994 Crl LJ 213 held that it was clear that clause (b) of sub-section (1) of Section 37 of the Act must necessarily override proviso (a) to Section 167(2) of the Code, for Section 37 of the Act would apply notwithstanding anything contained in the Code. We have already given out our reasons, which impel us to differ from the view taken by the Division Bench of Gauhati High Court in the aforesaid case. At the risk of repetition, we are bound to observe, that subsequent to the decision of the Supreme Court in Hitendra Vishnu Thakur' case observations contra, about non-applicability of provisions of Section 167(2) of the Code of Criminal Procedure, when the relevant provisions under the TADA Act and the NDPS Act are almost identical, are bound to pale out of relevant significance.

28. On power of remand, useful reference can be made to the law laid down by the Supreme Court in Directorate of Enforcement v. Deepak Mahajan, 1994 SCC (Crl) 785 : 1994 Cri LJ 2269.

29. While agreeing, with respect, with the decisions of other High Courts which reflect our views, with reverence, we are unable to accept the contrary view propounded by some other High Courts.

30. On the basis of our reasoning, structured on the foundation of law laid down by the Supreme Court, we have to necessarily hold that the pronouncement of Pratap Singh, J. in Seemaraj v. Asstt. Collector, Central Excise, (1992) Mad LW (Cri) 387 : (1993 Cri LJ 844) and that of S. M. Ali Mohammed, J. in Sanjeevi v. State by Inspector of Police B-1, (1993) Mad LW (Cri) 76, can no longer be good law. They will stand overruled.

31. As far as HCP No. 1675 of 1994 and HCP No. 1692 of 1994 are concerned, it was fairly stated by Mr. K. Asokan, that till today, complaint has not been filed, for information is yet to be received from foreign countries, in spite of efforts having been made through Delhi authorities even from

August, 1994. More than three months have elapsed. As we have already stated, there is no scope for extension of remand period, under the available provisions in the NDPS Act, contra distinguished from certain salient amended provisions of the TADA Act. We are satisfied that, on default committed by the prosecution, detenu Arumugham (HCP No. 1675 of 1994) and detenu Y. V. Nagaraj (HCP No. 1692 of 1994) will be entitled to be released on bail, since they are prepared to furnish bail. We are not inclined to accede to the argument of Mr. Asokan, that since the Special Court had chosen to decline the plea for bail made by these two detenus on default made by the prosecution, the remedy, if any, cannot be through issue of a habeas, but only through a petition invoking the inherent powers of this court, under S. 482 of the Code of Criminal Procedure. Once it is evident that the Magistrate had no power to extend remand, on the expiry of 90 days, on default committed by the respondent, moreso, when they were prepared to furnish bail, further incarceration will have to be necessarily held to be illegal. In that event, seeking issue of 'habeas', for release from illegal detention, will be a just and proper remedy, which cannot be refused merely because an alternate remedy could also have been chosen. Illegality of detention would certainly entitle these two detenus to invoke our constitutional powers for issue of a habeas. On the facts available, application of proviso to S. 167(2) of the Code of Criminal Procedure, these two detenus will be entitled to be released on bail. While directing release on bail, of these two detenus, certain conditions will have to be imposed, for their availability, for the further processing of the prosecution case.

32. These two detenus Arumugham and N. Y. Nagaraj shall be enlarged on bail on the ground of default committed by the prosecution, on each one of them executing a bond for Rs. 2,00,000/- (Rupees two lakhs only) with two sureties each for a like sum to the satisfaction of the Special Judge under NDPS Act, Madras. Those two sureties must each possess immovable properties worth over Rs. 2,00,000/- (Rs. two lakhs only). These two detenus shall deposit their passports, if not already seized, before the Special Judge, Madras. These two detenus shall also give an undertaking that they will not leave the country without the permission of the Special Court and would appear before it as and when required. They shall also furnish their local residential addresses to the Special Court and the respondent.

33. These two detenus shall, on being released on bail, present themselves before the Assistant Director, Narcotic Control Bureau, T. Nagar, Madras-17, every day at 11.00 a.m. until further orders. These two detenus shall not leave the City of Madras except with the permission of the Special Court. Violation of any one of the conditions imposed would entitle the Special Judge to cancel the bail, apart from already existing liberty, for cancellation of bail being otherwise made out. While imposing the conditions aforestated, we have taken note of the law laid down by the Supreme Court in S.C.L.A.C. representing Undertrial Prisoners v. Union of India, .

34. As far as HCP No. 1676 of 1994 is concerned, Mr. B. Kumar, fairly conceded that on the expiry of 90 days (17-8-1993) till the complaint was laid on 27-9-1993, the petitioner did not plead for bail on the ground of default committed by the prosecution we have already noticed that in Hitendra Vishnu Thakur's case , the Supreme Court has stated that in its opinion an accused was required to make an application, if he wished to be released on bail, on account of the default of the investigating/prosecuting agency and it was not impressed with the argument that on the expiry of

the period during which investigation was required to be completed, under S. 167 of the Code of Criminal Procedure, read with S. 20(4) of TADA Act, the Court must release the accused on bail on its own motion, even without any application of an accused person or his offering to furnish bail. In the instant petition, that stage where the petitioner could have pleaded for release on bail on default, had been crossed long long ago and if at all, this petitioner can plead for bail only on merits, for remand after filing of the complaint is taken care of by the provisions of S. 309 of the Code of Criminal Procedure. Since the petitioner is in remand on valid orders passed by the Special Court, we are unable to hold that there has been illegal detention at any point of time, much less now. This habeas corpus petition, which has no merit, is liable to be dismissed.

35. The net result is HCP Nos. 1675 and 1692 of 1994 are allowed by releasing the respective detenus on bail on terms and conditions listed earlier, while HCP No. 1676 of 1994 shall stand dismissed.

36. Mr. K. Asokan, learned Addl. Central Govt. Standing Counsel made an oral application for leave to appeal to the Supreme Court against this order. We have followed the law laid down by the Supreme Court in arriving at our verdict and we are unable to discern any ground to accede to the prayer made for leave to appeal to the Supreme Court. This prayer shall stand negated.

37. Order accordingly.