

Harendra Alias Hari Singh Vs. State of Rajasthan

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Court : Rajasthan

Decided On : May-05-1993

Reported in : 1994CriLJ50; 1993(2)WLC78

Judge : N.K. Jain, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18, 36A, 37, 37(2) and 37(3); [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 167, 167(2) and 439

Appeal No. : Cr. Bail Application No. 545/93

Appellant : Harendra Alias Hari Singh

Respondent : State of Rajasthan

Advocate for Def. : K.L. Thakur, Public Prosecutor

Advocate for Pet/Ap. : P.R. Choudhary and; Mahendra Purohit, Advs.

Judgement :

ORDER

N.K. Jain, J.

1. Mr. P. R. Choudhary, learned Counsel for the petitioner submits that the prosecution has failed to file challan within the prescribed period of 90 days,

therefore, the petitioner is entitled to be released on bail automatically. In support of this contention he has placed reliance on Phool Chand v. State of Rajasthan, 1993 Cri LR (Raj) 8 decided on 9-12-1992, Sri Ram v. State of Raj (S. B. Cr. Misc. Bail Application No. 2023/92) decided on 1-2-93: (1992 Cri LJ 2570), Hira Ram v. State of Raj., 1990 (2) RLR 284 decided on 28-4-89 and Shankerlal v. State (S. B. Cr. Misc. Bail Application No. 2375/92) decided on 8-2-93.

2. Learned Public Prosecutor submits that the petitioner alleged to have committed offence under the N.D.P.S. Act cannot claim a right to be released on bail Under Section 167(2), Cr.P.C. that too when challan has now been filed. He also submits that a bare perusal of Section 36A of the N.D.P.S. Act shows that this Court has power to grant bail and at the most it will not come in the way of High Court while granting bail Under Section 439, Cr.P.C. but in view of the clarification of law given by the Supreme Court in Narcotics Control Bureau v. Kishanlal (1991) 1 SCC 705: (1991 Cri LJ 654), the power of High Court to grant bail is subject to the limitations of Section 37 of the N.D.P.S. Act. He has relied on Jarin Khan v. State of Rajasthan, 1992 Cri LR (Raj) 723 decided on 16-10-92, Shardulbhai v. State of Gujarat, 1990 Cri LJ 1275 and further submits that the cases cited by the counsel for the petitioner are not applicable.

3. I have heard learned Counsel for the parties and perused the case law cited at Bar and written submissions.

4. It is no doubt true that under proviso (a) to Section 167(2), Cr.P.C., order for release on bail is an order on default and 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 as it is a legislative command and not court's discretion. It is also undisputed that for the offence other than N.D.P.S. Act, the accused is entitled to bail if 90 days period expired, which begins from the date of order of remand and not from date of arrest as has been held in Shivanna v. State, 1993 (1) Crimes 689 decided on 3-2-92, which is based on a decision of the Supreme Court in Ghaganti Satyanarayana v. State of Andhra Pradesh, AIR 1986 SC 2130 wherein it has been held that the period of 90 days or 60 days can begin to run only from the

date of order of remand. But at the same time if the accused has not made application for his release on bail after expiry of the period prescribed by the proviso (a) to Section 167(c) and before filing of the charge-sheet/final report, he cannot be released solely on the ground that the charge sheet/final report was not submitted within the prescribed period and where the prayer for bail is to be considered after submission of charge-sheet the question of granting bail does not arise Under Section 167(2), Cr.P.C. in view of the decision in *Kawarlal v. State of M.P.*, 1993 (1) Crimes 808.

5. In the present case the petitioner was arrested on 18-11-92 and he was produced before the Magistrate on 19-11-92. Incomplete challan without F.S.L. report was filed on 9-2-93 and ultimately challan papers were given on 23-2-93 as the P.O. was on leave. Admittedly, the petitioner did not move for bail after expiry of period of 90 days and prior to filing of challan and, therefore, the accused-petitioner cannot take advantage of default on the part of investigating agency. I am supported by the view expressed in the cases relating to offences other than N.D.P.S. Act viz. *Lakshmi Brahman's case* 1983 Cri LJ 839: (AIR 1983 SC 439) which has been followed by the Full Bench of the Gujarat High Court in *Shardulbhai v. State of Gujarat*, 1990 Cri LJ 1275 and *Hariom v. State of U.P.*, 1992 Cri LJ 182 decided on 18-2-91, so also in *Kawarlal v. State of M.P.*, 1993 (1) Crimes 808 decided on 22-10-92. In view of this and as discussed above, the petitioner cannot claim bail solely on the ground that the challan was filed after 90 days particularly when this case relates to the offence under the N.D.P.S. Act.

6. That apart I have already expressed my view in *Jarin Khan's case* (supra) that the petitioner has no right to be released on bail even after 90 days, after relying on the decision of the Supreme Court in the case of *Narcotics Control Bureau* (supra).

7. So far as the cases cited by the counsel for the petitioner are concerned, in a recent decision of this Court rendered in *Sri Ram's case* (supra) after relying on the earlier decision of this Court in *Phool Chand v. State* (supra), *Heera Ram v. State* (supra) bail has been granted as challan was not filed within a period of 90 days.

In Phool Chand v. State of Rajasthan (supra), it has been held that in the cases relating to N.D.P.S. Act, the Magistrate cannot give remand beyond 15 days even in case where he feels that further remand is necessary, he has no jurisdiction except to commit the accused to the Special Court having jurisdiction and granted bail. This case is not helpful to the petitioner in view of the Division Bench decision of this Court in Alimuddin v. State of Rajasthan decided on 21-12-1990, (1990 Cri LR (Raj) 57) of which I was also a member, wherein the petitioner was arrested in a case relating to the N.D.P.S. Act on 16-10-1990 and remained in police custody till 15-10-1990 and remanded to judicial custody on 26-10-1990, 8-11-90, 19-11-90, 26-11-90 and further on 12-12-90. It has been held after considering the provision b of Section 36A of the Act read with Section 167(2), Cr.P.C. that it clearly authorises a Judicial Magistrate to grant remand to an accused to Judicial custody beyond the period of fifteen days, if the Magistrate satisfies that adequate grounds exist for remanding him to judicial custody for proper investigation of the case, and the custody of the accused petitioner was held to be legal.

In Heera Ram v. State of Rajasthan (supra) it has been held that filing of challan after expiry of 90 days does not curtail right of the accused to be released on bail. This case was decided on 28-4-89, prior to the amendment of Sections 36A and 37 which came into force on 29-5-1989 and also prior to the decision of Narcotics Control Bureau's case (supra) and therefore, Heera Ram's case is not helpful to the petitioner.

As stated above in Sri Ram v. State of Rajasthan (supra) while granting bail it has been observed as under:--

the harmonious construction of two non obstante clauses in my opinion lead to only one result that when condition for invoking provisions of Section 167, Cr.P.C. arises in a particular case, provision of Section 36A will apply and the provisions of Section 37 of the N.D.P.S. Act will not come in the way.

It has also been observed as under:--

It appears that provisions of Section 36A were not brought to the notice of the Court and decision in Jarin Khan's case (supra) is based on considering the

provisions of Section 37 of the N.D.P.S. Act and provisions of Section 36A has not been considered. That being the position, in my opinion, the aforesaid decision is distinguishable.

Similarly in *Shankerlal v. State of Rajasthan* (supra) this Court while relying on *Sri Ram's case* and *Phool Chand's case* granted bail holding that if the accused petitioner has been detained for more than 90 days and the challan has not been filed against him, he is entitled to be released on bail under the proviso to Sub-section (2) of Section 167, Cr.P.C.

8. In the above decisions relating to the N.D.P.S. Act bails have been granted only on the ground that the investigating agency has failed to file challan/charge-sheet, observing that in *Jarin Khan's case* provisions of Section 36A of the N.D.P.S. Act were not considered. In my humble opinion in *Narcotics Control Bureau's case* (supra) those provisions were very much there and considered. In para 2 at page 706 it has been stated as under:--

2. ... The petitioners filed a writ petition as well as a criminal miscellaneous petition seeking bail firstly on the ground that they are entitled to be released on bail as required under Section 167(2) of the Code of Criminal Procedure as the charge-sheet was filed at a belated stage and secondly on the ground of illness. A learned single Judge referred this matter to a Division Bench and the Division Bench by the impugned order held 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. The only limited question to be decided in these appeals is whether the view taken by the High Court is right or wrong and we may also mention that leave was granted only to this limited extent.

Their lordships after considering the provisions of Section 36A including Sub-section (3), 37 of the Act and 439, Cr.P.C. held in para 6 at page 709 as under:--

6. ...Consequently the power so 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.

Their lordships of the Supreme Court has further held in paras 7 and 8 at page 714 as under:--

7. ...For all the aforesaid reasons we hold that the powers of the High Court to grant bail under Section 439 are subject to the limitations contained in the amended Section 37 of the NDPS Act and the restrictions placed on the powers of the court under the said section are applicable to the High Court also in the matter of granting bail. The point of law is ordered accordingly.

8. The two accused respondents in these two appeals have been on bail pursuant to the order of the High Court, for a long time. The learned Counsel appearing for the Narcotics Control Bureau the appellant herein is also not pressing cancellation of the bail. Therefore, we are not remitting the matters to the High Court for fresh consideration. Pending the proceedings they would continue to be on bail. Subject to the above clarification of law, the appeals are disposed of.

In Jarin Khan's case (supra) I have discussed in detail various provisions of the N.D.P.S. Act as well as the case law of both the sides though Section 36A of the N.D.P.S. Act has not been specifically mentioned but that case is based on the said Narcotics Control Bureau's case (supra) wherein all the relevant provisions were considered including the provisions of Section 36A and therefore in view of the clarification of law given by their lordships of the Supreme Court, it is not necessary for me to refer the matter to a Division Bench as I have followed the view taken by their lordships which has a binding effect in all courts of India and as discussed above the petitioner cannot take any benefit out of the cases cited by him.

9. Reference may also be made to Mrs. Shasibala Nair v. Intelligence Officer (1990) 1 EFR 244 decided on 3-8-1989 wherein it has been observed that it is true, under Section 36A the Special Court has powers to exercise its jurisdiction as provided under Section 167 of the Code of Criminal Procedure. It has also been observed that under the Act bail can be granted only on the grounds mentioned under Section 37, Sub-section (1) and subject to such limitation as may have been under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting bail. It has been further observed that if one reads the provisions

of Sections 36A and 37 together and particularly, Sub-section (2) thereof it becomes clear that the proviso to Sub-section (2) of Section 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 the N.D.P.S. Act. It has also been observed that very often investigation in a case under this Act has national and international ramifications and it is not easy to complete the investigation and to file a complaint within a time bound schedule of ninety days or so. As regards the contention of the powers of the High Court under Section 439 of the Code of Criminal Procedure have not been taken away for the purpose of grant of bail. It has been further observed that of course, Mr. Mooman is right. As far as the powers of the High Court are concerned, wherever the offences are committed under this Act the court has to take serious view of the matter. In any case it cannot be exercised to defeat the object of the Act, and a technical plea shall be no ground for undeserving liberty under this Act.

Reference may also be made to *Ram Dayal v. Central Narcotic Bureau, Gwalior* 1993 (1) EFR 139: (1993 Cri LJ 1443), wherein Full Bench of Madhya Pradesh High Court has held as under at page 1452 (of Cri LJ):

Section 167(2) Criminal Procedure Code, is not applicable to a proceeding under ND PS Act. Thus, even if the charge-sheet is filed after 90 days of the arrest of the accused on that ground itself the person charged under Section 18, NDPS Act is not entitled to get bail from the High Court.

The same view has been expressed by the Bombay High Court in *Prahalad v. State of Maharashtra*, S. B. Cr. App. No. 1084/89 decided on 15-3-90 as also by the Full Bench of Orissa High Court in *Banka Das v. State of Orissa*, 1993 Cri LJ 442 and by the Division Bench of Calcutta High Court in *Mabia Bibi v. State of West Bengal*, 1992 (1) EFR 263 decided on 11-4-1991.

10. As discussed above and in view of the provisions of N.D.P.S. Act and the decision of their lordships of the Supreme Court in *Narcotics Control Bureau's* case (supra), the petitioner cannot be released on bail only on the ground that challan papers were not filed within 90 days. Accordingly, the bail application filed by Harendra alias Hari Singh Under Section 439, Cr.P.C. is, therefore, rejected.

