

Abdul Rahman Vs. State and anr.

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Court : Chennai

Decided On : Oct-28-1999

Reported in : 2000CriLJ2410

Judge : V.S. Sirpurkar and ;Gnanaprakasam, JJ.

Acts : National Security Act - Sections 3(2); Code of Criminal Procedure (CrPC) , 1974 - Sections 20(4), 167, 167(2), 309, 309(2), 437, 437(1), 437(5), 438, 439(1), 439(2), 441, 441(2), 441(3), 441(4), 442, 442(1), 442(2), 443, 444, 445, 446, 446A and 482; Indian Penal Code (IPC) - Sections 302

Appeal No. : H.C.P. Nos. 1198 and 1201 of 1999 and HCMP Nos. 220 and 221 of 1999

Appellant : Abdul Rahman

Respondent : State and anr.

Advocate for Def. : G.M. Syed Fasiuddin, Addl. Public Prosecutor

Advocate for Pet/Ap. : B. Kumar, Sr. Adv. for ;S. Xavier Felix, Adv.

Judgement :

V.S. Sirpurkar, J.

1. This order will govern HCP Nos. 1198/99 and 1201/99. The controversy as well as the facts involved are common in both the petitions.
2. While in HCP. No. 1198 of 1999 which is filed by one Abdul Rahman, the detenu is Noorudeen, in HCP. No. 1201 of 1999 which is filed by the same petitioner Abdul Rahman, the name of the detenu is Ibrahim, S/o Mohammed Ali, Both these persons face prosecution for offence punishable under Section 302, Indian Penal Code in Cr. No. 246 of 1998 registered by J2, Mathichiyam Police Station, Madurai. We would proceed on the facts applicable to Noorudeen. Needless to mention that they are common in the case of the other detenu Ibrahim also, the only difference being the date of detention order. It is a common ground that Noorudeen was detained under the provisions of Section 3(2) of the National Security Act by an order passed by the Police Commissioner, Madurai dated 25-5-1998, while the detenu Ibrahim was detained by an order dated 8-5-1998 passed by the same authority. It is however, common ground that the period of detention i.e. one year period has expired in case of both the detenus. But the validity of the detention order is not the subject in these petitions. These petitions are on entirely different set of facts.
3. It is the common case that in both the petitions, after the initial arrest of the detenus in respect of the abovementioned crime by the police, they were produced before the concerned Judicial Magistrate and they were remanded to custody from time to time. During the pendency of their incarceration in jail while they were in custody, the detenus filed the bail application. It is a common ground that both these persons were arrested on 12-4-1998 and 13-4-1998 respectively in respect of the incident which took place on 28-2-1998. It seems that immediately after they were arrested, the detention orders came to be passed as has already been stated above, almost within a month of their arrest. At the time when these detention orders were passed, the detenus were in the judicial remand. After the detention orders were passed, these detenus who are hereinafter referred to as the accused persons, filed an application for bail on 15-7-1998 as probably the period of 90 days has expired and yet, the charge-sheet was not filed by the police against them. The Magistrate passed an order granting bail under the provisions of Section 167(2) of the Code of Criminal Procedure, taking the view that though 90

days period had expired, since the charge-sheet had not been filed, the accused persons were entitled to be released on bail. It seems that after the bail order was passed on 23-7-1998, the prosecution filed the charge-sheet on 7-8-98. Since the accused persons had already been ordered to be released on bail vide order dated 23-7-1998, they furnished sureties before the Judicial Magistrate, II, Madurai on 23-9-1998. It is suggested during arguments that the sureties were offered by the accused earlier on 30-7-1998, but those sureties were returned by the Magistrate. Learned counsel however did not rely those facts during the arguments and shows the date as 23-9-1998 when sureties were furnished before the Magistrate. It seems from the records that the Magistrate wanted to be satisfied regarding the sureties. Therefore, he ordered their verification. The probation officer filed a report regarding the verification of the sureties only on 3-10-1998 and ultimately the sureties furnished by the accused came to be accepted by the Judicial Magistrate on 2-11 -1998. It is also an admitted position by the parties that the release warrant was sent by the Judicial Magistrate to the Jail on 2-11-1998. However the release warrant was sent back by the Jail authorities on 13-11-1998 on the ground that the detenus could not be released on the basis of the release warrant, since that they were already under detention, passed by the Police Commissioner, Madurai. Now the petitioner have come up before this Court saying that these accused persons had been ordered to be released on bail as back as on 23-7-1998 and the sureties offered by them were accepted as back as on 2-11-1998 and the release was ordered and in pursuance of that, release warrant was also issued by the Court and therefore since the period of detention which was ordered by the Police Commissioner, Madurai has expired in the month of May 1999, they are bound to be released. Since they were not so released, it seems they had filed an application for bail before the Sessions Court, Madurai. That bail application has been dismissed by the learned Sessions Judge, Madurai on 30th June, 1999. Again a bail application was tried to be moved on behalf of the accused Noorudin, pointing out that in fact he had already been released on bail earlier, but even that bail application seems to have been dismissed by the Second Additional Sessions Judge on 14-7-1999. It is also an admitted position that after the charge-sheet filed before the Judicial Magistrate, Madurai on 7-8-98, the matter now stands committed to the Sessions Court on 22-3-1999 and

thereafter the accused are being produced from time to time before the Sessions Judge, Madurai. It has also been brought to our notice that in the meantime while the matter was pending before the Judicial Magistrate, I Class on couple of occasions, the accused persons were not produced before the Magistrate which resulted in his issuing the non-bailable warrant against the accused. However, today the position as it stands is that there is no cancellation of bail and that there is no such non-bailable warrant pending against the accused.

4. The main contention of the petitioner is, therefore, that the accused persons have earned indefeasible right under Section 167, Cr. P.C. They had enforced that right by filing application under Section 167, Cr. P.C. before the Judicial Magistrate, Madurai. The Judicial Magistrate had also allowed that application thereby recognising and crystallising their rights and the accused persons have to be released on bail and in pursuance of that, they had also furnished securities and executed the bonds as required under Section 441, Cr. P.C. learned senior counsel Mr. B. Kumar, therefore, contends that once the detention period of these accused persons is over, the situation must revert back to the stage of the order granting bail which was passed by the Magistrate as also the subsequent acceptance of the sureties offered on behalf of the accused persons. He therefore, says that the accused persons were bound to be released on bail and their further incarceration is illegal. Learned senior counsel points out that even if the accused had preferred applications and later on before the Sessions Judge, they were of no consequences of the order passed by the Judicial Magistrate, granting bail under Section 167, Cr. P.C. still remains intact not having been cancelled either under Section 437(5) or under Section 439(2) of Cr.P.C. learned senior counsel points out that there is no complaint regarding that order by the prosecution. Learned senior counsel also points out that once the release warrant is sent by the Magistrate and the order passed by the Judicial Magistrate remains intact, as a natural sequel to the situation, the accused must be released on bail and their subsequent custody would be rendered illegal.

5. In reply the learned Addl. Public Prosecutor Mr. G. M. Syed Fariuddin very earnestly argues that though the accused persons were ordered to be released on bail on 23-7-1998, the fact remains that they had actually not come out on bail till

the charge-sheet was filed against the accused persons on 7-8-98. He submits that once the charge-sheet was filed on 7-8-98, whatever right which was earned by the accused came to an end and therefore the accused could not have furnished the sureties before the Judicial Magistrate, First Class and even if they offered sureties subsequently on 23-9-1998, the Judicial Magistrate, First Class did not have the jurisdiction to accept the same which he did on 2-11-1998. Learned Additional Public Prosecutor submits that subsequent filing of the charge-sheet has obliterated the order passed by the Judicial Magistrate, First Class and therefore the accused cannot now insist of their release particularly because the accused now having been remanded with the aid of Section 309, Cr. P.C. learned Public Prosecutor also seriously challenges the tenability of the Habeas Corpus petitions and points out that the accused persons are under the valid and legal orders passed by the learned Magistrate from time to time and therefore such an incarceration which is sanctified by the valid and legal orders of the Judicial Magistrate cannot be questioned by filing a writ of Habeas Corpus. Alternatively, learned Public Prosecutor suggests that the accused should not have approached the constitutional jurisdiction of this Court, but the criminal jurisdiction of this Court under Section 482, Cr.P.C. and since the accused have not approached the Court under Section 482, Cr. P.C. which was the statutory remedy available to the accused, the Habeas Corpus petitions filed by the accused were bound to be dismissed as not maintainable. Learned Additional Public Prosecutor also earnestly argues that merely because the order is passed granting bail by the Judicial Magistrate on the default of the prosecution in filing the charge-sheet within 90 days till such time as the accused validly offers and furnishes the sureties, it cannot be said that he has enforced his right. Therefore there is no question of any right coming into existence and therefore before the accused offers and furnishes security and executes a bond, if the charge sheet is filed the order itself meets its natural death. We have to see in these petitions as to whether the order is passed under Section 167, Cr. P.C, but in pursuance of it, the sureties are not offered and the bond was not executed. If, in the meantime the charge sheet is preferred, would the accused lose the benefit of bail order which he had earned rightfully under Section 167, Cr. P.C.

6. Learned senior counsel, at the outset, submitted that the Apex Court had described the right earned by the accused under Section 167, Cr. P.C. as an indefeasible right. We were taken through the judgments in *Hitendra Vishnu Thakur v. State of Maharashtra* 1994 SCC 1087 : : 1995 CriLJ517 and also the subsequent judgment of the Constitution Bench of the Apex Court in *Sanjay Dutt v. State through C.B.I., Bombay (II)* : 1995 CriLJ477 , where it is specifically held by the Apex Court that on a default committed by the prosecution in filing the charge sheet within the prescribed time, an indefeasible right is created on the accused. The Apex Court goes further and settles the law in these cases that such indefeasible right would be available to the accused only till the charge sheet is filed against them. If the accused enforces his right by filing an application under Section 167, Cr. P.C, and the charge sheet is already filed, then there would be no question of accused being allowed to make an application under Section 167, Cr. P.C. and take the benefit of the default committed by the prosecution in not filing the charge sheet within the prescribed time. In short, the Apex Court in *Sanjay Dutt's* case, cited *supra*, in clearest possible term has declared that the said indefeasible right created in favour of the accused by the default on the part of the prosecution in filing the charge sheet within the prescribed time would come to an end, if the accused has not enforced their right and before such enforcement, the prosecution has already filed the charge sheet. Learned counsel submits that in the present case, the accused has enforced their rights. Admittedly the period of 90 days has expired in case of both the accused persons viz. Noorudeen as well as Ibrahim. He points out that after their arrest, the prosecution had failed to file the charge sheet within 90 days and therefore both the accused had earned their right. Learned counsel takes his argument further and submits that this right was further crystallised by the accused by filing an application under Section 167, Cr. P.C. before the Judicial Magistrate and those applications were also allowed, thereby the Magistrate actually passed an order granting bail on 23-8-1998. Learned counsel, therefore, points out that in terms of their right laid down in *Sanjay Dutt's* case, cited *supra*, the accused had enforced their right and, therefore the right in favour of the accused had become indefeasible in the sense that the subsequent filing of the charge sheet could not have defeated this right. Learned counsel is at pains to point out the very decision of *Sanjay Dutt's* case :

1995 CriLJ477 that there was no scope for any confusion and the law was clear that merely because subsequently charge sheet came to be filed and if the right was enforced by the accused, the accused could not ipso facto taken into custody. As a matter of fact these legal situation is no more res integra and has been recognised in Aslam Babalal Desai v. State of Maharashtra : 1992 CriLJ3712 . According to the learned Additional public prosecutor the right could not be said to have been enforced unless the accused persons offered the proper sureties and actually came out. from the jail custody on the basis of the bail orders passed in their favour. Learned Public Prosecutor is at pains to point out that the concept of enforcement, which came to be introduced by the decision of Sanjay Dutt's case, has to be understood in its totality and it cannot be said that the right was enforced by the accused unless the accused offered sureties also in pursuance of or sequel to the order of granting bail passed by the Magistrate.

7. For this purpose the learned senior counsel invites our attention to the specific language of Section 167, Cr.P.C. He invites our attention more particularly to the proviso to Section 167(c) which has resulted in creating this right. The proviso is as follows :

Provided that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life, imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this subsection shall be deemed to be so released under the provisions of Chapter XXXIII for the purpose of that Chapter;

(Emphasis supplied by us).

Learned Additional Public Prosecutor specifically invited our attention to the emphasized portion. He points out that the accused would be released on bail by the Judicial Magistrate, First Class, as a result of the default on the part of the prosecution to submit the charge sheet within ninety days or sixty days as the case may be and consequently and more importantly only if the accused is prepared to and does furnish bail bond. The learned Public Prosecutor therefore argue that unless the accused until furnishes the bail bond even if the order has been passed in his favour, it cannot be said that he has fully enforced his right and therefore as a necessary sequel to the argument though an order has been passed granting bail where before the accused applies his sureties, if the charge sheet is filed then the so called right earned by the accused would come to an end and would not be available to him at all. To counterblast this argument, the learned senior counsel Mr. B. Kumar relied on a celebrated decision of *Raghubir Singh v. State of Bihar* : 1987 CriLJ157 , learned senior counsel points out that it is the only decision which has taken into consideration not only the nature of right earned by the accused, but also the subsequent provisions of Section 441 of Chapter XXXIII of Cr. P.C. The argument in short is that the passing of the order completes the enforcement on the part of the accused. It is argued that it cannot be questioned that the order, which is passed under Section 167, Cr. P.C. granting bail, is deemed to be an order passed under Chapter XXXIII which pertains to the power of the Court to grant bail. It is pointed out at this stage that because of the deeming provision in the aforementioned proviso, the order partakes the character of the bail order as if it is passed under Section 437 or 438, Cr. P. C. as the case may be and as such that order would be governed by the other provisions of Chapter XXXIII. It is clear from the various provisions of Chapter XXXIII that once the bail order is granted there is no limitation provided for offering the sureties. Section 441, Cr. P.C. opens with the following words and runs as under :

Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the

time and place mentioned in the bond....

Sub-Sections 2, 3 and 4 are not relevant for our purpose.

7-A. Section 442, Cr. P.C. speaks about the discharge from custody :

As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the orders shall release him.

Sub-section (2) of Section 442, Cr. P.C. provides that whether such a person is required to be detained in some other matter, the jail authorities would not be required to release such a person merely on the basis of such a release order, Section 443 gives power to the Court to arrest the person released on bail on insufficient sureties. Section 444, Cr. P.C. speaks about the discharge of sureties. Section 446, Cr. P.C. speaks about the procedure when bond has been forfeited, while Section 446A provides for the cancellation of bond and bail bonds. None of these provisions however claim an outer limit on the accused in whose favour the bail order has been granted either under Section 437(1) or under Section 439(1), Cr. P.C. In short, it would be up to the accused to offer the sureties and to execute the bond and he may take his own time, also in not providing for a limitation for offering the sureties or executing the bond, the legislature has only taken into account the fact that there could be difficulties in arranging for the sureties. At any rate, the fact remains that there is no limitation for offering the sureties in any of the provisions under Chapter XXXIII. If there is no such time limit provided in Chapter XXXIII and if the order, which is passed under Section 167, Cr. P.C. partakes the character under Chapter XXXIII for the purpose under Chapter XXII, then it goes without saying that for the order which is passed under Section 167, Cr. P.C. granting bail, there would be no time limit provided for offering the sureties. Learned senior counsel further argues that there would be no question of the accused furnishing sureties within a particular time limit as the case may be before filing the charge sheet. Learned senior counsel points out that once the release of the accused is ordered by the Magistrate under Section 167, Cr. P.C., then the enforcement of the right of the accused would be complete, because no

other order granting bail passed under Chapter XXXIII can be defeated merely because the accused does not offer the sureties within a particular time limit. It will be seen that an order for bail granted under Section 437(1), Cr. P.C. can be cancelled only by taking recourse to the provisions provided for under Section 437(5) or 439(2), Cr. P.C. unless the order, is cancelled by taking recourse to those provisions, the order stands and can be executed at any time. In short, the order granting bail is like a decree while offering the sureties, and executing the bond is like execution of the decree. It cannot be forgotten, at this stage that the right, which is created by the default under Section 167, Cr. P.C. has been described as indefeasible right by the Apex Court. Therefore to hold that such an indefeasible right where it has resulted into further passing of the order by the Magistrate, would stand defeated, would be travesty of justice. In Raghbir Singh's case : 1987 CriLJ157 the situation has been explained in the clearest possible term. In Paragraph 20, the Supreme Court take note firstly of the fact of the new proviso and points out in the following words : 'A person released on bail under the proviso to Section 167(2) for the default of the investigating agency is statutorily deemed to be released under the provisions of Chapter 33 of the Code for the purposes of that Chapter. That is provided by the proviso to Section 167(2) itself. This means, first, the provisions relating to bonds and sureties are attracted.' After taking resume of the provisions of Sections 441, 445, 442(1) and the language of these Sections, the Apex Court further quotes that Sections 441 and 442, to borrow the language of the Civil Procedure Code, are in the nature of provisions for the execution of orders for the release on bail of accused persons. What is of importance is that there is no limit of time within which the bond may be executed after order for release on bail is made often accused persons find it difficult to furnish bonds soon after the making of an order for release on bail. This frequently happens because of the poverty of the accused persons. It also happens frequently that for various reasons, the sureties produced on behalf of accused persons may not be acceptable to the Court and fresh sureties will have to be produced in such an event. The accused persons are not to be deprived of the benefit of the order for release on bail in their favour because of their inability to furnish bail straightway. Orders for release on bail are' effective, until an order is made under Section 437(5) or Section 439(2). These two provisions enable the

Magistrate who has released an accused on bail or the Court of Session or the High Court to direct the arrest of the person released on bail and to commit him to custody. Thereafter taking further note of these sections, the Apex Court has held that the order for release on bail is not extinguished and not to be defeated by the discharge of the surety and the inability of the accused to straightway produce a fresh surety. The Apex Court further held that the accused person may yet take advantage of the order for release on bail by producing a fresh, acceptable surety. The Apex Court then clarified the position in the following words :

The arguments of the learned counsel for the State of Bihar was that the order for release on bail stood extinguished on the remand of the accused to custody under Section 309(2) of the Code of Criminal Procedure. There is no substance whatever in this submission. Section 309(2) merely enables the Court to remand the accused if in custody. It does not empower the Court to remand the accused if he is on bail. It does not enable the Court to cancel bail as it were. That can only be done under Section 437(5) and under Section 439(2). When an accused person is granted bail, whether under the proviso to Section 167(2) or under the provisions of Chapter XXXIII the only way the bail may be cancelled is to proceed under Section 437(5) or Section 439(2).

Subsequently, the Apex Court has taken note of the observations in *Natabar Parida v. State of Orissa* : AIR 1975 SC1465 and also *Bashir v. State of Haryana* : 1978 CriLJ173 . In Paragraph 22 the Supreme Court then proceeds to declare the law in the following words :

The result of our discussion and the case law is this : An order for release on bail made under the proviso to Section 167(2) is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody under Section 309(2). The order for release on bail may however be cancelled under Section 437(5) or Section 439(2).

In the same paragraph, the Apex Court then goes to hold that the accused has a right to release on bail. If he abuses the liberty granted to him then the prosecution would be at liberty to apply to the Court for cancellation of the bail. We found that this case applies on all fours to the factual situation in this case. At no time

admittedly the prosecution has proceeded under Section 437(5) or under Section 439(2) against the accused persons. The argument raised by the Public Prosecutor that the subsequent filing of the charge sheet had extinguished the right, has been completely answered by the Apex Court in this case. So also the argument that the subsequent remand under Section 309(2) has resulted in defeat of the right has also been answered. It must be noted that in Sanjay Dutt's case : 1995 CriLJ477 of 1994 in Paragraph 48, the Supreme Court approves the principle of indefeasible right propounded in Hitendra Vishnu Thakur's case : 1995 CriLJ517 cited supra and holds that the indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. It goes on to suggest that once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The following words in this paragraph are very significant:-

In short the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure.

On a reading of whole paragraph 48 of the Sanjay Dutt's case, cited supra, it is clear that by using the term 'enforcement', the Supreme Court contemplated by making an application before the Court for grant of bail. Here also in that sense the right earned by the accused has been enforced by making an application. In our opinion and as the case found in Raghubir Singh's case : 1987 CriLJ157 , the mere non-execution of the order which is finally passed and remains undisturbed by the provisions of Section 437(5) or 439(2) could not help the prosecution to subsequently file a charge-sheet and such subsequent filing of charge-sheet could not ipso-facto efface, annihilate or totally cancel the legal order passed by the Magistrate.

8. We also must note that Courts are governed by 'Rule of Law' in this country. Therefore the order of the Court which is legally passed must be honoured unless it is modified or set aside by a competent authority. In the present case, the order passed by the Magistrate has not been set aside by any other Court. The order having been on the same pedestal as the order passed under Chapter XXXIII can be varied with or cancelled only under Section 437(5) or under Section 439(2). That not having been done, the order must be deemed to remain in force. In the present case, the order was not only in force, but was also enforced by the Magistrate by accepting the sureties either at the subsequent stage. The question, whether the legal order passed by the Magistrate, merely because the sureties were offered at a later stage, would stand defeated Our answer would be in the negative. We have also one more reason to take that view. If that view is taken then the order can be defeated merely on account of the failure to offer sureties and produce such surety. This view may give scope for misusing this interpretation. It may be that where the order has been passed with a sheer idea to deprive the benefit of the order, the sureties may be refused to be accepted or a long time may be taken to verify the sureties, thereby giving hand to the prosecution to file a charge-sheet and to defeat the order itself. Such can never be the interpretation as it would lead to the mischief than to remedy. We clearly find a remedy in favour of the petitioner accused persons.

9. Learned Public Prosecutor also invited our attention to a typical phraseology under Section 167(2) and he invited our attention to explanations to the proviso, more particularly to Explanation (1) which is hereunder.

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

Learned Public Prosecutor submitted that still such time as the sureties are furnished in respect of the order passed by the Magistrate granting the bail, the accused would still be in custody and the remanding of the accused would then be deemed to be legal. We have no doubt about this proposition. However, in this case, earlier the sureties have been cancelled and then offered to accept also.

That apart, the explanation does not in any manner suggest that in the meantime if the charge-sheet is filed the order granting bail would come to an end. According to us, there is nothing in the explanation further to cause interpretation as proposed by the learned Public Prosecutor. We therefore reject that argument.

10. Learned Public Prosecutor then heavily relied upon the decision in *Devinderpal Singh v. Govt. of National Capital Territory of Delhi* 1996 SCC 5 : 1995 AIR SCW 4506. Here, the principle propounded by the Supreme Court in *Hitendra Vishnu Thakur's case* : 1995 CriLJ517 and subsequently confirmed in *Sanjay Dutt's case* cites *supra* : 1995 CriLJ477 cited *supra* is only reported. In Paragraph 17, the extracts from the case of *Sanjay Dutt's case* : 1995 CriLJ477 have also been quoted and relied upon the case, However, it nowhere provides that enforcement of the right of the accused would be complete only on executing the bond and offering sureties. We are unable to find any such expression in this decision. The second decision relied upon is reported in the same Volume in *Dr. Bipin Shantite.1 Panchal v. State of Gujarat* : 1996 CriLJ1652 . Here also factually the same principle propounded in Supreme Court cases Cited *supra* has been relied upon. Again there is nothing in the whole decision to suggest that the enforcement of the right as contemplated in Supreme Court cases is complete only on offering surety and not earlier. Similarly the decision in *Mohamed Iqbal Madar Sheikh v. State of Maharashtra* 1996 SCC 202 in the same volume was also relied upon. Learned Public Prosecutor invites our attention at Page 10 and more particularly to the observations :

It need not be pointed out or impressed that in view of a series of judgments of this Court, this right cannot be defeated by any Court, if the accused concerned is prepared and does furnish bail bond to the satisfaction of the Court concerned. Any accused released on bail under proviso (a) to Section 167(2) of the code read with Section 20(4)(b) or Section 20(4)(bb), because of the default on the part of the investigating agency to conclude the investigation, within the period prescribed, in view of the proviso(a) to Section 167(2) itself, shall be deemed to have been so released under the provisions of Chapter XXXIII of the Code.

Learned Public Prosecutor says that necessary meaning of the quoted portion would be that if the bail bonds are not furnished, till such time as the bail bonds are furnished, the said right can be defeated. We do not think that the quoted portion has brought an interpretation as such. This is the special case because the case of Raghbir Singh : 1987 CriLJ157 cited supra has also been approved in this decision. We have already dealt with Raghbir Singh's case in detail. Again these observations are not in respect of the subsequent filing of charge sheet, but a warning that such a right cannot be defeated by any Court. The observations are in entirely different sphere and would not be of any help..

11. Learned Public Prosecutor also tried to rely on the observations in the celebrated decision of State of U. P. v. Lakshmi Brahman : 1983 CriLJ839 as follows :

but if the charge-sheet is not submitted within the period of 60 days, then notwithstanding anything to the contrary in Section 437(1), the accused would be entitled to an order for being released on bail if he is prepared to and does furnish bail.

From this, the learned Public Prosecutor suggests that the right of the accused would not be complete, unless he offers the sureties and executes the bonds. We have already clarified that the furnishing of the surety and execution of the bond are in the nature of the execution of a decree. It is also finalised by an order of the Court. This apart, the law laid down by the Supreme Court in Raghbir Singh's case : 1987 CriLJ157 is more than clear to the same fact. On the other hand, in Raghbir Singh's case, it has been specifically mentioned that the accused persons are not to be deprived the benefit of the order of release on bail in their favour because of their inability to furnish bail straightway, that the orders of release on bail are effective until an order is made under Section 437(5) or under Section 439(2). These observations relied upon in Lakshman Brahman's case : 1983 CriLJ839 would also be of no consequence, in view of the subsequent decision in Raghbir Singh's case. Learned Public Prosecutor then attacked the tenability of the Habeas Corpus petitions on the ground that on the date of the rule or return of the rule, the accused persons were in legal custody inasmuch as their

remand has been ordered under Section 309(2). Learned Public Prosecutor therefore relied on the observations in Sanjay Dutt's case : 1995 CriLJ477 and more particularly in Paragraph 48 to the following effect :-

It is settled by Constitution Bench decisions that a petition seeking the Writ of Habeas Corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of the rule, the custody or detention is on the basis of a valid order (see Naranjan Singh Nathawan v. State of Punjab : 1952 CriLJ656); Ram Narayan Singh v. State of Delhi : 1953 CriLJ113 and A. K. Gopalan v. Government of India : 1966 CriLJ602 .

Learned Additional Public Prosecutor says that since the date of rule, even on today the accused are in legal custody. On the basis of the order passed, these Habeas Corpus Petitions would have to be dismissed as untenable. We do not agree. We have already pointed out that subsequent remand under Section 309(2) would be of no consequence particularly where an indefeasible right has been earned by the accused. Once that right had to be found indefeasible, subsequent remand would be of no consequence, i.e. the law laid down in Raghubir Singh's case as also in Sanjay Dutt's case by describing the right as an indefeasible right. Therefore in pursuance of the default of the prosecution, the accused have enforced their rights by making an application. May be that right also is crystallised by subsequent order passed by the Magistrate as has happened in this case. There would be no question of such a right being defeated by mere remand ordered by the Sessions Judge under Section 309(2). We therefore reject this contention.

12. In view of the above discussions, it will be clear that the petitions must succeed and the accused must be released on bail. Learned Public Prosecutor had expressed that they are dangerous accused persons and they are the members of an illegal and banned organisation called A1 Umma and if they are released on bail, it would adversely affect the pending trial. He also points out that the case is now posted for evidence. We only express that the prosecution would be free to take such steps as are available under the framework of law including making an application under Section 437(5) or under Section 439(2), Cr. P.C. as

the case may be, if the situation so demand on facts.

13. With this observation, we allow these Habeas Corpus petitions and quash the detention orders. We direct the respondents to release the detenus forth with, unless they are required in any other matter by any other authority. Consequently, H.C.M.P. Nos. 220 and 221 of 1999 are closed.

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