

Surinder Kumar, etc. v. The State of Punjab (Mital, J.)

month's notice *before* discharge. The emphasis is on the word "before", which means that the issue of one month's notice or tender of one month's salary in lieu of notice is a pre-requisite to the discharge of the employee. In *Gopi Nath's case (supra)* the Supreme Court had strictly construed the words "by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice—" to mean that the termination of the service to be effective, must be simultaneous with the payment of dues to the employee. The wording of section 45(1) of the Act goes a step further inasmuch as the words used in this section are "before discharge". As such, the amount representing one month's salary, in lieu of one month's notice, not having been paid or tendered along with the impugned notices of discharge, these notices have to be struck down being invalid and it is ordered accordingly. There will, however, be nothing to debar the respondents from taking any action under the law after complying with the necessary requirements thereof. The petitioners having succeeded, more on a technical ground, there shall be no order as to costs in all these writ petitions.

A. D. Koshal, Acting Chief Justice.—I agree.

Pritam Singh Pattar, Judge.—I agree.

N. K. S.

FULL BENCH
CRIMINAL MISCELLANEOUS

Before S. C. Mital, Pritam Singh Pattar and Gurnam Singh, JJ.

SURINDER KUMAR, ETC.,—*Petitioners.*

versus

THE STATE OF PUNJAB,—*Respondent.*

Criminal Misc. No. 4453-M of 1975.

May 13, 1976.

Defence and Internal Security of India Rules, 1971—Rules 43 and 184—Defence and Internal Security of India Act (49 of 1971)—Section 37—Code of Criminal Procedure (2 of 1974)—Sections 4, 5 and proviso (a) to section 167(2)—Accused arrested under the rules and detained in custody beyond sixty days—Whether to be released on

bail under proviso (a) to section 167(2) of the Code—Rule 184—Whether a bar to such release.

Held, that there is no provision in the Defence and Internal Security of India Act, 1971, or in the Defence and Internal Security of India Rules, 1971, enacting any procedure relating to investigation of cases concerning the contravention of the Rules. That being so, the applicability of section 167 of the Code of Criminal Procedure 1974 to such cases is obvious. Nowhere have the Rules curtailed the operation of proviso (a) to section 167(2) of the Code nor is there anything in the Act or the Rules overriding the said proviso. Section 167 of the Code is firmly embedded in the scheme of investigation. It is proviso (a) to section 167(2) of the Code that makes it obligatory on the Magistrate to release the accused person after the expiry of detention of 60 days. Having regard to the true meaning and scope of section 167, the release aforesaid is required to be regulated and controlled. Intention of Legislature was not such as to set an accused person at liberty without imposing any condition, for his release is obviously in the course of the investigation of the case against the accused. With this end in view, the Legislature enacted that the release of an accused on bail shall be deemed to be under the provisions of Chapter XXXIII of the Code. A combined reading of sections 4 and 5 of the Code and section 37 of the Act read with rule 184 shows that rule 184 will override the provisions of Chapter XXXIII to the extent they are found inconsistent with those of rule 184 but there is nothing to show that rule 184 had any thing to do with the release envisaged by proviso (a) to section 167(2) of the Code. Thus an accused person who is arrested under the Rules and detained in custody beyond sixty days has to be released on bail under proviso (a) to section 167 of the Code and rule 184 of the Rules is no bar to such a release.

(Paras 5, 6, 7 and 8)

Case referred by Hon'ble Mr. Justice Man Mohan Singh Gujral, on 21st November, 1975, to a Larger Bench for decision of the following question. The Full Bench consisting of Hon'ble Mr. Justice S. C. Mital, Hon'ble Mr. Justice Pritam Singh Pattar and Hon'ble Mr. Justice Gurnam Singh after deciding the question on 13th May, 1976, returned the case to the Single Judge, for disposal of the case according to law.

Question : "Whether where the provisions of proviso (a) to section 167(2) of the Criminal Procedure Code comes into operation the detention can be allowed to continue even after the period of sixty days in view of the provisions of rule 184 of the Rules."

Application under section 439 of the Code of Criminal Procedure read with rule 184 of the D.I.R. praying that the petitioners be granted bail during the pendency of their trial in Cr. M. 4453 M-75.

Surinder Kumar, etc. v. The State of Punjab (Mital, J.)

Adarsh Goel, Advocate, for the Petitioners.

H. S. Brar, Senior Deputy Advocate-General (Punjab), for the respondent.

ORDER OF FULL BENCH

S. C. Mital, J.—Surrinder Kumar and five others were arrested on 20th August, 1975, for the alleged contravention of the provisions of rule 43 of the Defence and Internal Security of India Rules, 1971 (hereinafter referred to as the Rules) and section 188 of the Indian Penal Code. Relying on proviso (a) to sub-section (2) of section 167 of the Code of Criminal Procedure, 1973, they applied for their release on the ground that they had been under detention for more than 60 days. The relief claimed by them was rejected by the learned Sessions Judge, Patiala. Feeling aggrieved they moved this Court under section 439 of the Code, read with rule 184 of the Rules. Before Gujral, J. (as he then was) their petition was opposed on behalf of the State on the ground that rule 184 disentitled them. The question referred to the Full Bench by the learned Judge is:—

“Whether where the provisions of proviso (a) to section 167(2) of the Criminal Procedure Code comes into operation the detention can be allowed to continue even after the period of sixty days in view of the provisions of rule 184 of the Rules.”

(2) Sub-section (2) of section 4 of the Code provides that all offences under any law, other than the Indian Penal Code, shall be investigated, enquired into, tried, and otherwise dealt with according to the provisions of the Code of Criminal Procedure but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. It is pertinent to mention here that section 5 of the Code lays down:—

“Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

Then section 37 of the Defence and Internal Security of India Act, 1971 (hereinafter referred to as the Act) is in the following terms:—

“The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any

instrument having effect by virtue of any enactment other than this Act.”

(3) As regards alleged breach of the provisions of section 188 of the Indian Penal Code, it has not been disputed before us that the proviso aforesaid of section 167 of the Code governs the case. But as to the contravention of rule 43 of the Rules, Learned Deputy Advocate General hotly contested before us that rule 184 of the Rules operated as a bar. In order to appreciate the rival contentions, the relevant part of section 167 of the Code may first be set down.

*167(1)

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(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction provided that—

(a) the Magistrate may authorise detention of the accused person, otherwise than in 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 section for a total period exceeding sixty days, and on the expiry of the said period of sixty days, 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 section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;”

In *Baldev Singh v. State of Punjab* (1) a Full Bench of this Court examined the true meaning and scope of the section quoted above. S. S. Sandhawalia, J., who delivered the judgment observed that “the arrest and detention of an accused person for the purposes of investigation of the crime forms an integral part of the process therefor. Section 167 provides a step therein, being the judicial sanction for the custody of an accused person either with the police

(1) 1975 P.L.R. 534.

Surinder Kumar, etc. v. The State of Punjab (Mital, J.)

or what is conveniently called 'judicial custody'. This section in general and sub-section (2) with the proviso thereto directly relates to the arrest, custody or release of an accused person and therefore it is clearly a procedural provision embedded firmly in the scheme of investigative process."

(4) The learned counsel for the petitioners then placed strong reliance on the following observations of the learned Judge in the Full Bench case :—

"A bare reading to section 167 of the new Code of Criminal Procedure would indicate that under this provision there need be no application for bail by the accused at all. This provision goes to the power and the very jurisdiction of the Magistrate to grant judicial or police custody of the person of the accused irrespective of the moving of an application on his behalf. In no uncertain terms, the statute provides that the accused person must be released on bail if he is prepared to furnish the same in case he has already been in custody for a period of sixty days. The presentation of an application is thus irrelevant to the issue. *The Magistrate is himself duty-bound and the accused is entitled as of "right to be released on furnishing bail provided the requisite condition of detention beyond sixty days is satisfied."*

(Emphasis is ours).

Our attention was then drawn to the authoritative pronouncement of the Supreme Court in *Natabar Parida and others v. State of Orissa* (2). Their Lordships at page 1467 of the Reporter laid down :—

"It may be emphasised here that the Court will have no inherent power of remand of an accused to any custody unless the power is conferred by law."

(5) It deserves particular mention that the learned Deputy Advocate-General was unable to refer to any provision of the Act or the Rules framed thereunder, enacting any procedure relating to investigation of cases concerning the contravention of the Rules. That being so, the applicability of section 167 of the Code to the case in

hand is obvious. It follows that all along the petitioners had been remanded to police or judicial custody by the Magistrate in the exercise of his powers under section 167 of the Code. Now the question is :—

“Have the Rules made any change in the procedure prescribed by section 167 of the Code ?” —

Proviso (b) to sub-section (2) of section 167 does not authorise a Magistrate to order detention in any custody unless the accused is produced before the Magistrate. Learned counsel for the petitioners very candidly pointed out that rule 184-A was the only alteration so far made. Rule 184-A reads :—

“The provisions of clause (b) of the proviso to sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), shall not apply to a person who is arrested for alleged contravention of any provisions of these rules or of any order made thereunder, if such person had been, after such arrest, produced before a Magistrate who is competent to try the cases or commit for trial and the initial order for detention of such person in custody had been made by the Magistrate before whom he was so produced.”

(6) The learned counsel for the petitioners vehemently urged that nowhere have the Rules curtailed the operation of proviso (a) to section 167(2) of the Code. The learned Deputy Advocate-General was unable to repel the contention that neither in the Act nor in the Rules was there anything overriding the proviso in question to section 167(2). All the same the learned Deputy Advocate-General endeavoured to defend the detention of the petitioners beyond the expiry of 60 days on the strength of rule 184, which is in the following terms :—

“Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), no person accused or convicted of a contravention of these rules or orders made thereunder shall, if in custody, be released on bail on his own bond unless :—

- (a) the prosecution has been given an opportunity to oppose the application for such release, and
- (b) where any such provision of these rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this

Surinder Kumar, etc. v. The State of Punjab (Mital, J.)

behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention."

It is no gainsaying that rule 184 of the Rules was enacted before the coming into force of the new Code of Criminal Procedure, 1973. But the fact remains that by virtue of the provisions of section 8 of the General Clauses Act, 1897, instead of the old Code, the new Code is deemed to have been incorporated in rule 184 of the rules. Thus the applicability of the proviso in question to section 167 has not been disputed. However, the learned Deputy Advocate-General urged that the proviso, upon the expiry of 60-day detention, requires the Magistrate to release the accused person on bail and such release under section 167 shall be deemed to be under the provisions of Chapter XXXIII for the purposes of that chapter. The inference thus drawn was that the deeming provision made out a case for bail, controlled by rule 184 extracted above.

(7) On the other hand, advertent to the Full Bench decision, the learned counsel for petitioners, emphasised that section 167 is firmly embedded in the scheme of investigation. It is the proviso under consideration, that, after the expiry of detention of 60 days, makes it obligatory on the Magistrate to release the accused person. Having regard to the true meaning and scope of section 167, in our opinion the release aforesaid is required to be regulated and controlled. Intention of legislature was not such as to set an accused person at liberty without imposing any condition, for his release is obviously in the course of the investigation of the case against the accused. With this end in view, the legislature enacted that the release of an accused on bail shall be deemed to be under the provisions of Chapter XXXIII of the Code. Interpretation of the proviso in question to section 167 will not be proper by taking the deeming provision out of the context.

(8) The other aspect of the matter is that Chapter XXXIII of the Code dealing with bail and bonds makes the provision as to the following matters :—

(a) In what cases bail is to be taken, section 436.

(b) When bail may be taken in case of non-bailable offence, section 437.

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- (c) Direction for grant of bail to person apprehending arrest, section 438.
 - (d) Special powers of High Court or Court of Session regarding bail, section 439.
 - (e) Amount of bond and reduction thereof, section 440.
 - (f) Bond of accused and sureties, section 441.
 - (g) Discharge from custody, section 442.
 - (h) Power to order sufficient bail when that first taken is insufficient, section 443.
 - (i) Discharge of sureties, section 444.
 - (j) Deposit instead of recognizance, section 445.
 - (k) Procedure when bond has been forfeited, section 446.
 - (l) Procedure in case of insolvency or death of surety or when a bond is forfeited, section 447.
 - (m) Bond required from minor, section 448.
 - (n) Appeal from orders under section 446, section 449.
 - (o) Power to direct levy of amount due on certain recognizances, section 450.

Combined reading of sections 4 and 5 of the Code and section 37 of the Act with rule 184 shows that rule 184 will override the provisions of Chapter XXXIII to the extent they are found inconsistent with those of rule 184. The learned Deputy Advocate-General was unable to show that rule 184 had anything to do with the release envisaged by proviso (a) to section 167(2) of the Code.

(9) For the foregoing reasons the question referred to the Full Bench is answered in negative.

(10) In the order of reference Gujral J. (as he then was) made mention of conflict in *Jiwan Lal v. The State of Punjab*, Criminal Misc. No. 3981-M of 1975 decided by Pattar J., on 16th October, 1975, and *Sumer Chand and another v. The State of Haryana*, (3), on 31st October, 1975. In the former case the learned Judge allowed bail by applying proviso (a) to section 167(2) of the Code because the

(3) Cr. M. 4276-M-75 decided by Gurnam Singh, J. on 31-10-75.

Surinder Kumar, etc. v. The State of Punjab, (Mital, J.)

learned counsel for the State conceded that rule 184 was not applicable. In the latter case the learned Judge disallowed bail on the ground that provisions of section 167(2) and section 437(6) of the Code were not applicable. All the points raised before us and discussed above were not urged before Gurnam Singh, J., and that explains the conflict between the two decisions.

(11) The case be now laid before the learned Single Judge for disposal according to law. Interim bail allowed by Gujral, J. to the petitioners to continue in the meanwhile.

Pritam Singh Pattar, Judge.

Gurnam Singh, Judge.

N. K. S.

