

Gurmit Kaur v. State of Punjab (Ujagar Singh, J.)

may, on a plain reading of section 28-A, we are unable to agree with the learned counsel that the Land Acquisition Collector has any jurisdiction at this stage, after the matter has been referred to the Court which had decided the issue, to modify his award. If the learned counsel wanted to rely on the decision of the Delhi High Court or any other decision of this Court, he may only file a review petition before the Land Acquisition Tribunal and not to invoke the jurisdiction of the Land Acquisition Collector under section 28-A. There are, therefore, no grounds to interfere. This petition is accordingly dismissed.

R.N.R.

Before Ujagar Singh, J.

GURMIT KAUR,—*Petitioner.*

versus

STATE OF PUNJAB,—*Respondent.*

Criminal Misc. No. 7900-M of 1987.

January 7, 1988.

Code of Criminal Procedure (II of 1974)—Sections 167(2) and 439—Right to bail—Failure to file charge-sheet within 90 days—Accused—Whether has right to be enlarged on bail—Subsequent filing of charge-sheet—Whether extinguishes his right.

Held, that as a matter of fact, the order of remand for judicial custody cannot be made by the magistrate if the custody after the production of the accused before a Magistrate has exceeded or is likely to exceed 60 days (now within 90 days after the said section has been amended), and it is the duty of the magistrate to release the accused on bail as soon as the said period expires. If the filing of the charge-sheet can extinguish the right to be released on bail, the provisions of the said proviso can be conveniently avoided by the investigating agency. In any case the application for bail was made before the challan was presented and, therefore, the accused had the right to be released on bail. (Paras 5 and 6)

H. S. Bhullar, *Advocate for the Petitioner.*

Miss Ritu Bahri, *Advocate for the State, for the Respondent.*

JUDGMENT

Ujagar Singh, J.

(1) This petition has been filed for grant of bail under section 439 of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) in case F.I.R. No. 108 dated 23rd July, 1987, Police Station Qadian, under sections 302/449/34/120-B, Indian Penal Code, after the bail was declined to the petitioner by the Additional Sessions Judge with the observations that she could not be admitted to bail on the sole ground that the charge-sheet had not been filed within the stipulated period of 90 days.

(2) The learned Additional Sessions Judge has relied on a Division Bench judgment of this Court in *State of Punjab v. Nand Singh* (1) and has ignored the verdict of a Full Bench of this Court in *Surinder Kumar v. The State of Punjab* (2) and has held that the right to be released on bail under the provisions of section 167 (2) of the Cr. P.C., 1973 (No. 2 of 1974) gets extinguished on the filing of the charge-sheet.

(3) For ready reference, the relevant part of section 167, Cr.P.C., is reproduced here:—

“167. (1)

(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 authorize 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 authorize detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is satisfied that

(1) Cr. Misc. No. 447-M of 1976, decided on September 17, 1976.

(2) 1976 (78) P.L.R. 643.

Gurmit Kaur v. State of Punjab (Ujagar Singh, J.)

adequate grounds exist for doing so, but no magistrate shall authorize the detention of the accused person in custody, under this section for a total period of 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;

* * * * *

While considering the above provisions, the Full Bench in *Surinder Kumar's case* (supra) referred to the case *Baldev Singh v. State of Punjab* (3), decided by a Full Bench of this Court and noticed the observations made by S. S. Sandhwalia, J. (as he then was) to the following effect:—

“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 of the New Code provides a step therein, being the judicial sanction for the custody of an accused person, either with the police 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.”

The attention of the learned judges of the Full Bench was drawn to the following further observations made in *Baldev Singh's case* (supra):—

“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 in 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 issues. 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 60 days is satisfied."

(4) After discussing the facts of *Baldev Singh's case* (supra), the Full Bench in *Surinder Kumar's case* (supra) came to the conclusion that the said proviso required the magistrate to release the accused on bail and such a release under section 167, Cr.P.C., shall be deemed to be under the provisions of Chapter 33 for the purposes of that chapter. The inference, thus, drawn was that the deeming provision made out a case for bail. This case was decided on 13th May, 1976.

(5) *Nand Singh's case* (supra) on which reliance has been placed by the lower court was decided on 17th September, 1976, and it is clear that the attention of the learned judges deciding that case was not drawn to the Full Bench judgment in *Surinder Kumar's case* (supra), and O. Chinnappa Reddy, J. (as his Lordship then was), held in that case as under:—

"The accused person can take advantage of the provisions of proviso to section 167(2) if no charge-sheet is filed and if more than 60 days have elapsed from the date of his arrest. He has a right to demand to be released on bail so long as the charge-sheet is not filed. But this right gets extinguished on the filing of the charge-sheet."

With due deference to the above observations of the learned judge, it can be said that this Division Bench judgment runs counter to the earlier Full Bench decision in *Surinder Kumar's case* (supra) according to which the magistrate is himself duty bound and the accused is entitled as of right to be released irrespective of the fact whether an application has been presented or not. As a matter of fact, the order of remand for judicial custody cannot be made by the magistrate if the custody after the production of the accused before a magistrate has exceeded or is likely to exceed 60 days (now within 90 days after the said section has been amended), and it is the duty of the magistrate to release the accused on bail as soon as the said period expires. If the filing of the charge-sheet can extinguish the right to be released on bail, the provisions of the said

Gurmit Kaur v. State of Punjab (Ujagar Singh, J.)

proviso can be conveniently avoided by the investigating agency. In some cases, and I think, invariably, the magistrate give a remand before the expiry of the said period, but for a period during which the prescribed period expires, and immediately after the expiry of the said period, an application is made for release on bail under the said proviso and its consideration is adjourned for the date fixed. Suppose before the date fixed, the investigating agency presents the charge-sheet, the right of the accused to get released under the proviso will be defeated so easily. In such cases, the court while deciding about the right of the accused has to consider as to whether his remand order for a period which exceeds the said period is illegal, and, therefore, liable to be set aside.

(6) In the present case, however, a copy of order dated 13th November, 1987 passed by the magistrate has been produced showing that the challan was presented on that very day and the accused was directed to appear on 24th November, 1987. The order refusing bail by the learned Additional Sessions Judge shows that the application for bail was submitted to that Court on 12th November, 1987. In any case, the application was made before the challan was presented, and, thus, the accused had the right to be released on bail under the said provision.

(7) Again, this matter came up before their Lordships of the Supreme Court in *Raghubir Singh v. State of Bihar* (4) and Hon'ble O. Chinnappa Reddy, J., is the author of the judgment. It has been clearly observed in that case that an order for release on bail made under the proviso to section 167(2), Cr.P.C., is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody under section 309(2), Cr.P.C., and the order for release on bail may, however, be cancelled under section 437(5) or section 439(2) of the Cr. P.C. Reference has been made to *Natabar Parida v. State of Orissa* (5), wherein these provisions were discussed as follows:—

“But then the command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation may still be proceeding. In serious offences of criminal conspiracy—murders, dacoities, robberies by inter-state gangs or the like it may not be possible for

(4) A.I.R. 1987 S.C. 149.

(5) A.I.R. 1975 S.C. 1465.

the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the Court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the accused released on bail under section 167 will be deemed to be so released under the provisions of Chapter XXXIII and for the purposes of that Chapter. That may empower the Court releasing him on bail, if it considers necessary so to do to direct that such person be arrested and committed to custody as provided in subsection (5) of Section 437 occurring in Chapter XXXIII. It is also clear that after the taking of the cognizance the power of remand is to be exercised under section 309 of the new Code. But if it is not possible to complete the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a "paradise for the criminals", but surely it would not be so, as sometimes it is supposed to be because of the Courts. It would be so under the command of the Legislature."

In *Raghubir Singh's case* (supra) it has been further laid down that the view of the High Court and that of the Special Judge that the order for release on bail came to an end with the passage of time, on the filing of the charge-sheet, was not the correct view.

(8) In the present case, the magistrate failed in his duty to release the petitioner on bail under the said provisions on the date the application was filed and the remand order thereafter was against the said provisions, and the same is, therefore, held to be illegal and without authority. The same is, consequently, liable to be ignored. In such a situation, this order refers back to the time when the application was filed before the magistrate, and this right cannot be taken away by any lapse of time. Of course, the order has to be considered as having been passed under the provisions of chapter 33 of the Cr.P.C., and its cancellation can be considered under the provisions of sections 437(5) or 439(2) Cr.P.C.

(9) In view of the above discussion, the petitioner is allowed bail to the satisfaction of Chief Judicial Magistrate, Gurdaspur.

P.C.G.