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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: 7th December, 2010

Date of Order: January 04, 2011

+ CrI. MC No.435/2009

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Narcotics Control Bureau

04.01.2011

...Petitioner

Versus

Ashok Mittal & Anr.

...Respondents

Counsels:

Mr. Satish Aggarwala for petitioner.
Mr. Yogesh Saxena for respondent.

JUSTICE SHIV NARAYAN DHINGRA

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the reporter or not? | Yes. |
| 3. | Whether judgment should be reported in Digest? | Yes. |

JUDGMENT

1. This petition under Section 482 Cr.P.C has been preferred by the petitioner assailing an order dated 28th January 2009 passed by learned Special Judge, NDPS Act of releasing the accused on bail under Section 167(2) Cr.P.C.

2. A perusal of order of learned Special Judge would show that the incident had taken place on 10th March, 2008 and the chargesheet in the case was filed on 9th September 2008. The accused filed an application for bail on 9th September 2008 under Section 167(2) Cr.P.C and the learned Special Judge issued notice of the application to the prosecution for 17th September 2008. Reply to the application was filed and ultimately vide order dated 28th January 2009, the learned Sessions Judge under Section 167(2) Cr.P.C directed release of the accused/ respondents from whose car 125 packets of hashish weighing 32 kg were recovered.

3. The issue raised by way of this petition is whether the respondents had an undefeatable right to be released on bail under Section 167(2) since the chargesheet was not filed within 180 days of the incident.

4. Section 167(2) Cr.P.C reads as under:

“(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-

1*[(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 or 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 purposes of that Chapter;]

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police.

5. A perusal of above provision would show that the jurisdiction of the Magistrate to detain the accused in judicial custody arises only when the accused is produced before him. One time detention which the Magistrate can authorize is of 15 days and the total detention varies according to the nature of offence. The Magistrate has power of detention of 180 days in respect of an offence under NDPS Act. Beyond the prescribed period of 180 days in case of an offence under NDPS Act the Magistrate has no power to extend detention unless challan is filed. The power to authorize detention by the Magistrate extinguishes on 180th day and the law provides that he shall pass an order of

his release on bail and on accused furnishing bail bond as per order, he shall be released on bail. The power of Magistrate to authorize detention again starts when challan is filed and cognizance of the offence is taken by the Magistrate. Thus, after expiry of 180 days, the Magistrate has not to wait for bail application but has to pass an order for bail and ask the accused to furnish bail bonds so that he can be set at liberty. However, if before the accused furnishes the bail bonds, the investigating agency files challan, the Magistrate per se has to take cognizance of the offence and take cognizance of the facts and circumstances under which the offence was allegedly committed by the accused and the investigating agency can very well press that since the bail bond of the accused has not been furnished, he be not released on bail under Section 167(2) Cr.P.C. and the accused be kept in custody and his bail application be decided on merits. While the accused has a right to be released on bail after 60,90 or 180 days, as the case may be, the State also has a right to detain the accused on filing of challan and accused is entitled to bail only on merits. This position was clarified by the Supreme Court in *Sanjay Dutt v State* 1994(5) SCC 410 whereby the Supreme Court observed that undefeatable right of the accused to be released on bail arising from the default in not producing the challan continues till filing of challan but does not survive thereafter and after filing of challan, grant of bail has to be decided on merits.

6. The respondent has relied upon *Uday Mohan Lal Acharya v State of Maharashtra*, AIR 2001 SC 1910 which is a judgment by three Judges Bench of Supreme Court and by a majority of 2::1, the Supreme Court observed that Sanjay Dutt's case (supra) has to be understood in the manner that Magistrate has to dispose of such application made by accused forthwith if the accused has been in custody without filing of charge sheet within the specified period and that accused was prepared to furnish bail bonds. If after filing of application by the accused, the charge sheet has been filed, still the right of the accused under Section 167(2) Cr.P.C shall continue. *Uday Mohan Lal*

Acharya's case (supra) does not overrule *Sanjay Dutt's case (supra)* nor the smaller Bench of Supreme Court could overrule law laid down by Constitutional Bench. The judgment given by the Constitutional Bench of Supreme Court (Five Judges) in *Sanjay Dutt's case (supra)* is very clear that this right of being released on bail without merits is available only after statutory period as given under Section 167(2) Cr.P.C for extending remand has expired till the charge sheet is filed by prosecution. It is not the right of accused which is defined in Section 167(2), it is the authority of the Magistrate to extend remand which is defined in Section 167(2). The authority of Magistrate to extend remand of such an accused is up to 180 days in NDPS cases, in absence of filing of charge sheet, but once the charge sheet is filed this authority again gets vested in the Magistrate and after filing of charge sheet, the Magistrate can decide the bail application only on the basis of merits i.e. facts and circumstances of the case. *Uday Mohan Lal Acharya's case (supra)* is not in consonance of provisions of Section 167(2) Cr.P.C and its understanding of *Sanjay Dutt's case (supra)* is contrary to provisions of Section 167(2) Cr.P.C.

7. The criminal justice system cannot be made subservient to the wishes of an investigating officer who, for some or the other reasons, may choose to delay filing charge-sheet for 2/3 days to ensure that the accused gets bail even in a most heinous crime. In the present case, the charge sheet was filed on 9th September 2008 itself i.e. on the date when bail application was made. Once charge sheet had been filed, the Magistrate was not supposed to consider the bail application under Section 167(2) Cr.P.C. Moreover, in this case, Magistrate has counted 180 days from 10th March 2008 i.e. from the date of incident. Section 167(2) envisages powers of Magistrate from the date of production of accused before the Magistrate and not from the date of incident.

8. I consider that the trial court did not realize the extent of its powers under Section

167(2). If the trial court had to pass an order under Section 167(2), it has to pass it on 61st, 81st or 181st day, as the case maybe, on production of accused as its power of remanding accused to judicial custody extinguishes, either on an application from the accused or suo moto and the accused has to be granted bail as if the offence was bailable. If powers are not exercised on 61st, 81st or 181st day, as the case may be, and is exercised on a day subsequent to which charge sheet has been filed, such an exercise of powers under Section 167(2) is illegal since after filing charge-sheet, power to remand the accused to judicial custody for unlimited period i.e. till trial is over, starts and the accused can be released on bail only if he deserves bail on merits and not otherwise. I find that the order of learned trial court is bad in law and is liable to be set aside. The petition is therefore allowed. The order of the trial court is hereby set aside. The accused be taken in custody. The accused shall be at liberty to make an application before the trial court for grant of regular bail on merits.

January 04, 2011
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SHIV NARAYAN DHINGRA, J