

Before Adarsh Kumar Goel-ACJ & Ajay Kumar Mittal, J.

LAKHINDER SINGH,—Appellant

versus

UNION OF INDIA AND OTHERS,—Respondents

Civil Writ Petition No. 9315 of 2011

25th May, 2011

Constitution of India, 1950—Art. 14, 19, 21, 22, 22(4) & 226/227—Narcotic Drugs and Psychotropic Substances Act, 1985—S. 37—Code of Criminal Procedure, 1973—Ss. 167(2), 309 & 433—Indian Penal Code—S. 302—Petitioner arrested for possession of 3 Kg of opium—Petitioner in custody during trial—Bail application dismissed as withdrawn—Contention that continuation in custody is violative of its fundamental rights—Section 37 of the NDPS Act, Section 167(2) and 309 of Cr. P.C. challenged—declaration without detention of petitioner beyond 90 days is violative of Section 22(4) of Constitution.

Held. That no doubt that personal liberty of a citizen is a fundamental right, which cannot be deprived without procedure. However continue detention non-bailable case as a consequence of rejection of bail application cannot be held to be inconsistent with Article 21 relying upon **Union of India versus Ram Samajuh** (1999) 9SCC 429, **Dadu versus State of Maharashtra** (2000) 8SCC 437 and **Bachan Singh versus State of Punjab** (1980) 2 SCC 684 Section 37 held to be constitutional, *Further held.* That persons belonging in narcotic drugs are instrumental in inflicting a death blow to number of innocent young victims which was required to be checked validity of Section 167(2) Cr. P.C. also upheld as the same is necessary to advance investigation and also provides for legal authorization for keeping a person in custody if he is not granted bail. Section 309 Cr. P.C. also cannot be held to be invalid in view of Kalyan Chandra, Petition dismissed.

(Para 6, 7, 8, 9 & 10)

ADARSH KUMAR GOEL, ACJ

This petition seeks a declaration that detention of the petitioner as underrital is illegal and violative of Articles 14, 19, 21 and 22 of the Constitution. Declaration has also been sought that Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and Section 167(2) and 309 of the Code of Criminal Procedure are ultravires. Declaration has been further sought that detention of the petitioner beyond 90 days is violative of Article 22(4) of the Constitution.

(2) Case of the petitioner is that he has been arrested in connection with FIR No. 407, dated 8th November, 2009 under sections 18/29/61 of the Act and has been kept in custody pending trial on the allegation that he was found in possession of 3 kgs. of opium. The petitioner applied for bail by filing CrI. M. No. 1049-M of 2011 in this Court which was dismissed as withdrawn, as stated in para 16 of the petition. Thus, the petitioner continues to be in custody which is claimed to be in violation of his fundamental rights.

(3) We have heard learned counsel for the petitioner.

(4) In support of the petition, learned counsel for the petitioner submitted that during trial a person could not be kept in custody and he could be kept in custody only after conviction as if he is found innocent, there can be no compensation for the illegal detention under the law. The detention will be against the principle of fairness of procedure and procedure which allows detention without conviction is harsh on a citizen. Reliance has been placed on judgment of the Hon'ble Supreme Court in **State of Kerala versus Raneef, (1)**. It was further submitted that in judgment of Nine Judges Bench of the Hon'ble Supreme Court in **I. R. Coelho versus State of Tamil Nadu (2)**, the direct impact test or the "rights test" laid down in **R. C. Cooper versus Union of India (3)** has been reiterated and, thus, validity of violation of right of liberty could be tested not only under Article 21 but also under Articles 14 and 19.

(1) (2011) 1 SCC 784

(2) AIR 2007 SC 861

(3) AIR 1970 SC 564

(5) We are unable to accept the submission.

(6) Undoubtedly, personal liberty of a citizen is a cherished fundamental right guaranteed under the Constitution. No person can be deprived such right without procedure established by law and procedure prescribed by law must be just, fair and reasonable which can be tested with reference to rights under Articles 14 and 19 of the Constitution. At the same time, detention of an undertrial in custody in a non-bailable case as a consequence of rejection of his bail application cannot be held to be inconsistent with Article 21 nor can detention be held to be violative of fair procedure and thus, inconsistent with Articles 14 and 19 of the Constitution. Dealing with this matter in **Kalyan Chandra Sarkar versus Rajesh Ranjan** (4) was observed.

“18. It is right that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled to bail if the court concerned comes to the conclusion that the prosecution has failed to establish *prima facie* case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of *prima facie* case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing require that such persons be released on bail, in spite of his earlier applications being rejected, the courts can do so.” (emphasis supplied).

Section 37 of the NDPS Act is more stringent in the matter of grant of bail compared to provisions for bail in the Code of Criminal Procedure, 1973. The object thereof was considered by the Hon'ble Supreme Court in **Union of India versus Ram Samujh (5)** and it was held that the said provision was incorporated to effectively control and eradicate smuggling of Narcotic Drugs and Psychotropic Substances and illegal trafficking in such drugs and substances which had deleterious effect and deadly impact on the society. It was observed that persons dealing in Narcotic drugs are instrumental in inflicting death blow to a number of innocent young victims which was required to be checked. Relevant observations therein are as under :—

- “6. The aforesaid Section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus :

“Even though the major offences are non-bailable by virtue of the level of punishment, on technical grounds, *drug offenders were being released on bail*. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.’
(emphasis supplied)

7. If it is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable’ it causes deleterious effects and a deadly impact on the society; they are hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about

the adverse effect of such activities in **Durand Didier versus Chief Secy., Union Territory of Goa**, (1990) 1 SCC 95 as under : (SCC P. 104, para 24).

- ‘24. With deep concern, we may point out that the organised activities of the underworld and clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole. Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.’
8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should be released on bail during trial unless the mandatory conditions provided in Section 37, namely,—
- (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and
 - (ii) that he is not likely to commit any offence while on bail are satisfied.”

(8) Again in **Dadu versus State of Maharashtra** (6), the matter was considered as under :—

- “4. The vires of the Section have been defended by the Union of India on the ground that as Parliament has jurisdiction to enact the law pertaining to the Narcotic Drugs and Psychotropic Substances Act, reasonable restrictions can be imposed upon

the right of the convict to file appeal and seek release, remission or commutation. The Act is intended to curb the drug addiction and trafficking which is termed to be eating into the vitals of the economy of the country. The illicit money generated by drug trafficking is being used for illicit activities including encouragement of terrorism. Anti-drug justice has been claimed to be a criminal dimension of social justice. It is submitted that statutory control over narcotic drugs in India was being generally exercised through certain Central enactments, though some of the States had also enacted certain statutes to deal with illicit traffic in drugs. Reference is made to the Opium Act and the Dangerous Drugs Act etc. In the absence of comprehensive law to effectively control psychotropic substances in the manner envisaged by the International Convention of Psychotropic Substances, 1971, a necessity was felt to enact some comprehensive legislation on the subject. With a view to meet the social challenge of great dimensions, Parliament enacted the Act to consolidate and amend the existing provisions relating to control over drug abuse and to provide for enhanced penalties under the Act. The Act provides enhanced and stringent penalties. The offending Section is claimed to be not violative of Articles 14, 19 and 21 of the Constitution of India. To fulfil the international obligations and to achieve the objectives of curbing the menace of illegal trafficking, the section was enacted not only to take away the power of the executive under Section 433 of the Code but also the power under the Code to suspend, remit or commute the sentences passed under the Act. The convicts under the Act are stated to be a class in themselves justifying the discrimination without *offending guarantee of equality* enshrined in the Constitution. To support the constitution validity of the section, the respondents have also relied upon the Lok Sabha debates on the subject.

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15.....The restriction imposed upon the executive, under the Section appears to be for a reasonable purpose and object sought to be achieved by the section. While moving the Amendment Bill, which included Section 32-A, in Parliament on 16th December, 1988 the Minister of State in Department of Revenue in the Ministry of Finance explained to Parliament that the country had been facing the problem of transit traffic in illicit drugs which had been escalated in the recent past. The spillover from such traffic had been causing problems of abuse and addiction. The Government was concerned with the developing drug situation for which a number of legislative, administrative and preventive measures had been taken resulting in checking and transit traffic to a considerable extent. However, increased internal drug traffic, diversion of opium from illicit growing areas and attempts of illicit manufacture of drugs within the country threatened to undermine the effects of the counter-measures taken. Keeping in mind the magnitude of the threat from drug trafficking from the Golden Crescent Region comprising Pakistan, Afghanistan and Iran and the Golden Triangle Region comprising Burma, Thailand and Laos and having regard to the internal situation, a 14-point directive was stated to have been issued by the then Prime Minister on 4th April, 1988, as a new initiative to combat drug trafficking and drug abuse....."

(9) In **Bachan Singh versus State of Punjab** (7), after considering the developments of law in **R.C. Cooper**, it was observed :

"61.....It cannot reasonably or rationally, be contended that any of the rights mentioned in Article 19(1) of the Constitution confers the freedom to commit murder or, for the matter of that, the freedom to commit any offence whatsoever. Therefore, penal laws, that is to say, laws which define offences and prescribe punishment for the commission of offences do not attract the application of Article 19(1). We cannot, of course, say that the object of penal laws is generally such as not to involve any

violation of the rights conferred by Article 19(1) because after the decision of this Court in the *Bank Nationalisation case*, (1970) 1 SCC 248, the theory, that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant, stands discredited. But the point of the matter is that, in pith and substance, penal laws do not deal with the subject-matter of rights enshrined in Article 19(1). That again is not enough for the purpose of deciding upon the applicability of Article 19 because as the test formulated by us above shows, even if a law does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), if the direct and inevitable effect of the law is such as to abridge or abrogate any of those rights, Article 19(1) shall have been attracted. It would then become necessary to test the validity of even a penal law on the touchstone of that Article. On this latter aspect of the matter, we are of the opinion that the deprivation of freedom consequent upon an order of conviction and sentence is not a direct and inevitable consequence of the penal law but is merely incidental to the order of conviction and sentence which may or may not come into play, that is to say, which may or may not be passed. Considering therefore the test formulated by us in its dual aspect, we are of the opinion that Section 302 of the Penal Code does not have to stand the test of Article 19(1) of the Constitution.

62. This is particularly true of crimes, inherently vicious and pernicious, which under the English Common Law were classified as crimes *mala in se* as distinguished from crimes *mala prohibita*. Crimes *mala in se* embrace acts immoral or wrong in themselves, such as, murder, rape, arson, burglary, larceny (robbery and dacoity); while crimes *mala prohibita* embrace things prohibited by statute as infringing on others rights, though no moral turpitude attaches to such crimes. Such acts

constitute crimes only because they are so prohibited. While crimes *mala in se* do not *per se*, or in operation directly and inevitably impinge on the rights under Articles 19(1), cases under the other category of crimes are conceivable where the law relating to them directly restricts or abridges such rights. The illustration given by Shri Sorabjee will make the point clear. Suppose, a law is enacted which provides that it shall be an offence to level any criticism, whatever, of the Government established by law and makes a further provision prescribing five years' imprisonment as punishment for such an offence. Such a law (i.e. its provision defining the offence) will directly and inevitably impinge upon the right guaranteed under clause and clause (a) of Article 19(1). Therefore, to be valid, it must pass the test of reasonableness embodied in clause (2) of the Article. But this cannot be said in regard to the provisions of the Penal Code with which we are concerned."

(10) In view of above, we are unable to hold that Section 37 of the Act is unconstitutional. As regards Section 167(2) Cr. P.C., the same provides for remand by the magistrate during investigation. Such provision is necessary to advance investigation and also to provide for legal authorization for keeping a person in custody if he is not granted bail. Similarly, Section 309 Cr. PC providing for remanding a person in custody during trial cannot be held to be invalid in view of law laid down in *Kalyan Chandra*, Article 22(4) of the Constitution requiring opinion of the Advisory Board is applicable only for preventive detention and not for detention during trial of an offence. The same cannot, thus, be invoked to declare continued detention of an undertrial whose bail has been rejected to be illegal.

(11) Accordingly, we do not find any merit in this writ petition. The same is dismissed. It is made clear that we have not expressed any opinion on the merits of the case.