

## Chander Sain Vs State of Haryana

**Court:** High Court Of Punjab And Haryana At Chandigarh

**Date of Decision:** Sept. 28, 1994

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€” Section 167, 167(2), 4, 439  
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€” Section 36A(1), 37, 37(1)

**Citation:** (1995) CriLJ 3160 : (1995) 1 RCR(Criminal) 113

**Hon'ble Judges:** H.S. Brar, J

**Bench:** Single Bench

**Advocate:** G.S. Grewal and T.P.S. Mann, for the Appellant; Neena Madan, AAG, for the Respondent

**Final Decision:** Dismissed

### Judgement

@JUDGMENTTAG-ORDER

H.S. Brar, J.

Since a common question of fact and law is involved in all the six Criminal Miscellaneous Petitions (Nos. 13842-M of 1994,

13386-M of 1994, 1350-M of 1994, 13516-M of 1994, 13551-M of 1994 and 13776-M of 1994). I propose to dispose of the said petitions by

this judgment.

2. In a nutshell, in all these petitions, the contention of the learned counsel for the petitioners is that Section 36A(1)(b) of the Narcotics Drugs and

Psychotropic Substances Act, 1985 (hereinafter called the NDPS Act) has been contravened as the learned Judicial Magistrate did not forward

the custody of the petitioners on expiry of 15th day to the Special Court and consequent further detention of the petitioners in judicial custody was

rendered illegal and unauthorised (like a case of illegal and unauthorised detention of the accused u/s 167(2)(a) of the Code of Criminal Procedure,

1973 (No. 2 of 1974) (hereinafter called the Code) on the ground of non-submitting a charge-sheet within the prescribed limit of 90 days. It was

then submitted that Section 36A(1)(b) of the NDPS Act not only expressly prohibits the detention of the accused in any manner whatsoever either

in police custody or in judicial custody beyond a span of 15 days in the whole, but the same further specifically directs the learned Magistrate to

forward the custody of the accused to the Special Court. Thus, placing reliance on Section 36A(1)(b) of the NDPS Act, the learned counsel

submits that by virtue of an express mandatory provision the accused cannot be kept even in judicial custody exceeding the prescribed statutory

limit of 15 days, as after the expiry of the said period the petitioners accused were required to be forwarded to the Special Court and in the

absence of it. to the Sessions Court as the case may be. Thus, any default in complying with the said provisions of Section 36A(1)(b) of the NDPS

Act being patently illegal, the petitioners were entitled to be released on bail forthwith. In order to substantiate the contentions, the learned counsel

placed reliance on Criminal Miscellaneous No. 9322-M of 1993 in which a request has been made by a learned Judge of this Court (vide order,

dated August 17, 1993) to the Hon"ble the Chief Justice, for referring the matter to a larger Bench. The learned counsel asserted with one voice

that the petitioners in all the aforementioned petitions are entitled to be set at liberty forthwith, in view of the Full Bench decision of the Kerala High

Court in *Berlin Joseph v. State* 1992 (2) Cri 353 (Ker) and a Division Bench decision of the Delhi High Court in *Rakesh Kumar v. State*, 1994 (1)

CLR 336.

3. It may be stated here that the question for determination before the Full Bench of the Kerala High Court in *Berlin Joseph's* case 1992 (2) Cri

353 (supra), was, as to whether the conditions in Section 37 of NDPS Act for granting bail have overriding effect on the proviso to Section 167 of

the Code and the interpretation of Section 36A(1)(b) of the NDPS Act was not an issue directly involved therein. While answering the above

question, the learned Judges of the Kerala High Court had held that Section 37 of the NDPS Act does not override Section 167(2) of the Code

and, thus, Section 167(2) of the Code would operate even for offences under NDPS Act.

4. In *Rakesh Kumar's* case 1994 (I) CLR 336 (supra), it was held that the Judicial Magistrate had no power to authorise detention of a person

accused or suspected of commission of an offence under the NDPS Act exceeding 15 days in the whole. The detention in excess of that period by

the Judicial Magistrate by ordering repeated remand, was held to be illegal.

5. I cannot persuade myself to grant the concession of bail to the petitioners on the basis of arguments advanced as well as the authorities cited at

the bar particularly till Section 37 of the NDPS Act as interpreted by the Hon"ble Supreme Court in *Narcotics Control Bureau Vs. Kishan Lal* and

others, , holding that the limitations on granting of bail specified in Clause (b) of Sub-section (1) of Section 37 of the NDPS Act are in addition to

the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail, remains on

the statute book.

6. It is worthwhile to mention here that while interpreting Section 36A(1)(b) of the NDPS Act, the High Court cannot afford to overlook the

decision rendered by the apex Court in Kishan Lal's case, 1991 (1) RCR 338 (supra), wherein the effect of Section 167(2)(a) of the Code came

to be appreciated in the contest of Section 37 as amended, of the said Act. In the said decision of the Supreme Court, the charge-sheet claimed to

be filed was beyond the prescribed limit of 90 days and, therefore, though the custody of the accused thereafter was clearly rendered as illegal and

unauthorised, yet their Lordships of the Supreme Court in their wisdom in view of the specific provisions as contained in Section 37 of the NDPS

Act did not order the release of the accused on bail. In the instant case also the Judgment advanced by the learned counsel for the petitioners were

to the effect that the learned Magistrate was not empowered to extend the judicial custody of the accused beyond 15 days, or he did not forward

the custody of the accused to the Special Court on expiry of 15 days, their subsequent detention was rendered illegal, and, therefore, the accused

deserved to be released on bail. The contention of the learned counsel regarding bail u/s 36A(1)(b) of the NDPS Act and Section 167(2) of the

Code on account of illegal and unauthorised detention is quite identical and accordingly if under the identical situation u/s 167(2)(a) of the Code,

applying the provisions of Section 37 of the NDPS Act, their Lordships of the Supreme Court in their wisdom while interpreting Section 37 of the

NDPS Act did not think it proper to release the accused on bail, this Court in the instant cases in the similar set of circumstances of alleged illegal

and unauthorised detention u/s 36A(1)(b) of the NDPS Act would not be authorised to release the petitioners on bail. The breach of the provisions

of Section 36A(1)(b) of the NDPS Act, if at all considered to be a breach, even then it is just like a simple breach of the procedure u/s 167(2) of

the Code, wherein the investigating agency is directed to file the charge-sheet within the prescribed limit as held by the Supreme Court in Kishan

Lal's case 1991 (1) RCR 338 (supra) that such procedural illegality cannot be permitted to outweigh the underlying object of the said provisions

as contained in Section 37 of the NDPS Act which has clearly taken away all the rights of the accused to have the benefit of bail until and unless

the conditions provided u/s 37 are complied with. In view of the judgment of the Supreme Court, referred to above, none of the views expressed

earlier to the contrary by this Court or by different High Courts including the Kerala and Delhi High Courts, if I may say so with all humility at my

command, would be a good law on the point and the authorities cited at the bar go against the express provisions of Section 37 of the NDPS Act

as interpreted by the Supreme Court" in Kishan Lal's case 1991 (1) RCR 338 (supra). In that case, the Supreme Court had specifically held that

power to grant bail under any of the provisions of Code of Criminal Procedure should necessarily be subject to the conditions mentioned in

Section 37 of the NDPS Act. It has been made clear in the Judgment that since Section 37 of the NDPS Act starts with a non-obstante clause

stating that "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein

shall be released on bail unless the conditions contained therein were satisfied", the NDPS Act being a special enactment and having been enacted

with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and the

provisions of Section 37 of the NDPS Act being in negative terms limiting the scope of the applicability of the provisions of the Code regarding

bail, it cannot be said that High Court's powers to grant bail u/s 439 of the Code are not subject to the limitation mentioned u/s 37 of the NDPS

Act. It is again specifically mentioned by the Supreme Court in the judgment that provisions of Section 4 of the Code also make it clear that when

there is a special enactment in force relating to the manner of investigation, enquiry or otherwise dealing with such offences, the other powers under

the Code of Criminal Procedure should be subject to such special enactment.

7. I would also like to refer to a Full Bench decision of the Orissa High Court rendered in Banka Das v. State of Orissa, (Orissa), 1993 (2) RCR

285, wherein after interpreting the scope of Section 36A(1)(b) of the NDPS Act and Section 167(2) of the Code and after referring to the

decisions of the Supreme Court in Kishan Lal's case, 1991 (1) RCR 338 (supra), as also other relevant law on the point, the learned Judges of

that High Court held that the accused arrested under the NDPS Act is not entitled to bail unless conditions u/s 37 of the said Act are satisfied u/s

37 overrides the provisions of Section 167(2) of the Code.

8. In other Full Bench decision of the Madhya Pradesh-High Court in Ram Dayal v. Central Narcotic Bureau, 1993 (3) Crimes 818, while noting

down the Full Bench decision of the Kerala High Court in Berlin Joseph's case 1992 (II) Crimes 353 (Ker) (supra), it was held as under:

We respectfully disagree with the view expressed in Kerala High Court's Full Bench in Berlin Joseph - that Section 37, NDPS Act does not

override Section 167(2), Cr.P.C.

It has been further concluded by the Full Bench of the Madhya Pradesh High Court in Para 15 of the judgment as under:

We reiterate that Section 167(2) proviso, Cr.P.C, is not applicable to a proceeding under NDPS Act. We hold that even if charge-sheet is filed

after 90 days of the arrest of the accused on that ground itself the person charged u/s NDPS Act is not entitled to get bail from the High Court.

9. To conclude, in view of the my discussion above particularly in view of the provisions of Section 37 of the NDPS Act and the decision of the

Supreme Court in Kishan Lal scase 1991 (1) RCR 338 (SC) (supra), later on interpreted by Full Bench of Orissa High Court in Banka Das"s

case, 1993 (2) RCR 285 (Orissa) (supra) and the Full Bench of Madhya Pradesh High Court in Ram Dayal"s case 1993 (3) Cri 818 (MP)

(supra), I do not find any ground to grant bail to the petitioners. All the aforementioned petitions are dismissed and it is held that there is no

contravention of the provisions of Section 36A(1)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985.