

NDPS 40 of 2025

(36 of 2024)

Order No.34

09.04.2025

The accused no.1 to 3 on bail are present by their hazira.

The accused no.4 on bail is present by hazira.

The ld defence lawyers for them are present.

The ld Special PP is present.

Heard the ld lawyers for the parties at length on issue of maintainability of the case before this Court.

It appears that this case is received on 17.03.2025 on transfer from the Court of ld Sessions Judge, Alipurduar vide order no. 32 dated 11.03.2025.

Section 36D of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, '*the NDPS Act*'), however, states thus, -

'(1) Any offence committed under this Act on or after the commencement of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 (2 of 1989), which is triable by a Special Court shall, until a Special Court is constituted under section 36, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), be tried by a Court of Session.

(2) Where any proceedings in relation to any offence committed under this Act on or after the commencement of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 (2 of 1989), are pending before a Court of Session, then, notwithstanding anything contained in sub-section (1), such proceeding shall be heard and disposed of by the Court of Session:

Provided that nothing contained in this sub-section shall affect the power of the High Court under section 407 of the Code of Criminal Procedure, 1973 (2 of 1974) to transfer any case or class of cases taken cognizance by a Court of Session under sub-section (1).'

The close perusal of the instant provision undoubtingly suggests that any case regards to an offence committed under this Act on or after commencement of the NDPS (Amendment) Act, 1988 cognizance of which is already taken by the Court of Session under Section 36D(1) of the NDPS Act, such cases cannot be transferred by the Court of Session to the Special Court constituted subsequently for the purpose and such cases are to be tried by the Court of Session. Proceeding of a case is said to be commenced on taking cognizance. Thus, it can otherwise be said that a case in respect of which proceedings is already commenced before the Court of Sessions, is not triable by the Special Court on its establishment subsequent to such commencement of proceeding.

The Proviso to Section 36D of the NDPS Act, however, states that such cases can only be transferred by the Hon'ble High Court under section 407 of CrPC. Meaning thereby, a case proceeding of which is already commenced before the Court of Sessions, in absence of any order under section 407 of

Contd.....P/2

NDPS 40 of 2025

(36 of 2024)

CrPC, cannot be tried on transfer by the Special Court on its establishment subsequent to such commencement of proceeding.

To buttress my contention, I may here refer profitably the decision of the Hon'ble Apex Court held in **Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India & Ors. – (1994) 6 SCC 731**. It has been held in **Para 11** thus, -

'11. Section 36 provides for the constitution of Special Courts and Section 36-A(1)(a) says that notwithstanding anything contained in the Code, all offences under the Act shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government. On a conjoint reading of these two provisions it becomes clear beyond any manner of doubt that once a Special Court (or more than one) has been constituted for an area or areas in which the offence has been committed, then notwithstanding anything contained in the Code, the Special Court alone will have jurisdiction and all other courts exercising jurisdiction prior to the constitution of the Special Courts will cease to have jurisdiction. Sub-sections 36-A(1)(a) and (d) which also begin with a non-obstacle clause notwithstanding anything contained in the Code provide that a Special Court may, upon a perusal of the police report of the facts constituting an offence under the Act or upon a complaint made by an officer of the Government concerned authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial. This is a provision which is analogous to Section 190 of the Code. It is clear from this provision that a Special Court may take cognizance of an offence without the accused being committed to it for trial. Section 36-C makes the provisions of the Code applicable to proceedings before a Special Court, save as otherwise provided in the Act, and says that the Special Court shall be deemed to be a Court of Session. That brings us to Section 36-D which is a transitional provision. Under sub-section (1) of Section 36-D any offence committed under the Act on or after the commencement of the Amendment Act, 1988, until a Special Court is constituted under Section 36, shall, notwithstanding anything contained in the Code, be tried by a Court of Session. The non-obstacle clause in this provision makes it clear that until a Special Court is constituted under Section 36, the Court of Session shall try any offence committed on or after the commencement of the Amending Act and no other court including the Magistrate's Court will have jurisdiction to try an offence under the Act. Sub-section (2) of Section 36-D further provides that nothing in sub-section (1) shall be construed to require the transfer to a Special Court of any proceeding in relation to an offence taken cognizance of by the Court of Session under sub-section (1) and the same shall be continued, heard and decided by the latter court. As we have pointed out earlier before this group of sections came to be introduced in the Act by the Amending Act 2 of 1989 with effect from 29-5-1989, the offences under the Act were triable by different courts

Contd.....P/3

under the Code depending on the punishments provided therefor. But after the introduction of this group of sections in the Act, the legislature, with a view to speeding up the trial provided for the constitution of a Special Court and until such court was constituted it provided by sub-section (1) of Section 36-B that the Court of Session will have jurisdiction to try any offence committed under the Act; the provisions in the Code notwithstanding. The effect of this provision is to vest jurisdiction in the Court of Session alone during the transitional period in respect of offences under the Act even where the punishment prescribed is three years or less. Ordinarily the Magistrate's Court would have power to try the offence under the Code but by this provision the power is vested in the Court of Session alone and, therefore, the Courts of the Magistrate, First Class, Metropolitan Magistrates, Chief Judicial Magistrates and Chief Metropolitan Magistrates would cease to have jurisdiction. Sub-section (1) of Section 36-A overrides the provisions of the Code. So, from the date of its introduction on the statute book the Magisterial Courts ceased to have jurisdiction or power to try any offence committed under the Act even if the punishment prescribed is three years or less since only the Court of Session is empowered to deal with such cases. There would, therefore, be no question of the Magistrate going through the exercise of committal proceedings as on account of the non-obstante clause in Section 36-D(1)(a), all offences under the Act become triable only by the Court of Session till the constitution of Special Courts and thereafter by the Special Court. Ordinarily, therefore, cases pending before the Court of Session by virtue of Section 36-D(1) would be transferred to the Special Court, but sub-section (2) of Section 36-D carves out an exception in relation to an offence of which the Court of Session has already taken cognizance. Where the Court of Session has already taken cognizance under sub-section (1) of Section 36D that court will be entitled to hear and dispose of the case and will not be required to transfer the same to the Special Court of the area by virtue of the exception carved out by sub- section (2) of Section 36-D. On a conjoint reading of Sections 36, 36-A to 36-D, it seems clear to us that after the insertion of these provisions all offences under the Act have to be tried by the Special Court for the area constituted under Section 36. That is the thrust of clause (a) of sub-section (1) of Section 36-A. But the legislature was aware that there may be a time-gap between the coming into force of these provisions w.e.f. 24-5-1989 and the constitution of a Special Court. This period which is a transitional period is taken care of by Section 36-D of the Act. Under this provision during the transitional period offences committed under the Act would be tried by the Court of Session alone notwithstanding anything to the contrary contained in the Code. But once the Special Court is constituted under Section 36 that court alone would have jurisdiction to try the offences under the Act save and except those in relation whereto the Sessions Court has already taken cognizance. It is not necessary to elaborate on when cognizance is understood to have been taken because that is fairly well-settled by a catena of decisions of this Court, vide decisions based on an interpretation of Section 190 of the Code. Also see para 7 of Kishun Singh v. State of Bihar.'

[emphasis supplied]

Contd.....P/4

NDPS 40 of 2025

(36 of 2024)

It is, therefore, found that an offence cognizance of which is already taken by the Court of Session, or nay in respect of which the proceeding is already commenced before the Court of Sessions sans an order u/s 407 of CrPC, cannot subsequently be transferred to the Special Court on its constitution subsequent to the commencement of the proceeding of the case before the Court of Sessions. To put it otherwise, such offence is exclusively triable by the Court of Session – Section 36D(1) of the NDPS Act till it gets transferred under section 407 of CrPC.

It appears from the record that on submission of charge sheet, cognizance was taken by the Id Judge, Special Court (under NDPS Act), 1st Court, Jalpaiguri on 05.04.2023, and the case was subsequently received on transfer by the Court of Id Sessions Judge, Alipurduar on 09.08.2024 as per Notification of the Hon'ble High Court vide No.2357-G Dated 06.07.2024 that is prior to constitution of this Court, which came into existence on 05.11.2024 vide Government of West Bengal, Judicial Department Notification No.4217-J/JD/4P-01/09 dated 05.11.2024. It is, therefore, found that the proceeding of the instant case is already commenced before the Court of Id Sessions Judge, Alipurduar before establishment of this Court, which came into force on 05.11.2024. Having said so, I am of my considered view that the instant case proceeding of which is already commenced before the Court of Id Sessions Judge, Alipurduar, having been not transferred under section 407 of CrPC is not triable by this Court. To be precise, this Court lacks jurisdiction to try this case. This case should accordingly, be transferred back to the Court of Id Sessions Judge, Alipurduar since this Court has no jurisdiction to try the case.

Hence, the case is transferred to the Court of Id Sessions Judge, Alipurduar at once.

All the 04 accused persons are hereby directed to appear before the Court of Id Sessions Judge, Alipurduar on **17.04.2025** positively.

Inform the parties.

Office to do needful.

d/c

Judge, Special Court (NDPS)
Alipurduar