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Court : Kerala

Decided On : Nov-27-2015

Judge : The Honourable Mr.Justice K.T. Sankaran & V. Raja Vijayaraghavan

Appeal No. : CRL.A.No. 1064 of 2015

Appellant : Rajeesh

Respondent : State of Kerala represented by the Public Prosecutor High Court of Kerala, Ernakulam and Another

Judgement :

V. Raja Vijayaraghavan, J.

1. The legality of the order dated 7. 10. 2015 in Crl.M.P. No 1784 of 2015 of the Sessions Judge, Kalpetta, is challenged in this appeal preferred u/s 21(4) of the National Investigation Agency Act, 2008 by the appellant, who is the 6th accused in crime number 142/2014 of the Vellamunda police station.

2. The above petition was preferred by the appellant under section 439, 167 (2) of the Code of Criminal Procedure (hereinafter referred to as the Code) read with section 43(D) of the Unlawful Activities (Prevention) Act (hereinafter referred to as the UA(P) Act), seeking default bail.

3. The question raised by Sri K.S. Madhusoodanan, the learned counsel appearing for the appellant, centers around the interpretation of S. 43D (2) of the UA(P) Act which modifies the operation of S. 167 (2) of the Code , when offences under the UA (P) Act are involved.

4. Skeletal facts will have to be noted first :-

(a). On 24.4.2014, at about 20.30 hrs, one Roopesh along with 4 other accused, who are allegedly members of a terrorist organization by name CPI (Maoist), in prosecution of their common object, formed themselves into an unlawful assembly, armed with deadly automatic firing weapons, trespassed into the house of a police Constable by name Pramod and after criminally intimidating him and the other inmates of the house by threatening them with machine guns, committed mischief by fire and also caused damage of a motorcycle and left the place after leaving writings and pamphlets which revealed their intention to excite disaffection towards the Government established by law in India.

(b). The first accused Roopesh and four others were arrested on 4.5.2015 at Coimbatore and crime No. 1/2015 was registered by the "Q Branch Coimbatore for offence u/s 120 B r/w 124 (A) of the IPC and S 10 of the UA (P) Act , 1967. Based on the information received from the aforesaid Roopesh, the petitioner was arrested on 10.5.2015 by the Payyoli Police and Crime No 327/15 u/s 124 (A) of the IPC and S 10, 13 and 19 of the UA (P) Act was registered .

(c). Thereafter when the role played by the petitioner was revealed during interrogation, he was included as the 6th accused in Crime No 142/2014 of Vellamunda Police Station. The specific allegation against the petitioner is that he assisted the other accused in arranging weapons, food articles, vehicles and also hideouts .

5. Certain dates are undisputed :-

i. The formal arrest of the petitioner was recorded on 25.6.2015 at the Central Prison, Kannur .

ii. The petitioner was produced before the Sessions Court, Kalpetta on 2.7.2015

iii. The petitioner was given in police custody from 2.7.2015 to 6.7.2015 iv. He is in judicial custody from 6.7.2015 onwards.

v. Investigation officer filed a status report before court on 28.9.2015.

vi. The 90 days period under S 167 (2) as modified expired on 30.9.2015.

vii. On 1.10.2015 application seeking default bail was filed.

viii. On 6.10.2015 , the public prosecutor filed an application seeking continued detention of the appellant as per S. 43 D (2) of the UA (P) Act .

6. We have heard the learned counsel appearing for the appellant as well as the Learned Additional Director General of Prosecution.

7. According to the learned counsel appearing for the appellant, the learned Session Judge has misinterpreted the provisions of law by holding that the report filed by the investigating officer, though dated 22.9.2015, but filed on 28.9.2015 , fulfilled the mandate of subsection 43 D (2) of the UA (P) Act. According to the learned counsel, the Apex court right from **Hitendra Vishnu Thakur v. State of Maharashtra (AIR 1994 SC 2623)** has settled the law on the point and has held that the application filed by the investigating officer for extension of time would not be a substitute for the report of the public prosecutor. In tune with the statutory provisions, the appellant, on the expiry of 90 days, had filed an application under section 167(2) of the Code as modified by S. 43D for default bail, and as no charge had been laid by the time and as no proper extension application was also filed by the public prosecutor, an indefeasible right had accrued in favour of the appellant and the court was bound to release the appellant on bail as prayed for by him. It was finally pointed out that the application seeking continued detention of the appellant was filed by the Public Prosecutor only on 7.10.2015 , much after the expiry of 90 days, which could never have been taken as a relevant factor to deny the valuable right of the appellant as it failed to satisfy the requirement under the relevant statute.

8. Au Contraire, the Additional Director General of Prosecution , vehemently opposed the interpretation of law advanced by the learned Counsel appearing for

the appellant and contended that the report filed by the Deputy Police Superintendent, Mananthavady, the Investigating Officer in the instant case on 28.9.2015 would satisfy the conditions stipulated under S 43 D(2). According to the ADGP, the said report is initialed by the Public Prosecutor as well and it was on the strength of the said application that the extension was granted and the application for bail was rejected by the learned Sessions Judge.

9. It is beyond any cavil that the right to bail u/s 167(2) proviso (a) is absolute. It is a legislative command and not the discretion of the Court. If the investigating agency fails to file charge sheet before the expiry of 90 days as per the modified provision contained in S. 43D(2) of the UA(P) Act, the accused in custody should be released on bail. The Court is bereft of powers to remand a person beyond the stipulated period. At the same time the legislature has provided for seeking extension of time for completion of investigation on a report of the Public Prosecutor. This is provided in S.43D(2) of the UA(P) Act. For the sake of convenience, we shall extract S. 43 D(2) of the UA(P) Act .

S 43 D .(1)

(2). S.167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2), -

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and

(b) after the proviso, the following provisos shall be inserted, namely: -

"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody

of any person in judicial custody, he shall file an affidavit stating the reason for doing so and shall also explain the delay, if any, for requesting such police custody".

(emphasis supplied by us)

10. As per proviso to clause (b) of sub-section (2) of S.43D of the Act of 1967, for extension of the period of detention from 90 days to 180 days, the Public Prosecutor is required to submit a report indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days to the satisfaction of the Court.

11. The provisions of the TADA and that of UA(P) Act are in pari materia with each other. The Honourable Supreme Court in **Hitendra Vishnu Thakur V State (AIR 1994 SC 2623)** had occasion to consider and interpret the in pari material provisions contained in the Terrorists and Disruptive Activities Act, wherein proviso (bb) to clause (b) of sub section (4) dealt with the extension of period of investigation and continued detention of the accused on satisfaction of necessary conditions. The exposition of law in para 22 of the judgment answers lucidly the question involved in the instant case :-

[22].We may, at this stage, also on a plain reading of clause (bb) of subsection (4) of S.20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under

the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigation agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it, that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period" as occurring in clause (bb) in sub-section (2) of S.167 as amended by S.20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the

necessary corollary would be that an accused would be entitled to seek bail and the court 'shall' release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes infeasible and cannot be defeated by reasons other than those contemplated by sub- section (4) of S.20, as discussed in the earlier part of this judgment. We are unable to agree with Mr. Madhava Reddy or the Additional Solicitor General Mr. Tulsi that even if the public prosecutor 'presents' the request of the investigating officer to the court or 'forwards' the request of the investigating officer to the court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasized that he is neither a 'post office' of the investigating agency nor its 'forwarding agency' but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub- section (4) of S.20. Since, the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report fails in the performance of one of its essential duties and renders its order under clause (bb) vulnerable. Whether the public prosecutor labels his report as a report or as an application for extension would not be of much consequence, so long as it demonstrates on the

face of it that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (supra). Even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report, the Designated Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension."

12. The reliance placed by the learned Counsel appearing for the appellant on **Sanjay Kumar Kedia v Intelligence Officer, Narcotic Control Bureau and Another (2010 (2) SCALE 145)** is apposite and would also aid in cementing his argument further. Though involving TADA offences, the provisions are identical. The Apex Court in para 9 of the judgment had observed as follows :-

The maximum period of 90 days fixed under S.167(2) of the Code has been increased to 180 days for several categories of offences under the Act but the proviso authorizes a yet further period of detention which may in total go upto one year, provided the stringent conditions provided therein are satisfied and are complied with.

The conditions provided are:

- (1) a report of the public prosecutor,
- (2) which indicates the progress of the investigation, and

(3) specifies the compelling reasons for seeking the detention of the accused beyond the period of 180 days, and

(4) after notice to the accused.

13. In an identical matter when the question was whether the application filed by the investigating Officer for extension of time would be a substitute for the report of the Public Prosecutor was considered by us while considering Criminal Appeal No.973 of 2015 and it was held as follows :-

The question is whether the application filed by the investigating officer for extension of time would be a substitute for the report of the Public Prosecutor. The proviso does not contemplate any application to be filed by the investigating officer. It also does not contemplate the satisfaction of the Court to be drawn from the report or application submitted by the investigating officer. The Court has to arrive at the required satisfaction only from the report of the Public Prosecutor. What the report should contain is also indicated in the proviso. It is true that the Public Prosecutor may get the necessary details from the investigating officer. On getting the necessary details, the Public Prosecutor has to apply his mind and submit the report before the Court to enable the Court to apply its mind independently as to whether the case is a fit one where extension of the period beyond 90 days should be granted. The exercise contemplated under the proviso sought to be inserted in Section 167(2) consists of two elements:

(i) The satisfaction to be arrived at by the Public Prosecutor on the necessity of requesting for extension of time.

(ii) The satisfaction to be arrived at by the Court that extension is required.

The satisfaction shall be arrived at by the Court on the basis of the material supplied in the report submitted by the Public Prosecutor. The proviso does not contemplate a communication between the investigating officer and the Court in this matter. The legislature was quite aware of the distinction between the report of the Public Prosecutor and an affidavit to be filed by the investigating officer. The second among the provisos sought to be added in Section 167(2) CrI.P.C. as

provided in Section 43-D(2) provides that an affidavit by the police officer making the investigation shall be filed to found the request for police custody. The distinction between the report of the Public Prosecutor and an affidavit of the investigating officer is clear from two provisos sought to be inserted in Section 167(2) CrI.P.C., by sub-section (2) of Section 43-D of the Unlawful Activities (Prevention) Act.

14. Since we wanted to ascertain whether the report filed before the court on 28.9.2015 would satisfy the mandate under the statute, we had called for the lower court records. We have anxiously considered the petitions filed by the appellant as well as that the applications filed by the investigating officer and the public prosecutor. The contention of the appellant that no application seeking extension was filed by the public prosecutor is found to be correct. In view of the settled pronouncements of the apex court as well as of this court we cannot agree with the fervent submissions of the Additional Director General of Prosecution that the application signed by the investigating officer should be treated as sufficient compliance of the aforesaid statutory provision. Similar contentions were repelled by the apex court in **Hitendra Vishnu Thakur** (supra). For seeking extension of time under S 43 D (2) , the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause , must disclose on the face of it, that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an

extension, the right to be released on bail on account of the 'default' of the prosecution becomes infeasible and cannot be defeated on extraneous grounds.

15. Another very relevant aspect, we had occasion to note in the course of hearing , was that no orders were passed by the learned Sessions Judge in the application filed by the Public Prosecutor seeking extension of time. Though the learned Additional Director General of Prosecution submitted that a common order has been passed by the Learned Sessions Judge while disposing the application seeking bail as well as the application seeking extension of time, the same is not reflected in the order. In other words when the application for default bail filed by the appellant was dismissed, no orders granting extension of time was issued by the learned sessions judge. This is yet another illegality.

16. It is by now settled that when an application filed by the accused for release on bail and also a prayer for extension of time to complete the investigation filed by the prosecutor comes up simultaneously before Court, they are to be considered together. It is obvious that no bail can be given in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. (see **Union of India through Central Bureau of Investigation v. Nirala Yadav Alias Raja Ram Yadav Alias Deepak Yadav (2014 (9) SCC 457)**)

17. Though it was submitted by the learned Additional Director general of Prosecution that the allegations levelled against the petitioner are serious, we are of the view that the gravity of the case, seriousness of the offence or the character of the offender cannot weigh with the Court at the stage of grant of bail to an accused under S.167(2) of the Code as modified by S.43D (2) of the UA(P) Act on account of the default of the prosecution. An application for grant of bail has to be decided on its own merits for the default of the prosecuting agency to file the charge sheet within the prescribed or the extended period for completion of the investigation uninfluenced by the merits or the gravity of the case. In view of the above we are of the view that the appellant has acquired an infeasible right to be enlarged on default bail as no report was filed by the public prosecutor seeking

to extend the time for completing the investigation.

18. In conclusion, we are of the considered view that the learned Sessions Judge was not justified in dismissing the application filed by the appellant seeking default bail. The order impugned is set aside and the CrI.M.P.No. 1784/2015 is allowed. The appellant shall be released on bail on the following conditions :-

(i). The appellant shall execute a bond for Rs.25,000/- (Rupees Twenty Five thousand only) with two solvent sureties each for the like sum to the satisfaction of the Court of Session, Kalpetta, Wayanad.

(ii). The appellant shall not leave the State of Kerala without getting permission from the Court below.

(iii). The appellant shall report before the investigating officer between 9.00 a.m and 11.00 a.m on alternate Mondays until the investigation is over.

The CrI.Appeal is allowed as above.

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