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In Re: Sanjay Kumar Kedia @ Sanjay Kedia

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Overruled by : [Sanjay Kumar Kedia @ Sanjay Kedia Vs. Intelligence Officer, Narcotic Control Bureau and Anr.](#)

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Court : Kolkata

Decided On : Sep-05-2008

Reported in : 2009(1)CHN156

Judge : Amit Talukdar and ;Kishore Kumar Prasad, JJ.

Acts : Narcotic Drugs and Psychotropic Substances Act - Sections 19, 24, 27A, 29, 30, 36A(4) and 38; ;Code of Criminal Procedure (CrPC) - Sections 144, 167, 167(2), 309, 397, 401 and 482; ;Indian Penal Code (IPC) - Section 188

Appeal No. : C.R.R. Nos. 411 and 765 of 2008

Appellant : In Re: Sanjay Kumar Kedia @ Sanjay Kedia

Advocate for Pet/Ap. : Sekhar Basu, ;Amit Bhattacharjee, ;J. Bagchi, ;Sabyasachi Banerjee, ;Abhijit Sarkar, ;Rajdeep Mazumdar, ;Ayan Bhattacharya, ;Basuri Swaraj and ;Subhendu Sinha Roy, Advs.;Biswa Ranjan Ghosal, ;C.S. Bag

Disposition : Application dismissed

Judgement :

1. Two orders passed by the learned Judge, Special Court, Barasat (hereinafter referred to as the 'learned Trial Court') under the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'said Act') on 30.01.2008 and

13.02.2008 in Case No. 23 of 2007 has paved the way for the petitioner to file these two applications.

2. While C.R.R. No. 765 of 2008 relates to an order dated 13.02.2008, in C.R.R. No. 411 of 2008 the subject-matter for decision is the order passed on 30.01.2008.

3. Initially, both these applications styled under Section 397/401 read with Section 482 of the Code of Criminal Procedure were moved before a learned Single Judge of this Court. In course of hearing of the same, the learned Senior Counsel for the Narcotic Control Bureau (hereinafter referred to as the 'Bureau') and the Counsel for the State of West Bengal raised a preliminary objection that the issue involved in these applications would, ultimately, impinge on the question of bail, which determination was not available before the learned Single Judge while dealing with an application in connection with the NDPS case.

4. However, Shri Basu for the petitioner abandoned the prayer for bail and only invited a decision on the question involved.

5. Accepting the submissions made on behalf of the Bureau and the State of West Bengal, the learned Single Judge referred the matter to the First Bench.

6. It is pursuant to an assignment made by the Hon'ble Chief Justice, these two matters have been placed for disposal before this Bench.

7. Since issue involved is common in both the applications, even though separate orders have been challenged therein, but as they flow from the same proceeding- we dispose of the same by this common Order which will govern the fate of either of them.

8. Assailing these two orders, Shri Sekhar Basu appearing with Shri Amit Bhattacharjee, Shri Joymalya Bagchi, Shri Avijit Sarkar, Shri Sabyasachi Banerjee, Shri Rajdeep Mazumdar, Shri Ayan Bhattacharjee, Ms. Basuri Swaraj and Shri Subhendu Sinha Roy has raised the following contentions for decision:

(A) The petitioner was arrested on 12.02.2007 and the period of one hundred eighty days was valid till 12.08.2007. The period for extension on 02.08.2007 by

the investigating agency could be done till 12.08.2007 and not for a full period of 02.02.2008.

(B) The prayer for extension was made by the Investigating Officer and not by the Public Prosecutor himself on 02.08.2007 which was an infraction of the proviso to Sub-section (4) of Section 36A of the said Act.

(C) He was of the view that unless the satisfaction of the Public Prosecutor was placed before the Court praying for further extension of time, any order passed on the application was bad in law.

(D) According to Shri Basu in view of the ratio of the decision of Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors. 1994 SCC (Cri) 1087, it was incumbent on the Public Prosecutor to give reasons and it is only after being satisfied thereof, the Court could have extended the time. But in the instant case not only there was no petition filed by the Public Prosecutor as required under the proviso to Sub-section (4) of Section 36A of the said Act but the Court also mechanically extended the time.

(E) On the strength of the decision of Hitendra Vishnu Thakur and Ors. (supra) and Sanjay Dutt v. State through CBI, Bombay (II) reported in 1994 SCC (Cri) 1433, Shri Basu submitted that before such extension was made-in any event it was necessary on the part of the Court to notify the petitioner as to the proposed extension to be made since it curtailed his valuable right to be released on bail.

9. Shri Basu was of the view since the order passed on 02.08.2007 was per se illegal, all subsequent orders emanating therefrom also were nugatory and were required to be set aside.

10. Relying on the decisions of Uday Mohanlal Acharya v. State of Maharashtra 2001 SCC (Cri) 760; Hitendra Vishnu Thakur and Ors. (supra) and Radhakrishnan and Anr. v. State by Inspector of Police, Kanyakumari Police Station 2005(2) Crimes 533 and the Division Bench decision of this Court in Subodh Kundu v. State 2003 C Cr. LR (Cal) 609, he submitted that as the petitioner had exercised his indefeasible right for being released on bail on February 4th, 2008 after expiry

of the statutory period before the challan was submitted - he was entitled to an order of bail and the order passed on 13.02.2008 was an illegal order.

11. Shri Basu also submitted that the order passed on 30.01.2008 cannot be sustained as the initial order passed on 02.08.2007 was not legally sustainable.

12. Shri Bishwa Ranjan Ghosal, learned Senior Counsel appearing on behalf of the Bureau with Shri G.S. Makkar, learned Junior Central Government Advocate assisted by Shri Ujjal Kr. Dutta and Shri C.S. Bag countered all the submissions made by Shri Basu.

13. According to Shri Ghosal, since the complaint has already been filed and the proceeding is towards culmination in the trial, the submissions of Shri Basu, if accepted, would put the clock back.

14. Shri Ghosal was of the further opinion that the order passed on 02.08.2007 was not challenged on behalf of the petitioner on any occasion. As such, it would be deemed to have merged with the subsequent orders by way of acquiescence, which has attained its finality by virtue of filing of the complaint within the stipulated period.

15. He pointed out from the list of dates relied upon by him that from initial date of the arrest of the petitioner (12.02.2007) the first phase of one hundred eighty days was covered till 12.08.2007 and within the statutory period (02.08.2007) it was extended for another one hundred eighty days which would cover up to 02.02.2008 and further extension having been prayed for on 30.01.2008 the period stood extended till 13.02.2008. In the meantime as the complaint was already filed on 07.02.2008-----the point canvassed by Shri Basu was no longer available to him.

16. Shri Ghosal distinguished the decisions of Hitendra Vishnu Thakur and Ors. (supra), Sanjay Dutt v. State through CBI (supra), Uday Mohanlal Acharya v. State of Maharashtra (supra) and the Division Bench decision of our Court in Subodh Kundu (supra).

17. Shri Ghosal lastly submitted that the order of 02.08.2007, which has been repeatedly harped on by Shri Basu was not assailed earlier nor in these two applications and for the present the said order cannot be re-opened as it is barred by limitation.

18. State of West Bengal has mostly adopted the submission made by the Union of India.

19. Learned Counsel for the State of West Bengal Shri Sengupta has submitted at the first instance that the order passed by the learned Trial Court on 02.08.2007 cannot be faulted under any circumstances. He was of the view that it was the content of the petition filed for extension and not the form that would matter.

20. Referring to the prayer made by the Investigating Officer, which was endorsed by the Public Prosecutor, Shri Sengupta submitted there were valid reasons set out in the said petition for extension of the period of detention. As such, even though there was no formal prayer made on behalf of the Public Prosecutor- simply on that ground the entire proceeding cannot be vitiated on the analogy that the order of extension was not in accordance with law.

21. Shri Sengupta also distinguished from the decision of Hitendra Vishnu Thakur and Ors. (supra) and Sanjay Dutt (supra) including the decision of Uday Mohanlal Acharya (supra) to illustrate his point that since in the instant case the challan has already been filed within the statutory period; the question which has been decided in all these three decisions are no longer available before the petitioner considering the fact that the stage of Section 167 Cr.PC has been over once the challan is before the Court.

22. In reply, Shri Basu drew an analogy from Section 144 Cr.PC and submitted that in the event it is found that the initial proceeding, which was not drawn up properly-the question of infraction of the same by way of invoking Section 188 of the Indian Penal Code did not arise and as the initial order was non est in the eye of law; entire subsequent proceeding emanating therefrom would be a nullity.

23. Shri Basu was of the further view that there cannot be any estoppel against law as it was found that on 02.08.2007 the order passed by the learned Judge, Special Court was contrary to the provision of Sub-section (4) of Section 36A of the said Act-----all orders including the order taking cognizance till the time of filing of the chargesheet are absolutely illegal and the Court can suo motu take notice of the same and set aside the said order. For this, Law of Limitation will have no manner of application.

24. Winding up, Shri Basu submitted that in view of the aforesaid position the orders impugned cannot be sustained for a moment.

25. Once we have apprised ourselves with regard to the elaborate submissions made at the Bar and after considering the various citations relied upon, we would now proceed to appreciate the same in the light of the legal position that has cropped up.

26. Flurry of points have been raised by Shri Basu for the petitioner, which of course, was countered both by Shri Ghosal for the Bureau and Shri Sengupta for the State of West Bengal in their own inimitable way. Without being flummoxed by the barrage of contentions put forth by Shri Basu, we have to find what would be 'Just Desert' after apprising ourselves of the citations relied upon and the legal position before us.

27. The petitioner after his incarceration by the opposite party No. 1 on the accusations of committing offences punishable under Section 24/29/30/38 of the said Act was forwarded before the learned Trial Court on 12.02.2007. He was remanded to custody from time to time.

28. In the meantime three successive Division Benches of this Court refused the prayer for bail of the present petitioner. The opposite party No. 1 prayed for further time to complete the inquiry on 02.08.2007 and the learned Trial Court by order passed on 02.08.2007 after perusing the case diary and satisfying itself that CFSL report was not yet available-extended the time for another six months and returned the case diary to the learned Public Prosecutor.

29. It would be pertinent to note that the Hon'ble Supreme Court of India also refused the prayer for bail of the petitioner on 03.12.2007.

30. Since this order of 02.08.2007 passed by the learned Trial Court fell in the eye of a storm, which has been sought to be raised by Shri Basu- we will, at first advert to the efficacy of the same in the line of his objection and the legal position without being lost in the heat and dust of the complex arguments.

31. Section 36A(4) was overhauled by Act 9 of 2001 wherein penal rigors of the parent Act were mollified to a great extent. For a profitable discussion the provisions of Section 36A(4) is set out hereinbelow:

36A. Offences triable by Special Courts.-(4) In respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27A or for offences involving commercial quantity the references in Sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to 'ninety days', where they occur, shall be construed as reference to 'one hundred and eighty days':

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year 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 of one hundred and eighty days.

32. A plain reading of the proviso to Sub-section (4) of Section 36A of the said Act shows that 'the Special Court may extend the period one hundred eighty days up to one year' in connection with offences falling under Section 19 or Section 24 or Section 27A or for offences involving commercial quantity (in the present case Section 24 was applied) '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 of one hundred and eighty days.'

33. The submission of Shri Basu in this regard may have surface effect. But if the petition dated 02.08.2007 and the order passed thereon by the learned Trial Court is read carefully, we are afraid, the argument of Shri Basu would fall like nine pins.

34. The petition dated 02.08.2007 seeking to extend the period of investigation for a further period of six months was presented by the Intelligence Officer of the opposite party No. 1. However, the same was not presented by the learned Public Prosecutor himself but the order passed by the learned Trial Court would show the same was proceeded in the presence of the learned Public Prosecutor.

35. However, 'specific reasons' and the 'progress of investigation' has been set out in the petition dated 02.08.2007 wherein it was shown that the offence against the petitioner and his associates are being investigated even in the United States of America and several electronic equipment, which have been seized, were sent to the Central Forensic Science Laboratory for deciphering and the report is yet to be received. Further time was sought for and the learned Trial Court applied its judicial mind on the basis of a subjective satisfaction quoting the substance of the prayer and allowed the time. As such, other portion of the proviso to Sub-section (4) of Section 36A of the said Act with regard to the progress of investigation and the specific reasons for detention of the petitioner beyond the period of one hundred eighty days, in our humble view, have been complied with.

36. Now, if we see the phrase 'on the report of the Public Prosecutor' vis-a-vis the petition dated 02.08.2007 sent by the Intelligence Officer and submitted through the Public Prosecutor and was moved in his presence - we must make a purposive construction of the word 'report of the Public Prosecutor' and give it a wider and meaningful implication without doing violence to the statute.

37. Proviso to Sub-section (4) of Section 36A has to be construed in relation to the subject-matter covered by the said section. The general rule in construing an enactment which contains a proviso is to construe them together without making either of them redundant or otiose.

38. In other words, the language of a proviso, even if general, should be normally construed in relation to the subject-matter covered by the section to which the proviso is so appended.

39. Once we have seen the efficacy of the order passed on 02.08.2007, which cannot be sullied for the reasons seen by us earlier-----we find the undisputed

position remains that the period of further detention of the present petitioner stands extended till 02.02.2008.

40. Even though we do not share the views of the learned Senior Counsel for the Bureau that the order dated 02.08.2007 was not questioned earlier and being hit by the Law of Limitation; we are of the view that there cannot be any estoppel against law but on the question of merit the order of 02.08.2007, which had become the cynosure in the eye of Shri Basu has to be retrieved from its position and restored to the rails.

41. Even at the cost of repetition, we would say that after having found the same to be in such position, the period of detention of the petitioner stood extended till 02.02.2008.

42. Ancillary point raised by Shri Basu to the effect that on the date on which the extension was made on behalf of the opposite party No. 1 through its Intelligence Officer (on 02.08.2007), the petitioner was not produced. We have considered this point of Shri Basu in the light of the ratio of the decision of the Constitution Bench in Sanjay Dutt's (supra) case. Even though we find the same was not a very taciturn situation but in view of the fact that the proceeding has culminated in a stage beyond the inquiry/investigation period; this would have little impact on the whole.

43. Now, comes the legality of the order passed on 30.01.2008 passed by the learned Trial Court. Of course, the said order was preceded by a petition filed by the Public Prosecutor himself outlining the fact since the prosecution is not in a position to file the complaint some short time may be allowed. Acting on the basis of the same the learned Trial Court extended the period till 13.02.2008.

44. A put up petition was preferred on behalf of the petitioner for being released on bail on 04.02.2008 but in the meanwhile of 07.02.2008 the petition of complaint was filed on behalf of the opposite party No. 1.

45. From a plain reading of the sequence of events it can be easily deciphered that the first phase of extension was up to 02.02.2008 which was subsequently,

extended by the order dated 30.01.2008 till 13.02.2008. It is within the said period of extension i.e. on 07.02.2008 petition of complaint has been filed.

46. This would, at once change the entire scenario. If we see the order impugned dated 13.02.2008, we would find that the learned Trial Court had extensively dealt with this question and negated the contention of the petitioner for being released on bail since within the statutory period petition of complaint was filed.

47. After the petition of complaint is accepted before the Court the stage of Section 167 of the Code of Criminal Procedure passes over and the stage of Section 309 Cr. PC comes into play. In all the decisions which have been cited by Shri Basu in Hitendra Vishnu Thakur and Ors. (supra), Sanjay Butt v. State through CBI (supra), Uday Mohanlal Acharya v. State of Maharashtra (supra), Radhakrishnan and Anr. v. State by Inspector of Police (supra) the report in final form was filed beyond the statutory period.

48. We have carefully read all the decisions cited on behalf of the petitioner including the decision of Madras High Court in Radhakrishnan and Anr. v. State by Inspector of Police (supra) and the Division Bench decision of our Court in Subodh Kundu v. State (supra) and find the same would have no manner of square application in the fact situation of the present case for the foregoing reasons.

49. It would now be Tweedledum and Tweedledee. After the petition of complaint was laid before the learned Trial Court and cognizance on the basis of the same having been taken, the proceeding is now in the allay of the trial. Agony of Shri Basu with regard to infraction of Section 167 Sub-section (2) cannot hold any water simply, on the score that after the petition of complaint was filed, all subsequent orders passed by the learned Trial Court the later stage were on the basis of valid orders of remand passed by the other provisions of the Code as the stage of Section 167(2) Cr. PC was crossed. Clearly, the petitioner has missed the bus and it is quite evident that his indefeasible right for being released on statutory bail was not exercised prior to the filing of the petition of complaint. In this context it would be profitable to refer to the three-Judge Bench decision of the Supreme Court in Bipin Shantilal Panchal v. State of Gujarat 1996 SCC Cri 200.

50. In the light of our wholesome assessment of the entire situation, we would be of the view that the position as projected by Shri Basu turns out to be more academic than realistic. It has to be 'Just Justice'. Justice in the sense of law and the Constitution and not to the individual mindset of the Court. The said Act and its ramification has to be understood in a wider context.

51. Upon filing of the petition of complaint the present proceeding has culminated at the threshold of the trial. Not only the points canvassed by Shri Basu at this stage is purely pedantic but would render the entire proceeding, which is at the onset of the trial in a reverse gear. We see no reason to interfere with any of the orders dated 30.01.2008 or 13.02.2008 passed by the learned Trial Court.

52. Having found no merit in these applications the same are dismissed. After this order was dictated and pronounced in open Court in presence of the learned Counsel for the petitioner and the Union of India and the State of West Bengal-learned Counsel appearing on behalf of the petitioner prayed for xerox certified copy of this order. The same may be made available upon compliance of usual formalities.

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