

GAHC010222112023



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : Crl.Rev.P./436/2023**

DIPEN BISWAS AND 2 ORS  
S/O SRI DURLAV BISWAS  
VILL- KATHALBARI  
P.O. EKRA BARI  
DIST. UDALGURI, ASSAM

2: SUMANGAL SINGHA  
S/O SAHADEV SINGHA  
VILL- NO. 2 JUNGLE BLOCK  
P.S. ORANG  
DIST. UDALGURI  
ASSAM

3: NIRMAL SINGHA  
S/O MANU HAR SINGHA  
VILL- NO. 2 JUNGLE BLOCK  
P.O. ORANG  
P.S. ORANG  
DIST. UDLAGURI  
ASSA

VERSUS

THE STATE OF ASSAM AND ANR  
REP. BY THE PP, GOVT. OF ASSAM

2:HARISH GHOSH  
S/O LATE KALIPADA GHOSH  
VILL- CHOKAPARA  
P.S. FAKIRAGRAM  
DIST. KOKRAJHAR  
ASSA

**Advocate for the Petitioner : MR. R P HAZARIKA**

**Advocate for the Respondent : PP, ASSAM**

**BEFORE  
HONOURABLE MR. JUSTICE ROBIN PHUKAN**

**ORDER**

**18.10.2023**

Heard Mr. R.P. Hazarika, learned counsel for the petitioners and also heard Mr. D. Das, learned Additional Public Prosecutor, Assam for the State respondent.

2. In this petition under Sections 397/401 read with Section 482 of the Code of Criminal Procedure, three petitioners, namely, (1) Dipen Biswas; (2) Sumangal Biswas; and (3) Nirmal Singha have put to challenge the correctness or otherwise of the order dated 18.08.2023, passed by the learned Special Judge, Kokrajhar in connection with Fakiragram P.S. Case No. 43/2023.

3. It is to be noted herein that vide impugned order, dated 18.08.2023, the learned Court below has extended the period of detention of the petitioners by another 90 days. It is also to be mentioned here that the petitioners were arrested in connection with Fakiragram P.S. Case No. 43/2023. They have been shown arrested in this case on 13.06.2023. Thereafter, on 18.08.2023, the Investigating Officer, S.I. Suresh Sarma of Fakiragram Police Station, through the Public Prosecutor, Kokrajhar Court filed a petition under Section 43D of Unlawful Activities (Prevention) Act praying for further extension of the period of detention of the accused, namely, Dipen Biswas, Sumangal Biswas Nirmal Singha and Rabi Lochan Roy, for another period of 90 days, after completion of 90 days in jail hajot. The learned Court below, thereafter, hearing the learned Public Prosecutor and without issuing notice to the accused and their engaged counsel and without their production before it had extended the period of detention by another period of 90 days, vide impugned order dated 18.08.2023.

4. Mr. Hazarika, learned counsel for the petitioners has advanced two fold arguments. Firstly, Mr. Hazarika submits that the period of detention of the present petitioners have been extended by the learned Court below without there being a report of the Public Prosecutor, merely on the prayer being made by the I.O. Secondly Mr. Hazarika submits that neither notice was issued to the petitioners before extension of the period of detention nor they were produced before the learned Special Judge on the that day and as such the impugned order has failed to withstand the legal scrutiny and, therefore, Mr. Hazarika contended to set aside the same. Mr. Hazrika has referred to a decision of Hon'ble Supreme

Court in **Hitendra Vishnu Thakur and others –vs.- State of Maharashtra and others**, reported in (1994) 4 SCC 602, in support of his submission.

5. Whereas Mr. D. Das, learned Additional Public Prosecutor, submits that though no report was filed by the Public Prosecutor, yet, the prayer of the Investigating Officer was made through the Public Prosecutor and that there is no indication in the impugned order dated 18.08.2023, regarding production of the accused persons before the learned Court below from jail hazot or issuing any notice to them to that effect.

6. Having heard the submission of learned Advocates of both the sides, I have carefully gone through the petition and the documents placed on record and also perused the case law referred by Mr. Hazarika, learned counsel for the petitioners.

7. It is apparent from the record of the learned Court below and also from the impugned order dated 18.08.2023, that the petitioners were not produced before the Court on 18.08.2023, and also no report was filed by the Public Prosecutor before the learned Court below to show his application of mind in respect of the requirement of extension of the period of detention. Only one petition was filed by the Investigating Officer, which was forwarded by the Public Prosecutor of the Court of learned Special Judge, Kokrajhar.

8. It is to be noted here that in the case of **Hitendra Vishnu Thakur** (supra) Hon'ble Supreme court has held that:

**“23. We may at this stage, also on a plain reading of clause (bb) of sub-section (4) of Section 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 investigating 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 Section 167 as amended by Section 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. ....”

**9.** In the case of **Jigar @ Jimmy Pravinchandra Adatiya v. State of Gujarat** reported in **2022 SCC OnLine SC 1290**, also while dealing with the issue production of accused persons before the learned court at the time of extension of period of detention is explained as under:-

**“34. Clause (b) of sub-section (2) of Section 167 of Cr.P.C. lays down that no Magistrate shall authorise the detention of the accused in the custody of the police unless the accused is produced before him in person. It also provides that judicial custody can be extended on the production of the accused either in person or through the medium of electronic video linkage. Thus, the requirement of the law is that while extending the remand to judicial custody, the presence of the accused has to be procured either physically or virtually. This is the mandatory requirement of law. This requirement is *sine qua non* for the exercise of the power to extend the judicial custody remand. The reason is that the accused has a right to oppose the prayer for the extension of the remand. When the Special Court exercises the power of granting extension under the proviso to sub-section (2) of Section 20 of the 2015 Act, it will necessarily lead to the extension of the judicial custody beyond the period of 90 days up to 180 days. Therefore, even in terms of the requirement of clause (b) of sub-section (2) of Section 167 of Cr.P.C., it is mandatory to procure the presence of the accused before the Special Court when a prayer of the prosecution for the extension of time to complete investigation is considered. In fact, the Constitution Bench of this Court in the first part of paragraph 53(2)(a) in its decision in the case of *Sanjay Dutt*<sup>2</sup> holds so. The requirement of the report under proviso added by sub-section (2) of Section 20 of the 2015 Act to clause (b) of sub-section (2) of Section 167 of Cr.P.C. is two-fold. Firstly, in the report of the Public Prosecutor, the progress of the investigation should be set out and secondly, the report must disclose specific reasons for continuing the detention of the accused beyond the said period of 90 days. Therefore, the extension of time is not an empty formality. The Public Prosecutor has to apply his mind before he submits a report/an application for extension. The prosecution has to make out a case in terms of both the aforesaid requirements and the Court must apply its mind to the contents of the report before accepting the prayer for grant of extension.”**

**10.** Again in the case of *Sanjay Kumar Kedia vs. Intelligence Officer, NCB and Another*, reported in (2009) 17 SCC 631, Hon’ble Supreme Court has held that the condition on which the prayer for extension is to be considered are:-

- (i) a report from Public Prosecutor;
- (ii) which indicates the progress of the investigation;
- (iii) specifies compelling reasons for seeking the detention of the accused beyond 180 days; and
- (iv) after notice to the accused;

**11.** In the aforementioned case, no notice was given to the accused and he was also not produced in the

court and the said date, and therefore, Hon'ble Supreme Court has held that the extension, so granted to the Investigating Officer, under provision of section 36 A (4) of the NDPS Act, did not satisfy the condition and accordingly, held that order extending the time was contrary to the law and accordingly, struck down the same.

12. Thus, it appears that production of the accused before the court, granting extension and the report of the Public Prosecutor is not an empty formality and it is the requirement of the law, and it is sine qua non for the exercise of the power to extend the judicial custody/remand and the period of investigation.

13. Now, advertent to the facts herein this case I find that the learned Special Judge, Kokrajhar while extending the period of detention, has never procured a report from the learned Addl.P.P.to show his application of mind. What the learned Public Prosecutor did was he just forwarded the prayer of the I.O. Further, it appears from the record of the learned court below that it has not issued any notice to the petitioners/accused nor they were produced before the court and no opportunity was afforded to them to raise any objection. Thus, I find sufficient force in the submission of Mr. Hazarika, the learned counsel for the petitioners, and the case law, **Hitendra Vishnu Thakur** (supra) referred by him also strengthened his submission.

14. In view of above, this court is of the considered opinion that the impugned order, so passed by the learned Special Judge, Kokrajhar in connection with Fakiragram P.S. Case No. 43/2023, fails to withstand the legal scrutiny and, therefore, this Court is inclined to set aside the same.

15. In terms of above, this criminal revision petition stands disposed of.

**JUDGE**

**Comparing Assistant**