

GAHC030003022023



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

Case No. : Crl.Pet./7/2023

Sh. Animesh Debbarma
S/o Sushil Debbarma
R/o Shnatinagar, Tripura.

VERSUS

Narcotic Control Bureau r/b the Zonal Director, Guwahati Zonal Unit
House No. 25, S.K. Baruah Road, Dispur, Guwahati, Assam - 781006

Advocate for the Petitioner : Mr. C Lalfakzuala

Advocate for the Respondent : Mr C Zoramchhana, Special Public Prosecutor

ORDER

BEFORE
HONOURABLE MR. JUSTICE NELSON SAILO

19.01.2024

Heard Mr. C. Lalfakzuala, learned Special Public Prosecutor, Narcotics Control Bureau (NCB).

[2.] By filing this petition under Section 482 Cr.PC, the petitioner prays for setting aside the impugned orders dated 21.02.2023 and 27.04.2023 passed by the

learned Judge, Special Court, ND&PS Act, 1985 in connection with NCB Cr No. 03/2023 and Bail Application No. 784/2023 respectively.

[3.] The case of the prosecution in brief is that the petitioner was arrested on 18.08.2022 by the Special Narcotic Police Personnel for alleged possession of 10.134 kg of Methamphetamine. As a result, Special Narcotic Case No. 40/2022 dated 18.08.2022 under Section 22(c)/25 of the ND&PS Act was registered and investigated into. Although, the investigation was conducted initially by the Special Narcotics Police Personnel but later on, it was taken over by the Narcotics Control Bureau, Guwahati Zonal Unit and the case was registered as NCB Cr No. 03/2023. The old number being Special Narcotics Case No. 40/2022.

[4.] It is the specific case of the petitioner that an application was filed by the NCB through the Special P.P on 21.02.2023 praying for extension of the detention of the petitioner and the investigation period for another 180 days under Section 36A(4) of the ND& PS Act. That the learned Trial Court without directing the production of the petitioner and without giving any notice to him or to his counsel allowed the application on the same day of the application. According to the petitioner, this has adversely affected his Fundamental Rights guaranteed under the Constitution of India and particularly his right to avail for default bail. The petitioner was unaware about the permission granted by the learned Trial Court extending the period of investigation and his detention for another 180 days and it only came to his

knowledge on 27.04.2023 when he filed his bail application before the learned Trial Court. In view of the extension granted by the learned Trial Court, the bail application filed by the petitioner came to be rejected by the Trial Court on 27.04.2023.

[5.] The learned counsel for the petitioner submits that the manner in which the impugned orders have been passed is contrary to the law laid down by the Apex Court inasmuch as, no opportunity was afforded to the petitioner before granting the extension of the investigation and his detention. In support of his submission, the learned counsel relies upon the following authorities:-

(i) Jigar Alias Jimmy Pravinchandra Adatiya -Vs- State of Gujarat (2023) 6 SCC 484.

(ii) Sanjay Dutt -Vs- State Through CBI., Bombay (II) (1994) 5 SCC 410.

(iii) Sanjay Kumar Kedia Alias Sanjay Kedia -Vs- Intelligence Officer, Narcotics Control Bureau & Anr. (2009) 17 SCC 631.

(iv) Order dated 19.05.2023 passed by a Coordinate Bench of this Court in Cr.Pet. No. 5/2023. (Smt. Vanlalsiami & Anr. -Vs- State of Mizoram & Anr.)

[6.] The learned counsel for the petitioner thus submits that under the given facts and circumstances, the impugned orders may be set aside and that the petitioner

may be granted default bail.

[7.] Mr. C. Zoramchhana, learned Special Public Prosecutor, NCB submits that the contention of the petitioner is a technical one and therefore what should be considered by this Court is the advancement of substantial justice. He submits that the petitioner was caught red-handed with a substantial amount of Methamphetamine and for which he has been booked under the relevant provisions of law. He submits that the investigation has long been completed and the charge sheet has already been filed on 03.08.2023 and presently, the trial is in progress. He further submits that the petitioner is not a resident of the State and therefore in the event the petitioner is granted bail, it will be not possible to secure his presence for conducting and completing the trial. Therefore, his release on bail is not advisable. The learned Special P.P in support of his submission relies upon the following authorities:-

(i) Narender G. Goel -Vs- State of Maharashtra & Anr., (2009) 6 SCC 65.

(ii) Lallan Rai & Ors. -Vs- State of Bihar (2003) 1 SCC 268.

[8.] I have heard the submissions made by the rival parties and I have perused the materials available on record including the record requisitioned from the learned Trial Court. The issue to be considered as projected by the petitioner is that he has been deprived of the right to be heard prior to the grant of the extension period of the investigation and his detention and thereby his

Fundamental Rights guaranteed under the Constitution of India has been violated. According to the petitioner, he was not produced before the learned Trial Court when the application was considered and no notice was issued to him nor to his counsel in view of the filing of the said application. In order to consider the veracity of such claim, this Court considered it appropriate to requisition the Trial Court records. From a perusal of the Trial Court records, more particularly the order sheet, it is seen that there is no order recorded between 17.02.2023 and 09.03.2023 stating that the petitioner was produced and was remanded back till the next date. It may be seen that the order impugned in the present petition granting the investigating authority further 180 days for making investigation and at the same time remanding the petitioner was passed on 21.02.2023. It is therefore clear that the petitioner was not produced before the Trial Court when the application was considered. It is further seen that the impugned order dated 21.02.2023 is kept separately in the Trial Court records without the same being a part of the daily order sheet. This Court is therefore satisfied that the petitioner was not produced before the Trial Court on 21.02.2023 when the impugned order extending his remand and the investigation period was passed.

[9.] The next question which arises for consideration is as to whether any rights of the petitioner has been violated in view of the passing of the order dated 21.02.2023 in his absence. The Apex Court in *Jigar Alias Jimmy Pravinchandra*

Adatiya (supra) by referring to its earlier decision rendered in *Hitendra Vishnu Thakur -Vs- State of Maharashtra (1994) 4 SCC 602* and in *Sanjay Dutt -Vs- State (1994) 5 SCC 410* at paragraph Nos. 44 and 45 held as follows:-

“44. As noted earlier, the only modification made by the larger Bench in the case of Sanjay Dutt to the decision in the case of Hitendra Vishnu Thakur is about the mode of service of notice of the application for extension. In so many words, in paragraph 53(2)(a) of the Judgment, this Court in the case of Sanjay Dutt held that it is mandatory to produce the accused at the time when the Court considers the application for extension and that the accused must be informed that the question of extension of the period of investigation is being considered. The accused may not be entitled to get a copy of the report as a matter of right as it may contain details of the investigation carried out. But, if we accept the submission of the respondents that the Crl.A.@SLP(Crl.)No.7696 of 2021 etc. accused has no say in the matter, the requirement of giving notice by producing the accused will become an empty and meaningless formality. Moreover, it will be against the mandate of clause (b) of the proviso to subsection (2) of section 167 of CrPC. It cannot be accepted that the accused is not entitled to raise any objection to the application for extension. The scope of the objections may be limited. The accused can always point out to the Court that the prayer has to be made by the Public Prosecutor and not by the investigating agency. Secondly, the accused can

always point out the twin requirements of the report in terms of proviso added by subsection (2) of Section 20 of the 2015 Act to subsection (2) of Section 167 of CrPC. The accused can always point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension cannot be granted.

45. The logical and legal consequence of the grant of extension of time is the deprivation of the indefeasible right available to the accused to claim a default bail. If we accept the argument that the failure of the prosecution to produce Crl.A.@SLP(Crl.)No.7696 of 2021 etc. the accused before the Court and to inform him that the application of extension is being considered by the Court is a mere procedural irregularity, it will negate the proviso added by subsection (2) of Section 20 of the 2015 Act and that may amount to violation of rights conferred by Article 21 of the Constitution. The reason is the grant of the extension of time takes away the right of the accused to get default bail which is intrinsically connected with the fundamental rights guaranteed under Article 21 of the Constitution. The procedure contemplated by Article 21 of the Constitution which is required to be followed before the liberty of a person is taken away has to be a fair and reasonable procedure. In fact, procedural safeguards play an important role in protecting the liberty guaranteed by Article 21. The failure to procure the presence of the accused either physically or virtually before the Court and the failure to

inform him that the application made by the Public Prosecutor for the extension of time is being considered, is not a mere procedural irregularity. It is gross illegality that violates the rights of the accused under Article 21.”

[10.] From the above abstract, it may be seen that according to the Apex Court, although the scope of objection may be limited but the accused has the right to be heard and to point out that the prayer has to be made by the Public Prosecutor and not the investigating agency and also point out the twin requirements of the report in terms of proviso added by subsection (2) of Section 20 of the Gujarat Control of Terrorism and Organised Crime Act, 2015 to subsection (2) of Section 167 of CrPC. By giving opportunity to the accused person, the accused person can point out to the Court that full compliance of the twin requirements is mandated before any extension of investigation is granted. Further, by depriving the accused person of an opportunity to be heard his right to be considered for grant of default bail gets obviated and therefore, his rights under Article 21 of the Constitution of India gets infringed.

[11.] The Apex Court in *Sanjay Dutt* (supra) while considering a similar issue under the Terrorist and Disruptive Activities (Prevention) Act, 1987 also held that that the accused person should be either given notice or produced before the Trial Court before such extension of the investigation and his remand is granted by the Trial Court. The Court also held that the requirement of notice to the accused is

met or is sufficient if the accused person is produced before the Court and he is informed that the question of extension of the period for completing the investigation is being considered.

[12.] The Apex Court in *Sanjay Kumar Kedia Alias Sanjay Kedia* (supra) while examining the case under the ND&PS Act and the extension period for detention of the accused person and the period of investigation held that the maximum period of 90 days fixed under Section 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 up to 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 the present case, it may be seen that the petitioner was neither produced before the Court on the date of passing the impugned order nor was a notice issued to him or to his counsel. Therefore, it may be seen that the conditions to be satisfied as provided under the relevant provision of law and by the Apex Court has not been fulfilled.

[14.] The learned Special P.P has relied upon the case of *Narender G. Goel* (supra)

which under the given facts of that case provides that it is settled law that the accused has no right to be heard at the stage of investigation. The prosecution will however have to prove its case at the trial when the accused will have full opportunity to rebut/question the validity and authenticity of the prosecution case. It may however be seen that in the present case, we are concerned with the issuance of notice or the petitioner being produced while considering the application made to the Trial Court for extension period of the investigation and the remand period. Notice to the accused person as can be seen from the authorities already relied upon herein above is not an empty formality in view of the fact that the extension of the investigation period without the accused person being informed or being given an opportunity to oppose the same infringes his or her Fundamental Rights guaranteed under the Constitution of India and therefore, the present case is clearly distinguishable to the one that has been referred to by the learned Special P.P. The learned Special P.P has also relied upon the case of *Lallan Rai & Ors.* (supra) in which the Apex Court in the given facts of that case observed that it is axiomatic that procedural law is the hand-maid of justice and the Cr.PC is no exception thereto. However, it is also noticed that the Apex Court went on further to observed that incorporation procedural law in the Statute Book is to subserve the ends of justice and non-observance of the technicalities does not and cannot frustrate the concept of justice since technicality would not out-weigh the course of justice. It may further be noticed that although charge was not framed

under Section 34, the accused person was convicted under Section 302 as well as under Section 34 IPC. It was in that context that the Apex Court held that even in the absence of non-framing of charge, the conviction would not be vitiated. In the present case, we are concerned with deprivation of opportunity to the petitioner before the period of investigation as well as his detention was extended. Therefore, this Court is of the considered view that the case *Lallan Rai & Ors.* (supra) has no direct application to the present case in view of the fact that non-production of the petitioner before the Trial Court or giving a notice to him or to his counsel prior to passing of extension order has only infringed his guaranteed rights under Article 21 of the Constitution of India. Accordingly, the present case is not similar to the one referred to by the learned Special P.P.

[15.] Under the facts and circumstances and upon hearing the learned counsels for the parties and on perusal of the records, this Court finds that the impugned Order passed in the NCB Cr No. 03/2023 as well as the Order dated 27.04.2023 passed in Bail Application No. 784/2023 are not sustainable and accordingly, they are set aside. However, notwithstanding the setting aside of the two (2) impugned orders, the charge sheet which has already been filed on 03.08.2023 and the Trial proceedings which has been initiated thereafter shall not be affected by this Order.

[16.] Criminal Petition accordingly stands disposed of.

JUDGE

Comparing Assistant