

214

In the High Court of Punjab and Haryana at Chandigarh

CRM-M 4219 of 2015

Date of decision: 11.3.2015

Arun Kumar and others

.....Petitioners

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Veneet Sharma, Advocate,
for the petitioners.

Mr. Arshdeep S. Kler, DAG, Punjab.

RAJ MOHAN SINGH, J.

[1]. This petition has been filed by the petitioners under Section 439 Cr.P.C. read with Section 167 (2) Cr.P.C. read with Section 36-A (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) for grant of regular bail in case FIR No.147 dated 16.7.2014 under Section 20, 21, 29 of the N.D.P.S. Act registered at Police Station 'C Division' Amritsar City District Amritsar.

[2]. In this case, petitioners were arrested on 16.7.2014 and period of 180 days was completed on 12.1.2015. The application for grant of bail under Section 167 (2) Cr.P.C. was filed on 14.1.2015 by petitioners No.1 and 2 and petitioner No.3 moved such application on 13.1.2015. The State moved an application for extension of time on 20.1.2015 i.e. after the expiry of period of 180 days. The application for grant of bail under Section 167 (2) Cr.P.C. was declined by the

Additional Sessions Judge, Amritsar on 20.1.2015 on the ground that the application for extension of time has been allowed and period of 30 days more over and above 180 days has been granted in favour of prosecution. Since the application for extension of time has been allowed, therefore, the petitioners have no right under Section 167 (2) Cr.P.C. read with Section 36 A (4) of the NDPS Act and as such it was ordered that the application in question is not maintainable.

Following questions arise for consideration of the Court:-

“1. Whether filing of application for extension within 180 days would defeat indefeasible right of the accused on expiry of period of 180 days ?

2. Whether independent application of mind by the public prosecutor in moving the application for extension of time is required for granting such extension by the authority ?

3. Whether application for grant of bail under Section 167 (2) Cr.P.C. must be filed before the extension is granted?

4. Whether application under Section 167 (2) Cr.P.C. should be decided forthwith and not to be adjourned at a later stage?”

[3]. In **Hitendra Vishnu Thakur vs. State of Maharashtra**

1994 (3) RCR (crl.) 156, the Hon'ble Supreme Court, while dealing with provision of 20 (4) of TADA, which is quite analogous to Section 36 (A) 4 of N.D.S.P. Act, observed that if it is not possible to complete the investigation within the said period of 180 days, the designated Court shall extend the period up to one year on the report of public prosecutor indicating the progress of the investigation and specific

reasons are to be quoted for detention of the accused beyond the period of 180 days. Section 167 (2) Cr.P.C. prescribes outer limits within which the investigation must be completed. Section 167 Cr.P.C.read with Section 20 (4) of TADA is not a provision for grant of bail but certainly provides maximum period during which the accused may be kept in custody and detention to enable the investigating agency to complete the investigation and file challan. The proviso to Section 167 (2) Cr.P.C. read with Section 20 (4) (b) of TADA creates an inderfeasible right in favour of the accused on account of default by the prosecution agency in completing the investigation within the prescribed or extended time. As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of nature of offence with which he is charged with, where the prosecution fails to put up challan against him on completion of the investigation.

[4]. The Hon'ble Supreme Court further observed that the legislature has provided that the extension of time for completion of investigation is to be granted on a report of public prosecutor. Purposely it was not brought under the domain of Investigating Officer to make such an application for seeking extension of time from the Court. The requirement is that the public prosecutor has to satisfy and form an opinion for seeking extension of time for completion of investigation. This opinion has to be found independently after due application of mind and the office of public prosecutor is not like a post office from where such application is to be processed or progressed in routine manner. This is a statutory

duty wherein public prosecutor is expected to independently apply 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. 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 and deliberate delay in completing the investigation. In such an eventuality the public prosecutor even may not submit any report to the Court under the relevant provision for extension of time. The report of public prosecutor, therefore, is not merely a formality, but a very vital report, the acceptance of which, affects the liberty of an accused and, therefore, it must be strictly complied with in respect of requirements as contained in the statute. Ultimately, the Hon'ble Supreme Court in the aforesaid judgment held that the accused has indefeasible right of bail on expiry of 180 days if no extension is granted by the Court before the expiry of such period of 180 days. Question No.2, as formulated above, also stands answered in the manner that the public prosecutor has to apply independent mind and has to satisfy himself with regard to the facts and circumstances of the case warranting such extension and such application must be filed before expiry of 180 days.

[5]. In **Sanjay Dutt vs. State through C.B.I.Bombay (II)** (1994) 5 SCC 410, the Hon'ble Supreme Court reiterated the principles laid down in **Hitendra Vishnu Thakur's case (supra)** and held that on expiry of 180 days, the accused has indefeasible right in

terms of Section 20 (4) (bb) of TADA Act read with Section 167 (2) Cr.P.C.

[6]. In Sayed Mohd. Kazmi vs. State, GNCTD and others **2012 (4) RCR (Crl.) 857**, the Hon'ble Supreme Court commented upon the fact that the acceptance of application for extension of time after the period of 180 days cannot operate with retrospective effect to defeat the indefeasible right accrued to the accused on expiry of 180 days. The Court observed that deferring the hearing of application under Section 167 (2) Cr.P.C. till next date when the public prosecutor filed an application for extension of time is not proper. The retrospectivity of the order of the Court in granting extension cannot be presumed and it cannot defeat the statutory right which accrued to the accused on expiry of 90 days or 180 days.

[7]. In Uday Mohanlal Acharya vs. State of Maharashtra **2001 (2) RCR (Crl.) 452**, the Hon'ble Supreme Court in para 13 of the judgment held that the expression 'availed of' if chargesheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a chargesheet is filed, the so called indefeasible right of the accused would not stand extinguished thereby and on the other hand, the accused has to be

released on bail.

[8]. In para 10 of the judgment in **Sanjay Kumar Kedia vs. Intelligence Officer, Narcotic Control Bureau and another** 2010 (1) RCR (Crl.) 942, the Hon'ble Supreme Court observed as under:-

“ 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 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.”

[9]. The Hon'ble Supreme Court further observed that the report of the public prosecutor must indicate application of mind in respect of progress of the investigation and the compelling reasons in which extension is being sought beyond 180 days.

[10]. In **Union of India through CBI vs. Nirala Yadav @ Raja Ram @ Deepak Yadav** 2014 (4) Law Herald (SC) 2942, the Hon'ble Supreme Court endorsed the view taken in **Hitendra Vishnu Thakur's case (supra)** and **Udey Mohanlal 's case (supra)** and

upheld the verdict given by the Hight Court in accepting the indefeasible right of the accused on expiry of period of 180 days for the grant of bail under Section 167(2) Cr.P.C. The appeal filed by the State was rejected by the Hon'ble Supreme Court. The Court observed that the application filed under Section 167(2) Cr.P.C. is required to be decided on the same day. The adjournment by the Magistrate on this application was held misconceived as the Magistrate was obligated on that day to deal with the application filed by the accused as required under Section 167(2) Cr.P.C. The Court held that such procrastination frustrates the legislative mandate. A Court cannot act to extinguish the right of an accused if law so confers on him. Law has to prevail. Prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible.

[11]. In view of aforesaid precedents, the extension of time granted on 20.1.2015 cannot affect the indefeasible right of the petitioners and, therefore, petitioners are entitled to bail under Section 167 (2) Cr.P.C..

[12]. Accordingly, for the reasons recorded above, present petition is allowed. Petitioners are entitled to benefit of regular bail under Section 167(2) Cr.P.C. on their furnishing requisite bail bonds and surety bonds to the satisfaction of the trial Court/ Duty Magistrate.

(RAJ MOHAN SINGH)
JUDGE

March 11, 2015

anita