

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment pronounced on: 12th May, 2015

+ **Crl. M.C. No.3644/2014**

MOHD. MAROOF @ IBRAHIM & ORS Petitioners
Through Mr.Mehmood Pracha, Adv. with
Mr.Arjun Agarwal, Adv.

versus

STATE Respondent
Through Ms.Jasbir Kaur, APP for the State.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. It is settled law that once the period of 90 days, as stipulated under clause (a) (i) of the proviso to Sub-section (2) of Section 167 Cr.P.C., came to an end, the right of a person arrested in connection with the commission of an offence to be released on statutory bail commenced and could not be extinguished by a subsequent application for extension of the period of custody.

2. The provisions of Section 167(2) of the Code were modified by virtue of Section 43D of the Unlawful Activities (Prevention) Act, 1967. The modification of the provisions of Section 167(2) Cr.P.C. by virtue of Section 43D of the aforesaid Act is extracted hereinbelow :-

“43D. Modified application of certain provisions of the Code. - (1) Notwithstanding anything contained in

the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly.

(2) Section 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 reasons for doing so and shall also explain the delay, if any, for requesting such police custody."

3. In view of modification to the provisions of Section 167(2) Cr.P.C., the period of 90 days stipulated for completion of investigation and filing of charge-sheet, was modified by virtue of the amended proviso, which indicated that if the investigation could not

be completed within 90 days and if the Court was satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for detention of the accused beyond the period of 90 days, extend the said period upto 180 days. Meaning thereby, the custody of an accused could be directed initially for a period of 90 days and, thereafter, for a further period of 90 days for the purpose of filing charge-sheet. In the event the charge-sheet was not filed even within the extended period of 180 days, the conditions directing that the accused persons shall be released on bail if he is prepared to do and does furnish bail, would become operative.

4. For offences under the Unlawful Activities (Prevention) Act, 1967, investigation can be conducted by the National Investigating Agency and the provisions of the Code of Criminal Procedure, 1973 would apply concerning investigation as also cognizance of offences by Courts, but as modified by the applicable provisions of the Unlawful Activities (Prevention) Act, 1967. The cognizance of reports had to be by the Designated Courts constituted as per law under the NIA Act.

5. The three petitioners, namely, Mohd. Maroof @ Ibrahim, Wakar Azhar, Mohd. Saqib Ansari have filed the present petition under Section 482 Cr.P.C read with Article 226 of Constitution of India or in the alternate Criminal Appeal under Section 21 of N.I.A. Act, 2008 for quashing of order dated 7th June, 2014 passed by the Additional Sessions Judge-02/FTC, New Delhi District, Patiala House Courts, New Delhi.

6. The status report has been filed by the respondent which disclosed the lengthy details of the involvement of the petitioners, cases pending against them as well as the details of investigation.

7. It is the case of the prosecution that on 21st November, 2011 on the basis of specific source information one Mohd. Quateel Siddiqui @Sajan @Siraj @Vivek Mishra (since expired), s/o Mohd. Zafeer, r/o Village Barhsamela, PO Lalganj, PS Kyoti, Darbhanga, Bihar; present address: 7307, Aram Nagar, Nabi Karim, Paharganj, Delhi, was arrested from near Anand Vihar Inter State Bus Terminal and the possession of arms, ammunition, fake Indian currency and other incriminating articles were recovered from him. In this regard initially a case vide FIR No.54/11 dated 22nd November, 2011 under Section 489B/489C IPC and 25 Arms Act was registered at Police Station Special Cell, New Delhi.

7.1 During interrogation, accused Quateel Siddique disclosed that he is a member of "Indian Mujahiddin" (IM), a banned terrorist outfit. Therefore, Sections 16/18/20 of Unlawful Activities (Prevention) Act, 1967 were added and investigation was taken up by ACP/ Special Cell. The arrested accused Quateel disclosed that he was involved in various terrorist activities, i.e. German Bakery Blast in Pune, 2010, Chinnaswami Stadium blast at Bengaluru, 2010 and Jama Masjid attacks in Delhi, 2010. He further disclosed about his associates and other members of Indian Mujahiddin. Besides Quateel Siddiqui, 24 accused including the present petitioners, all members of banned terrorist organization 'Indian Mujahiddin' have been arrested in this case on different dates from different places.

Huge quantity of explosives, arms and ammunitions were recovered from their possession/hideouts. An arms and ammunition factory, being run by this module of Indian Mujahiddin was also unearthed at Meer Vihar, Delhi. Charge sheet and supplementary charge sheets have been filed in concerned court against the arrested accused persons on different dates. Some of the arrested accused persons were also arrested in Jama Masjid attack case which was executed in September 2010.

7.2 Non-Bailable Warrants were issued against the wanted accused persons including Riyaz Bhatkal and Iqbal Bhatkal, Top commanders of Indian Mujahiddin.

7.3 On 22nd March, 2014 on the basis of secret information one wanted accused Waqas, a Pakistani National, also involved in Jama Masjid attack cases registered vide FIR Nos. 65/10 and 66/10 PS Jama Masjid (investigated by Special Cell) was arrested from Ajmer Railway Station, Rajasthan. Complete identity of Waqas was revealed as Zia-Ur-Rehman @ Waqas @ Nabeel Ahmed @ Ahmed, s/o Jalaluddin, r/o Village Mustafabad, Tehsil Toba Tek Singh, Punjab, Pakistan.

7.4 It was revealed in the interrogation of accused Waqas that he was on his way to Jaipur on the directions of Tehsin Akhtar @ Monu, the operational commander of Indian Mujahiddin in India and Riyaz Bhatkal, the Chief Commander of IM currently reported to be operating out from Pakistan, to oversee a terrorist operation which was to be carried out in Delhi by members of IM namely Maroof, Waqar and Saquib who were based in Jaipur and Jodhpur,

Rajasthan and for that purpose, a huge consignment of explosive material was lying with these members of IM.

7.5 On the basis of disclosure statement of arrested accused Zia-Ur-Rehman @Waqas, two persons namely Md. Maroof @Ibrahim and Waqar Azhar @Haneef were arrested from Jaipur and Saquib Ansari @ Khalid was arrested from Jodhpur, Rajasthan with the assistance of ATS Jaipur and ATS Jodhpur.

7.6 Huge quantity of explosive material including detonators, live Sutli bombs, timers, circuits. Ammonium Nitrate and digital items such as Laptops, pen drives, mobiles and Jihadi literature were recovered from their possession.

7.7 In view of recoveries affected from their possession a case vide FIR No. 03/14, dated 23rd March, 2014, under Section 120-B IPC, 3/10/13 Unlawful Activities (Prevention) Act, 1967 and 4/5 Explosive Substances Act was registered at PS CID, Jaipur and a case vide FIR No. 112/14, dated 23rd March, 2014 under Section 120-B IPC, 18/19/20 Unlawful Activities (Prevention) Act, 1967 and 4/5 Explosive Substances Act was registered at PS Pratap Nagar, Jodhpur, respectively.

7.8 These cases were investigated by ATS Jaipur and ATS Jodhpur, Rajasthan. The emergence of a new module of Indian Mujahideen in Rajasthan was also revealed after the arrest of Yasin Bhatkal, and Assadullah Akhtar @ Haddi, top terrorist of Indian Mujahideen in India, on 29th August 2013 by NIA in case RC-06/2012/NIA/DLI and their subsequent arrest in the present case.

7.9 During investigation, Tehsin Akhtar, the operational Commander of Indian Mujahiddin (IM) in India was also arrested on 25th March, 2014 in the present case. A number of Jihadi songs and speeches of different commanders of terrorist organizations like Osama Bin Laden (an international terrorist) and Anwar Awlaki (motivational Jihadi speaker), books like 'Gazwa-e-Hind' which propagates that the group of jihadist which will fight against India will go to heaven, photographs of foreign terrorists, books like 'Jehad aur iske Taqajey', video songs related Kashmiri terrorists, videos about the use of transistors, videos showing Hindu Muslim riots, book like 'a message to every youth' invitation for every Muslim youth to join Jehad, videos containing Jihadi songs of terrorist organizations 'LeT' and 'Jaish-e-Mohammad', videos showing terrorist training, images showing explosion of IED, TNT by remote, video named 'Indian Mujahideen Aseer' which shows photos of Batla House Encounter of Delhi with logo of Indian Mujahideen, playing Jihadi motivational song and a lot more Jehadi books, videos, pictures were recovered from the Laptop and pen drives of accused Md Maroof, Waqar Azhar and Saquib Ansari. A large number of incriminatory Chats/e-mail contents between these arrested accused persons and Riyaz Bhatkal were recovered from their e-mail/chat accounts. It was revealed from the analysis of chats/e-mails that these accused were talking about terrorist training, arrangement of logistics, arms and explosives and preparation and execution of blast in different places. It has also been revealed during the investigation that these accused persons for the purpose of causing

blasts in Delhi, Agra and Bharatpur, Rajasthan did reconnaissance of vital installations such as Red Fort in Delhi and Taj Mahal in Agra on the instructions of Riyaz Bhatkal. Accused Tehsin Akhtar and Waqas had also imparted training to accused Md Maroof, Waqar and Saquib for making IEDs to be used in blasts.

7.10 A number of fake Ids were also recovered from the possession of arrested accused persons which they were using to procure SIM Cards, mobiles, for arrangement of accommodation and other logistic support at the time of terrorist attack. They were also getting money through Hawala and Western Union Money Transfer by using these fake IDs. After the arrest of Md Maroof, Waqar Azhar and Saquib Ansari by Special Cell, a number of Indian Mujahideen members were arrested by ATS Jaipur and ATS Jodhpur in Rajasthan on the basis of information given by these arrested accused persons. These members were motivated by Md Maroof for subversive and terrorist activities.

8. The petitioners/accused persons were arrested on 23rd March, 2014 for alleged crimes/conspiracy and on 19th April, 2014 on the completion of police custody remand of accused Md. Maroof, Waqar Azhar and Saquib Ansari, they were sent to judicial custody in the present case. On the same day they were taken on transit remand by the investigation officers of ATS Jaipur and ATS Jodhpur in the cases investigated by them.

9. During the investigation on 2nd June, 2014 an application was moved before trial court for issuing notices to the counsels of accused persons and production warrants of accused persons for 7th

June, 2014, as on that day an application for extension of period of investigation beyond 90 days was moved before trial court. As the accused Md Maroof, Waqar Azhar and Saquib Ansari were in Jaipur and Jodhpur Jails, required for the investigation of cases registered there, therefore Production Warrants were sent there.

10. On 7th June, 2014 an application seeking extension of period of investigation was moved before trial court. None of the accused was produced from judicial custody. Shri MS Khan was present on behalf of accused Tehsin Akhtar, Imtiyaz and Waqas. The trial court after hearing arguments extended the period of investigation for thirty days w.e.f. 21st June, 2014.

11. As the trial Court extended the period of investigation from 90 days to 120 days on the basis of the Public Prosecutor report. The case of the petitioners is that the said order was passed in violation of the provisions of law as prescribed by Section 43 (D)(2)(b) of Unlawful Activities (Prevention) Act, 1967.

12. On 23rd June, 2014 bail application under Section 167 (2) Cr.P.C. was filed on behalf of the petitioners. Due to vacations, the Additional Sessions Judge did not preside on 23rd June, 2014 and the said bail application was filed before the Link Judge. The said bail application of the accused/appellant was taken up for hearing and the court by the impugned order dated 23rd June, 2014 the same was dismissed.

13. Again, on 17th July, 2014 an application was moved before trial court for issuing notices to the counsels of accused persons and production warrants of accused persons for 18th July, 2014.

14. On 18th July, 2014 an application seeking extension of period of investigation was moved before trial court. None of the accused was produced from judicial custody. Shri Akram Khan was present on behalf of accused Tehsin Akhtar, Imtiyaz and Waqas. Shri Mehmood Pracha, despite receiving of notice did not appear before trial court at the time of extension of period of investigation.

15. The Charge Sheet against the arrested accused persons was filed before trial court on 8th August, 2014.

16. The case is at the stage of framing of Charge.

17. Being aggrieved by the impugned order dated 7th June, 2014 the petitioners have filed the present petition under Section 482 Cr.P.C. challenging the legality of the impugned order dated 7th June, 2014 mainly on the following grounds:-

- (i) That while extending the period of custody for another 30 days (beyond the statutory period of 90 days as prescribed in Section 167 (2) Cr.P.C.) the Additional Sessions Judge failed to consider the fact that neither the appellant/accused nor their counsel were given any prior notice/intimation regarding the application filed by the prosecution thereby seeking extension of period of investigation by another 30 days.
- (ii) By extending the period of investigation from 90 days to 120 days by not issuing notice, with regard to extension of custody, to the appellant/accused or his counsel as per the law laid down by Supreme Court in ***Hitender Vishnu Thakur vs. State of***

Maharashtra reported as (1994) 4 SCC 602 and ***B.K. Lala v. State of Chhattisgarh.***

- (iii) The specific report of the Public Prosecutor specifying the grounds for further detention with respect to each accused person as mandated by law under Section 43 (D) (2) (b) of Unlawful Activities (Prevention) Act, 1967 is a necessity for extension of investigation period beyond a period of 90 days.
- (iv) The Public Prosecutor Smt. Reeta Dutta is not competent as per the provisions of NIA Act to plead for the prosecution as she is not appointed as per provisions of NIA Act. Therefore, the so called report dated 7th June, 2014 filed by Public Prosecutor has no legal sanctity in the eyes of law and is therefore null and void ab-initio and as such could not have been relied upon by the Additional Sessions Judge-02 and accordingly any order passed on the basis such report is illegal and not sustainable in law as well as the entire records pertaining to the matter.
- (v) The Additional Sessions Judge-02 below committed flagrant miscarriage of justice by ignoring the crucial fact that so called report was prepared without application of mind and without disclosing the detailed and precise status of the investigation and without specifically disclosing the reasons qua each accused as to specific reasons for detention of the accused. The report of the Public Prosecutor was prepared in a routine, casual, vague and stereotypical manner.

18. The following order was passed on 7th June, 2014, the same is reproduced as under:-

“This is an application and report for further extending the period of investigation of above mentioned accused persons for 30 days w.e.f. 21st June, 2014.

It is stated by Ld. PP that Haider @ Black Beauty, who is a wanted accused in this case is presently in police custody remand in Patna and Bodhgaya blast cases investigated by NIA, is to be arrested in this case. It is further stated that arrest of accused Waqar Azhar, Maroof and Saquib has resulted the arrest of several members of Indian Mujahiddin vide FIR No.3/14, PS CID Jaipur and FIR No. 112/14 PS Pratap Nagar, Jodhpur and relevant documents is yet to be obtained. It is further stated that procedure to obtain Sanction u/s. 45 Unlawful Activities (Prevention) Act is in progress. It is further stated that wanted accused Riyaz Bhatkal and others are still absconding and efforts are being made to arrest them. It is further stated by Ld. PP that Letters Rogatory to obtain chat logs of Email/Chat messenger accounts of accused persons from concerned service provider is in progress. It is further stated that the ownership of Internet Dongles recovered from the possession of accused persons is being obtained from concerned companies. It is further stated by Ld. PP that from the possession of accused Waqar and Tehseen Akhtar @ Monu copies of some election I-cards were recovered, which were being used by these accused to obtain SIM cards and these I-card are to be verified from the concerned election officers. Hence, it is prayed that period of investigation be extended.

Sh.M.S.Khan, Ld.Counsel for accused Zia-Ur-Rehman, Tehsin Akhtar and Imtiyaz opposed the application on the grounds that prospective period of investigation cannot be extended. It is further stated that without physical appearance of accused persons the

period of investigation cannot be extended. It is further stated that there is no ground made out in the application for extension of investigation period.

Heard. Record perused.

Keeping in view the application and after considering the arguments advanced, the application is allowed. Investigation Agency is granted 30 days time w.e.f. 21.06.2014 to conclude the investigation.”

19. It is argued by the learned counsel for the petitioners that the impugned order dated 7th June, 2014 extending the period for further 30 days is not only unjustifiable, but has also engrossed upon the right to life and personal liberty of the appellant/accused as guaranteed under Article 21 of Constitution of India. It ought to have been considered that the application moved by the investigation agency for the extension of custody of the appellant is nothing but an attempt to deprive the appellant from his indefeasible right to be released on bail as per the statutory provisions of Cr.P.C. more particularly Section 167 (2).

20. Mr.Mehmood Pracha, learned counsel for the petitioners has made mainly two submissions. The first one is that after the charge-sheet was not filed within 90 days as stipulated under Section 167(2) Cr.P.C., the petitioners were entitled to get the bail on the basis of indefeasible right as per the statutory provision. The second submission is that the petitioners were arrested on 23rd March, 2014 for fictitious crimes/conspiracy and they were kept in custody for a period of 90 days which expired on 21st June, 2014. The prosecution with intent to misuse the process of law filed the

application seeking further extension from 90 days to 120 days by attaching the Public Prosecutor report dated 7th June, 2014. On the same day, the matter was taken up by the trial Court in the absence of the petitioners/accused and their counsel. Even, no notice was issued to them or their counsel extending the period of investigation from 90 days to 120 days. Therefore, the order passed on 7th June, 2014 is an illegal order and the same is liable to be quashed.

21. In support of his both submissions, the learned counsel for the petitioners has relied upon the following judgments:-

- (i) ***Udhay Mohanlal Acharya v. State of Maharashtra***, (2001) 5 SCC 453.
- (ii) ***Sayed Mohd. Ahmed Kazmi v. State, GNCTD & Ors.***, (2012) 12 SCC 1.
- (iii) ***Syed Maqbool v. N.I.A.***, 2015 Cri.LJ 682.

22. Learned APP for the State submits that while extending the time, it was the duty of the counsel to appear in the Court. Despite having the knowledge about the date, counsel did not appear before Court, his vakalatnama is already on record. A request was made before the trial court to issue notice to the counsel of accused persons as well as for production warrants of accused persons. It was informed that on 7th June, 2014 an application for extension of period of investigation was moved before the trial court. On the request of the ACP, the trial court issued notices to the counsel, Shri M.S. Khan and Shri Mehmood Pracha. Shri M.S. Khan was the counsel of accused Tehsin Akhtar, Zia-Ur-Rehman @ Waqas and Imtiyas. As per judicial record Shri Mehmood Pracha, Advocate was

the counsel of accused Md. Maroof, one of the petitioners in the present petition, as per vakalatnama filed on 2nd April, 2014 and order dated 15th April, 2014 of the trial court, wherein he had caused his appearance as counsel of accused Maroof. Shri M.S.Khan received the notice while Mr.Mehmood Pracha refused to receive the notice as he alleged that he was not his counsel of accused Maroof. As the petitioners were in Jaipur and Jodhpur Jails in connection with the investigations of case being investigated against them in Jaipur and Jodhpur, therefore production warrants were sent there. But reports were received on the production warrants issued against the petitioners that they could not be produced before the trial court due to non availability of Escort Guard.

23. On the other hand, Mr.Mehmood Pracha, learned counsel appearing on behalf of the petitioners has argued that after the expiry of 90 days, if any extension is sought, the accused should have been produced before Court and proper notice to all the counsel ought to have been given. He submits that in the present case, the petitioners/accused persons were not produced before the Court despite of valuable right occurred in their favour and secondly, even if they were outside Delhi, they ought to have been produced before the Local Court (nearest Magistrate). Therefore, the order passed on 7th June, 2014 is an illegal order.

The learned counsel for the petitioners has relied upon the judgment passed by the Supreme Court in the case of ***Hitendra Vishnu Thakur v. State of Maharashtra***, (1994) 4 SCC 602, wherein it was held as under:-

“20. Section 57 of the Code of Criminal Procedure provides that a person arrested shall not be detained in custody by the police for a period longer than that which is reasonable but that such period shall not exceed 24 hours exclusive of the time necessary for journey from the place of arrest to the court of the Magistrate in the absence of a special order under Section 167 of the Code. The Constitution of India through Article 22(2) mandates that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to that court and that no person shall be detained in custody beyond that period without the authority of the Magistrate. Thus, the Constitution of India as well as the Code of Criminal Procedure expect that an arrested person, who has been detained in custody, shall not be kept in detention for any unreasonable time and that the investigation must be completed as far as possible within 24 hours. Where the investigation of the offence for which accused has been arrested cannot be completed within 24 hours and there are grounds for believing that the accusation or information against the accused is well-founded, the police is obliged to forward the accused along with the case diary to the nearest Magistrate for further remand of the accused person. The Magistrate, on the production of the accused and the case diary, must scrutinize the same carefully and consider whether the arrest was legal and proper and whether the formalities required by law have been complied with and then to grant further remand, if the Magistrate is so satisfied. The law enjoins upon the investigating agency to carry out the investigation, in a case where a person has been arrested and detained, with utmost urgency and complete the investigation with great promptitude in the prescribed period. Sub-section (2) of Section 167 of the Code lays down that the Magistrate to whom the

accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that section. The proviso to sub-section (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate *shall* release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure. The said chapter comprises of Sections 436 to 450 but for our purposes it is only Sections 437 and 439 of the Code which are relevant. Both these sections empower the court to release an accused on bail. The object behind the enactment of Section 167 of the Code was that the detention of an accused person should not be permitted in custody pending investigation for any unreasonably longer period. However, realising that it may not be possible to complete the investigation in every case within 24 hours or even 15 days, as the case may be, even if the investigating agency proceeds with utmost promptitude, Parliament introduced the proviso to Section 167(2) of the Code prescribing the outer limit within which the investigation must be completed. Section 167 read with Section 20(4) of TADA, thus, strictly speaking is not a provision for “grant of bail” but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-sheet, if necessary, in the court. The proviso to Section 167(2) of the Code read with Section 20(4)(b) of TADA, therefore, creates an indefeasible right in an accused person on account of the ‘default’ by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section

167(2) of the Code read with Section 20(4) of TADA is generally termed as an “order-on-default” as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. 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 the nature of the offence with which he is charged where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (b) of sub-section (4) of Section 20 read with the proviso to sub-section (2) of Section 167 of CrPC an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 CrPC. An obligation, in such a case, is cast upon the court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section 20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. (*Hussainara Khatoon case [Hussainara Khatoon v. Home Secy., State of Bihar, (1980) 1 SCC 98 : 1980 SCC (Cri) 40 : AIR 1979 SC 1369]*). This legal position has been very ably stated in *Aslam Babalal Desai v. State of Maharashtra [(1992) 4 SCC 272 : 1992 SCC (Cri) 870 : AIR 1993 SC 1]* where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in *Rajnikant Jivanlal Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi [(1989) 3 SCC 532 : 1989 SCC (Cri) 612 : AIR 1990 SC 71]* wherein it was held that : (SCC p. 288, para 9)

“The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency

fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.”

21. Thus, we find that once the period for filing the charge-sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court *shall* release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the court must release the accused on bail *on its own motion* even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the ‘default’ of the investigating/prosecuting agency and once such an application is made, the court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of ‘default’. The issuance of notice would avoid the possibility of an accused obtaining an order of bail

under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's 'default'. Similarly, when a *report* is submitted by the public prosecutor to the Designated Court for grant of extension under clause (bb), its notice should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party. We must as already noticed reiterate that the objection to the grant of bail to an accused on account of the 'default' of the prosecution to complete the investigation and file the challan within the maximum period prescribed under clause (b) of sub-section (4) of Section 20 TADA or within the extended period as envisaged by clause (bb) has to be limited to cases where either the factual basis for invoking the 'default' clause is not available or the period for completion of investigation has been extended

under clause (bb) and the like. No other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the 'default' of the prosecution."

24. It is true that the Right to Life and Personal Liberty of the petitioners/accused is guaranteed under Article 21 of Constitution of India. But at the same time, the matter has to be decided on merits and in accordance with law and also as per the facts of the matter.

25. In the present case, admittedly 90 days period after the arrest expired on 21st June, 2014. The Investigation Agency, Special Cell, Delhi Police filed another application seeking further extension from 90 days to 120 days. The Public Prosecutor attached his alleged report dated 7th June, 2014 which was accepted on the same. The bail application was admittedly filed on 23rd June, 2014, i.e. after allowing the application for extension of time for investigation from 90 days to 120 days. The said bail application was dismissed on the same day, i.e. 23rd June, 2014. The said order was not challenged by the petitioners prior to filing of the present petition. Under these circumstances, if once the Court after examining the order dated 7th June, 2014 and the report of the Public Prosecutor *prima-facie* makes its opinion that the case of further investigation is made out by granting extension, obviously the benefit for acquiring the right for grant of statutory bail stands extinguished because of the reason that the bail in the present case was applied on 23rd June, 2014. Ninety days period was expiring on 21st June, 2014 and prior to

expiry of custody period of 90 days, the application for extension of time for investigation was allowed on 7th June, 2014.

26. The decision referred by the learned counsel for the petitioners in **Sayed Mohd. Ahmed Kazmi** (supra) is not applicable to the facts of the present case due to the reasons that in that case, the custody of the accused was held to be illegal on 17th July, 2012 before the trial Court after the expiry of 90 days. The trial Court did not hear the application under Section 167(2) Cr.P.C. and simply re-notified for hearing on 18th July, 2012. The application for extension of period of custody was allowed by the trial Court on 20th July, 2012 without considering the application under Section 167(2) Cr.P.C. and subsequently extension of time of investigation and custody of the accused was extended with retrospective effect from 2nd June, 2012. Since on the expiry of first period of custody beyond 90 days, there was no application pending for extension of the period of custody as contemplated under the amended provisions of Section 167(2) Cr.P.C.

27. However, in the present case, the application for extension of custody period was filed prior to the expiry of the period of 90 days. The same was allowed before the expiry of 90 days. The application for bail was filed on 23rd June, 2014 when the application for extension was already allowed. Therefore, under no circumstances, the referred decision would help the case of petitioners. It is clear that the benefit sought by the petitioners on 23rd June, 2014 was not available. The trial Court has rightly dismissed the said application treated as normal application on

merit. The other decisions relied upon by the learned counsel for the petitioners on this issue are not applicable to the facts of the present case.

28. Now, the next issue raised by the petitioners is that the order passed by the trial Court on 7th June, 2014 is illegal, on the reasons stated in the grounds of the petition.

29. The Division Bench of this Court had an occasion to deal with the same issue in the case of **Syed Maqbool v. N.I.A.**, (supra) wherein it was held as under :-

“13. Section 43D of the Unlawful Activities (Prevention) Act, 1967 which is material and relevant for our discussion reads as under:-

“43D. Modified application of certain provisions of the Code. - (1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly. (2) Section 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 reasons for doing so and shall also explain the delay, if any, for requesting such police custody.". (3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that- (a) the reference in sub-section (1) thereof- (i) to "the State Government" shall be construed as a reference to "the Central Government or the State Government";

(ii) to "order of the State Government" shall be construed as a reference to "order of the Central Government or the State Government, as the case may be"; and (b) the reference in sub-section (2) thereof, to "the State Government" shall be construed as a reference to "the Central Government or the State Government, as the case may be". (4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act. (5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release: Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail. (7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.”

14. The centre of gravity of the first argument concerns the first proviso to sub-Section 2 of Section 43D of the Unlawful Activities (Prevention) Act, 1967. It reads: 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.

15. Now, as a matter of fact, when the 90 days period of detention was about to expire, pleading that the investigation was still in progress, an application was filed contents whereof have been reproduced in paragraph 3 by us for detention to be extended up to 180 days and along with the application a report of the learned Public Prosecutor was filed contents whereof have been noted by us in paragraph 4 above.

16. The requirement of the proviso is that if it is not possible to complete the investigation within the period of 90 days, if the Court is satisfied with the report of the Public Prosecutor that the progress of the investigation requires detention of the accused beyond period of 90 days but up to 180 days, the Court may permit so. Undisputably the mandate of the law warrants: (i) a satisfaction to be recorded by the Court; (ii) with reference to the report of the Public Prosecutor; and (iii) which report must indicate

the progress of the investigation and the specific reasons for the detention of the accused beyond 90 days up to 180 days.

17. The report of the Public Prosecutor makes a reference to the application prepared by the Investigating Officer. It also records that the learned Public Prosecutor has perused the case diary. The report highlights that a large number of call details and e-mails as also IDs of suspects have to be collected. It records that the investigation is voluminous and lengthy. The application brings out that the investigation related to activities of Indian Mujahideen, a proscribed terrorist organization, in association with the sleeper cells of Indian Mujahideen. The application brings out that the investigation concerned terrorist activities by causing bomb blast with the aid of associates based in Pakistan. The application brings out that a large data pertaining to call details have been seized and the same were to be analyzed. Some items such as mobile phones and retrieved e-mails were sent to the CFSL for forensic analysis. The application brings out that the investigation was scattered in at least six states.

18. The application and the report of the Public Prosecutor have indicated the progress of the investigation and the specific reasons for the detention of the accused up to 180 days.”

xxx xxx xxx xxx

26. Learned counsel for the appellants has relied upon the decision of the Supreme Court reported as (1994) 4 SCC 602 Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors. to urge that in view of said decision where a similarly worded proviso was added to sub-Section 4 of Section 20 of TADA, the impugned order had to be set aside.

27. The proviso considered by the Supreme Court reads as under:- “Provided further that, if it is not possible to

complete the investigation within the said period of one hundred and eighty days, the Designated Court shall 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; and”.

30. No doubt, on 7th June, 2014, the accused persons/petitioners were not produced before Court at the time of extension of time of investigation for 30 days, though it is the requirement of the principle of natural justice and for issuance of notice to the accused. However, it has come on the record that the trial Court had issued a notice to the counsel who were appearing on behalf of the accused, they did not appear despite of having knowledge about the concerned application. One of the counsel refused to receive the notice. He did not appear when the application for extension of time of investigation for 30 days was taken up. If he had any objection about the production of accused at the time of extension, he could have appeared and pointed out the same to the trial court. The reasons given by the counsel are unacceptable. This Court after having gone through the report submitted by the Public Prosecutor allowed the prayer of the said application. Many other objections were raised by the counsel in this regard, I am of the view that while sitting in the jurisdiction of 482 Cr.P.C., the Court is not to decide the objections unless the order is perverse or it has been passed contrary to law. One of the objections is with regard to the appointment of public prosecutor by the Government. These are the issues which are to be considered at the time of framing of charge.

Prima-facie, this Court is satisfied with the reasons recorded by the trial Court on the basis of the report of the Public Prosecutor. The report submitted by the Public Prosecutor is a very detailed report which indicates the progress of the investigation and specific reasons are given for the detention of the accused beyond 90 days to 120 days. All the objections raised by the petitioners are allowed to be taken by them at the time of framing of charge.

31. Another aspect of the matter is that even the second extension sought by the prosecution was also granted by the trial Court. The said order has not been challenged by the petitioners. Under these circumstances, I am not inclined to interfere with the order dated 7th June, 2014 and once the said order is sustainable, the petitioners did not get the benefit of indefensible rights of bail under Section 167(2) Cr.P.C. as the time was extended by the trial Court within the period of 90 days. It is settled law that the provisions of the statute have to be read in a meaningful manner and the same are given effect to in case of any conflict to the provisions, i.e. Sections 167(2) Cr.P.C and 43(D) of the Unlawful Activities (Prevention) Act, 1967 have to be read together.

32. Thus, there is no force in the submission of the learned counsel for the petitioners. The petition is accordingly dismissed.

33. No order as to costs.

(MANMOHAN SINGH)
JUDGE

MAY 12, 2015