

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 2673 OF 2015

Mr.Areeb s/o. Ejaz Majeed	...Petitioner
vs.	
National Investigation Agency & Anr.	...Respondents

ALONG WITH

CRIMINAL APPEAL NO. 630 OF 2015

Mr.Areeb Ejaz Majeed	...Appellant
vs.	
National Investigation Agency & Anr.	...Respondents

Mr.Mubin Solkar I/b. Tahera Qureshi for Petitioner.
Mrs.A.S. Pai for Respondent No.1.
Mrs.M.M. Desxhmukh, APP for State.

CORAM : RANJIT MORE & S.C. GUPTE, JJ.

RESERVED ON : 5 FEBRUARY 2016

PRONOUNCED ON : 4 APRIL 2016

JUDGMENT (PER S.C. GUPTE, J.):

By this petition, filed under Article 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code ("Code"), the Petitioner has sought quashing of an order passed by the Sessions Court at Mumbai extending his detention and granting extension of time to the prosecution for filing of the charge-sheet as well as an order extending his judicial custody.

2. In its First Information Report, being FIR No.01 dated 28 November 2014, the Petitioner was named by National Investigation Agency ("NIA") as one of the four named accused along with other unknown persons for having committed offences under Sections 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967 ("UAP Act") and Section 125 of the Indian Penal Code ("IPC"). The offence involved joining of an international terrorist organization, the Islamic State of Iraq and Levant ("ISIL"), with an aim to indulge in terrorist activities in Syria and Iraq, which are Asiatic powers at peace with India. The FIR alleges that the Petitioner along with three named individuals and other pilgrims left the country on 25 May 2014 for Iraq on a Ziarat Visa; that upon reaching Iraq, they parted from the group of pilgrims; that they went to Syria to join ISIL; and that after undergoing training in handling of weapons and firearms, they were actively involved in terrorist acts in Iraq and Syria and waged war against the two countries which are in alliance with the Government of India.

3. The Petitioner's case is that the Petitioner was shown to be arrested on 29 November 2014 on his return from Turkey (though actually arrested on the previous day) and instead of being produced before the Special Court constituted under Section 11 of the National Investigation Agency Act, 2008 ("NIA Act"), was produced before the ordinary Sessions Court and remanded to police custody till 8 December 2014; that thereafter, on 8 December 2014, the Petitioner was produced before the Special NIA Court, which extended his police custody till 22 December 2014; that he was produced on 17 December 2014 before the Special NIA Court, when he was remanded to judicial custody till 31 December 2014; and that once again, on 31 December 2014, instead of being produced before the Special NIA Court, the Petitioner was produced before the Sessions Court and remanded to

further judicial custody till 14 January 2015, the custody having been thereafter extended twice by the Special NIA Court and once by the Sessions Court till 25 February 2015. The Petitioner's grievance is that the action on the part of NIA to produce the Petitioner before the ordinary Sessions Court instead of the Special NIA Court for obtaining police/ judicial remand and orders of the Sessions Court thereon were in violation of the provisions of Sections 13 and 16 of the NIA Act. The further case of the Petitioner is that since the investigation could not be completed by NIA within the stipulated period of 90 days from the date of the first judicial remand, on 16 February 2015, NIA preferred an application before the Special NIA Court under Section 43-D (2)(b) of UAP Act; that on 24 February 2015, when the Petitioner was, upon directions of the Special NIA Court, produced before Court, the Special Judge presiding over that Court was on leave and the hearing of the Miscellaneous Application was assigned for hearing to the Sessions Judge holding charge of the Special NIA Court under administrative orders of the Principal Judge of the City Civil and Sessions Court, Mumbai; that the Sessions Judge heard the matter on that day and allowed the Miscellaneous Application the next day, i.e. on 25 February 2015, extending the Petitioner's detention for a further period of 30 days from 26 February 2015 and granting the same extension to NIA to complete the investigation and file the charge-sheet; and that on the same day, by an order on a separate application of NIA, the judicial custody of the Petitioner was extended up to 11 March 2015. It is the grievance of the Petitioner that the Special Judge appointed by the Central Government under Section 11 of the NIA Act for the State of Maharashtra alone has jurisdiction to try the Petitioner and deal with his remand in custody or extend the time for filing of the charge-sheet; and that under Section 13 of the NIA Act, ordinary courts under the Code are barred from doing so. The Petitioner submits that accordingly, the Petitioner's detention and judicial custody beyond 25 February 2015 as well

as extension of time to file charge-sheet are vitiated as unlawful. On 10 March 2015, after the Special NIA Court resumed its duties, the Petitioner presented an application for statutory or default bail, seeking his release on bail under Section 167(2) of the Code read with Section 43-D(2)(b) of the UAP Act. During the pendency of this application, the NIA moved for a further extension of detention of the Petitioner before the Special NIA Court. The application was allowed by that Court and the period of detention was extended for 60 days from 26 February 2015. Finally, by its order dated 2 May 2015, the application of the Petitioner for statutory bail was rejected by the Special NIA Court. Being aggrieved by the order, the Petitioner has preferred the companion appeal.

4. The Criminal Writ Petition and appeal are heard together. Mr Solkar, learned Counsel for the Petitioner (and Appellant), submits that under Section 13 of the NIA Act, every scheduled offence investigated by the NIA can only be tried by the Special Court within whose local jurisdiction the offence was committed, such special court having all powers of a Court of Sessions for the purpose of trial of such offence. Learned Counsel submits that Special Court alone shall try such offence as if it were a Court of Sessions so far as may be in accordance with the procedure prescribed by the Code of Criminal Procedure ("Code") for the trial before a Court of Sessions. He submits that though both State and Central Governments have power to constitute Special Courts under the NIA Act, only Central Government has constituted such Special Court by Notification in the Official Gazette, which is presided over by a judge appointed by the Central Government on the recommendation of the Chief Justice of this Court. Learned Counsel submits that all applications for detention, remand, extension of time to file charge-sheet, etc. in the course of the trial of an offence covered by the NIA Act must be made before, and considered by, this Special Court presided over by the

Special Judge so appointed and not by any other Court. He submits that the orders of detention and extension of time to file charge-sheet passed in the present case by an ordinary Sessions Judge are illegal and must be quashed and the Petitioner be released on statutory bail. On the question of statutory bail, it is submitted that under Section 167(2) of the Code, the entitlement of the accused to get a default bail arises from the date of expiry of the period provided for filing of charge-sheet without such charge-sheet being filed and this entitlement must be considered by the Court as of that date and no subsequent filing of charge-sheet, or extension of the period for filing it, can disentitle the accused from getting such bail. Learned Counsel relies upon several judgments in support on his interpretation of Section 167(2) as above.

5. The FIR against the Petitioner is in respect of a terrorist act and conspiracy, and membership of a terrorist organisation punishable, respectively, under Sections 16, 18 and 20 of the UAP Act and of waging war against an Asiatic power in alliance with the Government of India punishable under Section 125 of IPC. The offences are ordinarily triable by a Court of Session. It is only when these offences, which are scheduled offences under the NIA Act, are investigated by NIA that they are exclusively triable by the Special Court constituted by the Central Government under Section 11 of that Act. By virtue of Section 16 of the NIA Act, the Special Court may take cognizance of these offences, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offences or upon a police report of such facts. Subject to the provisions of the NIA Act, a Special Court has, under sub-section (3) of Section 16, for the purpose of trial of these offences, all powers of a Court of Session.

6. What we have to consider here is whether the various powers exercised by a Court during the stage of information to the police and

investigation of the offence can, in the present case, be only exercised by a Special Court or even a Court of Session is empowered to exercise them. We need to take into account the conspectus of the provisions of the Code and the effect of the provisions of two special statutes, namely, the UAP Act and the NIA Act, thereon and consider the same in the context of the trial of the offences and the various powers exercised by the Court.

7. Trial of offences in a warrant case commences only after a charge is framed and not when the accused is brought before the Court. Before the trial so commences, various pre-trial formalities and procedures are called into play. The very first is the stage of information to the police and investigation of the offence. This stage starts with information in cognizable cases and continues through police investigation, and for which the custody of the accused may be required. Such custody starts with the arrest of the accused, and can continue upto twenty-four hours. Continued custody of the accused calls for successive remands of the accused to police or judicial custody, as the case may be. Then comes the stage of filing of a charge-sheet, for which the Code provides for a maximum period of detention in custody. For the offences with which we are concerned here, the maximum period is of ninety days at the end of which, if the charge-sheet is not filed, the accused is entitled to get a default bail under Section 167(2) of the Code unless the period is extended by the court under the proviso added to Section 167(2) by Section 43D(2)(b) of the UAP Act. This proviso confers power upon the Court to extend the period upto one hundred and eighty days. Thus, in a case like the present, the Court also needs to consider whether the period of filing of charge-sheet needs to be extended. All these powers, i.e. remand of the accused and extension of the period of custody pending filing of a charge-sheet, which are pre-trial powers, are exercised by the Court both under the provisions of the Code and by virtue of the provisions of the UAP Act. UAP

Act defines “Court” as a “Criminal Court having jurisdiction, under the Code, to try offences under that Act and includes a Special Court constituted under Section 11 or under Section 22 of the National Investigation Agency Act, 2008”. The offences with which we are concerned here, namely, offences punishable under Sections 16, 18 and 20 of the UAP Act and Section 125 of IPC, are triable under the Code by a Court of Session. A Court of Session is, thus, empowered to exercise all the aforesaid powers.

8. Now the question is, because a scheduled offence under the UAP Act investigated by NIA is triable exclusively by a Special Court constituted under the NIA Act, is an ordinary Court of Session prohibited from exercising the powers of detention, remand and extension of custody for filing of a charge-sheet under the UAP Act read with the Code so far as the Petitioner is concerned. In the first place, as of the date of the application for extension of time for filing of the charge-sheet, the investigation was not accomplished. There is no warrant for concluding that the offence was one which was investigated by NIA and thus, exclusively triable by the Special Court. At this stage, NIA itself has an option, under Section 7 of the NIA Act, to investigate the offence and prosecute the accused or transfer the case to the State Government for investigation and trial of the offences. Then, of course, the State Government itself has powers to investigate and prosecute the offences, which are not affected by anything contained in the NIA Act save as otherwise provided by that Act. The matter is, in other words, in flux and it cannot be said with any certainty that the offences are triable only by the Special Court constituted under Section 11 of the NIA Act. Secondly, powers under the UAP Act, which include the pre-trial power of extension of the custody of the accused for filing of the charge-sheet beyond the statutory period of ninety days under the proviso to Section 167(2) of the Code, can be exercised by 'Court' defined as a 'criminal court having jurisdiction, under the

Code, to try offences under this Act' (i.e. the UAP Act). Merely because such court includes a Special Court constituted under the NIA Act, there is nothing in the UAP Act to prevent an ordinary criminal court, which could try the offences under the Code, from exercising these powers. Thirdly, when the State Government itself has power to investigate the offence and prosecute the accused and in that case a Special Court appointed by the State Government under Section 22 of the NIA Act would have the jurisdiction to do everything including trying and finally convicting the accused, the jurisdiction of such Special Court can under sub-section (3) of Section 22 be exercised by the Court of sessions until such Special Court is constituted by the State Government under sub-section (1) of Section 22. (The State Government has not constituted such Special Court as of date.)

9. Considering this position, the Sessions Judge, who was actually holding the charge of the Special Court (constituted by the Central Government under Section 11 of the NIA Act), was well within his powers to act under Section 43-D(2)(b) of the UAP Act read with Section 167(2) of the Code and extend the custody of the Petitioner beyond the statutory period of ninety days.

10. In view of what we have held above, it is not necessary for us to consider whether by virtue of holding charge for a Special Court under an administrative direction of the Principal Judge, a Sessions Judge would have the power to do anything which a Special Court alone could do.

11. Accordingly, there is no merit in the criminal writ petition. The same is dismissed.

12. Insofar as the criminal appeal is concerned, the same involves

the question of default bail under Section 167(2) of the Code, the Appellant's application for which was rejected by the Special Court. The application was on the footing that the extension of custody beyond ninety days granted by the learned Sessions Judge was without jurisdiction, and null and void and hence, upon expiry of the statutory period of ninety days under Section 167(2) the Appellant was entitled to a default bail. Since we have held above that the extension order was duly passed by the learned Sessions Judge and is valid, there is no question of the proviso under Section 167(2) taking effect, since in the meantime an application was made by the prosecution for extension of custody under the second proviso introduced by Section 43D(2)(b) of the UAP Act into Section 167(2) of the Code, and that application was granted by the Court. (The application of the prosecution was admittedly made and granted before the expiry of the statutory period of ninety days.) In view of our conclusion as above, there is no need for us to consider the case law cited by learned Counsel for the Appellant under Section 167(2) on the entitlement of the accused for a default bail thereunder.

13. Accordingly, there is no merit in the criminal appeal and the same is also dismissed.

(S.C. GUPTE, J.)

(RANJIT MORE, J.)