

IN THE HIGH COURT OF JUDICATURE AT MADRASDated : **08.08.2017**

CORAM:

**THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN****Crl.A.No.227 of 2017**

Thangaraj @ Thamizharasan Appellant

Vs.

The State Rep. by
The Deputy Superintendent of Police
National Investigation Agency,
Hyderabad (Camp at Puducherry)Respondent

Prayer : Criminal Appeal filed under Section 21 of NIA Act, to call for the records in Crl.M.P.No.1471 of 2016, dated 29.03.2017 on the file of the Special Court for NIA Cases at Puducherry and set aside the same and grant bail to the appellant.

For Appellant : Mr.M.Radhakrishnan
for Mr.P.PugalendhiFor Respondent : Mr.R.Karthikeyan
Special Public Prosecutor**JUDGMENT**(Judgement of the Court delivered by **P.KALAIYARASAN, J**)

This Criminal Appeal is against the order of the Special Court for NIA Cases at Puducherry dated 29.03.2017 passed in Crl.M.P.No.1471 of 2016 rejecting bail to the petitioner.

2. It is averred in the appeal that the Deputy Superintendent of Police, National Investigating Agency, Hyderabad made a formal arrest of the appellant inside the Central Prison, Madurai on 09.04.2014 and he was produced under PT warrant and remanded to judicial custody in R.C.No.01/2014/NIA/HYD under Sections 307 IPC, Section 4 of Explosive Substances Act, 1908 and Sections 16 and 18 of the Unlawful Activities (Prevention) Act, 1967. Originally on the complaint given by one N.Premkumar, zentry at the residence of a former Minister at No.5, Ellaiaimman Kovil Street, Puducherry, a case was registered in Cr.No.25 of 2014 under Section 4 of Explosive Substances Act, 1908 in Udayansalai police station. Then the case was transferred to the National Investigating Agency and after investigation, charge sheet was filed on 30.09.2014 against the appellant and 5 others under Section 120 (B) of IPC r/w Sections 3 and 4 of Explosive Substances Act, 1908 and Sections 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967.

3. There is no material witness in the final report to establish the allegation levelled against the appellant. The appellant is not a member of any banned organization and had not committed any offence under Unlawful Activities (Prevention) Act. He is a Tamil film Director and has been in judicial custody from 09.04.2014. The

appellant had suffered illegal detention from 18.07.2014 to 12.09.2014.

4. The learned Sessions Judge ought to have considered that without complying with the provisions of Section 43 (D) (2) of Unlawful Activities (Prevention) Act, 1967, the detention of the appellant was extended beyond the period of 90 days. The very extension of the detention beyond 90 days was illegal and the appellant ought to have been granted bail on this ground alone.

5. The respondent in its counter contends that case was originally registered in Cr.No.25 of 2014 in Udayansalai police station and has been transferred to National Investigating Agency and after investigation, charge sheet has been laid against the appellant and 5 others on 30.09.2014. The NIA Special Court, Puducherry had also framed charges against the accused persons under Section 120 (B) of IPC r/w Sections 3 and 4 of Explosive Substances Act, 1908 and Sections 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967 on 08.06.2015. The appellant was involved in the conspiracy hatched on 31.12.2013 at the residence of A6 and in pursuance of the said conspiracy, the appellant and A1 went to Puducherry on 14.01.2014 on the motor cycle of A2 and stayed at Villianur and did

reconnaissance of the exact residential place of Sri.Narayanasamy to execute their plan.

6. The bail application in CrI.M.P.No.1471 of 2016 filed by this appellant before NIA Special Court, Puducherry was first dismissed on 27.09.2016. The said order, dated 27.09.2016 was set aside by the Division Bench of this Court in CrI.A.No.758 of 2016, dated 06.03.2017 and remanded back to the Court for fresh disposal. The Special Court had taken up the matter and dismissed the bail application by order, dated 29.03.2017. This appeal has been filed challenging the above said order, dated 29.03.2017.

7. Keeping in mind the security implication, the public order and larger public interest, Puducherry Government passed an order in G.O.Ms.No.8, Home Department, dated 19.02.2015, directing that all the six accused persons including the appellant herein shall not be removed from the Pondicherry Central Prison. The accused in this case including the appellant if enlarged on bail would pose a danger to the society and on that ground this appeal is to be dismissed.

8. In the order, dated 16.02.2017 in H.C.P.No.1642 of 2015, it has been clearly held that judicial custody of the appellant cannot

be said to be illegal. The appellant cannot be released on bail in view of restrictions of granting of bail contained in sub-section 5 and 6 of Section 43 (D) of the Unlawful Activities (Prevention) Act, 1967. The appellant and other accused persons are also involved in other cases in Tamil Nadu concerning importance of national security and therefore, this appeal is liable to be dismissed.

9. The learned counsel appearing for the appellant argued that the appellant has been in custody in this case from 09.05.2014; that his custody beyond 90 days without remand extension order is illegal and the application filed by the appellant for bail under Section 167 (2) Cr.P.C was returned at the time of illegal custody, i.e., on 11.07.2014; that the G.O., of Puducherry Government about taking the prisoner from Central Prison, Pondicherry cannot be taken advantage by the respondent for rejection of the bail and therefore, the appellant is to be enlarged on bail.

10. The learned Special Public Prosecutor appearing for the respondent per contra contends that in H.C.P order, it has already been held that the custody beyond 90 days of the appellant cannot be said to be illegal; that the Special Court having satisfied that prima facie case is made out from the materials furnished along with

the charge sheet, framed charges against the appellant and other accused; that as per Section 43(D) of the Unlawful Activities (Prevention) Act, 1967, the appellant is not entitled to be released on bail and therefore, appeal is to be dismissed.

11. There is no dispute that the appellant has been in custody in this case from 09.04.2014. On 07.07.2014, 90 days was completed. Immediately after 90 days, the appellant filed an application for bail under Section 167 (2) Cr.P.C and the same was returned.

12. Proviso to Section 167 (2) of the Code of Criminal Procedure, 1973 reads thus :

"Provided that—

1[(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding—

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]"

13. Similar provision as to Section 43(D) of Unlawful Activities (Prevention) Act, 1967 is also available in NDPS Act, 1985 under Section 36A. The Hon'ble Supreme Court while dealing with the above analogous provision has held in **Sanjay Kumar Kedia v. Narcotics Control Bureau** reported in **(2009) 17 SCC 631** held as follows :

"12. 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 authorises 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."

14. Thus it is very clear that the period of detention may be extended to 180 days if stringent conditions provided under Section 43(D) of Unlawful Activities (Prevention) Act, 1967 are complied with. As per the proviso clause under Section 43(D) of Unlawful Activities (Prevention) Act, 1967, the public prosecutor has to file the report indicating the progress of the investigation and specific reasons for the detention and notice is to be given to the accused.

15. Here the Public Prosecutor filed the report seeking extension of detention period beyond 90 days. But there is no specific order of the Special Judge extending the period of detention beyond 90 days on the above report. The extension of remand is not an empty formality. As per proviso clause to Section 43(D) of the Unlawful Activities (Prevention) Act, 1967, the Special Judge is to be satisfied with the report of the Public Prosecutor for further detention of the accused by applying his judicial mind, after affording sufficient opportunity to the accused and pass orders about detention.

16. There is no dispute in this case that the Special Judge had not passed any specific order for detention on 18.07.2014, 14.08.2014 and 12.09.2014. The learned Judge had made an endorsement only in the warrant authorising the appellant's detention in prison. There should be an order by applying judicial mind by going through the report filed by the Public Prosecutor extending the remand. Endorsement in the warrant is only a subsequent act to that. The endorsement in the warrant cannot be equated to an order of judicial remand. It is also pertinent to note that immediately after the expiry of 90 days of detention, the appellant filed petition for bail under Section 167(2) Cr.P.C on 11.07.2014 and the same was returned. Therefore, it cannot be said that there was no request from the side of the appellant. Therefore, the contention of the learned counsel for the appellant that the detention beyond 90 days, i.e., after 07.07.2014 without any order of remand extension till filing of the charge sheet on 13.09.2014 is illegal cannot be brushed aside.

17. The learned counsel appearing for the appellant cited the Hon'ble Supreme Court Judgment in **Sayed Mohd. Ahmad Kazmi v. State (Govt. of NCT of Delhi)**, reported in **(2012) 12 SCC 1** and contended that the accused has got an indefeasible right

to be released on statutory bail and retrospective validation of illegal custody is not permissible. In the above Judgment, it has been held as follows :

There is no denying the fact that on 17-7-2012, when CR No.86 of 2012 was allowed by the Additional Sessions Judge and the custody of the Appellant was held to be illegal and an application under Section 167(2) Cr.P.C. was made on behalf of the Appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of the Appellant for a further period of 90 days with retrospective effect from 2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the Appellant on the expiry of 90 days from the date when the Appellant was taken into custody. Such right, as has been commented upon by this Court in the case of Sanjay Dutt (Sanjay Dutt v. State, (1994) 5 SCC 410) and the other cases cited by the learned Additional

Solicitor General, could only be distinguished once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.

18. Here in this case also the appellant moved an application for statutory bail after completion of 90 days and the same was returned. Thus immediately after completion of 90 days and before filing charge sheet, the appellant exercised his right to grant of statutory bail. The custody without an order of the Special Judge beyond 90 days cannot be validated retrospectively. This ground alone is suffice to enlarge the appellant on bail.

19. The main contention put forth by the learned Special Public Prosecutor is that in H.C.P.No.1642 of 2015, the Division Bench of this Hon'ble High Court has held that the judicial custody of the appellant cannot be treated as illegal.

20.It is an admitted fact that H.C.P.No.1642 of 2015 has been filed on the file of this Court so as to quash the remand extension given by the Special Judge for NIA cases, Puducherry. It is also equally an admitted fact that in H.C.P.No.1642 of 2015, the Division Bench of this Court has observed that the Special Judge for NIA cases, Puducherry, has already extended custody of the petitioner therein/appellant herein. Since the Special Judge for NIA cases, Puducherry, has given remand extension, custody of the petitioner/appellant cannot be treated as illegal.

21.As mentioned supra, no specific order has been passed by the Special Judge for NIA cases, Puducherry, with regard to elongation of time for filing final report, even though report has been filed by the concerned Public Prosecutor. Under the said circumstances, the only remedy open to the present appellant is to invoke Section 167(2) of the Code of Criminal Procedure, 1973, for the purpose of getting statutory bail. But, without invoking the said Section, H.C.P.No.1642 of 2015 has been erroneously filed by way of invoking Article 226 of the Constitution of India.

22.It is an archaic principle of law that when an efficacious relief is explicitly available under any law, Article 226 of the

Constitution of India cannot be invoked. In the instant case, as mentioned earlier, the present appellant, without invoking Section 167(2) of the Code of Criminal Procedure, 1973, has erroneously invoked Article 226 of the Constitution of India, by way of filing H.C.P.No.1642 of 2015. Therefore, it is quite clear that the observation given in the order passed in H.C.P.No.1642 of 2015 is totally unwarranted and also supernumerary and the same can easily be eschewed/ignored. Therefore, the main contention put forth by the Special Public Prosecutor is sans merit.

23. Yet another contention of the learned Special Public Prosecutor is that as per sub-section (5) and (6) Section 43 (D) of the Unlawful Activities (Prevention) Act, 1967, there is restriction to release the appellant on bail. The above restrictions are applicable only to regular bail and not applicable when bail is ordered on the ground of detention beyond the statutory period.

24. For the aforesaid reasons, this appeal is allowed and the order of the learned Special Judge for NIA Cases, Puducherry, dated 29.03.2017 passed in CrI.M.P.No.1471 of 2016 is set aside. The appellant is ordered to be released on bail on executing a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties for

the like sum to the satisfaction of the Special Judge for NIA Cases, Puducherry and on condition that the appellant should appear before the trial Court for every hearing as directed by it. The appellant is also directed to surrender passport before the trial Court.

(A.S., J.) (P.K., J.)
08.08.2017

Index : Yes / No

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To

1. The Deputy Superintendent of Police
National Investigation Agency,
Hyderabad (Camp at Puducherry)
2. The Special Court for NIA Cases
Puducherry.
3. The Public Prosecutor
High Court, Madras.

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**A.SELVAM, J.
AND
P.KALAIYARASAN, J.**

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**Pre-Delivery Judgment in
Crl.A.No.227 of 2017**

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