

THE HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

CRL.R.C.Nos.221 and 222 OF 2017

COMMON ORDER:

These two petitions, in answering the office objections on maintainability and also on merits against the impugned orders of lower Court to decide correctness came for consideration and heard both sides at length.

2. These are revisions maintained impugning the order seeking for grant of bail, by the respective accused i.e. A.2, A.4 to A.7 of Crime No.164 of 2016 of P.S.Adibatla and A.4 to A.6 of Crime No.600 of 2016 of P.S.Hayathnagar, and impugning the order of the learned Metropolitan Sessions Judge, Cyberabad at L.B.Nagar, in CrI.MP.No.3604 of 2016 in Crime No.164 of 2016 and CrI.MP.No.14 of 2017 in Crime No.600 of 2016.

3. Law is fairly settled from several expressions of the Apex Court and, referring to it, it was held by this Court in **Sun Pharmaceuticals Ltd. v. State of Telangana, P.S. Central Crime Station, Hyderabad¹**, from paras 30 to 30.23; that merely because the order is outcome of an interlocutory application, it cannot be construed as interlocutory in nature and, once rights of the parties affected, by virtue of the order, it has to be treated as good as a final order, thereby, prone to revision, and the bar under Section 397(2) Cr.P.C. in such cases has no application. Apart from the above, power of the

¹ 2016(2) ALT (CrI.) 165 (AP)

Hon'ble Court is available either under Section 483 or Section 482 Cr.P.C, apart from the plenary jurisdiction, under Article 227 of the Constitution of India to consider even a revision is maintained if the same is shown not maintainable from the bar under Section 397 (2 or 3) Cr.P.C. It is because the inherent powers of the Hon'ble Court saved by Section 482 Cr.P.C. inhere from its very constitution to exercise under three situations viz., either to enforce its own orders or to prevent abuse of process or to subserve ends of justice.

4. Here the impugned orders, definitely, affect the rights of the respective accused persons from the conclusion arrived in dismissal of the default bail application even 180 days remand period lapsed and investigation not completed in saying by the learned Special Judge that even an oral statement of the Public Prosecutor representing the prosecution agency, for time of remand beyond 180 days requires extension constitute compliance and no written report is required from the reading of proviso to Section 36A (4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter NDPS Act) amended by Act, 2001. Thus revision is maintainable.

5. Arguments of both sides heard at length in considering the impugned orders of the lower Court on its legality, correctness or propriety concerned. The right to bail provided by the statutory provisions, either under the general law of Cr.P.C. or even in relation to the NDPS Act covered by

Section 37 with non-obstante clause from a reading of Sections 36 and 37 of the NDPS Act, no doubt, depending upon the general factors and, additionally, so far as the NDPS offences are concerned, the other criteria required in non-bailable offence, particularly involving commercial quantity to find that there is no ultimate change/success of the accused by acquittal but, for that finding, the accused is not entitled to regular bail pending investigation.

6. However, so far as the default bail is concerned, as there is mandate to complete investigation within the statutory period for general law provided under Section 167 Cr.P.C, for offence punishable upto ten years within 60 days and, 10 years above, within 90 days; so far as the offences covered by the NDPS Act concerned for grave offences, instead of that period prescribed under Section 167(2) Cr.P.C. with non-obstante clause irrespective of what is provided in Cr.P.C, the remand period maximum fixed is 180 days from reading of Section 36A (4) of the NDPS Act. Section 36A (4) with its proviso says, in respect of persons, accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days": Provided that, if it is not possible to complete the investigation within the said period

of one hundred and eighty days, the Special Court may 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.

7. The rigor of the proviso is, no doubt, the remand can be extended beyond 180 days but the maximum period shall not exceed one year, (365/366 days, as the case may be). However, for extending beyond 180 days, maximum period provided by clause 4 of Section 36A supra, pursuant to the proviso, there must be a report of the public prosecutor which shall indicate not only the progress of the investigation but also the specific reasons for the detention of the accused required beyond that period of 180 days. Once such is the statutory compliance required, in the case on hand, undisputedly, for no report filed, there is no compliance thereby. The impugned order of the learned trial Judge, as if there is compliance, is thus untenable.

8. No doubt, the section is silent as to report required is written report or even oral report is sufficient. One of the canons of criminal law on the fundamentals is besides presumption of innocence till guilt is proved, that, when two views are possible, the view favourable to the accused has to be applied, leave about the strict construction of provisions in penal law.

9. In this regard, the Apex Court in **Sanjay Kumar Kedia @ Sanjay Kedia v. Intelligence**², having considered the scope of law, by relying upon the earlier expression of two Judge Bench of the Apex Court in **Hitendra Vishnu Thakur v. State of Maharashtra**³, (no doubt, it is a case under Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short 'TADA') with observation of the wording of Section 24 of TADA is in *pari materia* to the wording of Section 36A (4) of NDPS At in holding the proviso imposes stringent conditions provided therein to be satisfied and ought to be complied with viz. (a). the report of the public prosecutor; (b) such report must indicate the progress of investigation and specifies the compelling reasons for seeking detention of the accused beyond the period of 180 days; and (c) it is also no doubt mentioned as one of the further requirements of compliance of principles of natural justice of notice to accused and also of hearing him, though not specifically provided hearing of accused with opportunity in the TADA Act. It is one of the reasons in applying the same analogy for the application of proviso to clause 4 of Section 36A. It is held on facts therefrom in **Sanjay Kumar Kedia** (2 surpa) that there is no separate report filed by the public prosecutor but for relied on the report of prosecution. It does not indicate the progress of investigation even nor show any compelling reasons required for extension of custody beyond 180 days and no notice, even

² 2010 (1) SCR 555

³ (1999) 4 SCC 602

to the accused, given for extension and there is no independent application mind and submission report by public prosecutor. The order of the learned Trial Judge, under the NDPS Act, was that the allegations are serious and the accused are not entitled to bail. The High Court, while noticing the decision in **Hitendra Vishnu Thakur** (3 supra) deviated from the decision and side-stepped the very categorical directions given by the Court therein, on wholly irrelevant consideration saying, for extension of the period beyond six months by the intelligence officer, though not presented a separate report by the officer, once he relied upon the order passed by the Trial Court, it shows that case was proceeded in the presence of public prosecutor is a compliance. The Apex Court found fault with in saying though the general rule in construing an enactment which contains a proviso is to construe them together without making either of them redundant or otiose, the proviso, when required to be applied, stringent conditions of the said Act and its ramifications that have to be understood in a wider context. The findings of the High Court do no justice to the observations of the Apex Court in **Hitendra Vishnu Thakur** (3 supra) as the very specific observations therein have been noticed and ignored by the High Court in the light of what has been held.

10. The Apex Court, in **Sanjay Kumar Kedia** (2 supra) observed further that, after expiry of the maximum period, no

doubt as held in **Uday Mohanlal Acharya v. State of Maharashtra**⁴, the accused need not be detained, thereby, there is no compliance with the requirement of proviso to clause 4 of Section 36A of the NDPS Act. The accused is held entitled to bail by setting aside the orders of Court below and extending the remand by reducing the concession of default bail. No doubt, it is one of the considerations of the expression of **Uday Mohanlal Acharya** (4 supra) requires clarification, however, the Apex Court in **Sanjay Kumar Kedia** (2 supra) observed that there is no necessity to go into it once compliance is not made.

11. Subsequent to the expression in **Uday Mohanlal Acharya** (4 supra), another two Judge bench of the Apex Court in **Sukhjinder Singh v. State (N.C.T) of Delhi**⁵ held that even though accused got a statutory right of default bail, if investigation is not completed within statutory time and, during its pendency, final report filed, he is not entitled to default bail concession. However it is not even the issue herein. Here the only issue is whether there is any compliance or not.

12. In **Sanjay Kumar Kedia** (2 supra), the Apex Court categorically held that the report, to mean, is a written report of the public prosecutor by his independent application of mind to the facts and also giving reasons in seeking extension of necessity to detain beyond the period prescribed, upto the

⁴ AIR 2001 SC 1910

⁵ AIR 2001 SC 2941

maximum highest. Here there is no written report of the public prosecutor undisputedly. There is nothing even to show that, before end of 180 days, the maximum period contemplated by clause 4 of Section 34A of the Act, any progress of case diary filed, much less, relied upon by the public prosecutor in showing the same to depict any cogent reasons for extension of remand period, if necessary. Thus, in the case on hand, there is total lack of statutory requirement of public prosecutors report, outcome of application of mind to the facts by giving reasons for extension to justify for the Court to consider, that too, after hearing the accused in extension, if any, else to the entitlement of default bail. Once there is no factual foundation of any statutory compliance of the proviso to clause (4) of Section 36A of NDPS Act, the accused is entitled to default bail. Once he sought for default bail and, even at that stage, no such report even filed by the public prosecutor even to extend concession laid down in **Sukhjinder Singh** (5 supra) the accused is entitled to default bail.

13. Accordingly and in the result the Criminal Revision Cases are allowed and miscellaneous applications, if any, pending shall stand disposed of. The orders dismissing the default bail applications of accused set aside. The lower Court is directed, by virtue of this common order, to grant default bail subject to necessary conditions to be imposed if no final report filed as on today. The lower Court shall dispose of the

applications with no lapse, after its receipt and after hearing pursuant to above observations.

B.SIVA SANKARA RAO,J

Date:25.01.2017

Note:CC by 27.01.2017

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