

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.10027 OF 2017

ORDER:

The petitioner herein/Accused No.2 filed this criminal petition under Section 482 Cr.P.C challenging the order passed in CrI.M.P.No.3665 of 2017 in F.No.DRI/HZU/VRU/48-F/ENQ-16 (int-32)/2016 dated 01.09.2017, dismissing the application filed under Section 167(2) Cr.P.C for grant of statutory bail.

The case of the respondent/Directorate of Revenue Intelligence (for short 'DRI') is that, on the night of 23.12.2016, the officers of Directorate of Revenue Intelligence, Zonal Unit, Hyderabad, on credible information, reached the scene of offence along with two panch witnesses and observed from outside that a lorry was parked in the said premises and about five persons unloading certain items from the lorry in the darkness by using torchlight. Upon which the Revenue Intelligence officials entered the premises and on question, the watchman informed that the material and lorry belongs to three persons, who came in Tavera bearing No.AP-28-DU-0160 , which is parked behind the lorry bearing No.CG-07-E-3033 and the watchman informed that the five persons, who were unloading the material from the lorry ran away in darkness from there, on hearing voices of the officers, the officers thoroughly checked the lorry and on removing plywood planks, they found that the planks were fixed at about one feet above the original base of the carriage and below them, layers of

packets wrapped with brown cello-tape were found and the officers retrieved 270 packets wrapped with brown cello-tape and documents from the lorry bearing No.CG-07-E-3033 and one hardbound register with marking 'Vinayaka' containing expenses from 26.01.2016 having pages from 01 to 22 and on further search of Tavera-SUV, they found similar packets in the rear portion of the vehicle, which were also wrapped in brown cello-tape, which comes to a total of 20 packets. The officers also found Indian currency of total worth of Rs.1,00,000/- and they also found similar packets wrapped in brown cello-tapes were stored in the room and there are 60 packets in the room. The officers cut and opened two packets available in the room and on physical characteristics, it appeared to be Cannabis, which is a 'narcotic drug' defined under NDPS Act. Further, the Directorate of Revenue Intelligence Officers totally retrieved 270 packets which weighed about 637.952 kgs, 20 packets retrieved from Tavera-SUV were cut and opened and total weight was found to be 44.26 kgs, 60 packets retrieved from the room were cut opened and the total weight of Cannabis was found to be 132.27 kgs and the officers were informed that the stored Ganja was brought by one Suraj Singh in the Tavera on 21.12.2016 and Sri Balaji informed that stock will be cleared along with cargo expected on 23.12.2016 and said Suraj Singh promised to pay Rs.5,000/- for the arrangement of unloading and storing. Accordingly, the officers seized total quantity of 814.482 kgs of Cannabis worth Rs.81,44,820/- and

they also seized lorry and Tavera worth Rs.16,02,000/-, Indian Currency of Rs.1,00,000/- from Tavera-SUV.

During investigation, it was revealed that the petitioner/accused along with other accused have committed the offence of transporting Ganja illegally, which is serious offence and punishable under NDPS Act, the petitioner and others were arrested and remanded to judicial custody. The petitioner is under judicial custody as on the date of filing the petition even after expiry of more than 180 days, without any further extension for completion of investigation and for filing of charge sheet, detaining the petitioner after expiry of 180 days permitted under Section 167(2) Cr.P.C is illegal and sought to enlarge the petitioner, granting statutory bail under Section 167(2) Cr.P.C.

The Special Public Prosecutor for D.R.I filed counter, opposing the request to grant statutory bail, contending that the investigation in this case is at crucial stage that relates to the facts relating to the statements of the witnesses recorded during investigation and the investigation is in the mid way to trace out the real culprits involved in the offence, criminal conspiracy with other persons. It is also contended that, investigation done so far revealed that Accused No.2 named several persons, who involved in smuggling of Ganja and therefore, required to make extensive enquiries about the criminal conspiracy and also the persons named by Accused No.1 in his confessional statement recorded on 31.05.2017. It is further contended that, in case the petitioner is

enlarged, granting statutory bail, there is a possibility of interfering with the investigation, tampering of evidence and prayed for dismissal of the petition.

Upon hearing argument of learned counsel for the petitioner and Special Public Prosecutor for D.R.I, the Court below dismissed the petition on the ground that the investigation is at crucial stage, while observing that, in case, the petitioner is enlarged on bail by granting statutory bail, it will effect further investigation to be done by the Investigating Agency, and the petitioner would conspire with Accused No.1. In such case, it is difficult to the Investigating Agency to nab the real culprits by following necessary procedure, dismissed the petition.

Aggrieved by the order passed by the Court below, the present criminal petition is filed mainly contending that, when the accused was detained for more than 180 days in judicial custody without any further extension, the detention is illegal. It is also contended that the Apex Court laid down certain guidelines in **Sanjay Kumar Kedia @ Sanjay kedia v. Intelligence**¹ where the Supreme Court laid down certain guidelines as to how the Court has to consider the petition filed under Section 167(2) Cr.P.C. But, the Trial Court dismissed the petition in utter disregard of the guidelines issued by the Supreme Court and this Court in **Kosu Venkanna Dora v. State of Andhra Pradesh**², **Dukka Sathibabu**

¹ 2010 (1) SCR 555

² Cri.P.No.144 of 2017 dated 19.01.2017

v. State of Andhra Pradesh³, Mohan Pandurang Wahmare and others v. State of Telangana⁴ and requested this Court to grant statutory bail to this petitioner.

During hearing, learned counsel for the petitioner Sri Duvvuri Suryanarayana while reiterating the contentions raised in the petition regarding detention of the petitioner, after expiry of 180 days permissible under Section 167(2) Cr.P.C, would draw the attention of this Court to **Sanjay Kumar Kedia¹** case and on the basis of guidelines laid down by the Supreme Court in **Sanjay Kumar Kedia¹**, the learned counsel for the petitioner requested this Court to set-aside the order passed by the Court below and issue necessary directions to enlarge the petitioner on bail.

Whereas, the learned Special Public Prosecutor for the State of Telangana representing the respondent/D.R.I contended that the order under challenge cannot be interfered while exercising jurisdiction under Section 482 Cr.P.C, since the order passed in bail application either statutory or regular or anticipatory is interlocutory in nature, against which no revision is maintainable, in view of the bar contained under Clause (2) of Section 397 Cr.P.C and when no revision is maintainable, this Court cannot exercise power under Section 482 Cr.P.C and placed reliance on the judgment of the Apex Court in **Girish Kumar Suneja v. C.B.I⁵** case.

³ CrI.P.No.150 of 2017 dated 19.01.2017

⁴ CrI.R.C.Nos.221 & 222 of 2017 dated 25.01.20174

⁵ AIR 2017 SUPREME COURT 3620

Learned counsel for the petitioner contended that the petitioner also filed petitions before the Court below for extension of time and the Court accepted the memos for extension of time and finally requested this Court to grant statutory bail to the petitioner.

Considering rival contentions and perusing the material available on record, the point that arises for consideration is:

“whether the petitioner is entitled to claim statutory bail under Section 167(2) Cr.P.C, when judicial custody was not extended. If so, the order passed by the Court below is liable to be set-aside?”

P O I N T:

The petitioner is arrayed as accused no.2 in Crime F.No.DRI/HZU/VRU/48-F/ENQ-16 (int-32)/2016 and he was remanded to judicial custody by the date of filing petition under Section 167(2) Cr.P.C on 28.08.2017. The initial period permitted under Section 167 Cr.P.C is 180 days and has expired. But, he was detained in prison as a part of pre-trial detention without further extension of period of judicial remand.

Learned counsel for the petitioner mainly contended that, when no order was passed extending period of detention, the petitioner is entitled to claim a statutory bail under Section 167(2) Cr.P.C, further no order was also passed extending judicial custody. But, the learned Special Public Prosecutor for the respondent/DRI contended that the petitioner filed two petitions

for extension of judicial custody, one on 16.08.2017 and the other on 27.09.2017. In view of the controversy between the parties, this Court called for the record from the Court below for verification. On verification of the entire record, no petitions were filed as on the date of expiry of 180 days i.e. on 28.08.2017. The petitions allegedly filed by the respondent are subsequent to passing of the order under challenge. Copies of these petitions are placed on record before this Court. But, the record of the Court below did not disclose filing of such petitions and the order passed, if any, in those petitions. In the absence of filing any petitions before the Court below, seeking extension of judicial custody of the petitioner, the petitioner shall not be detained as a pre-trial detenue after expiry of time permitted under Section 167 Cr.P.C and such detention is illegal.

In **A.K. Gopalan v. State of Madras**⁶, the Supreme Court considered the scope of Articles 19, 20 & 22 of the Constitution of India. The theory of freedom under Articles 19, 21, 22 & 31 of the Constitution of India, are exclusive of each Article enacting a Code in connection with the protection of separate and distinct fundamental right. Even, in the case of **R.C. Kapur vs. Union of India**⁷ the view was quoted with approval. But, the decision in **Mrs. Maneka Gandhi v. Union of India**⁸ was again followed and analysed in **Bachan Singh vs. State of Punjab**⁹.

⁶ AIR 1950 SC 27

⁷ AIR 1970 SC 564

⁸ AIR 1978 SC 597

⁹ AIR 1983 SC 473

The concept to life and liberty as nourished in Article 21 of our constitution continued its expansion and enlargement in Bank Nationalisation case i.e. **Rustom Cavasjee Cooper v. Union of India**¹⁰. The principle of law laid down in **A.K. Gopalan**⁶ case by the reason of expansion and enlargement of right to life and liberty could not influence or arrest the subsequent decisions. In consequence, a new jurisprudence with its modern outlook having its root in Article 21 of the Constitution of India shows its head to the exclusion of the old concept where guarantee to life and liberty were in fact laid down by the apex court with all their effulgence. It is a glorious triumph of the fundamental right to life and liberty which has not been swept away. In the background of the dispute, a furore has been raised more often than not that when a statute makes a procedure or provision for compliance, its departure by non-performance will render the act a nullity, as mandatory procedure can never be whittled down at the pleasure of the authority. But could it be said with a degree of precision that violation of a provision per se could really vitiate the search, seizure and the conviction in absence of prejudice? Prejudice must be shown and proved. A mere slogan of prejudice is, therefore, a vain publicity to confuse the issue without anything more, when it is an act of the accused from its inception, the information to the accused of his right before search by the officer as magnified is a fanciful imagination.

¹⁰ AIR 1970 SC 564

In **H.N. Rishbud vs. State of Delhi**¹¹, that a defect or illegality in investigation, however serious, has no bearing on the competence of the procedure relating to cognizance or trial. The cognizance, if taken on a police Report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice.

In view of the law declared by the Apex Court in the judgments referred supra, detention of accused beyond 180 days without extension of judicial remand is illegal and thereby, the petitioner is liable to be enlarged on statutory bail.

The detention of the accused after expiry of time permitted under Section 167 Cr.P.C without extension of judicial remand by the competent Court is illegal and it is in violation of the right to life and freedom guaranteed under the Constitution of India.

In **Arul and Dominic v. Inspector of Police, Madras**¹², the Madras High Court while dealing with similar case for grant of statutory bail, invoking under Section 167(2) Cr.P.C, the Court held that Section 167(2) Cr.P.C has no application to cases under NDPS Act

In **Union of India (UOI) vs. Thamisharasi and Ors**¹³, the Supreme Court had an occasion to deal with Section 167(2) Cr.P.C

¹¹ AIR 1955 SC 196

¹² 1995 (1) ALT (Cri) 319

¹³ 1995(2) ALT (Cri) 310

and provisions of NDPS Act, held that, in order to exclude the application of the proviso to sub-section (2) of Section 167 Cr. P.C. in such cases an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary implication. There is no such provision in the N.D.P.S. Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 Cr.P.C. which is expressly applied. The absence of any provision inconsistent therewith in this Act is significant.

Therefore, Section 167(2) Cr.P.C is equally applicable to the investigation under NDPS Act and unless the period of judicial remand is extended beyond the time permitted under Section 167 Cr.P.C, the accused is entitled for statutory bail. Therefore, in view of the judgment of the Apex Court in **Thamisharasi**¹³ case, the judgment of the Madras High Court in **Arul and Dominic**¹² will have no application.

As discussed above, the remand period of the accused was not extended by the Court below, or any application was filed by the respondent. In such case, the law declared in **Sanjay Kumar Kedia**¹ case, the Apex Court ruled that the maximum period of 90 days fixed under Section 167(2) Cr.P.C and it has been increased to 180 days for several categories of offences under the Act. But, the proviso authorises 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

In **Kamal Narayan v. State of Chattisgarh**¹⁴, the principles laid down in **Sanjay Kumar Kedia**¹ case were followed. This Court also, in **Kosu Venkanna Dora**², **Dukka Sathibabu**³, **Mohan Pandurang Wahmare and others**⁴ enlarged the accused on the ground of failure to extend judicial remand.

In the present criminal petition, this Court raised an objection about maintainability of the petition under Section 482 Cr.P.C, in view of the bar contained in sub-section (2) of Section 397 Cr.P.C. But, the learned counsel for the petitioner relied on the judgment of this Court in **Mohan Pandurang Wahmare and others**⁴, wherein, learned single Judge of this Court held that, petition under Section 482 Cr.P.C is maintainable against an order passed in a petition filed under Section 167(2) Cr.P.C discussed about the scope of Section 167(2) Cr.P.C with reference to Section 397(2) Cr.P.C while observing that remand can be extended beyond 180 days, but, the maximum period shall not exceed one year. However, extending maximum period beyond 180 days, provided

¹⁴ 2011 CrL.J 612

under Clause 36(A) (4) of the NDPS Act, pursuant to the proviso, there must be a report of the Public prosecutor which shall not only indicate any progress of the case, but also specific reason for detention of the accused, shall also be mentioned required beyond the period of 180 days. One such is the statutory compliance. The Court may extend the judicial remand, but when no such report is filed along with the request of the judicial remand, the accused cannot be detained further and based on the principle laid down in **Uday Mohanlal Acharya v. State of Maharashtra**¹⁵ and **Sanjay Kumar Kedia**¹ case, the learned single Judge of this Court held that a petition filed under Section 397(2) Cr.P.C is maintainable and allowed the petition.

Learned counsel for the petitioner Sri Duvvuri Suryanarayana, fairly conceded that the order granting bail, either pre-arrest, regular or statutory bail under Section 167(2) Cr.P.C is only interlocutory in nature and when such revision is barred under Section 397, in view of Clause (2), the petition under Section 482 Cr.P.C is maintainable.

In “**Girish Kumar Suneja v. C.B.I**”¹⁶, full Bench of the Supreme Court had an occasion to decide the similar question and held as follows:

“The second reason why **Amar Nath v. State of Haryana**¹⁷ is important is that it invokes the principle, in the context of criminal law, that what cannot be done directly cannot be done indirectly. Therefore, when Section 397(2) of the Code of Criminal Procedure prohibits interference in

¹⁵ AIR 2001 SC 1910

¹⁶ AIR 2017 SC 3620

¹⁷ AIR 1977 SC 2185

respect of interlocutory orders, Section 482 of the Code of Criminal Procedure cannot be availed of to achieve the same objective. In other words, since Section 397(2) of the Code of Criminal Procedure prohibits interference with interlocutory orders, it would not be permissible to resort to Section 482 of the Code of Criminal Procedure to set aside an interlocutory order. This is what this Court held:

While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred Under Sub-section (2) of Section 397 of the 1973 Code the inherent powers contained in Section 482 would not be available to defeat the bar contained in Section 397(2). Section 482 of the 1973 Code contains the inherent powers of the Court and does not confer any new powers but preserves the powers which the High Court already possessed. A harmonious construction of Sections 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred Under Section 397(2) and cannot be the subject of revision by the High Court, then to such a case the provisions of Section 482 would not apply. It is well settled that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject-matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers.

This view was reaffirmed in **Madhu Limaye v. State of Maharashtra**¹⁸ when the following principles were approved in relation to Section 482 of the Code of Criminal Procedure in the context of Section 397(2) thereof. The principles are:

- (1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;
- (2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;
- (3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

Therefore, it is quite clear that the prohibition in Section 397 of the Code of Criminal Procedure will govern Section 482 thereof. We endorse this view.”

In any view of the matter, the Apex Court in **Girish Kumar Suneja**⁵, wherein, the full Bench of the Supreme Court had an occasion to decide the similar subject and held as follows:

“When Section 397(2) prohibits interference in respect of interlocutory orders, Section 482, cannot be availed of to achieve same objective. In other words, since Section 397(2) prohibits interference with interlocutory orders, it would

¹⁸ AIR 1978 SC 47

not be permissible to resort to Section 482. To set aside an interlocutory order prohibition in Section 397 will govern Section 482 thereof. In the present case, although, appellants might have an entitlement (not a right) to file a revision petition in High Court but that entitlement can be taken away and in any event, High Court is under no obligation to entertain a revision petition – such a petition can be rejected at threshold. If High Court is inclined to accept revision petition it can do so only against a final order or an intermediate order, namely, an order which if set aside would result in culmination of proceedings. There appear to be only two such eventualities of a revisable order and in any case only one such eventuality is before Supreme Court. consequently result of paragraph 10 of order dated 25.07.2014 passed by Supreme Court is that entitlement of appellants to file a revision petition in High Court is taken away and thereby High Court is deprived of exercising its extraordinary discretionary power available under Section 397 of the Cr.P.C. However, it does not mean that appellants have no remedy available to them – paragraph 10 of order dated 25.07.2014 does not prohibit appellants from approaching Supreme Court under Article 136 of Constitution. Therefore all that has happened is that forum for ventilating grievance of appellants has shifted from High Court to Supreme Court. Mere fact that Supreme Court could dismiss petition filed by appellants under Article 136 of Constitution without giving reasons does not necessarily lead to conclusion that reasons will not be given or that some equitable order will not be passed. Thus, if an interlocutory order is not revisable due to the prohibition contained in Section 397(2) that cannot be circumvented by resort to Section 482”.

In view of the law declared by the Supreme Court in **Girish Kumar Suneja**⁵ case, where no revision is maintainable against interlocutory order, in view of bar under Section 397(2) Cr.P.C, similarl petition under Section 482 Cr.P.C is also not maintainable.

The Apex Court considered the principles laid down both in **Amar Nath**¹⁷ & **Madhu Limaye**¹⁸ cases and other judgments and finally concluded that, when a revision is barred against an interlocutory order, in view of Subsection (2) of Section 397 Cr.P.C, a petition under Section 482 Cr.P.C is not maintainable. Moreover, the Full Bench of the Apex Court took note of the law declared by the Constitutional Bench in other judgments to consider those

principles, arrived at such conclusion. The judgment of Full Bench of Apex Court is recent in time and it is binding precedent. When the Apex Court considered the judgments relied on by the learned counsel for the petitioner in **Madhu Limaye**¹⁸ case, and if the law laid down in the above judgment is applied strictly, the petition under Section 482 Cr.P.C is not maintainable. Therefore, on this ground alone, the petition is liable to be dismissed, as contended by the learned Special Public Prosecutor for respondent/DRI.

Learned counsel for the petitioner Sri Duvvuri Suryanarayana made a sincere attempt to distinguish the facts of the above case i.e. in **Girish Kumar Suneja**⁵ with the facts of this case, since the matter was decided by the Supreme Court and all the objections are directed to be filed before the Apex Court actually and the Court can pass appropriate orders by exercising power under Article 136 of Constitution of India, as such, the law declared by the Apex Court cannot be applied to the present facts of the case. But, I am unable to agree with this contention for the reason that, the facts are not relevant and the principle laid down by the Apex Court is relevant to decide the maintainability of this petition filed under Section 482 Cr.P.C that the order under challenge is not revisionable, in view of the bar under Section 397(2) Cr.P.C. Therefore, based on the law laid down by the Apex Court in **Girish Kumar Suneja**⁵ case, the law declared by the Apex Court cannot be applied to the present facts of the case is unsustainable. Even if the facts are distinguished, the law declared by the Apex Court i.e. the ratio laid down by the Court is binding

on this Court and consequently, the petition under Section 482 Cr.P.C cannot be maintained.

Learned counsel for the petitioner contended that the Court cannot close the forums to redress the grievance of the petitioner by laying such procedure which amounts to depriving a person from redressing his grievance in appropriate forum. But, I am unable to accept this contention, since the legislature itself created fetter on the power of this Court and this Court is bound to exercise power within the four corners of the law laid down by the legislature in its wisdom. The Apex Court interpreted the law by following the judgment in **Madhu Limaye**¹⁸ case, since the law declared in **Girish Kumar Suneja**⁵ is recent in time and it is a Full Bench Judgment and adverting to the principles laid down in various judgments, including **Madhu Limaye**¹⁸, this judgment is binding on this Court. Consequently, the present petition under Section 482 Cr.P.C against the order of refusal to grant statutory bail is not maintainable.

In **Rakesh Kumar Paul v. State of Assam**¹⁹, the Supreme Court of India held that, an indefeasible right to default bail accrues on expiry of prescribed period of investigation, where no charge-sheet is filed. Such a right continues till filing of charge sheet and cannot be frustrated by prosecution on any pretext. If the right is not availed of, it gets extinguished, on filing of charge-sheet and accused cannot claim a resuscitation of it then. The

¹⁹ 2017 (3) ACR 2474

Apex Court further held that practice of prosecution and of courts of frustrating the indefeasible right is deprecated.

If, the accused is detained after period fixed under Section 167 Cr.P.C, he is liable to be enlarged on statutory bail. But, the Court below committed an error in dismissing the petition. However, this Court by exercising power under Section 482 Cr.P.C, though, it conferred inherent jurisdiction to give effect to the orders passed to prevent abuse of process of law and to secure the ends of justice.

Though, I am of the clear view that the order passed by the Court below is contrary to the principle laid down by the Apex Court, but, I am unable to exercise my jurisdiction, in view of the law declared by the Apex Court in **Girish Kumar Suneja**⁵. Hence, I find no ground to quash the proceedings in CrI.M.P.No.3665 of 2017 in **F.No.DRI/HZU/VRU/48-F/ENQ-16 (int-32)/2016** dated 01.09.2017

The D.R.I officials/respondent, though investigated into the offences committed, filed their request for extension of time to complete investigation and file final report before the Court below, this approach directly highlighted the negligence on the part of the officials in taking steps to get extension of time to complete investigation and file final report. However, it is difficult to know whether this lapse is intentional or negligent. If it is intentional, the officials must reap the consequences of such intentional lapse in discharging the duties in serious crime of this nature.

In view of my foregoing discussion, I find no ground to quash the proceedings in CrI.M.P.No.3665 of 2017 in F.No.DRI/HZU/VRU/48-F/ENQ-16 (int-32)/2016 dated 01.09.2017, consequently, the petition is liable to be dismissed.

In the result, the criminal petition is dismissed.

Consequently, miscellaneous petitions pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Dated:06.12.2017

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