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

Reserved on: May 03, 2017
Pronounced on: May 22, 2017

+ CrI.A. 311/2017 & CrI.M.(Bail) 525/2017

RAMBEER SHOKEENAppellant
Through: Mr. Mehmood Pracha, Adv.
with R.H.A. Sikander & Mr.
Prateek Gupta, Advs.

Versus

STATE OF NCT OF DELHI Respondent
Through: Mr. Rajesh Mahajan, Addl.
Standing Counsel for the
State.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

ORDER

1. The appellant was arrested on 1.12.2016 during investigation of the first information report (FIR) 10/2015 of police station Special Cell, Delhi for offences punishable under Sections 3 and 4 of the Maharashtra Control of Organised Crime Act, 1999, as extended to Delhi ("MCOCA", for short) and came to be remanded to custody by orders of an additional sessions judge who had been appointed as the presiding officer of the Special Court under MCOCA in terms of Section 5, such custody having been extended from time to time. By the criminal appeal at hand, presented under Sections 12 MCOCA, also invoking Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.), he challenges certain orders passed by the District and Sessions Judge, New Delhi and the

additional sessions judge presiding over the Special Court MCOCA in the said case, primarily contending that his continued remand to judicial custody beyond 1.3.2017 is illegal and that he is entitled to release on bail on account of default on the part of the investigating police agency in completing the investigation and filing its report under Section 173 Cr.P.C. within the statutory period and thereby giving rise to right of release on bail in his favour in terms of the proviso to Section 167 (2) Cr.P.C.(commonly known as “bail by default”).

2. MCOCA is a special law enacted with the objective to make special provisions “*for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang, and for matters connected therewith or incidental thereto.*” The expression “*organized crime*” is defined in Section 2(e) and is made a penal offence under Section 3. The law also conceives of organized crime being committed by, *inter alia*, an “*organized crime syndicate*”, an expression defined in Section 2(f), possession of unaccountable wealth on behalf of a member of such organized crime syndicate being also an offence in terms of Section 4. The offences punishable under this Act are triable only by a special court, constituted under Section 5, though it is clarified by Section 7 that such special court while trying an offence punishable under MCOCA may also try any other offence with which the accused may be charged at the same trial. The provisions contained in Section 6 and 9 MCOCA prescribe the jurisdiction, procedure and powers of the special court. The judgment, sentence or any order, not being an interlocutory order, of the special court is subject to

appeal before this Court under Section 12. There are detailed provisions conferring certain special powers and authorization on the police empowered to investigate the crimes under this law.

3. Section 21 MCOCA is of special interest to the proceedings at hand in that it modifies certain procedures of the Code of Criminal Procedure for purposes of the cases under MCOCA. Particularly sub-section (2) of Section 21, being germane to the issues raised here, reads thus:-

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in sub-section (2),—

(a) the references to “ fifteen days ”, and “ sixty days ”, wherever they occur, shall be construed as references to “ thirty days ” and “ ninety days”, respectively ;

(b) after the proviso, the following proviso shall be inserted, namely :—

“Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period upto one hundred and eighty days, 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 ninety days.”.

4. The Code of Criminal Procedure, 1973 deals with the subject of “*information to the police and their powers to investigate*” in chapter XII. After the information relating to commission of cognizable offence is reduced into writing in terms of Section 154, commonly known as FIR, the police has the power to investigate in terms of Section 156. During such investigation, and subject to certain other provisions regulating such power (detailed provisions

being contained in Chapter V of Cr.P.C.), the investigating police officer, in the event of causing arrest or detaining a person in custody, is obliged by the conjoint effect of Sections 57 and 167 (1) Cr.P.C., as indeed command of Article 22 (2) of the Constitution of India, to produce the arrestee (or detainee) before the nearest judicial magistrate forthwith, not beyond twenty four hours exclusive of the time necessary for the journey to be undertaken for such purposes, to seek authorization for continued detention of such person in custody.

5. Section 167(2) Cr.P.C., being relevant for present discussion, may be quoted as under:-

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the 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;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention”.

6. Section 21 (1) of MCOCA declares that every offence under this special law shall be deemed to be “*cognizable offence*” within the meaning of Section 2(c) Cr.P.C. and “*cognizable case*” as defined in the said provision of law shall be construed accordingly.

To put it simply, the effect is that the offences under Sections 3 and

4 MCOCA are cognizable offences and in such a cognizable case, the empowered investigating police officer (Section 23) is authorized to cause arrest “without warrant”.

7. By virtue of Section 9, the special court under MCOCA is empowered to take cognizance of an offence under this law without the accused being committed to it for trial either upon receiving the complaint of facts constituting such offence or upon a police report of such facts. The conjoint effect of various provisions of this special law is that the authorization for detention in the custody (police or judicial) of the person arrested in terms of Section 167 Cr.P.C. is considered and granted by the special court, this being amply clear from the second proviso added to Section 167 (2) Cr.P.C. by Section 21 (2) (b) MCOCA quoted above. What also stands out from the modified application of specified provisions of Cr.P.C. in terms of Section 21 MCOCA is the fact that for purposes of MCOCA the remand to police custody may extend to thirty days (instead of fifteen days ordinarily permissible) while the investigating police is expected to complete the investigation within a total period of ninety days where the accused has continued to be detained in custody. The second proviso added to Section 167 (2) Cr.P.C. by Section 21(2) (b) MCOCA, however, permits the said period of ninety days to be extended upto one hundred and eighty days, if the special court, is satisfied “*on the report of the public prosecutor*” that “*it is not possible to complete the investigation*” within ninety days, such report of public prosecutor to mandatorily indicate the “*progress of the investigation*” and also set out

“specific reasons for the detention of accused beyond the said period of ninety days”.

8. The net effect of the modified provision of Section 167 Cr.P.C., in relation to an investigation under MCOCA, is that the investigating police officer having arrested a person and obtained orders authorizing the detention of the arrestee in custody is expected to complete the investigation within the period of ninety days, on expiry whereof the arrestee (accused) is entitled to be released on bail by default. But, if public prosecutor makes a report in terms of second proviso to Section 167(2) Cr.P.C. referred to above and the court is satisfied with the progress of the investigation and the reasons for which continued detention of the arrested accused beyond the period of ninety days, the said period of ninety days for completion of investigation may be extended upto one hundred and eighty days. In case the special court does allow the extension of the period for completion of investigation beyond ninety days within its jurisdiction under the second proviso to Section 167(2) Cr.P.C. the arrestee or detainee (accused) cannot claim bail by default on the expiry of ninety days, such right, by virtue of the order of extension, being postponed to the expiry of the extended period that has been allowed, the cap, of course, being the period of one hundred and eighty days.

9. Before coming to the issues of law which arise for consideration, the background narrative must be set out at this stage. As noted at the outset, the appellant was arrested in this case on 1.12.2016. Since the arrest is in a case involving cognizable offences under MCOCA, the period of ninety days would apply for

purposes of regulating his continued detention in terms of modified provision of Section 167 Cr.P.C. There is no dispute that 1.3.2017 would be the ninetieth day.

10. By virtue of order dated 20.02.2017, the remand to judicial custody of the appellant had been extended by the special court till 28.2.2017. On 28.2.2017, three applications were moved. One application was by the public prosecutor praying for the period of “filing charge-sheet” against the appellant to be “extended upto 15.3.2017”, this being in the nature of “report” envisaged by the second proviso to Section 167(2). The second application was moved by the investigating officer seeking extension of the judicial custody. The additional sessions judge presiding over the special court passed the following order *vis-à-vis* the two applications:

“28.2.2017

*Present: Shri Ravindra Kumar, Ld. APP for State
Shri Mehmood Pracha, Shri R.H.A.
Sikander and Shri Prateek Gupta counsels
for accused Rambeer Shokeen
Accused from JC.
ACP Special Cell Hirdey Bhushan in
person.*

*An application for further extension of JC beyond
90 days and for seeking further extension of time for
investigation beyond period of 90 days.*

JC is extended till 01.03.2017.

*Put up with main file for arguments on this
application on 01.03.2017.*

Copy of Order be given dasti.”

11. The third application moved on 28.2.2017 was on behalf of the appellant seeking release on bail in terms of Section 167(2) Cr.P.C. claiming the period of ninety days had expired. This

application was kept pending to be considered later. It may be added here that the said application would eventually be dismissed by the special court by order dated 14.3.2017.

12. On 1.3.2017, the additional sessions judge presiding over the Court was on leave of absence from duty. The report of the public prosecutor for extending the period of investigation moved on 28.2.2017, and a fresh application of the investigating officer for extension of the judicial custody, were placed before the District and Sessions judge, New Delhi. He passed the following order:-

“01.03.2017

File is put up before me Sh. Rakesh Pandit, Ld. Special Judge, NIA/POCSO/MCOCA, ASJ-01.

PHC, New Delhi is on leave today on account of unwellness.

Present: Sh. Devender Kumar, Ld. Chief PP for the State alongwith Sh. Ravindra Kumar, Ld. Addl. PP Hridaya Bhushan.

Accused produced from JC.

Sh. Mehmood Pracha and Sh. R.H.A. Sikander, Ld. Counsels for the accused Rambeer Shokeen.

Reply has been filed on behalf of accused Rambeer Shokeen to the application moved on behalf of the State seeking extension of time for filing the charge sheet. Copy supplied. An application has been moved on behalf of State seeking extension of JC of the accused above named.

As Ld. Presiding Officer is on leave, Judicial custody of the accused Rambeer Shokeen is extended till 07.03.2017. Merits of the application dated 28.02.2017 shall be decided by the concerned court.

Ld. Chief PP for the State submits that he has not been supplied with the copy of the application moved on behalf of the accused Rambeer Shokeen under Section 167 (2) of Cr.P.C. seeking grant of statutory bail. The Ld. Counsel for the accused is directed to supply the copy

of the same during the course of the day against proper receipt.

Put up on 07.03.2017 for further proceedings.”

13. On 2.3.2017, the appellant moved another application seeking release on bail under Section 167(2) Cr.P.C. The Additional Sessions Judge presiding over the special court listed it for consideration on 7.3.2017.

14. On 4.3.2017, the investigating officer moved an application seeking permission of the special court to “interrogate” the appellant in jail against the background of facts concerning declarations statedly made by him about his immovable and moveable assets in the affidavit submitted before the election commission in the context of election to Delhi Legislative Assembly wherein he was a candidate. This request was also placed before the District and Sessions Judge on 4.3.2017 since the additional sessions judge presiding over the special court was away to Cuttack, Odisha to participate in National Judicial Seminar, upon being nominated by this Court. The District and Sessions Judge, by a detailed order passed on 4.3.2017, permitted such interrogation in judicial custody, before expiry of the judicial remand which had been granted earlier till 7.3.2017.

15. On 7.3.2017, the report of the public prosecutor, moved on 28.2.2017, for extension of the period of investigation in terms of second proviso to Section 167 (2) Cr.P.C. and the application of the appellant, moved on 2.3.2017, for release on bail by default in Section 167(2) Cr.P.C. were taken up for consideration. Arguments were heard by the special court and the order reserved to be

pronounced on 8.3.2017, the judicial custody of appellant being extended till such date.

16. It is admitted fact that a report under Section 173 Cr.P.C. seeking prosecution of the appellant (charge-sheet) was submitted in the special court by the investigating officer and the special court, by order passed on the said report on 8.3.2017, took cognizance, adjourning the case to 18.3.2017, extending the judicial remand accordingly. The order passed by the special court on 8.3.2017 reads thus:-

*“Present: Sh. Ravindera Kumar Ltd. APP for State.
Sh. Mehmood Pracha, Sh. R.H.A. Sikander and
Prateek Gupta Counsel for accused Rambeer
Shokeen.
IO ACP Hirdey Bhushan in person.
Accused Ramber Shokkeen from JC.*

*Supplementary charge-sheet filed with respect to
accused Ramber Shokeen.*

*Charge-sheet perused. I take cognizance of the
offences involved.*

*Copies of documents supplied with respect to the
charge-sheet against Rambeer Shokeen. Time
sought by IO to supply copy of earlier charge-
sheet against other accused persons. Same be
supplied within 7 working days.*

*Put up for scrutiny of documents on
18.03.2017.*

*Considering the fact that supplementary
charge-sheet has already been filed against the
accused Ramber Shokeen, so the application
regarding extension of time dated 28.02.2017
become infructuous and thus dismissed as
infructuous.*

*Put up for arguments/order on application
u/sec. 167 (2) Cr.P.C. on 09.03.2017.”*

17. The application of the appellant for release on bail by default under Section 167 (2) was taken up for further arguments on 9.3.2017 and 14.3.2017. It was dismissed by order passed on 14.3.2017, *inter alia*, observing that since the prosecution had already moved the application (report) on 28.2.2017 there was no lapse on the part of the investigating agency and since the District and Sessions Judge had extended the judicial custody by his order dated 1.3.2017, there was no illegality attached to the continued custody, and consequently the right to statutory bail by default had not accrued.

18. By the appeal at hand, challenge is brought to the orders dated 1.3.2017 and 4.3.2017 of the District and Sessions Judge, New Delhi and orders dated 7.3.2017 and 14.3.2017 of the special court under MCOCA.

19. The respondent-State has submitted its response in the form of status report of the investigating police officer. Arguments on both sides have been heard at length in the light of facts and circumstances set out above.

20. One of the prime contentions urged on behalf of the appellant at the hearing on the matter at hand has been that the request for extension of time for filing the charge-sheet against the appellant till 15.3.2017, submitted by the additional public prosecutor before the special court on 28.2.2017, was not in proper compliance of the requirements of second proviso to Section 167 (2) Cr.P.C., reliance in this context being placed on the law laid down in *Hitendra Vishnu Thakur & ors. vs. State of Maharashtra & Ors.* 1994 (4) SCC 602 in the context of similar provisions contained in Section

20 (4) (bb) of Terrorist and Disruptive Activities (Prevention) Act, 1987 (“TADA, 1987” for short). Pertinent to mention here that by virtue of similar provision in TADA 1987 for purposes of crimes under the said special law, the second proviso to Section 167 (2) Cr.P.C. was to be read as modified wherein the maximum period upto which the investigation could continue, after arrest and detention of the accused, for period of one year, the extension beyond the period ordinarily available being contingent upon authorization by the special court constituted under the said law, on the report of the public prosecutor, an arrangement identical to the one prescribed by Section 21(2) (b) of MCOCA. The Supreme Court in *Hitendra Vishnu Thakur* (supra) made the following observations with regard to the procedure to be followed for such purposes, in the context of TADA, 1987:

“23. We may at this stage, also on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public

prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation

necessary. The use of the expression “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” as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court ‘shall’ release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the justification, from the report of the public prosecutor,

to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes infeasible and cannot be defeated by reasons other than those contemplated by sub-section (4) of Section 20 as discussed in the earlier part of this judgment.

... Whether the public prosecutor labels his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the face of it that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (supra).

...no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension.

(emphasis supplied)

21. The afore-quoted observations of the Supreme Court in the context of identical provision contained in TADA, 1987 on the subject of extension of the period of investigation for purposes of Section 167(2) regulating the continued detention in custody of the accused, having a bearing on his right to statutory bail by default hold good in relation to the procedure to be followed during investigation of offences under MCOCA.

22. What is, thus, requisite is report of the public prosecutor which is based on “scrutiny” by him of the “progress” of the investigation undertaken, the objective being to ensure that the accused is not kept in continued detention unnecessarily because of “prolonged investigation at the whims of the police”. The public prosecutor being “not part of the investigating agency”, instead being an “independent statutory authority” is expected to submit such a report after he has “independently” applied his mind to the request of the investigating agency. The public prosecutor may even refuse to make a report for such extension of the period of investigation. Conversely, should he be satisfied, he may submit a report seeking extension. His report must indicate “the progress of the investigation” and “specific reasons” for the necessity of continued detention of the accused in custody. The report envisaged in the second proviso to Section 167 (2) Cr.P.C. is not dependent on a form. Instead, it is vital report of import with consequences and, therefore, “*one of substance*”. Even if it is styled or labelled as an application, if it meets the twin requirement mentioned above, it is a “report” within the meaning of the statutory provision.

23. It must be added that the special court acts “on the report” of the public prosecutor and not on the application of the investigating agency. Undoubtedly, the public prosecutor, in normal course, would be making a report for extension of the period on being approached with a request of the investigating police. The public prosecutor may attach the request in writing made to him by the investigating police officer with his report submitted to the special

court. But, it is not the application of the investigating officer which comes up for consideration by the special court. Instead, it is the report of the public prosecutor on which the court either grants or declines the extension of period of investigation for reasons to be recorded. From this, it is clear that mere forwarding or endorsing the application of the investigating police officer by the public prosecutor is not sufficient. He must make his own report. His report must satisfy the twin criteria mentioned above. The fact that the public prosecutor has not attached the request in writing of the investigating officer made to him for submitting such a report is of no consequence for the reason, it may be re-stated at the cost of reputation, that the special court acts on the “*report of the public prosecutor*” and not at the instance or an application of the investigating police officer.

24. The status report submitted by the respondent/State indicates that the case FIR No. 10/2015 was registered for investigation into offences under Sections 3 and 4 of MCOCA on 23.2.2015 against the backdrop of inputs that an inter-state gang was running a crime syndicate for committing a series of sensational crimes including murders, extortion, criminal intimidation, obstruction of public servants to deter them from discharging their official duties and offences under Arms Act in Delhi and certain other States, the investigation statedly revealing the involvement of the appellant as an active member of the organized crime syndicate, he allegedly having been found involved in a number of connected cases including FIR No. 308/2007 under Sections 341/325/34 IPC police station Nangloi, Delhi; FIR No. 575/2014 under Sections

147/148/149/395/397/120-B/34 IPC, police station Kotwali, Baghpat, UP; FIR No. 35/2015 under Sections 384/34 IPC, police station Special Cell, Delhi and FIR No. 65/2016 under sections 25/27/54/59 Arms Act, police station Special Cell, Delhi. It is pointed out in the status report that initial efforts to trace the appellant, a member of Legislative Assembly of Delhi, could not succeed and he came to be declared a proclaimed offender by the special court. He was arrested on 27.11.2016 in FIR No. 65/2016 mentioned above and formally arrested in the present case on 1.12.2016.

25. The request submitted by the public prosecutor on 28.2.2017 seeking extension of the period for filing charge-sheet against him in this case till 15.3.2017, briefly referred to the report of the investigating officer that had been submitted before him (the public prosecutor) and upon its perusal the brief background facts were mentioned indicating certain steps that had been taken to collect evidence with regard to the income and assets of the appellant. The public prosecutor informed the special court by the said request in writing that investigation of the case was to be conducted, *inter alia*, by his “further interrogation” as to the source of money for acquiring the assets worth Rs. 1.85 crores as had been declared to be held by him and his wife to the Election Commission at the time of contesting the election to Delhi Legislative Assembly in 2013, income-tax returns not having been filed by him or his wife during 2006-2016.

26. Pertinent to mention here that the request for interrogation of the appellant in custody made by the investigating officer on

4.3.2017, granted on the same date by the District and Sessions Judge, was for the same reasons and on the same grounds as were set out by the public prosecutor in his request submitted on 28.2.2017.

27. It is true that the request of the public prosecutor submitted on 28.2.2017 is not captioned as “report” nor does it specifically refer to the provision contained in the second proviso to Section 167 (2) Cr.P.C. But, this cannot be construed as a deficiency. It has to be borne in mind that it is not a matter of form but one of substance. The request in writing dated 28.2.2017 of the additional public prosecutor satisfies the twin criteria of the second proviso to Section 167 (2) Cr.P.C. It indicates that the public prosecutor had subjected the investigating officer’s report as made to him to scrutiny and also informed the court the progress of the investigation and setting out the reasons why the continued detention of the appellant in custody was necessary. Therefore, it has to be accepted as a “report” of the public prosecutor satisfying the requirements of second proviso to Section 167 (2) Cr.P.C. Whether or not, in the facts and circumstances of the case, as prevailing on the date such report was submitted to the special court will have to be considered separately.

28. As noted above, the appellant had moved an application under Section 167(2) Cr.P.C. for release on bail by default under Section 167(2) Cr.P.C. on 28.2.2017. It is fairly conceded by the learned counsel for the appellant that such application moved on 28.2.2017 was premature as ninety days would expire only on 1.3.2017.

29. On 28.2.2017, besides the application of the investigating officer seeking extension of the custody period of the appellant, the report of the public prosecutor for extension of the period of investigation had come be submitted to the special court. Without doubt, the report could be considered before expiry of the period of ninety days or on the last day of such period ordinarily available which would be 1.3.2017. The special court, within its judicial discretion, decided to postpone the consideration to the following date i.e. 1.3.2017. It is reflected in the order passed on 1.3.2017 by the District and Sessions Judge, as extracted earlier, that the additional sessions judge presiding over the special court was indisposed and, therefore, on leave of absence on 1.3.2017. The District and Sessions Judge, before whom the file was placed for consideration of the report of the public prosecutor and the application of the investigating officer, decided to defer the former to 7.3.2017 for it to be “*decided by the concerned court*” while extending the judicial custody for such period. Questions have been raised as to the competence of the District and Sessions Judge to deal with this case under MCOCA on the plea that the judicial officer presiding over the court of District and Sessions Judge was not designated as a special court in terms of Section 5 MCOCA.

30. The learned additional standing counsel representing the respondent-State, however, placed reliance on notification promulgated and published in the Delhi Gazette, by order and in the name of the Lieutenant Governor of National Capital Territory of Delhi, on 15.9.2010 to the following effect:-

“(TO BE PUBLISHED IN DELHI GAZETTEE
PART –IV EXTRA ORDINARY)
GOVERNMENT OF NATIONAL CAPITAL
TERRITORY OF DELHI
DEPARTMENT OF NATIONAL CAPITAL
TERRITORY OF DELHI
DEPARTMENT OF LAW, JUSTICE AND
LEGISLATIVE AFFAIRS
8th LEVEL, C-WING, DELHI SECRETARIAT, I.P.
ESTATE, NEW DELHI -110002
NO. f.6(33)2009-JUDL./1125-1131 DATED
TO THE 15th September, 2010

NOTIFICATION

NO.F.6(33)/2009-Judl./ In exercise of powers conferred by sub-section (4) of section 9 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act 28 of 1987), sub-section (4) of section 23 of the Prevention of Terrorism Act, 2002(Act 15 of 2002), Section 3 of the Maharashtra Control of Organized Crimes Act, 1999 as extended to the National Capital Territory of Delhi, section 14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act 33 of 1989), section 5-B of the Suppression of Unlawful Act against safety of Civil Aviation Act, 1982 (Act 66 of 1982), section 6-A of the Anti-Hijacking Act, 1982 (Act 65 of 1982), sub-section(2) of section 36 of the Narcotics Drugs and psychotropic Substances Act, 1985 (Act 61 of 1985), sub-section (2) of section 153 of the Electricity Act, 2003 (Act 36 of 2003), sub-section (1) of section 3 of Prevention of Corruption Act, 1988, section 7 & 7A of Industrial Disputes Act, 1947 and section 3(3) of the Land Acquisition Act, 1984 and in consultation with the Chief Justice of the High Court of Delhi, the Lt. Governor of the National Capital Territory of Delhi, hereby confers the powers of Presiding Officer of the Designated court and Special Court constituted under the aforesaid acts on each of the officers of the Delhi Higher Judicial Service, to be exercisable by each of them with

effect from the date of assumption of the charge of the post of Presiding Officer or Judge of the Designated Court or Special Court, as the case may be, in pursuance of the transfer or posting orders made by the Chief Justice of the Delhi High Court.

*By order and in the Name of the
Lt. Governor of National
Capital Territory of Delhi
(Savita Rao)
Special Secretary (Law, Justice & L.A.)”*

31. It is noted that in the above notification, reference is made to Section 3 MCOCA. Apparently, it was a clerical error. The provision contained in Section 3 MCOCA relates to punishment for organized crimes. The subject matter of the notification being conferral of powers of presiding officer of the special court under MCOCA, the correct reference would have been to Section 5 MCOCA. In the considered view of this Court, such a clerical error cannot render the notification bad in law. Notification, thus, is read by ignoring reference to Section 3.

32. Noticeably, by the above-quoted notification, the Lieutenant Governor of National Capital Territory of Delhi, in consultation with the Chief Justice of the High Court of Delhi, was pleased to confer on each member of Delhi Higher Judicial Service, the powers of the presiding officer, *inter alia*, of the special court under MCOCA, as extended to NCT of Delhi, though qualifying such conferral of powers to be exercised “*with effect from the date of assumption of the charge*” of such post in pursuance of “*transfer or posting orders by the Chief Justice of the Delhi High Court*”.

33. Per the submissions of the learned additional standing counsel, the concerned District and Sessions Judge, New Delhi

being an officer of Delhi Higher Judicial Service, was also a judicial officer on whom powers of the presiding officer of the special court under MCOCA had been conferred and, therefore, had the necessary jurisdiction to deal with the matter at hand, as he did on 1.3.2017 and 4.3.2017, in absence of the additional sessions judge, who was actually posted as the presiding officer in the special court on such dates. He argued, in the alternative, that in his capacity as the Sessions Judge presiding over the court of sessions, as the head of the judicial apparatus of the district, the additional sessions judge presiding over the special court being a court under his administrative control, it was his obligation to make provision for the disposal of the urgent judicial business in the event of absence or inability to act on the part of the additional sessions Judge. He referred to the provision contained in Section 408 and 409 Cr.P.C. which confers the power on the Sessions Judge to “withdraw” or “transfer” any case or appeal from one criminal court to the other in his sessions division, the submission being that the Sessions Judge, having the jurisdiction to transfer any particular case from one criminal court to the other in his sessions division, also had the power to withdraw any case from any criminal court in his sessions division and allocate the matter to himself to deal with the matter that required urgent consideration and decision. The argument of the learned standing counsel was that the power to withdraw or transfer of the case from a criminal court, and its allocation to another criminal court, includes the power to do so for limited purposes of dealing with pending application or, as he put it, “temporarily”.

34. The learned additional standing counsel for State also relied on the decision of a division bench of Bombay High Court rendered on 6th July, 2006 in case of *Abdul Rasheed Sikandarasab Kulkarni & Ors. vs. the State of Maharashtra & Anr.* in W.P.(Crl. 1306/2006 arising out of some-what similar situation under MCOCA. It appears that there were two special courts constituted under MCOCA at Pune, the second being that of additional special judge. The two judicial officers presiding over the special court and additional special court respectively were to proceed on leave and the judge of the special court being the principal judge, in exercise of his power under Section 5(5) MCOCA had passed an order handing over the charge of the special court to another judicial officer, posted at Pune as the third additional district and sessions judge. The said (third) additional district and sessions judge, in exercise of power conferred upon him under Section 5(5) MCOCA by the presiding over of the special court, passed an order remanding an accused in a case under MCOCA to further custody. It was the legality and validity of the said remand order which was brought in question through the writ petition before the Bombay High Court primarily on the ground that the judge who had passed the order had not been “*validly appointed*” under MCOCA by the State Government under Section 5(3).

35. The division bench of the Bombay High Court dismissed the petition, repelling the above said challenge, holding that the order of remand was “*not void in law and must be given effect to*” referring, *inter alia*, to “*de facto doctrine*”, a doctrine of necessity and public policy relying upon the decision of the Supreme Court in

Gokaraju Rangaraju vs. State of Andhra Pradesh (1981) 3 SCC 132, which, in turn, had relied on exposition on the subject in Cooley's Constitutional Limitations, Eighth Edition, Volume 2, P.1355, *inter alia*, to the effect that an officer *de facto* is one who by some colour or right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact, eventually holding that judgments and orders of the Judge appointed as a Court of Sessions would be those of the Court of Sessions, notwithstanding that his appointment in such Court might be declared invalid. The division bench of Bombay High Court in *Abdul Rasheed Sikandarab Kulkarni* (supra) declined to hold the remand order to be void observing that the judge who had passed it had been conferred with the powers of the special court by virtue of he holding the office of additional sessions Judge, although as a result of a mistake in law, also referring to the following observations of the Supreme Court (in para 21) in decision reported as *Pushpadevi M. Jatia vs. M.L. Wadhawan (1987) 3 SCC 367*, which, in turn, had followed *Gokaraju Rangaraju* (supra) :-

“Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. The official acts of such persons are recognized as valid under the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief”

36. *Per contra*, the learned counsel for the appellant submitted that the notification dated 15.9.2010, of the Lieutenant Governor of Delhi, which has been extracted earlier, had conferred the power on

members of Delhi Higher Judicial Service with the rider that the same would be exercisable from the date of assumption of charge of the post of presiding officer of the special court, MCOCA, which, in turn, was contingent upon such officer being transferred to and posted in such court in such capacity by order to be issued by the Chief Justice of the High Court. His further argument is that the notification dated 15.9.2010, was bad in law inasmuch conferral of power could not be by virtue of one being an officer of the Delhi Higher Judicial Service. In his submission, the conferral of such power, jurisdiction or appointment must necessarily be “by name”. He also argued that the decision of the division bench of the Bombay High Court in *Abdul Rasheed Sikandarasab Kulkarni* (supra) cannot be a good precedent to be followed by this Court since, in contrast to such case, there was no such order issued under Section 5(5) MCOCA by the presiding officer of the special court.

37. To appreciate the arguments on both sides of the divide, it is necessary to take note of the provision contained in Section 5 MCOCA which reads as under:-

“5. Special Courts- (1) The State Government may, by notification in the Delhi Gazette, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

(2) Where any question arises as to the jurisdiction of any Special Court, it shall be referred to the State Government whose decision shall be final.

(3) A Special Court shall be presided over by a judge to be appointed by the State Government, with the concurrence of the Chief Justice of the Delhi High Court. The State Government may also appoint, with the

concurrence of the Chief Justice of the Delhi High Court, additional judges to exercise jurisdiction in a Special Court.

(4) A person shall not be qualified for appointment as a judge or an additional judge of a Special Court, unless he immediately before such appointment, is a sessions judge or an additional sessions judge.

(5) Where any additional judge is or additional judges are appointed in a Special Court, the judge of the Special Court may, from time to time, by general or special order in writing, provide for the distribution of the business of the Special Court among himself and the additional judge or additional judges and also for the disposal of urgent business in the event of his absence or the absence of any additional judges”.

38. Pertinent to note that in terms of Section 5(4), a person in order to be qualified for appointment as a judge or an additional judge of special court must be, immediately before such appointment, a sessions judge, or an additional sessions judge. Clearly, the District and Sessions Judge who passed the impugned orders in the present case was qualified to be appointed as a presiding officer of the special court under this provision of law. The provision contained in Section 5(5) MCOCA, as quoted above, is akin to the powers conferred on the Sessions Judge by the Code of Criminal Procedure to distribute the business amongst the criminal courts which are subordinate to him. In this context, a particular mention may be made of the power of the Sessions Judge, under Section 10(3) Cr.P.C., to “make provision for the disposal in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant

Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application”.

39. The provision of Section 5 (4) only prescribes the qualifications required to be satisfied by the person being appointed as a judge, or additional judge, of the special court under MCOCA. There is no requirement in this law for the appointment to be made mandatorily “by name”. In this context, the provision contained in Section 15 of the General Clauses Act, 1897 needs to be referred. It reads thus:-

“Power to appoint to include power to appoint ex-officio.—Where, by any Central Act or Regulation, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the commencement of this Act, may be made either by name or by virtue of office”.

40. It is well settled that a person can be specially empowered even by virtue of his office, expression “specially” having been interpreted to relate only to the mode of empowerment [*Abdul Husein Tayabali vs. State of Gujarat (1968) 1 SCR 597; State of Gujarat v. Chaturbhuj Maganlal (1976) 3 SCC 54*].

41. In above view, validity of the notification dated 15.9.2010 issued by the Lieutenant Governor of NCT of Delhi conferring powers on the officers of Delhi Higher Judicial Service, *inter alia*, in terms of MCOCA, such empowerment being “ex-officio”, cannot be questioned inasmuch it (conferral of jurisdiction or appointment) is so permitted by Section 15 of the General Clauses Act.

42. Whilst it is true that, in the present case, there was no order issued by the judge presiding over of the special court under Section 5(5) MCOCA, as was the case in *Abdul Rasheed Sikandarasab Kulkarni* (supra), this Court is informed that in each of the eleven sessions divisions of Delhi, one court of additional sessions judge has been vested with the jurisdiction to deal with cases under certain special laws including MCOCA. Thus, for purposes of New Delhi Sessions division, to which the case at hand pertained, the court of additional sessions judge-01 which was dealing with this case was the only special court under MCOCA for that area. It has to be borne in mind that the judicial officer presiding over was an additional sessions judge. He himself being subordinate to the sessions judge of the division, he could not have conceivably promulgated any order under Section 5 (5) MCOCA to confer jurisdiction to deal with urgent business relating to his special court on any other additional sessions judge or, upon his superior, the sessions judge.

43. The absence of any order under Section 5(5) MCOCA, cannot come to the aid of the appellant in the present case, for the reason, the sessions judge, was competent in law to deal with the matter under MCOCA. The Code of Criminal Procedure, 1973 applies across the board to all criminal jurisdictions, unless there are provisions to the contrary by any particular enactment that may be applicable to a particular case. Section 4 Cr.P.C., which makes it amply clear, reads thus:

“Trial of offences under the Indian Penal Code and other laws.— (1) All offences under the Indian Penal Code (45

of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

44. It is sub-section (2) of Section 4 quoted above which is relevant here. Noticeably, the application of the provisions of the Code of Criminal Procedure to a special law like MCOCA is subject to its special provisions, if any, governing the procedure.

45. As noted earlier, Section 21 MCOCA has modified the application of some provisions of Code of Criminal Procedure, 1973, for purposes of cases under this special law. The said provision generally relates to classification of the offences under MCOCA (Section 2 Cr.P.C), the procedure to be followed when investigation cannot be completed within twenty four hours (Section 167 Cr.P.C), and subject matter of release on bail of the person accused under MCOCA (Section 438 Cr.P.C) besides interrogation of a person in judicial custody by the investigating police officer. Pertinently, the modification to the provisions of Code of Criminal Procedure by MCOCA does not affect in any manner the power of the sessions judge to withdraw or transfer the cases or appeals from one criminal court to another in the same sessions division in terms of Section 408 and 409 Cr.P.C.

46. An officer of Delhi Higher Judicial Service is selected and appointed by the High Court to preside over the court of Sessions Judge, such appointment being under Section 9(2) Cr.P.C. By virtue of such appointment, the presiding judge of the court of sessions is conferred with the powers of withdrawal or transfer of cases and appeals from one criminal court to another in the same sessions division in terms of Section 408 and 409 Cr.P.C. There can be no dispute as to the fact that the court of additional sessions judge, and the special court under MCOCA, are criminal courts and by virtue of their position they stand in subordination to the court of Sessions Judge. Such courts being criminal courts within the meaning of the expression used in Section 408 and Section 409 Cr.P.C., withdrawal of judicial business from one such criminal court and its transfer to another criminal court lies within the jurisdiction and power of the Sessions Judge of the division. There is nothing in the provisions contained in Section 408 and 409 Cr.P.C. to indicate that there cannot be a temporary transfer of the case. To take a contrary view would be ignoring the *de facto doctrine* discussed earlier. For such interpretation, cue will also have to be taken from the provision contained in Section 10(3) Cr.P.C. wherein the Sessions Judge is expected to put in position provision for disposal of urgent judicial business, in the event of absence or inability to act on the part of the presiding judge of a criminal court referred to in that clause. Such provision for dealing with urgent business must necessarily be in the nature of *ad hoc* or temporary arrangement. If it were not to be so construed, it might lead to “needless confusion” and “endless mischief”, as was

envisaged in *Pushpadevi M. Jatia* (supra). Thus, the concerns of necessity and public policy demand that the power of the Sessions Judge to withdraw a case from one criminal court and transfer it to another criminal court temporarily for dealing with a matter of urgency will have to be read in his powers under Section 408 and 409 Cr.P.C.

47. The Sessions Judge, it must be again noted, in the present case, was also an officer of Delhi Higher Judicial Service. By virtue of the office he held, he had the necessary power and jurisdiction to transfer a case from one criminal court in his sessions division to another including to his own court.

48. In above view, when the Sessions Judge dealt with the case at hand on 1.3.2017 and 4.3.2017, in absence of the concerned additional sessions judge presiding over the Special Court, the orders passed by him were within the jurisdiction conferred upon him by virtue of the notification dated 15.9.2010 read with Sections 408 and 409 Cr.P.C.

49. Further issue raised, however, concerns the manner in which the report of the public prosecutor submitted before the special court under second proviso to Section 167 (2) Cr.P.C. was dealt with both by the Special Court and by the Sessions Judge.

50. It is the contention of the learned counsel for the appellant that a formal notice on the report of the public prosecutor seeking enlargement of time for investigation under second proviso to Section 167 (2) Cr.P.C. was necessary and that in the present case such notice was not given and, therefore, there is a serious breach of law. It has been submitted that the said report should have been

considered by the Additional Sessions Judge presiding over the special court on 28.02.2017 itself and since this was not done, the appellant herein having in the meantime filed an application for bail by default before such report was considered, an indefeasible right had accrued in his favour for release on bail. It is further submission of the appellant that the District & Sessions Judge was not right in putting off a decision on the report in terms of the second proviso to Section 167(2) Cr.P.C. leaving it to be considered by the special court on 07.03.2017 while extending the judicial custody on the separate application of the investigating officer on 01.03.2017, it being his obligation to first take a call on the request for enlargement of time for investigation and only, thereafter proceed to grant order in its accord extending the judicial remand period or directing release on bail, as the case may be. It has been argued that the view taken by the special court on 08.03.2017 holding the prayer for extension of time for submission of the report of investigation “*infructuous*” on the ground that supplementary charge sheet had by then been filed, was wholly improper, illegal and erroneous. In making these submissions, reliance is placed by the appellant on *Saquib Abdul Hamid Nachan vs. State of Maharashtra*, 2016 SCC OnLine SC 1408; *Union of India vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav*, (2014) 9 SCC 457; *Sayed Mohd. Ahmad Kazmi vs. State (Government of NCT of Delhi) & Ors.*, (2012) 12 SCC 1; *Uday Mohanlal Acharya vs. State of Maharashtra*, (2001) 5 SCC 453; *Sanjay Dutt vs. State (II)* (1994) 5 SCC 410; and *Hitendra Vishnu Thakur & Ors. vs. State of Maharashtra & Ors.*, (1994) 4 SCC 602.

51. *Per contra*, the respondent/State argued, relying upon *Sanjay Dutt* (supra) that since the investigating officer had approached the public prosecutor and the latter (the public prosecutor), in turn, had submitted his report for purposes of second proviso to Section 167 (2) Cr.P.C., before the expiry of the period of ninety days as was ordinarily available, the deferment of the decision on such a report by the special court, or by the District & Sessions Judge, would not render the continued custody illegal, the argument being that the right to bail by default would not inure unless the prayer for extension of the period for investigation was rejected. The learned Additional Standing Counsel also referred to a decision of full bench of this court in *Rakesh Kumar vs. State*, 53 (1994) DLT 609 (FB) to the effect “*that there does not arise any question of releasing such a person from custody*” if “*by happening of subsequent events his detention presently is legally valid*”, even if such detention was “*not in accordance with law earlier*”.

52. In *Sanjay Dutt* (supra), a case under Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), a Constitution Bench of the Supreme Court held that upon default on the part of the investigating agency to complete the investigation within the prescribed period, the indefeasible right of the accused to be released on bail arises from the time of default and continues till filing of the *challan* and that if an application for grant of bail on such default as well as prayer for extension of time to complete investigation are made, both must be considered “*together*” and bail can be granted only on rejection of prayer for extension of time.

53. In *Uday Mohanlal Acharya* (supra), the Supreme Court reiterated its consistent view that upon being satisfied that the accused had been in custody for the specified period, that no charge sheet had been filed and that the accused is prepared to furnish bail, the Magistrate is obliged to grant bail under Section 167(2) Cr.P.C. even if, after filing of an application by the accused for such relief, a charge sheet is filed, this being an “*indefeasible right*” and that in order to avail of such right, the accused is only required to file an application pointing out that no *challan* had been filed within the prescribed period.

54. The Unlawful Activities (Prevention) Act, 1967 (UAPA), by its Section 43-D, has also brought in similar amendment to Section 167(2) Cr.P.C. for purposes of cases involving offences under the said special law. In *Sayed Mohd. Ahmad Kazmi* (supra), the charge sheet (report under Section 173 Cr.P.C.) had been filed after an application had been moved by the accused seeking default bail, the maximum statutory period of detention envisaged in the said law having expired. The Supreme Court held that the right to default bail under Section 167(2) Cr.P.C. arises as soon as the maximum statutory period of detention without charge sheet has expired, rejecting the argument of “retrospective” validation of illegal custody.

55. In *Saquib Abdul Hamid Nachan* (supra), also a case under MCOCA, the application for enlargement of time for completion of investigation had been rejected by the special court before the application of the accused for bail by default under Section 167(2) Cr.P.C. could be considered, the High Court, by an *ex parte* order,

had stayed the operation of the order of the special court. Later, the appeal was allowed by the High Court setting aside the order of special court declining enlargement of period of investigation. In appeal, the Supreme Court set aside the order of the High Court restoring the view of the special court. It was held that the accused was entitled to consideration of his application for release on bail under Section 167 (2) Cr.P.C.

56. There can be no quarrel with the proposition of law founded on above noted authoritative pronouncements of the Supreme Court. It is well settled that once the maximum period available for completion of investigation under Section 167(2) Cr. PC has expired, a right accrues in favour of the accused who has been arrested and continues to be in custody to be enlarged on bail. Such right is indefeasible. But the question that must be addressed by the court before which an application for release on bail on these grounds is moved, as to whether the period prescribed has, in fact, expired.

57. The period under second proviso to Section 167(2) Cr. PC for purposes of the special law contained in MCOCA is ordinarily ninety days but the same can be enlarged on report of the public prosecutor satisfying the twin criteria (mentioned earlier) for a maximum period of one hundred and eighty days. Since the right to be released on bail by default depends on the issue of expiry of the period available for completion of investigation, it is incumbent on the court to first consider the report of the public prosecutor seeking enlargement of time, if such a report has been submitted before the right to be released on bail accrues – to put it simply, the report

seeking enlargement of time for completion of investigation must be submitted before the period available in law (or the period earlier granted by extension) has come to an end. Once the period prescribed in the statute (or the period enlarged by the court) lapses, the right of the accused to bail by default arises and such right thereafter cannot be defeated either by subsequent submission of the report of investigation under Section 173 Cr. PC (charge-sheet) or subsequent submission of report of the public prosecutor seeking enlargement of time. This position of law is supported by the view taken in *Nirala Yadav* (supra) noted hereinafter.

58. The case of *Nirala Yadav* (supra) involved, amongst others, offences under Section 49 of Prevention of Terrorism Act, 2002 which contained provision similar to the one of second proviso to Section 167(2) Cr.P.C. added to MCOCA by Section 21(2)(b). An application for enlargement of the period for filing charge sheet had been moved after the expiry of the prescribed period. The special court, while keeping the application of the accused for release on bail under Section 167 (2) Cr.P.C. pending, had adjourned the matter for consideration of the request of the prosecution. This approach was disapproved by the Supreme Court, holding it to be “*misconceived*” for the reason the court was obliged to deal with the application of the accused for release on bail by default on the day it had been moved there being no question of any contest “*since the application for extension had been filed after the expiry of time*”.

59. Noticeably, in the conclusions reached in *Sanjay Dutt* (supra), exposition of law in *Hitendra Vishnu Thakur* (supra) was

explained to the effect that the notice of the request of the prosecution for enlargement of time for completion of investigation was not a requirement of “*a written notice to the accused giving reasons thereunder*” and that production of the accused at the time of consideration of such request with information to him about the question being considered was “*alone sufficient for the purpose*”.

60. The above noted view in *Sanjay Dutt* (supra), is sufficient to reject the argument of the appellant herein about there being no formal notice on the report of the public prosecutor seeking enlargement of time for investigation. The proceedings recorded by the special judge show that the request was submitted in the presence of the appellant, he being assisted by an advocate, he even having exercised the right to file reply which was submitted on 01.03.2017.

61. Whilst there can be no doubt as to the fact that the report under the second proviso to Section 167(2) Cr. PC was submitted by the public prosecutor (on 28.02.2017), well in advance before the expiry of the period of ninety days ordinarily available for completion of investigation qua the appellant, it is not correct to contend that it was improper on the part of the special court to defer its consideration to 01.03.2017. Since the period of ninety days was to expire on 01.03.2017, it being the last day, the special court was not putting off the consideration beyond the statutory period.

62. The proceedings recorded by the District & Sessions Judge on 01.03.2017 show that the presiding officer of the special court was indisposed and, therefore, unable to hold the court on that day. No motive, or neglect in discharge of the responsibilities, on the

part of the judicial officer can be read into this fact. The matter was thus placed before the District & Sessions Judge, as already concluded, within his power and jurisdiction under the said law, for consideration of the request of the public prosecutor for enlargement of time for completion of investigation, on one hand, and for the extension of the period of custody (remand) on the application of the investigating officer, on the other. The appellant had also moved his application for release on bail by default under Section 167(2) Cr. PC which right would depend on the decision on the issue as to whether the period for completion of investigation was to be enlarged beyond 01.03.2017 on the report of the public prosecutor. As noted earlier, the District & Sessions Judge by his order dated 01.03.2017 extended the period of judicial remand to 07.03.2017 but deferred the consideration of the request of the public prosecutor for the said date placing the matter before the special court. This, it must be held, was wholly improper, if not an erroneous approach.

63. If the District & Sessions Judge was competent to deal with the case under MCOCA and if, he was competent to grant the extension of the judicial remand – which jurisdiction, in the judgment of this court, the District & Sessions Judge did possess – there was no reason why the report of the public prosecutor ought not also have received his consideration on 01.03.2017. In fact, it was incumbent on him to first consider the report of the public prosecutor and in light of the decision taken thereupon, he should have considered the request for enlargement of the period of judicial custody, thereby also taking a decision on the request of the

appellant for release on bail by default under Section 167(2) Cr. PC. By deferring a decision on the report of the public prosecutor to 07.03.2017, the District & Sessions Judge failed to exercise the jurisdiction vested in him, for no explicable reasons.

64. As already noted, the submissions of the parties - public prosecutor and the counsel for the appellant - on the request for enlargement of time for completion of investigation made through the report of the public prosecutor were heard by the special court on 07.03.2017, this alongside the request of the appellant for release on bail by default. The additional sessions judge presiding over the special court reserved his order for the next day i.e. 08.03.2017. The short order passed on 08.03.2017 has been extracted earlier. It shows the supplementary report under Section 173 Cr. PC (charge-sheet) seeking prosecution of the appellant had been submitted on the said date (08.03.2017) on which the special court took cognizance. Whilst adjourning the matter for consideration of the request for release on bail by default to the next date, the report of the public prosecutor (submitted on 28.02.2017) for enlargement of time for completion of investigation, however, was short-shifted, it being disposed of with observations that it had become “infructuous” since the supplementary charge-sheet had already been filed. This, to say the least, was again most improper and erroneous approach on the part of the Special Court.

65. The report (for enlargement of time to completion of investigation) had been submitted by the public prosecutor on 28.02.2017. The report required proper consideration, with due application of mind, on its own merits. The appellant had been

noticed on the application and he had filed a response resisting the request. The period that had gone by or the subsequent developments, particularly in the nature of filing of the supplementary charge-sheet, could not have been reasons good enough to trivialize the issue or to deny, if it had accrued, indefeasible right of the appellant to be considered for release on bail by default under Section 167(2) Cr. PC.

66. In the considered view of this court, the approach of the District & Sessions Judge in the proceedings recorded on 01.03.2017 deferring the consideration of the report of the public prosecutor to 07.03.2017 and of the additional sessions judge presiding over the special court by order dated 08.03.2017 holding such report to be “infructuous” were incorrect, improper and wholly whimsical, the procrastination or abdication of responsibility demonstrated thereby having the effect of frustrating the legislative mandate and, therefore, impermissible.

67. It is an expectation of the legislature that investigation into crimes is completed with promptitude so that the offender is brought to justice without unnecessary delay and, correspondingly, a person suspected (or accused) of complicity in such crime does not suffer protracted incarceration or proceedings so that there is no unreasonable denial or erosion of personal liberty. This is more true in grave crimes such as those governed by special enactments like Maharashtra Control of Organized Crime Act, 1999 (MCOCA). Given the intricacies involved, and the virtual web through which the investigating police must traverse to gather the requisite evidence in such offences where organized crime syndicates are

involved, what with the stealth and secrecy with which they would ordinarily conduct their business, the special law (MCOCA), like other similarly placed enactments (e.g. TADA, POTA, etc.) give enough room to the investigating police by making available sufficiently long period – longer than the ordinary – for completion of investigation, this by modifying the provisions of Criminal Procedure Code, particularly by adding proviso to Section 167 (2) Cr.P.C. wherein there is a possibility of extension of the period, after due scrutiny, first at the level of Public Prosecutor, an independent agency, and thereafter, on the report of the Public Prosecutor by the special court.

68. In the above scheme of things, the availability of sufficient period of investigation is not left to the whims or discretion of an individual. The scrutiny by the public prosecutor is followed by judicial scrutiny by the court. The prime reason is that there is public interest involved wherein the investigating officer is called upon to account for the progress of investigation undertaken by him particularly from the date of arrest of the accused, he also expected to make good the reasons why he requests more time for completion of the investigation. If the scrutiny by the public prosecutor, followed by consideration of his report by the court, make out a good case for extension of the period of investigation beyond the ordinarily available ninety days, such extension (upto maximum one hundred and eighty days), in the larger public interest, must be granted. Conversely, if the scrutiny of the investigation carried out till the stage of completion of initial period of ninety days does not give justification for enlargement, the request must be turned down,

this with consequences to follow particularly the release of the accused on bail by default. Either of the two results must flow from the decision of the court on the report of the Public Prosecutor submitted under second proviso to Section 167(2) Cr.P.C. and not, definitely not, on account of default on the part of the court.

69. As has been held above, the District and Sessions Judge, while dealing with the matter arising out of, *inter alia*, the report of the public prosecutor on 01.03.2017, and the additional sessions judge presiding over the special court also dealing, amongst others, with the said report of the public prosecutor on 07.03.2017 and 08.03.2017, failed to discharge the judicial responsibility properly. The consideration of the report of the public prosecutor, submitted (on 28.02.2017) well in time before expiry of the period of ninety days ordinary available, was deferred unnecessarily on 01.03.2017 and beyond till it was treated, wrongly so, as “*infructuous*” on 08.03.2017. It is against this backdrop that the appellant argues that there being no order in terms of second proviso to Section 167(2) Cr.P.C. enlarging the period of investigation, a right to bail by default has accrued in his favour which cannot be defeated by submission of the charge sheet on 07.03.2017. The crucial question, however, is as to whether such benefit can be extended to the appellant in a fact-situation where the investigating police officer, and the public prosecutor, had done their part of the duty under the law, well within time, and the default in consideration of, and decision on, the report of the public prosecutor was wholly for the reasons (or, shall we say, fault) attributable to the District & Sessions Judge and the special court.

70. It is well settled principle of law that a mistake on the part of the court shall not cause prejudice to anyone. This elementary rule of justice was reiterated by a bench of seven Hon'ble Judges of the Supreme Court in *A.R. Antulay vs. R.S. Nayak*, (1988) 2 SCC 602, in the following words:-

“83. ... The basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. Ex debito justitiac, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied....”

71. In the said case of *A.R. Antulay* (supra), by his separate concurrent opinion, Hon'ble Mr. Justice Ranganath Mishra observed thus:-

“103. ... Indian authorities are in abundance to support the view that injustice done should be corrected by applying the principle actus curia neminem gravabit — an act of the court should prejudice no one.”

72. The law to above effect has been consistently followed and, by way of illustration, one may refer to the cases reported as *Sanjiv Datta, Dy. Secy., Ministry of Information & Broadcasting*, (1995) 3 SCC, 619; *Mansukhlal Vithaldas Chauhan vs. State of Gujarat*, (1997) 7 SCC 622; *Anil Rai vs. State of Bihar*, (2001) 7 SCC 318; *U.P.SRTC vs. Imtiaz Hussain*, (2006) 1 SCC 380; *Japani Sahoo vs. Chandra Sekhar Mohanty*, (2007) 7 SCC 394; *S. Krishna Sradha vs. State of Andhra Pradesh & Ors.*, 2017 SCC OnLine SC 66 and

Neeraj Kumar Sainy & Ors. vs. State of U.P. & Ors., 2017 SCC OnLine SC 258.

73. The above principles would apply with equal, if not greater, force when larger public interest is at stake. If the contention of the appellant that a right for release on bail by default under Section 167(2) Cr.P.C. has accrued in his favour due to non-consideration of the public prosecutor's report by the special court, were to be accepted, a benefit would stand extended to him on account of mistake on the part of the special court. This would not be desirable as the public interest cannot be placed at the mercy or whims of individuals.

74. It is clear that the report submitted on 28.02.2017 by the public prosecutor in terms of second proviso to Section 167(2) Cr. PC seeking enlargement of time for completion of investigation did not receive due consideration of the court. If the grounds on which the public prosecutor was recommending extension of time were sufficient, there would be no justification for its denial and, resultantly absolutely no justification for the appellant to be released on bail by default. If, on the other hand, the request was unfounded, it should have been rejected and an appropriate order extending release on bail by default should have been passed.

75. Since the report did not receive due consideration and was improperly treated as "infructuous", there are two options available before this court : one, to remit the matter back to the special court for a proper decision on the report or, two, to consider the report and pass appropriate order thereupon. The former course would only entail further delay. In a case involving questions of personal

liberty, such course is not desirable. In this view, the learned counsel on both sides were also heard on the merits of the report of the public prosecutor, bearing in mind that this court is duty bound to secure the ends of justice and to prevent abuse of the process of court.

76. The background facts and circumstances of the case against the appellant have already been noted. Certain assets of the appellant and members of his immediate family had come to light for which, *prima facie*, there was no account, particularly in view of the declaration made on the subject in 2013, when he was a candidate in the election to Delhi Legislative Assembly. Noticeably, the investigating officer was seeking opportunity to interrogate the appellant against these facts to seek his explanation, if any. Under the provisions of the special enactment (MCOCA), the investigating police officer is entitled to interrogate the accused in judicial custody. As mentioned earlier, a formal request to this effect made by the investigating officer was allowed by order dated 04.03.2017. The report submitted on 28.02.2017 by the public prosecutor, thus, is found to pass the necessary muster of the second proviso to Section 167(2) as inserted in the Code of Criminal Procedure by Section 21(2) of MCOCA. The fact that the charge-sheet was filed on 08.03.2017, only re-assures that the request for enlargement of time for completion of investigation made on 28.02.2017 was not with ulterior motive.

77. In above view, in the considered view of this court, the request made by the public prosecutor should not only have received due consideration of the special court on 28.02.2017, or

the District & Sessions Judge on 01.03.2017, but also deserved to be allowed. The trashing of the said report as “infructuous”, by order dated 08.03.2017, was thus not only incorrect but improper. In these circumstances, in exercise of the jurisdiction vested in this court to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of proceedings of the inferior criminal court (under Section 397 Cr. PC), as indeed invoking the “inherent powers” of this court to secure the ends of justice and prevent abuse of the judicial process (under Section 482 Cr. PC), the order dated 08.03.2017 disposing of the report of the public prosecutor under second proviso to Section 167(2) Cr. PC is set aside and, instead the said report is accepted and the period for completion of investigation of the case at hand against the appellant is extended till 08.03.2017 when the report under Section 173 Cr. PC (supplementary charge-sheet) against him was actually filed. In this view, the prayer of the appellant for release on bail by default under Section 167(2) is rendered impermissible and is accordingly declined.

78. The captioned appeal and the pending application are dismissed in above terms.

79. Before parting, some further observations are in order:

- (i) The case at hand has brought out error in the notification dated 15.09.2010 issued by order and in the name of Lt. Governor of National Capital Territory of Delhi vis-à-vis conferment of powers of the presiding officers of special court under MCOCA on officers of

Delhi Higher Judicial Service. Corrective action needs to be initiated.

(ii) These proceedings have brought to the fore the confusion that might prevail not only in the cases involving offences under the MCOCA but also under other special enactments covered by the afore-said notification dated 15.09.2010, in the event of the presiding officers of special courts being not available either on account of leave of absence or due to other official engagements. There should never be a vacuum. Since such special courts as under MCOCA (or under other enactments like TADA, POTA etc.) are generally also designated as the courts of cognizance, it is necessary that arrangement for link courts, similar to the courts of the Metropolitan Magistrates, as per long standing practice, is put in position.

(iii) The impropriety reflected in the inept handling on the part of the judicial officers who dealt with the matter at hand, as noticed above, points to the need for proper sensitization of the judicial officers at large in the intricacies and nuances of such special enactments through training or orientation programmes organized by the judicial academy.

80. For the foregoing reasons, the Registrar General of this court is directed to place a copy of this judgment before Hon'ble the Chief Justice for kind consideration and issuance of such

appropriate directions on the administrative side as may be deemed proper.

(R.K. GAUBA)
JUDGE

MAY 22, 2017
nk/vk/yg

