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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Judgment: 13th September, 2017

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CRL. A. No.604/2016

MUFTI ABDUS SAMI QASMI

..... Appellant

Through : Mr.Jawahar Raja, Adv. with
Mr.Rajat Kumar & Mr.Chinmay
Kanojia, Advs.

versus

NATIONAL INVESTIGATION AGENCY

..... Respondent

Through : Mr.Sanjay Jain, ASG with
Mr.Neel Kamal, PP, NIA &
Ms.Rajul Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. The appellant has filed the present appeal under Section 21 (4) of the National Investigation Agency Act, 2008 impugning the order dated 10.06.2016 passed by the District and Sessions Judge (Special Judge, NIA) in RC-14/2015/NIA/DLI arising from an FIR under Section 125 of the Indian Penal Code, 1860 and Sections 18, 18-B, 38 and 39 of the Unlawful Activities (Prevention) Act, 1967 [in short the 'UA (P) Act'] whereby the application for grant of bail under Section 167 (2) of the Code of Criminal Procedure, 1973 ('Cr.P.C.') filed on behalf of the appellant was dismissed.
2. The necessary facts to be noticed for disposal of this appeal are that the appellant herein was arrested on 05.02.2016. He remained in police custody remand and thereafter, was remanded to judicial

custody. Admittedly, the respondent sought extension of the period of investigation of the appellant beyond the period of 90 days to 180 days, by filing an application which was supported with a report of the Public Prosecutor under Section 43D (2) (b) of the UA (P) Act. It is also not in dispute that the Special Judge vide his order dated 29.04.2016 extended the period of investigation and directed the accused/appellant herein to be kept in judicial custody and produced before the Special Court on 27.05.2016.

3. Thereafter, on 27.05.2016, the appellant was produced before the Special Court when the NIA had sought another extension of judicial custody of 30 days; which was granted by the Special Court and the appellant was directed to be kept in judicial custody and produced on 10.06.2016. On the next date, the appellant contended that he was entitled to the default bail as the statutory period of 90 days for filing chargesheet had expired. The contention was rejected by the Special Court, which has led to the filing of the present appeal.
4. It is the case of the appellant herein that on 27.05.2016, the extended period of detention for investigation had expired. The respondent neither filed the chargesheet nor sought extension of the period of investigation, and only sought extension of judicial remand, which was granted by order dated 27.05.2016 till 10.06.2016. It is, thus, contended that the appellant was entitled to default bail as on 27.05.2016. In this background, an application under Section 167 (2) Cr.P.C. was filed, seeking bail which was dismissed by an order dated 10.06.2016.
5. In this appeal, two grounds have been raised; *firstly*, that the impugned order is contrary to the settled law as laid down by the

Supreme Court in the case of ***Hitendra Vishnu Thakur v. State of Maharashtra***, (1994) 4 SCC 602; and *secondly*, ground (b) mentioned in the appeal which reads as under:

“b. Because, it is, respectfully submitted that the learned trial court has badly failed to appreciate that on 29.04.2016 the period of detention for investigation was extended till 27.05.2016 and from 27.07.2016 till 10.06.2016 neither the charge sheet was filed nor the period of detention for investigation was further extended and as such an indefeasible right to be released on bail under section 167(2) Code of Criminal Procedure accrued in favour of the appellant and he availed of the remedy by moving an application for grant of bail.”

6. Mr.Jawahar Raja, learned counsel for the appellant contends that by order of 29.04.2016 while the Special Judge allowed the application filed by the respondent/NIA under Section 43D (2) (b) of the UA (P) Act seeking extension of the period of detention beyond 90 days, the Special Judge had directed the accused/appellant to be kept in judicial custody and be produced before Court on 27.05.2016. On 27.05.2016 the judicial custody of the appellant was extended up to 10.06.2016. It is further submitted that neither on 27.05.2016 nor 10.06.2016, an application for further extension of period of investigation was filed and, thus, further detention was illegal and the appellant was entitled to default bail.
7. Mr.Sanjay Jain, learned ASG who appears in the matter, submits that the order of 29.04.2016 is clear and explicit. The order has been passed under Section 43D (2) (b) of the UA (P) Act. The request of the NIA for extension of the period for completion of investigation from 90 days to 180 days has been allowed. Once the application stands allowed taking into consideration the report of the Public

Prosecutor, there was no requirement in law to file additional and subsequent applications with the report of the Public Prosecutor on or before 27.05.2016 or 10.06.2016, as the period for extension of the investigation was already granted by the order dated 29.04.2016. Learned ASG also submits that once the period for investigation stood extended from 90 days to 180 days, there was no occasion for the appellant to be entitled for default bail, although he was entitled to seek regular bail, if so advised.

8. We have heard the learned counsels for the parties and perused the record before us. It would be useful to extract the relevant provisions herein. Section 57 Cr.P.C. reads as under:

“Person arrested not to be detained more than twenty-four hours.— *No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court.”*

(Emphasis Supplied)

9. Section 167 Cr.P.C. is as under:

“Procedure when investigation cannot be completed in twenty-four hours.— *(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.*

(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 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;

...”

(Emphasis Supplied)

10. Section 43D (2) of the UA (P) Act *inter alia* modifies the application of Section 167 C.P.C. as under:

“Modified application of certain provisions of the Code. –

...

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

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

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

Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with 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, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.”

(Emphasis Supplied)

11. A reading of Section 57 Cr.P.C. would show that it is an in-built safeguard provided by the Code of Criminal Procedure that no person shall be detained by a Police Officer or arrested without warrant for a period of more than 24 hours. Further detention can only be allowed as per the provisions of Section 167 Cr.P.C. after the nod of the Magistrate. The provision also entitles the accused to be released on bail on the lapse or ‘default’ of the investigating authority. Maximum period of detention envisaged is 90 days for graver offences under Sub-clause (i) to Section 167 (2) (a) and 60 days under sub-clause (ii).

The law in this regard has been recapitulated by the Apex Court recently in ***Rakesh Kumar Paul v. State of Assam*, 2017 SCC OnLine SC 924** and we need not divulge into the same in great detail.

12. Section 167 has been modified in respect of offences punishable under the UA (P) Act by Section 43D (2) (b) of the UA (P) Act and the same being a special act would override the provisions of the general law. The maxim *generalia specialibus non derogant* meaning special law will always prevail over the general law clearly lays down the rule [See ***Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473** (paragraph 22)]. Under the provisions of this Act, the proviso added by Section 43D (2) (b) enables the Special Court to extend the period of detention from the maximum period of 90 days stipulated under the Cr.P.C. to 180 days. As curtailment of the liberty of an individual is not a cavalier matter, a stringent safeguard has been provided that when in case such an extension is sought, an application is to be supported by a report of the Public Prosecutor which would indicate the progress of the investigation and the special reasons for the detention of the accused beyond the period of 90 days and extend the period up to 180 days. The Section also casts a duty on the Special Court being that it must be satisfied that there is a force in the report of the Public Prosecutor.
13. Having observed so, the question which we are faced with seems to be something different altogether, i.e. whether it was obligatory on the respondent to seek extension of time for investigation on each subsequent date of hearing when the same had already been allowed on 29.04.2016?

14. In the present case, an application under the proviso added by Section 43D (2) (b) was filed by the respondent. The said application was allowed by the order dated 29.04.2016, which is reproduced in extenso below:

“ An application has been moved by NIA u/s 43D(2(b)) of UA(P) Act, 1967 (as amended in 2012) seeking extension of the period of the detention of above named accused persons beyond the period of 90 days for completing the investigation stating therein that the accused Mohd. Azhar Khan and Mufti Abdus Sami Qasmi were arrested on 01.02.2016 and 05.02.2016 respectively and were produced before this court on 02.02.2016 and 06.02.2016 respectively. During the custodial interrogation of the accused persons, they have disclosed names, codes and mobile numbers of some active members, recruiters, sympathizer and motivator of ISIS involved in furtherance of its activities and its ideologies using internets, telephones/facebook/skype/ telegrams and other means of communications, thereby luring youths to join this proscribed terrorist organization. The identity of other associates involved is being ascertained on day to day basis.

During the course of investigation, NIA seized mobile sets, Sims, Laptop, Hard Disk and Micro SD card from the possession of accused persons which have been sent for forensic analyses to CERT-In, New Delhi on various dates and the report in this regard is still awaited from CERT-In. It is further stated that on 01.04.2016, NIA has sent MLAT (Mutual Legal Assistance Treaty) to USA, UAE and Canada requesting them to provide the evidence regarding social media and other digital communication used by the accused persons and reply in this regard is still awaited. It is further stated that during the course of investigation, it was unearthed that there is larger conspiracy by IS activities in India and abroad for recruitment of resident and non-resident Indians by the IS and the identity of such associates is being ascertained. Report of the Ld. PP, NIA u/s

43D(2(b)) of UA(P) Act has also been filed in a sealed envelope and the same is taken on record.

It is prayed that more time is required for completion of investigation in respect of the above named accused persons and as such, the period of their detention needs to be extended from 90 days to 180 days.

Heard. Keeping in view the aforesaid facts and circumstances, the application stands allowed and the accused persons above named are directed to be kept in judicial custody and be produced before this Court on 27.05.2016.

Application stands disposed of accordingly.

Copy of the order be given dasti, as prayed for.”
(Emphasis Supplied)

15. By the order dated 29.04.2016, the Special Court, in clear terms, allowed the application and extended the period of investigation upto 180 days; it, simultaneously, directed the appellant to be produced in Court on 27.05.2016. On 27.05.2016 the Court directed the appellant to be produced in Court on 10.06.2016. It is only on 10.06.2016 when an application filed by the appellant herein seeking default bail was considered and rejected. The order dated 10.06.2016, which has been impugned in the present appeal, reads as under:

“Reply to the application of accused Mufti Abdus Sami Qasmi u/s 167(2) CrPC has been filed on behalf of NIA. Copy thereof supplied.

NIA has sought extension of 30 days judicial custody of the accused persons namely Mohd. Azhar Khan & Mufti Abdus Sami Qasmi who were arrested on 01.02.2016 & 05.02.2016 respectively by moving an appropriate application.

The extension of the judicial custody of the accused Mufti Abdus Sami Qasmi has been resisted by the Ld. Defence Counsel by moving an application u/s 167(2) CrPC stating therein that the statutory period of 90 days for filing the chargesheet has already been expired. Therefore, he is entitled to the benefit of provision as envisaged in Section 167(2) CrPC to be enlarged on bail.

Heard. The time of filing the chargesheet has already been extended vide order dated 29.04.2016 which is neither set aside nor modified till date. Therefore, I do not find any ground to enlarge the accused Mufti Abdus Sami Qasmi on bail by giving him the benefit of section 167(2) CrPC. Hence the application u/s 167(2) CrPC stands dismissed.

Keeping in view the facts and circumstances, the accused persons namely Mohd. Azhar Khan & Mufti Abdus Qasmi are directed to be kept in judicial custody and to be produced before this court on 08.07.2016.

Applications stand disposed of accordingly. Copy of the order be given dasti, as prayed for.”

(Emphasis Supplied)

16. A careful reading of this order would show that having granted extension up to 180 days for completion of the investigation by order dated 29.04.2016, which, the Special Judge notices, had attained finality, there was no occasion for the appellant/accused being entitled for default bail.
17. A person would be entitled to default bail if, within the prescribed period, the investigation is not completed. Which in case which in case of Section 167 Cr.P.C. is 60 or 90 days depending on the offence for which investigation is pending and under an offence under the UA (P) Act would be 90 days unless an application under the proviso added by Section 43D (2) (b) is made and allowed. Once such an

application is allowed, the period of investigation would be extended till a period of 180 days and only thereafter, would the accused be entitled to default bail if the chargesheet has not been filed.

18. The ground (b), which we have extracted above, would show that the grievance of the appellant is that since the chargesheet was not filed before 27.05.2016, the investigating authority was in 'default' entitling the appellant to bail. The contention, in our view, is without any force, since the Special Judge had by the order dated 29.04.2016 granted time upto 180 days to complete the investigation, there was no need for the respondent to file an application on every subsequent date when the 180 days' period had not elapsed. To say, that each time the Special Court directed the appellant to be produced in Court, the respondent was duty bound to make an application for extension of period of investigation and give specific reasons with regard to the progress of the case and for the Court to record special reasons based on the report of the Public Prosecutor, cannot be accepted. The record clearly shows that the aspect of extension of judicial custody was dealt independently of the period of completion of investigation. While the period of investigation had been extended to 180 days, the period of judicial custody was extended till the next date. The effect of the order cannot change according to its interpretation by the party. We may also notice that a coordinate bench was also faced with an identical contention in *Abu Anas v. National Investigation Agency*, **MANU/DE/3209/2016: 2016 SCC OnLine Del 6129** and had rejected the same. Despite the same, we have given a detailed judgment as Mr.Raja had contended that the present case stood on a different footing.

19. Since the order of 29.04.2016 has attained finality and the period for completion of investigation stands extended by 180 days, in our view, there is no requirement that each on every date the accused was produced, an application was to be made seeking extension of period of investigation, as the first order dated 29.04.2016 is a final order deciding the application and not an interim one.
20. Resultantly, we find no merit in the appeal. The same is accordingly dismissed.

Crl. M.A. No.18735/2016

21. This is an application on behalf of the appellant seeking the summoning of the records of the case pending before the Special Court. The record had been summoned vide order dated 08.03.2016 and sent back pursuant to a subsequent order dated 13.07.2017 upon another application being Crl.M.A. 10889/2017 filed by the appellant himself. Accordingly, in view of the same and the order passed in the appeal, no further orders are required to be passed.
22. Additionally, the application has not been pressed and hence, dismissed.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

SEPTEMBER 13, 2017

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