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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION No. 434 OF 2018

Shahid Khan Pathan & Ors. ... Applicants
Vs.
State of Maharashtra ... Respondent

Adv. Mr. Nilesh Tribhuvanm a/w Adv. Shriniwas Bade, Adv. Ms. Alisha Pinto, Adv. Ms. Perna Sharma, Ashish Agarkar, Adv. for Applicants.

Ms. Veera Shinde, APP for the Respondent – State.

CORAM : P. N. DESHMUKH, J.

CLOSED FOR ORDER : MARCH 27, 2018

PRONOUNCED ON : APRIL 4, 2018

PC :-

1. Applicants involved in C. R. No. 130 of 2017 registered by Lonavala Gramin Police Station, Pune for offences punishable under 395, 397, 363 read with 120B of Indian Penal Code, 1860 and Section 3 of the Maharashtra Control of Organised Crime Act, 1999 (herein for the sake of convenience referred to as the “MCOC Act”) had filed this application for default bail under Section 167(2) of Criminal Procedure Code, 1973 (hereinafter for the sake of

convenience referred to as “Cr.P.C.) read with 21(2) of MCOC Act. Heard learned counsel for Applicants and learned Additional Public Prosecutor for Respondent State.

2. Facts arising in this application can briefly be stated as under:

. On 10th September, 2017 on the basis of report lodged by complainant Kamal Ahmad Shami Khan, crime, as aforesaid, came to be registered wherein all the Applicants are arrested on 26.9.2017 and on their production before the Magistrate, they were initially remanded to police custody and were subsequently remanded to judicial custody from time to time during the period of which provisions of the MCOC Act were invoked in the present case, and after Applicants were produced, learned Special Judge further extended their police custody from time to time. It is the specific case of Applicants that period of 90 days, as provided under Section 167(2) of the Cr.P.C. has expired on 25.12.2017 and Respondent State ought to have filed the charge-sheet on or before expiry of 90 days on 25.12.2017 or should have sought extension of time for further investigation, and to file the same. However, as none of these

procedures were adopted, on expiry of 90 days period, Applicants are entitled for statutory bail under the provision of Section 167(2) Cr.P.C.

3. It is case of Applicants that on 27.12.2017 Applicants preferred application for bail by default, which was adjourned for hearing to 30th December, 2017. On the same day on 27.12.2017 application was filed by State praying for extension of time to file charge-sheet under the provisions of Section 21(2) of the MCOC Act, upon which on issuing notice to Applicants, it has listed for hearing on 28.12.2017 and came to be allowed, thereby granting extension of further time of 44 days to carry investigation, from 28.12.2017. It is the specific case of Applicants that keeping their application for bail pending, application moved by State for extension of time to carry further investigation and to file charge-sheet came to be allowed, thereby frustrating Applicants' right of bail, as aforesaid as their application ought to have been considered simultaneously alongwith the application for extension of time. However, the learned Special Judge without considering said aspect, by extending time to carry further investigation by its order dated 28.12.2017, rejected

Applicants' application for bail on default by its order dated 16.1.2018.

4. Learned counsel for Applicants in support of facts involved in this application and submission relied upon following judgments:

- (i) Sayed Mohd. Ahmad Kazmi Vs. State & Ors.¹;
- (ii) Rakesh Kumar Paul Vs. State of Assam²;
- (iii) Sanjay Dutt Vs. State³;
- (iv) Union of India Vs. Nirala Yadav⁴;
- (v) Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors.⁵

And has submitted that in view of the settled law and facts, as aforesaid, application be allowed by imposing suitable condition as during the pendency of this application investigation is completed and charge-sheet is filed.

5. Learned APP has supported the impugned order by filing affidavit-in-reply on record and contended that after prosecution moved written application seeking further extension of time to

1 (2012) 12 SCC 1

2 2017 SCC OnLine SC 924 : 2017 (9) SCALE 24

3 (1994) 5 SCC 410

4 (2014) 9 SCC 457

5 (1994) 4 SCC 602

investigate and to file charge-sheet application under Section 167(2) Cr.P.C was filed by Applicants, thus, contended that since time to carry out further investigation was extended on 28.12.2017. Application for bail came to be rightly rejected as time for investigation and to file charge-sheet was already extended by the Special Court on 28.12.2017 and thus, submitted that as right of accused to file application under Section 167(2) got defeated application be rejected.

6. Applicants in support of their application has also placed on record Affidavit dated 23.3.2018 of their Advocate who had appeared before the learned Special Court wherein para 5 and 8 it is stated that on 27.12.2017 oral request was made to the Special Court in the morning session bringing to its notice that Applicants were entitled to bail by default as the statutory period of 90 days is over on 25.12.2017. Applicants were directed to file written application and in spite of Applicants' filing such application on record on 27.12.2017 by adjourning the same to 30th December, 2017, on 28th December, 2017 application filed by State for extension of time came to be allowed and after hearing Applicants on 30.12.2017, their application came to be

rejected on 16.1.2018.

7. In view of above facts, and the submissions advanced as aforesaid, in the case of *Sayed Mohd. Ahmad Kazmi* (supra) one of the submission advanced by the Learned Additional Solicitor General was that there was no breach of provision of Section 167(2) Cr.P.C. as the right of applicant for grant of statutory bail stood extinguished once application for extension of time for completing investigation had been filed by the prosecution. The submissions advanced as aforesaid, however, were not accepted as in para 25 of the judgment is noted thus:

“25. ... application under Section 167(2) Code of Criminal Procedure was made on behalf of the Appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20th July, 2012 extended the time of investigation and the custody of the Appellant for a further period of 90 days with retrospective effect from 2nd June, 2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the Appellant on the expiry of 90 days from the date when the Appellant was taken into custody.”

8. With regard to the case of Applicants of their making oral

request for grant of bail on Applicants' accruing right of bail by default, learned counsel relied upon judgment in the case of *Rakesh Kumar Paul (supra)* wherein in para 42, Hon'ble Apex Court noted thus:

“42. ... In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the Accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the Accused is prepared to and does furnish bail.”

In the same judgment in para 40, it is also noted thus:

“40. This Court also dealt with the decision rendered in *Sanjay Dutt* and noted that the principle laid down by the Constitution Bench is to the effect that if the charge sheet is not filed and the right for 'default bail' has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The Accused can avail his liberty by filing an application stating that the statutory period for filing the charge sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the Accused is prepared to furnish the bail bond.”

9. Considering the facts involved in the application, it is, thus, noted that apart from prosecution frustrating indefeasible right of

accused to be released on bail, Learned Special Court has further frustrated the same by not considering Applicants' application for bail by not considering the same with the application filed by State for extension of time for further investigating and by keeping it pending till Respondent's application is allowed.

10. For the above proposition, learned counsel for Applicants relied upon judgment in case of *Sanjay Dutt (supra)* invoking provisions of TADA Act wherein in para 48, it is indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together.

11. In the application in hand, facts reveals that though application under Section 167(2) Cr.P.C. was filed on 27.12.2017 after right accrued in favour of Applicants for their release on bail by default on 26.12.2017, the same application was adjourned to 30.12.2017 for hearing and pending this application, application filed by prosecution for extension of time to carry further investigation was allowed. It is, therefore, noted that by keeping the Applicants'

application pending, in fact, Special Court acted to extinguish the statutory right of accused. The procedure adopted by Trial Court, in fact, frustrated and destroyed the legal right of Applicants. Such an act is not permissible. In view of above undisputed facts, reliance can be placed on the pronouncement in the case of *Union of India Vs. Nirala Yadav (supra)* wherein para 42 of its judgment, it is observed as under:

“42. ... In the instant case, the day the accused filed the application for benefit of the default provision as engrafted under proviso to Sub-section (2) of Section 167 Code of Criminal Procedure the Court required the accused to file a rejoinder affidavit by the time the initial period provided under the statute had expired. There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the learned Magistrate was misconceived.”

12. Perusal of impugned order would reveal that apart from other aspects, learned Special Judge while allowing time for further investigation noted that same is required to be allowed considering gravity of the offences, which observation on the face of it appears to be contrary to the law laid down in the case of *Hitendra Thakur (supra)* wherein in para 22 of judgment, it is observed that application for grant of bail by default cannot be rejected only on the ground that accusation against the accused is of a serious nature or the offence is

very grave.

13. In the circumstances, since Applicants are found to have exercised their right to apply for statutory bail on the very same day, on which day their custody was extended, pending their application for bail undecided by the Special Court, and as the application filed by the prosecution for extension of time to complete investigation was taken up and was allowed, Applicants' right to statutory bail is found to be defeated.

14. Having considered above stated facts, application is liable to be allowed as per order below:

- (i) Applicants shall be released on bail in C. R. No. 130 of 2017 registered by Lonavala Gramin Police Station, Pune for the offences under Section 395, 397, 363 read with 120B of Indian Penal Code, read with Section 3 of the MCOC Act, on their furnishing PR bond in the sum of Rs. 25,000/- each with one surety each in the like amount;
- (ii) On release of Applicants on bail, they shall mark their presence in Lonavala Gramin Police Station, Pune on

the first day of each month initially for a period of six months and thereafter, quarterly on the first day of each such month pending the trial;

- (iii) Applicants shall not tamper the witnesses and shall attend the trial Court on the trial dates;
- (iv) Application is allowed of in aforesaid terms.

Sd/-
[P. N. DESHMUKH, J.]

Vinayak Halemath