

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.04.2018

Pronounced on : 27.04.2018

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL
AND
THE HONOURABLE Mrs. JUSTICE R.HEMALATHA

Crl.A.No.243 of 2018

Union of India represented by
Superintendent of Police,
National Investigation Agency,
Hyderabad Camp @ Chennai.
R.C.No.03/2018/NIA/DLI

.. Appellant

Vs.

Mubarak @ Mohammed Mubarak

..Respondent

Prayer: Appeal filed under Section 21 of National Investigation Agency Act, as against the order passed by the Learned Special Judge for NIA Cases/Sessions Court for Exclusive Trial for Bomb Blast Cases, Poonamallee in Crl.M.P.No.85 of 2018 in R.C.No.03/2018/NIA/DLI dated 16.03.2018 and grant police custody of the Respondent herein for the period of Ten (10) days.

For Appellants

: Mr.R.Karthikeyan
Special Public Prosecutor

For Respondents

: Mr.Shanmuga Velayutham
Senior Counsel
For Mr.A.Raja Mohammed

JUDGMENT**M.VENUGOPAL, J.**

The Appellant/Petitioner has filed the present Criminal Appeal before this Court (as an aggrieved person) as against the order dated 16.03.2018 in CrI.M.P.No.85 of 2018 in RC No.03/2018/NIA/DLI passed by the Learned Special Judge for NIA Cases, Poonamallee, Chennai.

2.Earlier, the Learned Special Judge for NIA Cases, Poonamallee, Chennai, while passing the impugned order in CrI.M.P.No.85 of 2018 in RC No.03/2018/NIA/DLI [filed by the Appellant/Petitioner], on 16.03.2018, at paragraphs 30 to 36, it is observed as under:

***"30.Among the three rulings submitted by the learned counsel in support of his arguments, the ruling in Central Bureau of Investigation, Special Investigation Cell-I, New Delhi – v – Anupam J. Kulkarni has been made to the point in this aspect. In the said judgment, it has been held as follows:
"13.Whenever any person is arrested***

under Section 57 Cr.P.C. he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial Magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest

Judicial Magistrate along with the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage.

..... Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody."

31. In view of the above ruling, it is clear that police custody cannot be granted after the expiry of first fifteen days of initial remand to judicial custody of any person.

32. In another ruling submitted by the learned counsel made in K.S.Palanichamy - v - The State, the Hon'ble High Court of Madras has also held that the police custody granted after the expiry of first fifteen days of initial remand is not sustainable.

33. Therefore, it is clear that police custody cannot be granted after the expiry of first fifteen days of initial remand. In this case, the first fifteen days of initial remand of both the respondents have expired long back. Further they have been placed under police custody at the hands of the then investigating officer, as stated above, well within the said stipulated period.

34. Since this petition has been filed under Section 43D of the UAP Act, which we have already decided to be

maintainable even now, let us consider the specific provision made in the said section of law in respect of a police custody. One of the provisos that have been inserted into Section 167(2)(b) of Cr.P.C. by way of Section 43D(2) of the UAP Act reads as:

"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."

35. The above provision provides a chance for police custody if it is sought for belatedly. In the instant case, there is no delay by the investigating authorities in getting police custody and the respondents were placed under police custody well within the initial fifteen days of their remand. The another part of this proviso in fact puts a stringent condition to file an affidavit

stating the reasons. Therefore, even as per this provision of the UAP Act, the respondents cannot be placed under the police custody.

36. There might have been change in respect of the investigating agencies. But, irrespective of the fact that whether the investigation is continued or carried out afresh, the period of detention of the accused has no change in colour and gets continued from the very first day in custody. Hence, although the petitioner has stated reasons for seeking police custody and justifying it quoting the recent taking over of investigation, in view of the settled position of law as stated above, the respondents cannot be placed under police custody as prayed for. Accordingly, Point No.2 is answered."

and ultimately, dismissed the Petition seeking police custody of the Respondents/A3 and A4.

3. The Learned Special Public Prosecutor for the Appellant contends that the investigation was taken over by the Appellant on

21.02.2018 and the custodial interrogation of the Respondent/A4 was necessary so that his examination may provide further investigational leads to prosecute the real culprits within the stipulated time frame.

4.The Learned Special Public Prosecutor for the Appellant submits that the custodial interrogation of the Accused are required to collect more evidence to unearth the overall larger conspiracy of the present case hatched by the Accused and their accomplice.

5.The Learned Special Public Prosecutor for the Appellant takes a plea that unless a police custody is granted, the prosecution will not be fruitful in the interest of justice and the complete chain of events may not be portrayed.

6.The Learned Special Public Prosecutor for the Appellant projects an argument that the role of each Accused in the whole conspiracy needs to be established elaborately and therefore, one-to-one is required to bring the real facts and to remove the inconsistencies and discrepancies, if any and to corroborate the same the custodial examination also required to corroborate the

statement of several witnesses and new evidences which emerge if any.

7.The Learned Special Public Prosecutor for the Appellant points out that at 2.30 hours, the case in Crime No.1 of 2016, under Sections 120B read with 302, 153A of the Indian Penal Code was registered by the Thudiyalur Police Station, Coimbatore, was taken up for investigation on 23.09.2016 and that the said case was transferred to the file of CBCID SD on 01.10.2016 from Thudiyalur Police Station and that the police custody in respect of the Respondent/A4 was sought on 25.12.2017 and that the police custody in respect of Respondent/A4 was granted on 03.01.2018 till 05.01.2018 and further police custody of the Respondent/A4 was sought for on 05.01.2018 and the said custody was granted till 08.01.2018.

8.The Learned Special Public Prosecutor for the Appellant brings it to the notice of this Court that the Central Government on 22.01.2018 transferred the investigation to the Appellant/Agency and that on 03.02.2018 a requisition was sent by the Special Court of NIA seeking for transfer of records and on 21.02.2018, the

Appellant/Agency received the case diaries from the CBCID SD, Coimbatore. In fact, the Learned District and Sessions Judge on 01.03.2018 transmitted the case records and material objects to the Special Court for NIA Cases, Poonamallee.

9.The Learned Special Public Prosecutor for the Appellant takes a stand that as per proviso to Section 43-D of the Unlawful Activities (Prevention) Act, 1967, it is open to the Investigating Officer to seek police custody explaining the delay and in the present case, the Appellant had explained the same, which was not appreciated by the Learned Special Judge in a proper and real perspective, which had resulted in dismissal of the Criminal Miscellaneous Petition.

10.The Learned Special Public Prosecutor for the Appellant further adds that the Appellant filed a petition for police custody in CrI.M.P.No.85 of 2018 on 05.03.2018 and on 08.03.2018, counter was filed to CrI.M.P.No.85 of 2018 and the matter was posted for orders on 13.03.2018. Thereafter, the matter was posted to 16.03.2018 for passing orders and on 16.03.2018, the Learned Special Judge for NIA Cases, Poonamallee rejected CrI.M.P.No.85 of 2018 seeking police custody of the Appellant.

11.The Learned Special Public Prosecutor for the Appellant cites the decision in ***Central Bureau of Investigation, Special Investigating Cell-I, New Delhi V. Anupam J.Kulkarni, (1992) 3 Supreme Court Cases 141 at special pages 158 & 159, wherein at paragraphs 13 and 14,*** it is observed as under:

"13. Whenever any person is arrested under Section 57 Cr.P.C. he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial Magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen day in the whole. Within this period of fifteen days there can be more than one order changing the nature

of such custody either from police to judicial or vice-versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after

the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under

the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody.

14. We may, however, in the end clarify that the position of law stated above applies to Section 167 as it stands in the Code. If there are any State amendments enlarging the periods of detention, different consideration may arise on the basis of the language employed in those amendments."

12. The Learned Special Public Prosecutor for the Appellant places reliance on the decision of the Hon'ble Supreme Court in ***Maulavi Hussein Haji Abraham Umarji V. State of Gujarat and***

another, (2004) 6 Supreme Court Cases 672 at special page 677, wherein at paragraph 6, it is observed as follows:

"6.Great emphasis is laid on the expression "in police custody for a term not exceeding 15 days in the whole" in sub-section (2) of Section 167 and "otherwise than in the custody of the police, beyond the period of 15 days" in the first proviso of sub-section (2) of Section 167. It is submitted that in Section 49(2)(a) the period of "15 days" in Section 167(2) of the Code has been substituted to be "30 days". Therefore, according to learned counsel for the appellant, Section 49(2)(b) can be resorted to only during the period of 30 days."

13.The Learned Special Public Prosecutor for the Appellant refers to the aforesaid decision wherein at paragraph 18 at pages 680 & 681, it is held as follows:

"18.The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed not as theorems of Euclid". Judge Learned Hand said, "but words

*must be construed with some imagination of the purposes which lie behind them". (See Lenigh Valley Coal Co. v. Yensavage, 218 FR 547). The view was re-iterated in **Union of India and Ors. v. Filip Tiago De Gama of Vedem Vasco De Gama**, AIR (1990) SC 981."*

14. Added further, in the aforesaid decision at page 682 & 683 at paragraph 25, it is laid down as follows:

*25. One thing which is specifically to be noted here is that the proviso inserted by **Section 49(2)(b)** of POTA is in relation to the proviso to **Section 167(2)** of the Code and not in respect of **Section 167(2)**. Therefore, what is introduced by way of an exception by **Section 49(2)(b)** of POTA is in relation to the proviso to **Section 167(2)(b)**. That being the position, the interpretation suggested by learned counsel for the appellant cannot be accepted. It is to be noted that the acceptance of application for police custody when an accused is in judicial custody is not a matter of course.*

Section 49(2)(b) provides inbuilt safeguards against its misuse by mandating filing of an affidavit by the investigating officer to justify the prayer and in an appropriate case the reason for delayed motion. Special Judge before whom such an application is made has to consider the prayer in its proper perspective and in accordance with law keeping in view the purpose for which the POTA was enacted, the reasons and/or explanation offered and pass necessary order. Therefore, the apprehension of learned counsel for appellant that there is likelihood of misuse of the provision is without substance. In any event, that cannot be a ground to give an extended meaning to the provision in the manner suggested by the learned counsel for the appellant.

15. The Learned Special Public Prosecutor for the Appellant refers to the **Judgment in Crl.A.No.1291 of 2013 dated 26.08.2013 [between P.V.Abdul Azeez and 20 others V. The National Investigating Agency, Kochi, represented by the**

Special Public Prosecutor, High Court of Kerala, Ernakulam]

wherein at paragraphs 15 & 16, it is observed as follows:

"15.This position was clarified in the decision reported in Moulavi Hussein Haji Abraham's case (supra) by the Honourable Supreme Court wherein, similar contentions raised by the accused persons were rejected, while considering the scope of Section 49(2) of the Prevention of Terrorism Act 2002 (For short, POTA) and the scope of Section 167 of the Code of Criminal Procedure regarding police custody. Section 49(2) of the POTA is similar to Section 43D(2) of the U.A.(P) Act. So, the submission made by the counsel for the appellants that no custody can be granted to the police after the period of 30 days of detention, cannot be accepted.

16.We are not going into the question as to whether the extension of the period of detention for 180 days as provided under the first proviso to Section 43D(2) of the U.A.P. Act, is proper or not because that is a matter to be decided in the appeal filed by the

appellants as Criminal Appeal No.1291/13 against the order in Criminal MP.No. 46/13. Further, though an appeal has been preferred against that order, the accused persons did not press for any stay of the operation of that order in that appeal. Once there is no stay of the operation of that order, the order extending the detention for 180 days as per the second proviso to Section 43D(2) of the U.A.(P) Act will be deemed to be in force. If that order is deemed to be in force, then, there is nothing illegal in the Special Judge granting police custody of the accused persons to the Investigating Officer as provided under the second proviso to the Section. Further, the reason for the delay has been explained by them, which is clear from the order of the court itself. Further, in a case of this nature, it is always necessary to provide custody of the accused persons to the Investigating Agency to unearth the illegal activities of the accused persons and also to trace out the links of other persons in the commission of

such activities, who promote such activities with the aid of the accused persons. This is highly necessary to protect the unity, safety and security of the Nation as well."

16.The Learned Special Public Prosecutor for the Appellant seeks in aid of the decision ***A.Rajendra Kumar Assistant Commissioner of Police Ambattur Circle, Ambattur Estate V. Kaja Moideen, 2014 SCC Online Madras 5663*** wherein at ***paragraph 7 to 9***, it is observed as under:

"7.Section 22(3) of the NIA Act clearly states that the powers of Special Court shall be exercised by the Sessions Court of the division in which such offence was committed and in this case, the offence was committed within the sessions division of Tiruvallur and in the absence of a Special Court, the District and Sessions Court, Tiruvallur, has the jurisdiction. The provisions of NIA Act would stand attracted in this case, since the accused is alleged to have been involved in offences under the Unlawful Activities (Prevention) Act, 1967, which

finds place as item 2 in the schedule of the NIA Act. Under Section 21(2) of the NIA Act, every appeal against the order of a Special Court shall be heard by a bench of two Judges of the High Court.

8.It was further submitted that police custody can be given only during the first 15 days of initial remand and not thereafter, as held in CBI v. Anupam Kulkarni [(1992) 3 SCC 14]. Section 43D sub Section 2 of the Unlawful Activities (Prevention) Act, 1967 reads as under:

"43D. 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".

9.By virtue of this provision, the

expression '15 days' used in Section 167 Cr.P.C. should be construed as 30 days and therefore, the police can seek custody within 30 days from the date of initial remand. In both these cases, this test is satisfied."

17.Also, in the aforesaid decision, at paragraph 15, it is held as follows:

"15.Suffice to use the expression of the Supreme Court in Assistant Director, Directorate of Enforcement v. Hassan Ali Khan [2011 (4) Scale 53], wherein, the Supreme Court, while setting aside the order of the Special Court refusing police remand of Hassan Ali Khan and granting police custody has stated:

"5.An extraordinary situation requires an equally effective and extraordinary solution. It is for that reason we propose to interfere with the order even at this stage."

18.Per contra, it is the submission of the Learned Senior Counsel for the Respondent/A4 that the police custody must be strictly in accordance with Law and the Hon'ble Supreme Court had

clearly declared the Law relating to Section 167(2) of the Criminal Procedure Code specifically with reference to the period within which the Court can grant police remand, viz., before the expiry of first 15 days of the first remand, which is applicable to all the Courts and in the present case is concerned, Section 43-D of the Unlawful Activities (Prevention) Act, 1967 and modified Section 43-D(2) of the Act reads as under:

"43-D. 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 it if 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."

19.The Learned Senior Counsel for the Respondent strenuously takes a plea that by means of Section 43-D(2)(a) of the Act, the expression "15 days" used in Section 167 Cr.P.C. should be construed as 30 days and therefore, the police can seek custody within 30 days from the date of initial remand. Further, in the present case, the Respondent (A4) was arrested on 25.12.2017 and the date of remand was 26.12.2017 and that the period of first

police custody was from 03.01.2018 to 05.01.2018 and that the period of second police custody was from 05.01.2018 to 08.01.2018 and 30 days expired from the date of first remand on 26.12.2017 was on 24.01.2018 and that the date of petition for present police custody was 02.03.2018 and since the Unlawful Activities (Prevention) Act, 1967 was invoked on 20.11.2017 and the Judgment of the Hon'ble Supreme Court in ***Central Bureau of Investigation, Special Investigating Cell-I, New Delhi V. Anupam J.Kulkarni, (1992) 3 Supreme Court Cases 141***, will squarely apply to the instant case and as such, the present Appeal filed by the Appellant/Agency is not maintainable.

20.The Learned Senior Counsel for the Respondent puts forth a plea that in the present case, the First Information Report was registered in Thudialur Police Station in Crime No.735 of 2016 on 23.09.2016 and later, the investigation was transferred to the CBCID, who re-registered the same in Crime No.1 of 2016 and that the Appellant/Agency had purposefully suppressed the fact of earlier police custody taken by the then investigation Officer by CBCID on several occasions and sufficient opportunity was given by the trial Court and that the Appellant had not established before the Special

Court of NIA Cases, the grounds for seeking the police custody.

21.The Learned Senior Counsel for the Respondent contends that the Appellant filed an application for interrogation of the Respondent in Prison on 03.04.2018 which was allowed on the same day and subsequently, the Appellant had sufficiently interrogated the Respondent in Prison on 04.04.2018 and that the police custody for the second time was impermissible.

22.The Learned Senior Counsel for the Respondent submits that the Appellant had filed a truncated final charge sheet against A2 and A3 under the guise of the final report and that the Appellant filed application seeking permission for further investigation as against A1 and A4.

23.The Learned Senior Counsel for the Respondent points out that when the Appellant had completed the investigation as against A2 and A3 proceeding with the investigation against A1 and A4 is unknown to Law and a petition filed under Section 173(8) Cr.P.C. by the Appellant seeking further investigation with regard to the Respondent and the same is posted for orders and without the

permission of the Special Court, the Appellant has no power to investigate the case and hence, the Appeal is to be dismissed.

24.The Learned Senior Counsel for the Respondent contends that no new materials were placed before the Special Court for seeking police custody again and the Special Court had passed a detailed order after scrutinising all the documents and as such, there is no infirmity in the impugned order dated 16.03.2018 passed in CrI.M.P.No.85 of 2018.

25.The Learned Senior Counsel for the Respondent cites the decision in ***State by Deputy Superintendent of Police 'Q' Branch CID, Dharmapuri V. Sundaramoorthy, [2007] 2 MLJ (Crl) 1676***, wherein at paragraphs 5 and 6, it is laid down as follows:

"5. ... He would also submit that Section 49 of the POTA contemplates that an application under Section 167(2) Cr.P.C. could be made within a period of 30 days, in case the accused is implicated for the offences under the POTA. Hence, an application having

been filed within a period of 15 days and the intimation for further investigation was made within a period of 30 days, the learned Judge ought to have ordered the police custody. Insofar as, the finding of the learned Judge to the Rule 76 of the Criminal Rules of Practice, it is only procedural and mere procedural aspect will not take away the substantive right for further investigation. Therefore, he would submit that securing or collecting information from the respondents in respect of the other accused as well as the concealment of the arms, ammunitions shall form part and parcel of investigation. For the said reasons, the police custody is necessary.

6. On the other hand, Mr. R. Sankara Subbu, learned counsel for the respondent submitted that once the final report is filed after completion of the investigation, unless a specific request in the form of an application for further investigation is made, the investigating agency has no right to ask

for police custody. In support of the said submission, the learned counsel would draw out attention to Section 309 of Cr.P.C. which contemplates the remand after the investigation is over and the final report is filed. He would also submit that under Section 1(6)(d) of POTA, the appellant could avail the benefit of the said provision only in case where investigation is pending. Once the investigation is over, the appellant cannot seek police custody either under Section 167(2) of Cr.P.C. or under Section 49 of the POTA, more particularly, the POTA expired as on 21.9.2014, when the application for police custody was filed. Lastly, the learned counsel submit that in the teeth of Rule 76 of the Criminal Rules of Practice, it is the duty of the investigating agency to satisfy the Court as to the reasons for which such police custody is sought for. It is not as if whenever such application is made, it is automatically be granted even without any supporting materials."

26.The Learned Senior Counsel for the Respondent relies on the decision in ***State represented by Inspector of Police, Nolambur Police Station, Chennai V. B.Ranganathan and another, 2012 (1) MLJ(Crl) 567*** wherein at paragraph 22, it is observed as under:

"22.It is well laid down principle of law regarding the police custody is concerned that it amounts to infringement of right of an individual, more particularly fundamental right guaranteed under Article 21 of the Constitution of India'. However, there are certain exceptions by way of reasonable restrictions and on such restriction is the grant of Police custody while investigation is pending. The Division Bench of our High Court in the judgment in State by Deputy Superintendent of Police, Q Branch CID, Dharmapuri v. Sundarmoorthy, 2007(2) MWN (Cr.) 414 while dealing with the mode of disposal of the application for police custody and the factors for consideration in the same, observed that any application for grant of police custody must be strictly considered on

materials as it involves the fundamental right and personal liberty of an individual and the provisions are to be strictly understood and complied with."

27.The Learned Senior Counsel for the Respondent contends that in the decision ***Central Bureau of Investigation, Special Investigation Cell-I, New Delhi V. Anupam J. Kulkarni [cited supra]***, the issue regarding the power of the Court to order for police custody or judicial custody came up for consideration and the Hon'ble Supreme Court, at paragraph 13, had held that the Judicial Magistrate can in the first instance authorise the detention of the accused in either to police or judicial custody from time to time, but the total period of detention cannot exceed 15 days on the whole.

28.The Learned Senior Counsel for the Respondent submits that the present Appeal filed by the Appellant as against the impugned order dated 16.03.2018 in CrI.M.P.No.85 of 2018 is only an 'Interlocutory Order' and in view of the bar created as per Section 21(3) of the National Investigation Agency Act, 2008, a Revision/Appeal against the said order is not maintainable in Law.

29. Apart from that, it is represented on behalf of the Respondent that an order rejecting the petition in CrI.M.P.No.85 of 2018 for police custody by the Special Judge for NIA Cases, Poonamallee, Chennai cannot be construed as Final Order, but, it can be termed as an 'Interlocutory Order'.

30. The Learned Senior Counsel for the Respondent submits that the order of remand to police custody has no bearing on the proceedings of the trial itself nor can it have any effect on the ultimate decision of the case and further that if an order of remand is found to be illegal, it cannot result in acquittal of the Accused or in termination of proceedings and in this connection, cites the decision of the Hon'ble Supreme Court in **Madhu Limaye V. State of Maharashtra, AIR 1978 Supreme Court 47 at special page 48**, wherein it is observed as follows:

"Ordinarily and generally the expression 'interlocutory order' has been understood and taken to mean as a converse of the term 'final order'. But an interpretation and the universal application of the principle that what is not a final order must be an

interlocutory order is neither warranted nor justified. If it were so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by Section 397(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the intention to the Legislature when it retained the revisional power of the High Court in terms identical to the one in the 1898 Code.

Although the words occurring in a particular statute are plain and unambiguous, they have to be interpreted in a manner which would fit in the context of the other provisions of the statute and bring about the real intention of the legislature. On the one hand, the legislature kept intact the revisional power of the High Court and, on the other, it put a bar on the exercise of that power in relation to any interlocutory Order. In such a situation

it appears that the real intention of the legislature was not to equate the expression "interlocutory order" as invariably being converse of the words "final order".

An order rejecting the plea of the accused on a point which, when accepted, will conclude the particular proceeding, will surely be not an interlocutory order within the meaning of Section 397(2).

The impugned order in the instant case rejecting the application challenging the jurisdiction of the Court to proceed with trial, even though it may not be final in one sense, is surely not interlocutory so as to attract the bar of sub-sec.(2) of S.397. It must be taken to be an order of the type falling in the middle course."

31. The Learned Senior Counsel for the Respondent refers to the decision in ***State Rep. By Inspector of Police and others V. N.M.T. Joy Immaculate, AIR 2004 Supreme Court 2282***, wherein the Hon'ble Supreme Court has inter alia held as follows:

".... The order of remand has no bearing on the proceedings of the trial itself nor it can have any effect on the ultimate decision of the case. If an order of remand is found to be illegal, it cannot result in acquittal of the Accused or in termination of proceedings. A remand order cannot affect the progress of the trial or its decision in any manner. It cannot be categorised even as an 'intermediate order'. The order is, therefore, a pure and simple interlocutory order and in view of the bar created by sub-section (2) of S.397, Cr.P.C., a revision against the said order is not maintainable."

32.It is to be borne in mind that the National Investigation Agency Act, 2008 is a Special Act. But the Criminal Procedure Code is a General One. As a matter of fact, the N.I.A. Act is a procedural one. Furthermore, it does not create new offence or disabilities or obligations as the case may be. Section 6 of the N.I.A. Act, 2008 provides for the manner of investigation of the offences listed in the 'Schedule' to this Act. Also that, N.I.A. Act is not retroactive in

character and furthermore, it is not a Penal Enactment. Be it noted that a Special Court is constituted as per Section 11 of the N.I.A. Act for trial of offences under this Act.

33.It is to be noted that because of our Country's commitment in the global fight against terrorism, as per terms of the United Nations Security Council Resolution 1373, dated 28.09.2001 and its resolve not to allow any compromise in the fight against terrorism, the Unlawful Activities (Prevention) Act, 1967 was amended to make provisions to deal with terrorism and terrorist activities.

34.In fact, the National Investigation Agency Act, 2008 is to constitute an Investigation Agency at the National level to investigate and prosecute the offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organisations and for matters connected therewith or incidental thereto.

35. In this connection, it may not be out of place for this Court to make a significant mention that the proviso inserted by the ingredients of Section 49(2)(b) of Prevention of Terrorism Act, 2002 pertains to the proviso to Section 167(2) Cr.P.C. and not in respect of Section 167(2). As such, what is introduced by way of exception by Section 49(2)(b) of the Prevention of Terrorism Act, 2002 is in regard to the proviso to Section 167(2)(b). Hence, there is no fetter that an application for police remand where the Accused was arrested for offences under the POTA, can be exercised only during the period of 30 days from the date of arrest and not thereafter, as per the decision ***Maulavi Hussein Haji Abraham Umarji V. State of Gujarat and another, 2004 (6) SCC 672.***

36. It is pertinently pointed out by this Court that the provision as per Section 43-D(2)(b) of the Unlawful Activities (Prevention) Act, 1967 is provided only with a view to extend the maximum period of detention beyond 90 days and upto 180 days only.

37. In reality, the applicability of the offences under the Unlawful Activities (Prevention) Act, 1967 does not *ipso facto* extend the detention period of an Accused pending investigation from 90 days to 180 days.

38.It cannot be forgotten that such an extension is an exercise of judicial discretion which may be permitted based on the following pre-conditions are fulfilled:

(i)A Report filed by the Public Prosecutor narrating the progress of the investigation and specific reasons for the detention of an Accused beyond 90 days.

(ii)The trial Court after being subjectively satisfied of course resting on the report filed by the Learned Public Prosecutor that further detention of Accused is necessary for further progress of investigation.

39.There is no two opinion of a primordial fact that acceptance of the petition for police custody when an Accused is in judicial custody is not a matter of course. The prayer made in the petition for police custody by the Investigating Agency is to be looked into and considered by the Learned Special Judge in real and proper perspective, of course, keeping in mind the necessary provisions of the relevant Acts and also considering the explanation offered and is to pass a reasoned speaking order.

40. At this stage, this Court aptly refers to the decision reported in ***Maulavi Hussein Haji Abraham Umarji V. State of Gujarat and another*** AIR 2004 Supreme Court 3946 at special pages 3949 & 3950, wherein at paragraph 11, it is observed as follows:

"11. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins v. Treasurer of Survey*, [1880] 5 QBD 170, (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha*, AIR (1961) SC 1596) and *Calcutta Tramways Co. Ltd. v. Corporation of Calcutta*, AIR (1965) SC 1728), when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a

case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co., (1897 AC 647) (HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors., (AIR (1991) SC 1406); Tribhovandas Haribhai Tamboli

v. Gujarat Revenue Tribunal and Ors., (AIR (1991) SC 1538) and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P) Ltd. and Ors., (1994 (5) SCC 672)."

41. It is to be pointed out that an 'Interlocutory Order' indicates an order of transitory nature. If an order overrides vital rights and liabilities, the same cannot be characterised as 'Interlocutory' one. The Acid test would be that if an Order or Judgment disposes of the rights of the Litigants, then, it is a final order. If it does not dispose of rights of the Litigants, it would be an Interlocutory Order.

42. No wonder, an order which substantially affects the rights of an Accused or determines certain rights of the parties, then, it is not an interlocutory order. Also that, the term 'Interlocutory Order' and 'Final Order' is to be considered separately with reference to particular performance for which they are meant to be interpreted and no particular yardstick can be applied to decide whether an order is 'Final' or 'Interlocutory' one. There is no definition for the term 'Interlocutory Order' under Criminal Procedure Code, 1973. In

fact, the N.I.A. Act does not define in express term what is 'Interlocutory Order'. Even the definition Section 2 of the Unlawful Activities (Prevention) Act, 1967 does not define the term 'Interlocutory Order'.

43. In Law, an Appeal is a proceeding preferred by an affected party before superior forum seeking to rectify the wrong/erroneous order/decision of the Court concerned. Undoubtedly, Article 21 of the Constitution of India guarantees life with dignity not only the individual dignity, but also the Society's interest or the cherished values of the Constitution of India. As such, it is incumbent on the Court concerned to exercise its judicial discretion, of course, guided by well established Principles of Law.

44. It is not in dispute that in the instant case, on 23.09.2016 the First Information Report in Crime No.735 of 2016 was registered under Section 302 I.P.C. by the Thudiyalur Police Station in respect of the Murder of the Complainant's brother Sasikumar. Later, F.I.R. was registered in Crime No.1 of 2016 on 01.10.2016 by the Coimbatore District CBCID. Subsequently, an Alteration Report dated 20.11.2017 was submitted before the Chief Judicial

Magistrate, Coimbatore by the Inspector of Police, SID, Crime Branch CID, Coimbatore wherein the Section 302 I.P.C. of the case was altered into 302 I.P.C., 153(A), 120(b) I.P.C. and Sections 16 and 18 of the Unlawful Activities (Prevention) Act, 1967.

45. On 22.01.2018, the Government of India, Ministry of Home Affairs, CTCR Division passed an order stating that it received information from the Government of Tamil Nadu in accordance with Section 6(2) of the National Investigation Agency Act, 2008 regarding registration of a Case in Coimbatore District CBCID, Crime No.1 of 2016 under Section 302, 153A and 120B I.P.C. and Sections 16 and 18 of the Unlawful Activities (Prevention) Act, 1967 against Sadham @ Sadham Hussain and 4 others for murdering Sasikumar, District Spokesperson, Hindu Front, near Sakkaravinyagar Temple, Subramaniampalayam, Thudiyalur Police Station, Coimbatore District and since the offence was a scheduled offence and was required to be investigated by the National Investigation Agency in accordance with the National Investigation Agency Act, 2008, the said Agency was directed to take up investigation of the case. The Appellant/Agency filed FIR on 29.01.2018 in R.C.-03/2018/NIA/DLI under Sections 16 and 18 of the Unlawful Activities (Prevention) Act,

1967 and under Sections 302, 153A and 120B of the Indian Penal Code.

46.As far as the present case is concerned, the Appellant/ Agency through its Chief Investigating Officer filed CrI.M.P.No.85 of 2018 in R.C.No.03/2018/NIA/DLI (under Section 43-D(2)(b) of the Unlawful Activities (Prevention) Act, 1967) before the Special Court for NIA Cases (Sessions Court For Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, Chennai seeking police custody of Sabair (A3) and the Respondent/A4 stating that the custodial interrogation of aforesated Accused were required to collect more evidence to unearth the overall larger conspiracy of this case hatched by the Accused persons and their accomplice. Further, the Appellant in CrI.M.P.No.85 of 2018 came out with a reason that during the course of investigation evidences against the Accused in the present case were collected which were required to be verified and corroborated further for the purpose of investigation and in this regard, the Accused were to be taken the role of each Accused in the whole conspiracy needs to be established elaborately and hence, one to one interrogation is required to bring the real facts and remove the inconsistencies and discrepancies, if any etc.

47. At this juncture, this Court, on mere running of the eye of the ingredients of Section 43-D(2)(b) of the Unlawful Activities (Prevention) Act, 1967, finds that the Special Court, after exercising its thinking judicial discretion and also being subjectively satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for detention of the Accused beyond 90 days, can extend the period upto 180 days. In fact, the Special Court is empowered to order for police custody as per Unlawful Activities (Prevention) Act, 1967 when a strong case is made out in this regard, of course, within the period of 180 days. Apart from that, Section 43-D(2)(b) of the Unlawful Activities (Prevention) Act, 1967 which speaks of Extension of Detention Period 180 days of Accused is subject to modification of Section 167(2) Cr.P.C.

48. In the present case, the Appellant took over investigation only on 29.01.2018 and the records were received from CBCID on 21.02.2018 and inasmuch as in CrI.M.P.No.85 of 2018 the Appellant /Agency at paragraphs 8 and 9 mentioned that the custodial interrogation of Accused Subair (A3) and the Respondent (A4) were required and as per Section 43-D(2)(b) of the Unlawful Activities

(Prevention) Act, 1967, there is no fetter on the part of the Appellant/Agency's Investigation officer to seek police custody of course, after explaining the delay. Even in Crl.M.P.No.85 of 2018 the Appellant/Agency at paragraph 4 had stated that based on the request of the Appellant/ Agency dated 03.02.2018 the Special Court had requested the Learned Principal District and Sessions Judge, Coimbatore to transfer the case records and case properties vide Dis.No.76/2018 dated 03.02.2018 and that the Appellant on 21.02.2018 took over the case diaries from the Chief Investigating Officer of SID CBCID, Coimbatore.

49. In regard to the plea taken by the Respondent that the order dated 16.03.2018 in Crl.M.P.No.85 of 2018 passed by the Learned Special Judge for NIA Cases, Poonamallee, Chennai is an Interlocutory Order and therefore, the present Appeal preferred by the Appellant is *per se* not maintainable, because of the bar created as per Section 21(3) of the National Investigation Agency Act, 2008, this Court significantly points out that as per Section 21 of the Act, the Appeal preferred before this Court is to be heard by a Division Bench and the High Court's power as per Section 21(4) of the Act, is co-extensive with the powers of the Special Court. Even though

there is no provision for filing of an Appeal against the Interlocutory Order in Criminal Procedure Code, the provisions of N.I.A. Act are clear contra distinction of the Criminal Procedure Code because of the simple reason that N.I.A. Act is a Special Enactment.

50.Indeed, Section 21 of the National Investigation Agency, 2008 begins with the words "Notwithstanding anything contained in the Code" which implies the legislative intent of excluding the provisions of the Criminal Procedure Code, 1973, wherever there is conflict between the provisions mentioned in Cr.P.C. on the one side and the N.I.A. Act on the other side. In short, the words or expressions made mention of in Section 21 of the N.I.A. Act, 2008 are to be given their ordinary and natural meaning and not the meaning which is attributed to the words 'Interlocutory Order' by the Law Courts concerned, with reference to the provisions of the Cr.P.C.

51.In the instant case on hand, the Order dated 16.03.2018 in Crl.M.P.No.85 of 2018 passed by the Learned Special Court for NIA Cases, Poonamallee substantially affects the rights of the Appellant/ Agency especially when the matter is at the investigation stage in so

far as the Respondent/A4 and another 3rd Accused are concerned and hence, the impugned order resulting in dismissal of the CrI.M.P. No.85 of 2018 would not be an Interlocutory Order. Viewed in that perspective, the present Appeal preferred by the Appellant [both on Facts and Law] as against the Order dated 16.03.2018 in CrI.M.P.No.85 of 2018 is perfectly maintainable under the National Investigation Act, 2008.

52. In view of the upshot, this Court comes to a resultant conclusion that the view taken by the Learned Special Judge for NIA Cases, Poonamallee in CrI.M.P.No.85 of 2018 at para 35 of the impugned order inter alia to the effect that *'... The another part of this proviso in fact puts a stringent condition to file an affidavit stating the reasons. Therefore, even as per this provision of the UAP Act, the respondents cannot be placed under the police custody'* and finally dismissing the petition, are not a legally tenable one. As such, this Court interferes with the order passed by the Learned Special Judge for NIA Cases, Poonamallee, Chennai in CrI.M.P.No.85 of 2018 dated 16.03.2018 and sets aside the same. Consequently, the present Criminal Appeal succeeds.

53. In fine, the Criminal Appeal is allowed. The order passed by the Learned Special Judge for NIA Cases, Poonamallee, Chennai in CrI.M.P.No.85 of 2018 dated 16.03.2018 is set aside by this Court for the reasons assigned in this Appeal. The Learned Special Judge for NIA Cases, Poonamallee, Chennai is directed to restore CrI.M.P.No.85 of 2018 to his file and to pass necessary orders *de novo*, in a Fair, Just, unbiased and dispassionate manner, untrammelled and uninfluenced with any of the observations made by this Court in this Appeal [of course after providing adequate opportunities to the respective parties].

(M.V., J.) (R.H., J.)

27.04.2018

Speaking Judgment

Index :Yes

Internet :Yes

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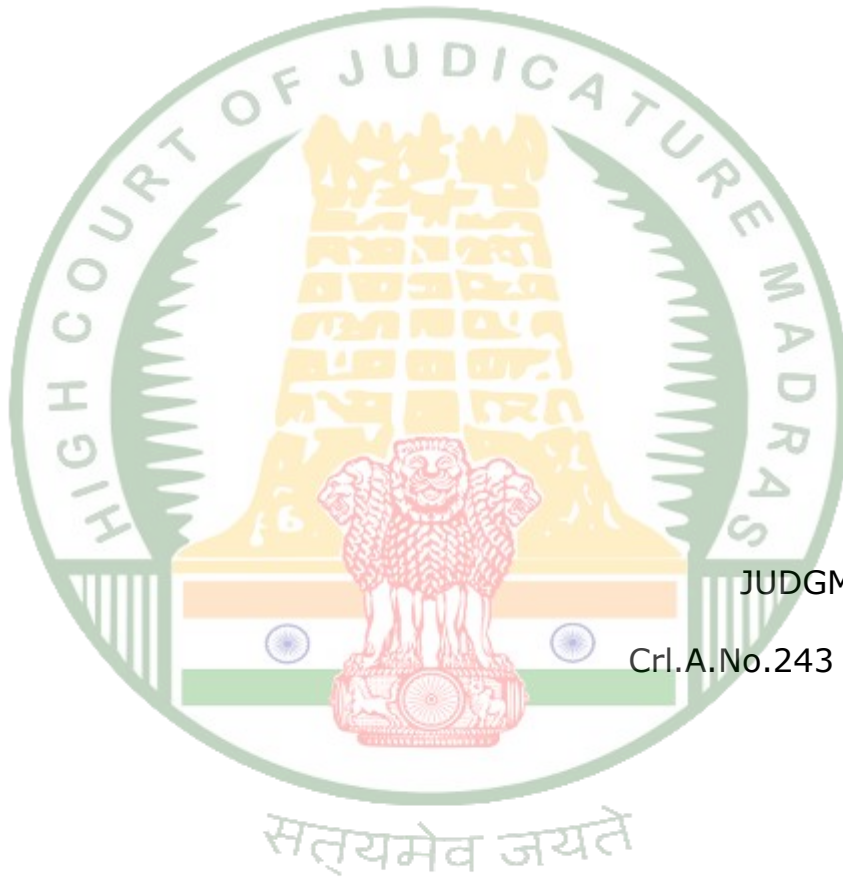
- 1.The Special Judge for NIA Cases/
Sessions Court for Exclusive Trial
for Bomb Blast Cases, Poonamallee,
Chennai.
- 2.The Union of India
Superintendent of Police,
National Investigation Agency,
Hyderabad Camp @ Chennai.
- 3.The Public Prosecutor,
High Court, Madras.



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M.VENUGOPAL, J.
and
R.HEMALATHA, J.

Sgl



JUDGMENT in
Crl.A.No.243 of 2018

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