

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 1108 of 2019**

- State Of Chhattisgarh Through The Station House Officer, Police Station Bagnadi, District- Rajnandgaon, Chhattisgarh.

---- Appellant**Versus**

- Nakka @ Murti Venkat Rao S/o Saheb Venkat Rao Aged About 54 Years Caste Mala, R/o Village Khattapeta, P.S. Khattapeta, District-East Godawari, (Andhra Pradesh)

---- Respondent

For Appellant : Shri Rajesh Singh, Deputy Govt. Advocate.

**Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Shri Gautam Chourdiya, JJ**

Judgment On Board By Prashant Kumar Mishra, J**31/07/2019 :**

1. On due consideration, delay of 50 days in filing the present Criminal Appeal is condoned. IA No.1/2019 is accordingly allowed.
2. Heard learned State Counsel on admission.
3. This Appeal under Section 21(1) of the NIA Act has been preferred to assail the legality and validity of the order dated 27.3.2019 passed by the Special Court (NIA) Bilaspur rejecting the appellant's application under Section 43 D (2)(b) of the Unlawful Activities (Prevention) Act,

1967 (henceforth 'the Act') and at the same time allowing the accused's application under Section 167 (2) of the CrPC to direct his release on bail for the default of the prosecution to file charge sheet within the stipulated period of 90 days.

4. Brief chronology is required to be referred for disposal of the Appeal.

The accused was arrested on 23.12.2018 on the allegation that he was involved in committing offence under Sections 4 & 5 of the Explosive Substance Act and under Sections 38 & 39 (2) of the Act, as on the date of incident he was found in illegal possession of 23 detonators, 2 walkie talkie, 1 walkie talkie charger, 18 numbers of Naxal Literature, 8 books, one mobile set, one TVS motorcycle and one cycle at a village within the jurisdiction of the Police Station Baghnadi, District Rajnandgaon. The investigation could not be completed by 23rd March, 2019, on which date the period of detention of 90 days was over. Therefore, the accused moved an application under Section 167 (2) of the CrPC for release on bail for the default of the prosecution to file charge sheet. The application was heard on the said date and was posted for orders on 27th March, 2019. However, on this date, the prosecution moved an application under Section 43 D (2)(b) of the Act seeking extension of the period of detention to 180 days, allowing further time for investigation. No progress report was filed at the time of moving application, as it was filed subsequently.

5. The trial Court dismissed the application having found that the

application is an afterthought to defeat the right accrued in favour of the accused for release on bail on account of default of the prosecution to file charge sheet within 90 days. The trial Court also observed that even the application was not filed on the 90th day of arrest or prior to that. Therefore, once the right has accrued in favour of the accused, the same cannot be defeated by moving an application at any subsequent point of time.

6. Learned State Counsel would submit that the application under Section 43 D (2)(b) of the Act having been filed before the accused's application under Section 167 (2) of the CrPC was disposed of, the trial Court should have extended the period of detention by allowing the prosecution to file the charge sheet within the extended period of 180 days.
7. To deal with the submission made by the learned State Counsel, Section 43 D of the Act needs reference which is reproduced hereunder:-

“43D. Modified application of certain provisions of the Code. (1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and “cognizable case” as defined in that clause shall be construed accordingly.

(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.”

8. Admittedly, the offence alleged against the accused carry maximum punishment of 10 years under Sections 4 & 5 of the Explosive Substance Act and the punishment of imprisonment for a term not exceeding 10 years under Sections 38 & 39 of the Act. The maximum permissible period of detention without filing charge sheet is 90 days for these offences. Under Section 43 D of the Act referred above, the period of detention can be extended to 180 days if the Court is satisfied with the report of Public Prosecutor indicating progress of investigation and the specific reasons for the detention of the accused beyond the period of 90 days. For attracting this provision, the Public Prosecutor has to move required application along with the progress report citing specific reasons as to why detention of the accused beyond the period of

90 days is necessary. This satisfaction of the Court is *sine qua non* for extending the period of detention up to 180 days because as soon as the detention period crosses the prescribed length of 90 days, a right accrues in favour of the accused to be released on bail and by extending the period of detention, as allowed under the provision, the trial Court would be violating the provision contained in the proviso to Section 167 (2) of the CrPC. If the Public Prosecutor fails to satisfy the Court and does not indicate progress of investigation and the specific reasons for further detention, the Court is not entitled to allow detention for the period beyond 90 days.

9. The Supreme Court in the matter of **Union of India Vs. Nirala Yadav**

@ Rajaram Yadav @ Deepak Yadav¹ has held thus in para-47:-

47. Coming to the facts of the instant case, we find that prior to the date of expiry of 90 days which is the initial period for filing the charge-sheet, the prosecution neither had filed the charge-sheet nor had it filed an application for extension. Had an application for extension been filed, then the matter would have been totally different. After the respondent-accused filed the application, the prosecution submitted an application seeking extension of time for filing of the charge-sheet. Mr P.K. Dey, learned counsel for the appellant would submit that the same is permissible in view of the decision in *Bipin Shantilal Panchal*[(1996) 1 SCC 718 : 1996 SCC (Cri) 200] but on a studied scrutiny of the same we find that the said decision only dealt with whether extension could be sought from time to time till the completion of period as provided in the statute i.e. 180 days. It did not address the issue what could be the effect of not filing an application for extension prior to expiry of the period because in the factual matrix it was not necessary to do so. In the

¹ (2014) 9 SCC 457

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 CrPC 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. He was obliged on that day to deal with the application filed by the accused as required under Section 167(2) CrPC. We have no hesitation in saying that such procrastination frustrates the legislative mandate. A court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. If we permit ourselves to say so, the prosecution exhibited sheer negligence in not filing the application within the time which it was entitled to do so in law but made all adroit attempts to redeem the cause by its conduct.”

10. The legal position is thus fairly well settled that if the Public Prosecutor fails to move an application under Section 43 D (2)(b) of the Act prior to the expiry of 90 days, any subsequent application, after the application is moved by the accused seeking benefit of the provision engrafted under proviso to sub-section (2) of Section 167 of the CrPC, is not entertainable and the Court is not entitled to extend the period of investigation, allowing detention up to 180 days.
11. For all the above stated reasons, we are not inclined to accept the submission made by the State Counsel for the simple reason that allowing such course would have the effect of defeating the accused's right to be set at liberty by releasing him on bail after the period of 90

days is over when the Public Prosecutor moves an application under Section 43 D (2)(b) of the Act after the said date. Once the right to be released on bail accrues in favour of the accused, the same cannot be negated by permitting the prosecution to move any application subsequently.

12. The present Appeal deserves to be and is hereby dismissed.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Gautam Chourdiya)
Judge

Barve

HEADLINES

Application under Section 43 D (2)(b) of the Unlawful Activities (Prevention) Act, 1967 for extension of period of investigation from 90 days to 180 days is not entertainable, when such application is moved beyond 90 days and after the accused moves application under proviso to sub-section (2) of Section 167 CrPC. The accused is entitled for bail for non filing of charge sheet.

CRA No. 1108 of 2019

State Of Chhattisgarh

Versus

Nakka @ Murti Venkat Rao

Judgment dated : **31/07/2019**