IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.880 OF 2018

MOHAMMAD IRFAN GAUS)...APPELLANT

V/s.

NATIONAL INVESTIGATION AGENCY)
AND ANOTHER)...RESPONDENTS

Mr.Mubin Solkar and Ms.Zara Salati with Mr.Aamir Sopariwala i/b. Mr.Sharif Shaikh, Advocate for the Appellant.

Mr.A.M.Chimalkar, Special Public Prosecutor for the Respondent – National Investigation Agency.

Mrs.S.V.Sonawane, APP for the Respondent - State.

CORAM : INDRAJIT MAHANTY &
A. M. BADAR, JJ.

DATE : RESERVED ON 3rd JULY 2019
PRONOUNCED ON 9th JULY 2019

JUDGMENT : (PER : A.M.BADAR, J.)

1 By this appeal under Section 21 of the National Investigation Agency Act, 2008 (hereinafter referred to as the NIA Act for the sake of brevity), appellant/accused Mohammad Irfan Gaus is challenging the order of the learned trial court rejecting

his application for bail in Sessions Case No.1010 of 2013 and praying for releasing him on bail in Crime No.10 of 2012 registered with Anti-Terrorist Squad, Mumbai, and re-registered as C.R.No.1 of 2013 by the respondent/NIA which is pending trial in Sessions No.1010 of 2013.

2 Heard the learned counsel appearing for appellant/accused no.4 Mohammad Irfan Gaus. He argued that there is no iota of evidence to implicate the appellant/accused no.4 in the subject crime and none of the prosecution witnesses have deposed anything against him. He is, therefore, entitled to be released on bail because of delay in disposal of the trial. The learned counsel further argued that the appellant/accused is undergoing pre-trial detention right from 31st August 2012, and as such, is behind bars for a period of about seven years. As against this, the learned counsel appearing for respondent no.1-NIA vehemently opposed the application by contending that there is voluminous documentary evidence available against the appellant/accused and therefore, he is not entitled to be released

on bail in view of bar engrafted in Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the U.A.(P) Act for the sake of brevity). The counsel for the respondent NIA has placed on record written submissions, so also, copies of deposition of prosecution witnesses and documentary evidence adduced by the prosecution. He submitted that about 65 witnesses are examined by the prosecution. He further submitted that evidence of the Investigating Officer is yet to be recorded.

3 We have considered the submissions so advanced and perused the record made available to us. Prior to adverting to merits of the instant appeal, past history is required to be brought on record. It is seen that initially the appellant/accused no.4 had moved an application for grant of bail before Aurangabad Bench of this court vide Criminal Application No.5381 of 2012 which was disposed off as withdrawn with liberty to approach the designated court. Thereafter, he moved Bail Application No.276 of 2013 which came to be rejected by the learned Special Judge under the U.A.(P) Act on 15th April 2013. The appeal filed by him

challenging that order before Aurangabad Bench of this court came to be disposed off with liberty to approach appropriate court with an observation that the appeal can lie to the Principal Seat of this court in view of Section 21 of the NIA Act. Then, the appellant/accused moved a fresh application below Exhibit 75 in Sessions Case no.1010 of 2013 before the Special Judge under the NIA Act, Sessions Court, Mumbai, which ultimately came to be rejected on 12th December 2014 by holding that there is no necessity to enter into the merits of the case, as earlier bail application moved by the appellant/accused was already rejected. Feeling aggrieved by the said order, the appellant/accused filed Criminal Appeal bearing No.475 of 2015 before this court and vide order dated 2nd March 2017, the learned Division Bench of this court (Coram : Smt.V.K.Tahilramani & Revati Mohite-Dere, JJ.) was pleased to dispose off the said appeal by granting liberty to the appellant/accused to file fresh appeal before this court seeking his enlargement on bail, if the trial is not concluded within the period of eight months. While disposing off the said appeal, the learned Division Bench of this court has categorically observed that the trial of the case be taken up as expeditiously as possible and in any event, within eight months from the date of receipt of the order dated 2nd March 2017. As the trial is still incomplete, despite directions of the learned Division Bench of this court in order dated 2nd March 2017, in view of the liberty granted to him vide the said order, the appellant/accused no.4 has preferred this criminal appeal and prayed for releasing him on bail.

4 Way back on 17th December 2018, this court had called for report from the learned trial court regarding progress of the trial and reasons for delay in the trial, apart from probable time for completion of the trial. The learned Special Judge had on earlier occasion had submitted the Status Report dated 1st September 2018. By the report the learned Special Judge has informed this court that few witnesses are examined by him and he is trying his level best to dispose off the matter at the earliest. Today also, when the appeal came up for hearing, both the parties were unanimous in stating that, as yet, the Investigating Officer is

not examined. This means that evidence of the prosecution is yet to be closed. Thereafter, statement of the accused persons under Section 313 of the Code of Criminal Procedure will have to be recorded and then, if they so desire, accused persons may enter in defence by examining defence witnesses. Then, after hearing the arguments, the trial of the case can be concluded by delivering judgment. This certainly will take much time. On this backdrop, it needs to be noted that the appellant/accused is behind bars from 31st August 2012 as an under trial prisoner.

5 Be that as it may, in the case in hand, Anti-Terrorist Squad had filed a charge-sheet for offences punishable under Sections 18, 20 and 38 of the U.A.(P) Act, under Section 201 of the Indian Penal Code as well as under Section 3, 25 and 27 of the Indian Arms Act against the accused persons including appellant/accused no.4 Mohammad Irfan Gaus. The prosecution has alleged that accused persons are members of a terrorist organization namely Lashkar-e-Taiba which is a prohibited organization. They, knowingly, facilitated, advised, abetted and

conspired with members of Lashkar-e-Taiba and others for commission of terrorist act by participating in a conspiracy meeting including the meeting at Mazal Residency on 17th July 2012. Accused persons had traveled and visited Hyderabad for discussing conspiracy plan and then they did recce for monitoring the movement and location of human targets at Nanded and Hyderabad. Accused nos.1 and 2 when arrested were found to be in possession of illegal fire arms.

6 In this factual background, evidence which is sought to be relied against the appellant/accused no.4 is to the effect that on 17th July 2012, he traveled along with accused no.1 Muzzammil from Mumbai to Nanded by a bus. PNR number of passengers of that bus gives mobile number of accused no.1 Muzzammil and two persons viz. accused no.1 Muzzammil and the appellant/accused no.4 traveled on that ticket. Except the fact that PNR number of the bus ticket bears mobile phone number of the accused no.1, no other evidence was pointed out to us in this regard. According to the prosecution case, several calls were

exchanged between the mobile number of accused no.1 Muzzammil and that of appellant/accused no.4. Precisely during the period from 10th October 2011 to 9th August 2012 there were 214 such calls. The appellant/accused no.4 used several handsets as reflected from 5 IMEI numbers. Apart from this piece of evidence, no other evidence of particular nature is pointed out to us, and it will not be proper to comment on merits of this evidence, because of pendency of the trial.

7 Section 43D(5) of U.A.(P) Act provides that accused person shall not be released on bail or on his own bond, if the court is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. The appellant/accused no.4 is being prosecuted for offences of indulging in conspiracy for commission of terrorist act, for being a member of terrorist gang or organization as well as for commission of offences relating to membership of a terrorist organization. Evidence against him comprises of exchange of calls with accused no.1 Muzzammil. Prima facie, at this stage, we are

of the opinion that, perusal of material made available to us does not show that there are reasonable grounds for believing that accusations against the appellant/accused no.4 are true.

8 Be that as it may, the Honourable Apex Court had considered similar provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987, in the matter of **Shaheen Welfare Association vs. Union of India and Others**[1]. Relevant portion of paragraph nos.13 and 14 thereof needs reproduction which read thus :

> "13 For the purpose of grant of bail to TADA detentes, we divide the undertrials into three classes, namely, (a) hardcore undertrials whose release would prejudice the prosecution case and whose liberty may prove to be a menace to society in general arid to the complainant and prosecution witnesses in particular; (b) other undertrials whose overt acts or involvement directly attract Section 3 and/or 4 of the TADA Act; (c) undertrials who are roped in, not because of any activity directly attracting Section 3 and A, but by virtue of Sections

1 (1996) 2 Supreme Court Cases 616

120B or 147, I.P.C., and;

(d) those undertrials who were found possessing Incriminating articles in notified areas and are booked under Section 5 of TADA."

"14 Ordinarily, it is true that the provisions of Sections 20(8) and 20(9) of TADA would apply to all the aforesaid classes. But while adopting a pragmatic and just approach, no one can dispute the fact that all of them cannot be dealt with by the same yardstick. Different approaches would be justified on the basis of the gravity or the charges. Adopting this approach we are of the opinion that undertrials falling within group (a) cannot receive liberal treatment. Cases of undertrials falling in group (b) would have to be differently dealt within. in that, if they have been in prison for five years or more and their trial is not likely to be completed within the next six months, they can be released on bail unless the court comes to the conclusion that their antecedents are such that releasing them may be harmful to the lives of the complainant the family members of the complainant, or witnesses. Cases of undertrials falling in groups (c) and (d) can be dealt with leniently and they can be released

> if they have been in sail for three years and two years respectively."

9 In the case in hand, the appellant/accused no.4 is behind bars as an under trial prisoner for a period of about seven years and considering the ratio laid down by the Honourable Apex Court in the matter of **Shaheen Welfare Association (supra)** as well as keeping in mind the fact that the bar of Section 43D(5) of the U.A.(P) Act is not applicable to his case, he deserves to be released on bail by quashing and setting aside the order dated 12th December 2014. Therefore, the following order :

ORDER

i) The appeal is allowed.

ii) The order dated 12th December 2014 passed below Exhibit 75 in Sessions Case No.1010 of 2013 by the learned Special Judge under the NIA Act, Mumbai, is quashed and set aside.

iii) The application for releasing appellant/accused Mohammad Irfan Gaus on bail is allowed.

iv) Appellant/accused Mohammad Irfan Gaus is directed to be released on bail on his executing P.R.Bond in the sum of Rs.50,000/- and on furnishing one or two sureties in the like amount.

v) The appellant/accused shall attend each and every date of hearing of the sessions case and he shall not, in any manner, protract the trial thereof.

vi) The appellant/accused shall remain within the area of the jurisdiction of the Special court pending trial and shall not leave the area without the permission of the Special court, Mumbai.

vii) Failure to abide by these conditions shall result in cancellation of bail granted to him.

viii) The appellant/accused shall deposit his passport if any with the Special court under the NIA Act, Mumbai, and if he does not hold a passport, he shall file an affidavit to that effect before the Special Court.

ix) The appellant/accused shall not extend any threat, promise or inducement to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to the police officer.

x) The appellant/accused shall not indulge in commission of any offence.

xi) The Special court shall be at liberty to cancel the bail if any conditions of this order are violated or if a case for cancellation of bail is otherwise made out.

xii) The application stands disposed off accordingly.

10 It is clarified that observations made in this judgment are prima facie observations only made for the purpose of deciding the instant appeal relating to rejection of bail application moved by

appellant. None of the observations in this judgment shall be construed to mean any expression of opinion on merits of the plea made by the parties and intervenor in other proceedings. Similarly, observations made in this judgment shall have no bearing on trial of the case.

(A. M. BADAR, J.) **(INDRAJIT MAHANTY, J.)**

<u>LATER ON</u> :

The learned counsel for the appellant/accused submits that till arrangement of sureties, the appellant/accused be released on cash bail. The request, so made, is required to be acceded to, and therefore, we direct that appellant/accused Mohammad Irfan Gaus be released initially, for a period of four weeks, on furnishing cash security of Rs.50,000/-. By the end of fourth week, he must furnish surety as directed by this court.

(A. M. BADAR, J.) **(INDRAJIT MAHANTY, J.)**