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CRL RC(MD) No.219 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Date on which reserved : 14/08/2019

Date on which pronounced : 19/08/2019

PRESENT

The Hon`ble Mr.Justice P.RAJAMANICKAM

CRL RC(MD) . No.219 of 2019

Ganesan,
S/o.Rasuthevar, Thirunagar, Nallur,
Aathur Taluk, Dindigul District.

... Petitioner/Accused

Vs

The Inspector of Police,
Pattiveeranpatti Police Station,
Dindigul District (Cr.No.214/2018).

... Respondent/Complainant

For Petitioner : M/s.M.Jegadeesh Pandian,
Advocate.

For Respondent : Mr.A.P.G.Ohm Chairma Prabhu ,
Government Advocate (Crl.Side)

Prayer: This Criminal Revision Case is filed under Section 397 r/w 401 Cr.P.C to call for the records relating to the order of the learned Principal Special Judge for EC and NDPS Act Cases, Madurai, dated 28.03.2019 in Crl.M.P.No.995 of 2019 and set aside the same as illegal and release the petitioner on bail.

ORDER : The Court Made the following order :-

This Criminal Revision Case has been filed by the accused against the order passed by the Principal Special Court for EC and NDPS Act Cases, Madurai in Crl.M.P.No. 995 of 2019, dated 28.03.2019.

2.The brief facts of the case, giving rise to this Criminal Revision are:

The Revision Petitioner was arrested by the respondent Police on 24.09.2018 and on the same day, he was remanded to judicial custody in Cr.No.214/2018 for the offence punishable under Sections 8(c) r/w 20(b)(ii) (C) and 25 of the NDPS Act as he was found in

<https://hcservices.ecourts.gov.in/hcservices/>



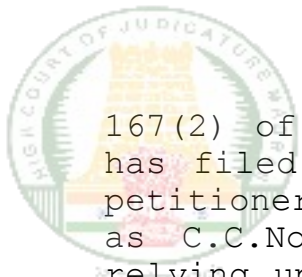
possession of 20.800 kgs of ganja which comes under the category of commercial quantity. On 25.03.2019, the revision petitioner has filed an application seeking bail in Crl.M.P.NO.995 of 2019 under Section 36-A (4) of NDPS Act r/w Section 167(2) of Cr.P.C before the Principal Special Court for EC and NDPS Act Cases, Madurai on the ground that the investigation was not completed within 180 days as contemplated under Section 36-A (4) of the NDPS Act. On the very same day I.e on 25.03.2019 itself, the respondent has filed a charge sheet. Hence the Principal Special Judge for EC and NDPS Act Cases, Madurai has dismissed the said Crl.M.P.No.995 of 2019 by the order dated 28.03.2019. Aggrieved by the same, the accused has filed the present criminal revision.

3.The respondent has filed counter opposing this petition.

4.Heard Mr.M.Jegadeesh Pandian, the learned counsel for the revision petitioner /Accused and Mr.A.P.G.Ohm Chairma Prabhu, the learned Government Advocate (Crl.Side) for the respondent Police.

5.The learned counsel for the petitioner has submitted that the petitioner/accused was arrested and remanded to judicial custody on 24.09.2018 and that the 180th day expired on 23.03.2019. He further submitted that before expiry of 180th day, the respondent has not filed final report and hence, on expiry of 180th day i.e on 23.03.2019 itself, the petitioner/accused has got indefeasible right to get bail. He further submitted that since 23.03.2019 fell on Saturday, on the next working day i.e on 25.03.2019 (Monday) in the morning, the petitioner has filed bail application under Section 36-A (4) of the NDPS Act r/w Section 167 (2) of Cr.P.C, but only thereafter i.e in the evening, the respondent has filed charge sheet. He further relying upon the decision of this Court in **Kannan Vs State, 2011 (1) MWN (Cr.) 260** contended that once the application is filed expressing willingness of the accused to come on bail and his readiness to furnish sureties, it must be held that he had availed of such a right, the very moment, he made it known to the court and that the subsequent filing of the final report will not take away such a right, but the learned Principal Special Judge for EC and NDPS Act Cases, Madurai has erroneously dismissed the petitioner's bail application as once charge sheet is filed, the indefeasible right has got extinguished and therefore, he prayed to allow this criminal revision and set aside the order passed by the learned Principal Special Judge for EC and NDPS Act Cases, Madurai in Crl.M.P.No.995 of 2019, dated 28.03.2019 and release the petitioner (accused) on bail.

4.Per contra, the learned Government Advocate (Crl.Side) has submitted that on 25.03.2019, the respondent has filed charge sheet and on the very same day, the petitioner has also moved statutory bail application under Section 36-A (4) of NDPS Act r/w



167(2) of Cr.P.C. He further submitted that since the respondent has filed charge-sheet, the trial court has rightly dismissed the petitioner's application on 28.03.2019 and taken the case on file as C.C.No.118 of 2019 and the case was adjourned. He further relying upon the decision of the Constitution Bench of the Hon'ble Supreme Court in **Sanjay Dutt Vs. State (1994) 5 SCC 410:1994 SCC (Cri) 1433** contended that the indefeasible right accruing to the accused is enforceable only prior to the filing of the charge sheet and once charge sheet is filed, the said right gets extinguished. He further submitted that in this case, before the petitioner has availed the said indefeasible right, charge sheet has been filed and hence, the trial court has rightly dismissed the bail application and there is no irregularity or illegality in the said order and therefore, he prayed to dismiss this Criminal Revision.

7.In **Kannan Vs State, rep. By Inspector of Police** (cited supra), a single Judge of this Court in para-7 has observed as follows:

"7.The cumulative effect of all those decisions will go to show that though the right of the accused to be released on bail on the failure of the Investigating Officer to complete the investigation and submit the final report within the time stipulated in Section 167 Cr.P.C is said to be indefeasible, it ceases to be indefeasible and get extinguished as soon as a final report is submitted, if the said right is not availed of prior to the filing of the final report. It has also been indicated as to when a person is said to have availed of the right. Clear views have been expressed to the effect that once the application is filed expressing willingness of the accused to come on bail and his readiness to furnish sureties, it must be held that he had availed of such a right, the very moment, he made it known to the court and that the subsequent filing of the final report before ever an order is passed, will not take away such a right. In the present case, the specific allegation of the petitioner is that the petition for bail under Section 167(2) Cr.P.C was filed in the morning and the learned Judicial Magistrate waited till the morning session was over and in the meantime, the Investigating Officer was made to file the final report so as to defeat the right of the petitioner to be released on bail. The said contention of the petitioner that the petition under Section 167(2) Cr.P.C was filed first in point of time and the final report was submitted subsequent to the filing of the said petition has not been denied by the respondent. Therefore, this court has to accept the contention of



the learned counsel for the petitioner that the petitioner availed his right of being released on bail under Section 167(2) Cr.P.C before ever such right got extinguished by the filing of the final report.".

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8.The legal position regarding bail under Section 167(2) of Cr.P.C was cemented by a Constitution Bench of the Hon'ble Supreme Court which has inter alia held in **Sanjay Dutt Vs. State** (cited supra), in para-53 (2) (b) as follows:

"53.(2) (b) :The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4) (bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in **Hitendra Vishnu Thakur** is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing on the challan, notwithstanding the default in filing it within the time allowed, as governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage."

9.Since in the aforesaid decision, the Constitution Bench has referred to **Hitendra Vishnu Thakur Vs State of Maharashtra (1994) 4 SCC 602: 1994 SCC (Cri) 1087**, it would be relevant to refer to para-30 of the decision in **Hitendra Vishnu Thakur Vs State of Maharashtra (cited supra)** which reads thus:-

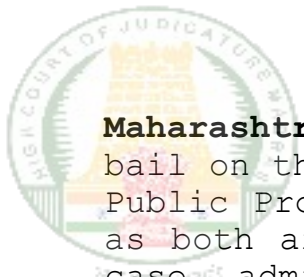
"30.In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail under Section 20(4) has to make an application to the court for grant of bail on grounds of 'default' of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail under Section 20(4) of TADA and both the provisions operate in separate



and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under clause (bb). *In this view of the matter, it is immaterial whether the application for bail on ground of 'default' under Section 20(4) is filed first or the report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while - granting or refusing bail.* If the period prescribed by clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under clause (bb) but the charge-sheet is not filed within the extended period, the court shall have no option but to release the accused on bail if he seeks and is prepared to furnish the bail as directed by the court. Moreover, no extension under clause (bb) can be granted by the Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in clause (bb) which must be strictly construed..”

10.The law laid down as above shows that requirement of an application claiming the statutory right under Section 167(2) of Cr.P.C is a pre-requisite for the grant of bail on default. It is also clear that it is immaterial whether the application for bail on the ground of “default” under Section 36-A (4) of the NDPS Act r/w Section 167(2) of Cr.P.C is filed first or the report as envisaged by the proviso to the said sub-section is filed by the Public Prosecutor first so long as both are considered while granting or refusing bail.

11.In this case, the respondent has not admitted in the counter that only after filing of the bail application by the petitioner, charge sheet has been filed. On the contrary, the respondent has stated in para-8 of the counter that on 25.03.2019, they have filed the final report before the trial court and on the very same day, the petitioner has also moved statutory bail application. Even assuming that the respondent has filed final report (charge sheet) only on the evening of 25.03.2019 I.e after filing of the bail application, in view of the decision of the Hon'ble Supreme Court in **Hitendra Vishnu Thakur Vs State of**



Maharashtra (cited supra), it is immaterial whether application for bail on the ground of "default" is filed first or the report by the Public Prosecutor seeking extension of time is filed first so long as both are considered, while granting or refusing bail. In this case, admittedly, the Public Prosecutor has not filed any report seeking extension of time. On the contrary, charge sheet itself was filed on the date, when the petitioner moved bail on the ground of "default". Therefore, it is immaterial whether the petitioner has filed bail application first or the respondent has filed charge sheet first.

12. In view of the decision of the Constitution Bench of the Hon'ble Supreme Court in **Sanjay Dutt Vs State (cited supra)**, the right of the accused to be released on bail, after filing of the charge-sheet, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the charge sheet only by the provisions relating to the grant of bail applicable at that stage. Section 167 of Cr.P.C will apply only at the investigation stage. Once charge sheet is filed, further remand can be made only by invoking the power under Section 309 of Cr.P.C. Therefore, the accused cannot seek bail under Section 167 (2) Cr.P.C. He has to seek bail only under provisions relating to the grant of bail applicable at that stage.

13. In view of the aforesaid decisions of the Hon'ble Supreme Court, I am unable to agree with the view of the learned Judge of this Court in **Kannan Vs State** (cited supra).

14. In this case, as already pointed out that though 180th day expired on 23.03.2019, the petitioner has filed bail application on the ground of default only on 25.03.2019. On that day itself, the respondent has filed charge sheet. In view of the decision of the Hon'ble Supreme Court in **Hitendra Vishnu Thakur Vs State of Maharashtra (cited supra)**, it is immaterial whether the bail application is filed first or charge sheet is filed first so long as both are considered simultaneously while granting or refusing bail. Taking into consideration of the aforesaid facts, the learned Principal Special Judge for EC and NDPs Act Cases, Madurai has rightly dismissed the CrI.M.P.NO.995 of 2019. This Court does not find any irregularity or illegality in the said order. Accordingly, this Criminal Revision Petition is dismissed.

Sd/-

Assistant Registrar(CO)

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Sub Assistant Registrar(CS)



TO

1. The Principal Special Judge
for EC and NDPs Act Cases, Madurai
2. The Inspector of Police,
Pattiveeranpatti Police Station,
Dindigul District (Cr.No.214/2018).
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

ORDER

IN

CRL RC(MD) No.219 of 2019

Date : 19/08/2019

TR (28.08.2019) 7P 4C