

IN THE CIRCUIT BENCH OF CALCUTTA HIGH COURT AT JALPAIGURI
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE

Present:- The Hon'ble Justice Shivakant Prasad
&
The Hon'ble Justice Hiranmay Bhattacharyya

C.R.M. 46 of 2021
Uttam Saha
Vs.
The Union of India & Anr.

For the Petitioner : Mr. Sabir Ahmed, Adv.
Mr. Hillol Saha Podder, Adv.

For the D.R.I. : Mr. Ratan Banik, Adv.

Heard on : 25.02.2021

Judgment on : 26.02.2021

Shivakant Prasad, J.:-

This is to consider an application under Section 439 of the Code of Criminal Procedure, 1973 challenging the order dated 22.09.2020 passed by the learned Judge, Special Court (under Narcotic Drugs and Psychotropic Substance Act, 1985) cum Additional Sessions Judge, 2nd Court Jalpaiguri in connection with N.D.P.S. Case No.06 of 2020, arising out of Alipurduar Customs Preventive Unit, Seizure Case No.:01/CL/NDPS/CUS/APD/2019-2020 dated 01.02.2020 under Section 20(ii) (C) of the Narcotic Drugs and Psychotropic Substance Act, 1985.

The petitioner's case in brief is that on the complaint of R. W. Sherpa, Superintendent of Customs, Alipurduar Preventive Unit, Alipurduar on the basis of an information, the DRI Officers of Siliguri Unit along with the officers of Customs Dinhata DPU, Dinhata, one oil tanker bearing Registration No.NL-02N-5136 was intercepted near Nimti Police Check Post, district Alipurduar and altogether 85 packets of cannabis (Ganja) weighing altogether 850 kgs. were recovered from the secret chamber of the said oil tanker from the possession of the petitioner namely, Uttam Saha and another accused namely, Jimdar Ray. On 01.02.2020 those two persons were arrested under Section 43(b) of the NDPS Act, 1985 for illegally carrying, possessing and transporting huge quantity of Ganja which is punishable under Section 20(b)(ii)(c) of the NDPS Act, 1985 and on 02.02.2020 they were produced before the Ld. Additional Chief Judicial Magistrate, Alipurduar and on 03.02.2020 in pursuance of the order of the learned Additional Chief Judicial Magistrate, Alipurduar, accused persons were produced before the learned Additional District & Sessions Judge, 2nd Court (Special Judge) under NDPS Act, 1985 at Jalpaiguri and they were remanded to the Judicial Custody.

It is submitted that on 31.07.2020 the prosecution filed an application/report praying for extension of period of investigation along with put up petition but the said application was not served to the accused person and next date was fixed on 14.08.2020 for hearing over the extension petition.

It is submitted that period of 180 days for completion of investigation expired on 30.07.2020 within the statutory period of limitation prescribed under Section 36A(4) of the Narcotic Drugs and Psychotropic Substance Act, 1985 and the prosecution filed prayer for extension of time to submit final report on investigation on 31.07.2020.

It is pointed out that copy of the said application was not served to the petitioner and a right of default bail under Section 167(2) of the Code of Criminal Procedure has accrued in favour of the petitioner to release on the principle of a default bail for non-submission of charge sheet.

The learned Judge was pleased to fix date on 14.08.2020 for hearing over extension petition on the same day. An application for bail was filed on behalf of the petitioner and the next date was fixed on 25.08.2020 for hearing, both application and the bail application and on 25.08.2020 the date was deferred on 29.08.2020 as none had appeared. Thereafter, on 04.09.2020 record was taken up for hearing by put up petition and the next date was fixed on 08.09.2020 and on that day an adjournment petition was filed on behalf of the prosecution and the next date was fixed on 22.09.2020.

It is further submitted that on 22.09.2020 the matter came up for hearing before the learned Judge and after hearing both parties the learned judge was pleased to reject the prayer for bail by extending the period of investigation for another 90 days from the date of expiry of 180 days by which investigating officer must submit report in final form.

It is also submitted that the order dated 31.07.2020 reveals that the application/report filed on behalf of the prosecution on 31.07.2020 was not served on the accused person and accordingly, the petitioner had sought to be released as entitled on default bail for the charge sheet not having been filed within the statutory period.

The supplementary affidavit was filed by the petitioner annexing order No.11 dated 16.10.2020 (Annexure P/1) the put up petition under Section 167(2) Cr.P.C. on behalf of the petitioner on 02.01.2020 for enlarging the petitioner on bail because no charge sheet was submitted by the investigating agency nor any petition for extension was filed by the Public Prosecutor within 60 days from the date of order dated 16.10.2020.

A copy of the report submitted by Public Prosecutor on 02.01.2021 filed before the learned Special Court, Jalpaiguri is also annexed to the supplementary affidavit which reflects that the prosecution sought for extension of period to file final report contending that in presence of two independent witnesses and the apprehended persons all the four chambers of the Oil Tanker opened. On opening the 1st chamber 85 packets of cannibies (believed to be Ganja) wrapped with newspaper and brown cello tape were recovered. The rest 3 chambers were empty and that Assistant Commissioner, Dinhata Customs Division telephonically ordered Shri Dhrendra Kumar Singh, Inspector of Customs Alipurduar Preventive Unit to seize the recovered goods and do the other seizure formalities. Complying the order of the Assistant

Commissioner all the 85 packers were weighed and found 850 Kgs altogether, alongwith the packing materials and seized the same under Section 43(B) of the NDPS Act, 1985 as those were reasonably believed to be liable to confiscation under Section 60(3) of the Act and the entire process of seizure goods and arrest of the two accused persons, were done in presence of two independent witnesses and officers of Siliguri DRI alongwith officers of Divisional Preventive Unit, Dinhata and the arrested persons were presented before the Special (NDPS) Court, Jalpaiguri who were sent to Judicial custody. A prayer for drawing the representative samples and to certify the correctness of inventory list in presence of Judicial Magistrate of Alipurduar was made and by an order dated 14.02.2020 the learned Chief Judicial Magistrate was appointed to do the needful. Accordingly, on 19.02.2020 in presence of the learned Judicial Magistrate, 1st Court, Alipurduar two sets of samples were drawn from those 85 packets each weighing 25 gm and marked as 01/85A to 85/85A and 01/85B to 85/85B. One set, containing 85 nos. of samples, was sent to the Chemical Engineer (Gr. II), Chemical Laboratory, Custom House, 15/1 Strand Road, Kolkata, West Bengal – 700 001 for chemical examination through the learned Judicial Magistrate, 1st Court, Alipurduar. Thereafter, due to the outbreak of Covid- 19 pandemic the certification of the seized carried vehicle (Oil Tanker which is seized in a breakdown condition) could not be done. Moreover, reply of most of the correspondences made in relation to the investigation of the instant case were abated. Accordingly, it was prayed before the learned Court for extension of the period to submit the charge sheet on completion of the investigation. The report submitted by the learned Public Prosecutor before the

Special Court further reflects that after the statutory period with the first extension order, the custody of the accused persons will be completed on 27.10.2020 and without certification of the offending vehicle and chemical report of the seized article the submission of the charge sheet will be defective one and premature. The extension was given till 31st December, 2020 and the investigation was almost completed by the I.O. and was in the final stage for certain departmental formalities required to be completed and as such the two weeks time was sought for to submit final report.

Admittedly, it would appear that accused was produced before the learned Additional Chief Judicial Magistrate, Alipurduar on 2.2.2020 and he was produced before the Special Judge on 3.2.2020.

Mr. Sabir Ahmed, learned advocate for the petitioner has relied on a decision in the case of *M. Ravindran Vs. The Intelligence Officer, Directorate of Revenue Intelligence* of the Hon'ble Supreme Court adverted to the observation made in paragraph 14 to contend that by a Constitution Bench in case of *Sanajy Dutt v. State through C.B.I., (1994) 5 SCC 410*, it was held that grant of default bail is subject to refusal of the prayer for extension of time, if such a prayer is made.

Our attention is invited to the conclusion arrived at by the Hon'ble Supreme Court at para 18 of the cited decision which is reproduced hereunder for profitable consideration:-

"18.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have availed of or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused

applies for bail under Section 167(2), Cr.P.C. read with Section 36A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

18.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.

18.3 However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

18.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid. "

In the affidavit-in-opposition filed on behalf of the D.R.I., it is submitted that:

"As per Section 36A(4) of the NDPS Act, 1985, the statutory period of filing complaint in final form as well as charge sheet in case of the offences involving commercial quantity is 180 days. Moreover, it has also been mentioned in the proviso that if it is not possible to complete the investigation within the said period of 180 days the special court may extend the said period upto one year on 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 180 days".

Mr. Ratan Banik, learned counsel for the D.R.I. submits that from the date of production i.e. from 02.02.2020 to 30.07.2020 altogether 178 days were elapsed and on 31.07.2020 the learned Public Prosecutor in view of report of the Enquiry Officer had

filed an application wherein he has prayed for extension of period together with an application for putting up the case record and the learned Special Judge was pleased to consider and seen the report and also fix the next date on 14.08.2020 for hearing over the extension application. On 14.08.2020 on the prayer of both sides the hearing of extension petition was deferred till 25.08.2020 which fact is evident from the order no.04 dated 31.07.2020 and order no.5 dated 14.08.2020 passed by the learned Judge Special Court.

Further, our attention is invited to the order dated 22.09.2020 to contend that upon hearing the learned lawyer of both the prosecution and the defence the learned Special Judge, Jalpaiguri was pleased to extend the period of investigation for another 90 days from the date of expiry of 180 days by the I.O., was directed to positively submit the report in final form and considering the attending facts and circumstances the prayer for bail is rejected.

The learned Judge was rightly of the view that legislature by framing law has given power to the Court to extend the period of investigation in a fit case and further considering the factual background of the case as narrated by the learned Public Prosecutor and bearing in mind the progress of the investigation such prayer for extension of period for investigation by another 90 days was granted.

The investigation was not completed because the F.S.L. Report could not be collected after March, 2020 due to Pandemic situation of the Covid – 19. So, the learned Public Prosecutor within the said extended period filed an application praying

for further extension of period of investigation and by the order dated 16.10.2020, the learned Special Judge was pleased to extend the period for another 60 days with effect from 28.10.2020.

Learned counsel for the DRI invited our attention to order No.14 dated 05.01.2021 whereby the learned Special Judge, Jalpaiguri upon hearing both sides considering the petition filed by the prosecution was pleased to further allow the extension for a period of 30 days with effect from 27.12.2020. We do find on perusal of the said order dated 5.1.2021 that the accused had filed bail petition on 29.12.2020 which was taken alongwith the application filed by the prosecution for extension of the period of investigation had filed on 2.1.2021. The said prayer for bail was moved, inter alia, on the ground that period of investigation has been completed on 26.12.2020 as the period of investigation was allowed by the Court on 16.10.2020 for a period of 60 days with effect from 28.10.2020 and accordingly on behalf of the petitioner bail was moved for releasing on default on the part of the prosecution for not submitting the charge sheet.

It would appear that the learned Judge has taken into consideration a decision reported in 2017 (2) Cr. LR Cal 306 wherein it has been observed that extension of time period to be sought on submission of report by the learned Public Prosecutor prior to the expiry of period of 180 days and in the event of failure to do so accused is entitled to statutory bail.

Reference to a decision in the case of *M. Ravindran (supra)* was also made to the learned Special Judge to contend that if accused files an application for bail under Section 167(2) Cr.P.C. he is deemed to have availed his right to be released on default bail accruing after expiry of stipulated time limit for investigation.

It is the contention of the prosecuting agency that in view of the order passed by the learned Special Judge on 05.01.2021 the total period for filing application in the final form by way of charge sheet was on 26.01.2021 and then that the final complaint as well as the charge sheet against accused person has been filed before the learned Special Judge, Jalpaiguri on 14.01.2021 and the charge sheet has been accepted and cognizance has been taken of the offence punishable under Section 20(b)(ii)(c) and Section 9 of the N.D.P.S. Act and the next date was fixed on 06.03.2020 for consideration of charge.

In support of the submission so made on behalf of the D.R.I. reference to a decision in the case of *Monotosh Ghosh vs. The State of West Bengal* reported in *Calcutta Criminal Law Reporter, 2011* pages 200, has been made to contend that granting of bail of the accused upon non submission of charge sheet by the prosecution within statutory period could be extinguished if the prosecution submits the charge sheet before production of bail bond by the accused and the Magistrate withhold the release of the petitioner even after granting of bail.

Accordingly, submission has been made that the petitioner is not entitled to get benefit under Section 167 of the Criminal Procedure Code and also charge sheet has been filed within the extended period.

In our considered opinion, the decision cited is not apposite to the facts and circumstances of the instant case because, the bail application was not allowed directing the accused to furnish bail bond. However, it would appear from the order no.14 dated 05.01.2021 that although the application for enlarging the accused on bail on 29.12.2020 was filed before the Vacation Court but a copy of such application was not served upon the prosecution due to ensuing Winter Vacation and it appears that on the first day of reopening after Winter Vacation an application for extension of period of investigation was filed on 02.01.2021, ergo, it cannot be said that the prosecution has filed the application for extension of time after expiry of period of investigation as the prosecution did not waste time in filing the said application on reopening after Winter Vacation.

The order sheet clearly goes to show that the ultimate period for submission of charge sheet as granted by the learned Court was till 26.01.2021 whereas charge sheet was submitted on 14.01.2021 before the learned Special Judge and cognizance has been taken of offences which fact is also evident from the information slip submitted on behalf of the prosecution.

In this context, the learned counsel for the petitioner relied on a decision in case of *Chaganti Satyanarayana and Ors. Vs. State of Andhra Pradesh* reported in (1986) 3

Supreme Court Cases 141 to submit that even the detention during the fraction of a day should also be counted as detention for a day since a calendar day as a unit of time is the interval between one midnight and another and further adverted to the observation made in Paragraph-30 to contend that in *Jagdish case* reported in (1984) *Cri LJ 79 MP : ILR 1983 MP 474: 1983 MPLJ 759*, it has been held that the date of arrest is to be excluded in computing the total period of detention by application of Section 9 of General Clauses Act and by bearing in mind Section 12 of the Limitation Act.

In *Sureya Reddy* case reported in 1985 *Cri LJ 939 (Ori.)* which states that the view taken is that Section 10 of the General Clauses Act would be attracted for interpreting the proviso if the last day happens to be a Sunday or holiday and even otherwise the principle enunciated therein should be invoked or considerations of justice and expediency. In that case the 90th day from the date of arrest happened to be a Sunday and hence the Court was of the view that Section 10 of the General Clauses Act would be attracted.

In so considering the propositions laid in the two cited decisions the Hon'ble Supreme Court has made observation in paragraph 31 thus:-

"31. Some of the decisions cited on either side have been rendered prior to the amendment of proviso (a) by Act 45 of 1978 and some have been rendered after the amendment. Mr. Ram Reddy sought to make a distinction of the earlier decisions by contending that they ceased to have relevance because of the amendment to proviso (a) making it an independent paragraph all by itself. Since we have held that in whichever way proviso (a) is construed i.e. with reference to Section 167(2) or without reference to it the periods of 90 days and 60 days prescribed by the legislature can be reckoned only from the date of remand the distinction sought to be made between the decisions rendered

prior to Amendment Act 45 of 1978 and subsequent to it does not have much of significance”.

It is urged that the application for bail in this case was filed before the Special Judge on 29.12.2020 which was taken up for consideration on 05.01.2021 whereas the charge sheet has been submitted on 14.01.2021 and, therefore, the petitioner has a right accrued for enlargement on bail in default of submission of charge sheet.

It is true that the application for bail was filed on 29.12.2020 during the Winter Vacation and the special Court was not in seisin as all Courts in West Bengal were on vacation and a vacation Court remained open during vacation period on roster basis, so obviously the application for bail filed on 29.12.2020 was not served on the prosecution whereas an application for extension of period to submit the final report was filed on 2nd January, 2021 i.e. on the date of reopening after Winter Vacation on behalf of the prosecution. This is the distinguishable features from the cited case of the Hon'ble Supreme Court in case of *M. Ravindran Vs. The Intelligence Officer, Directorate of Revenue Intelligence* inasmuch as the accused was remanded to judicial custody on 04.08.2018 for the offence punishable under Section 8(c) read with Sections 22(c), 23(c), 25A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and after completion of 180 days from the date of remand on 31.1.2019, accused had filed the application for bail under Section 167(2) of the Code of Criminal Procedure on 01.02.2019 before the Special Court on the ground that the investigation was not completed and charge sheet had not been filed within statutory period of 180 days and

the learned Trial Court granted order of bail on 05.02.2019 on the default of submission of the charge sheet.

In the instant case before us, we find that the prosecution was allowed extension of period for submission of the charge sheet by 26.01.2021 considering the complete lock down due to Pandemic situation by virtue of advisories of the Central Government and also of the Hon'ble Supreme Court, ergo, we do not find fault with the discretion exercised by the learned Special Judge vide order no.14 dated 05.01.2021 for the reason referred to hereinabove to the effect that the bail application was filed during Winter Vacation and it was not filed before the Special Judge under the N.D.P.S. Act, 2nd Court, Jalpaiguri and on the very date of reopening after the Winter Vacation the prayer of the prosecution for extension of period to submit final report was allowed by declining to enlarge the petitioner-accused on bail.

Accordingly, the application being, C.R.M. 46 of 2021 is rejected and disposed of.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties upon compliance of all requisite formalities.

I agree.

(Hiranmay Bhattacharyya J.)

(Shivakant Prasad, J.)

*S.Dutta
A.R.(Court)*