

\$~9

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Delivered on : 16th September, 2021

+ **CRL.A. 559/2020 and CRL.M.A. 16703/2020**

RAHUL GUPTA

..... Appellant

Through : Mr.Rajiv Mohan, Mr.Swapnil
Krishna, Mr.Nipun Arora,
Advocates.

versus

STATE

..... Respondent

Through : Mr.Kamal Kumar Ghai, APP for the
State with ACP Sanjay Sharma,
Rajouri Garden, and SI Amit
Sehrawat, PS Hari Nagar.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The appeal is filed against the impugned order dated 18.03.2020 passed by the learned Special Judge, West District, Tis Hazari Courts, Delhi (hereinafter referred *learned Trial Court*) and to direct release of appellant on bail *per* Section 167 Criminal Procedure Code (*Cr PC*) read with Section 21(2) of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred as *MCOCA*) in case FIR No.397/2019 registered at police station Hari Nagar.

2. The learned counsel for the appellant says FIR No.100/2018 was registered under NDPS Act at police station Hari Nagar, Delhi and accused Salman Tyagi was arrested on 17.02.2018 and appellant/accused Rahul Gupta, was arrested on 18.04.2018 in the said FIR. The appellant was granted regular bail in such FIR No.100/2018 on 05.07.2019 by this Court

Crl A. No.559/2020

Page 1 of 9

Signature Not Verified

Digitally Signed By VIJAYA
LAKSHMI DOPHAL

Signing Date: 17/09/2021 15:06

on the ground there being no evidence against him, except disclosure statement of a co-accused.

3. However, on 13.08.2019, the present FIR was registered under MCOCA. On 03.10.2019 co-accused Salman Tyagi was arrested in the present FIR and appellant herein was arrested on 21.10.2019. There is a provision for extension of period of investigation under the Act from 90 days to 180 days, but such application for extension needs to be moved prior to the expiry of 90 days from the date of arrest of the accused.

4. The time for moving such application for extension of period of investigation qua accused Salman Tyagi was to expire on 02.01.2020 and qua the appellant herein on 21.01.2020.

5. It is alleged though, initially, Mr.Mahesh Patel, Advocate was appearing on behalf of all accused, including this appellant but on 26.11.2019, the appellant filed an application for bail through Mr.Rajiv Mohan, Advocate, who also filed his *Vakalatnama*. The order sheets since 26.11.2019 record the attendance of Sh. Rajiv Mohan, Advocate and of his associates for the appellants, as alleged. However on 24.12.2019, an application for extension of period of investigation to 180 days was moved qua *all accused* by the prosecution, as period of investigation qua accused Salman was going to expire on 02.01.2020 and the advance notice of the application was *accepted* by Mr.Mahesh Patel, Advocate *for all accused*.

6. On 26.12.2019 this application was listed, but none of the accused was present, accordingly, notice of this application was issued only to accused Salman Tyagi and his counsel Mr.Mahesh Patel, Advocate.

7. On 28.12.2019 an order was passed recording the presence of accused Salman Tyagi, being produced from custody along with *his* counsel Mr.Mahesh Patel. The matter was then adjourned from time to time till 07.01.2020 by the learned District Judge- Vacations till an extension was granted not only qua accused Salman Tyagi but also against *other accused; including the appellant herein*. The order dated 07.01.2020 *inter alia* notes:-

“Considering the progressive investigation reported by the IO and the investigation that remains to be conducted in respect of remaining accused and evidence needed to be collected, I find it reasonable to extend the time of investigation for further period of 75 days from 15.01.2020.”

8. The learned counsel for the appellant relies upon order dated 28.11.2019 and subsequent orders where it notes the presence of Mr.Mahesh Patel, Advocate for all accused *except* accused Rahul Gupta, hence it is argued no notice for such extension was ever given to this accused/appellant and in any case Mr.Mahesh Patel, Advocate accepted notice for other accused, than this appellant hence the appellant is entitled to bail.

9. The learned counsel for the appellant referred to *Hitendra Vishnu Thakur and Others vs State of Maharashtra and Others* (1994) 4 SCC 602 which held:-

“21. Thus, we find that once the period for filing the charge-sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be

so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the court must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating prosecuting agency and once such an application is made, the court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused 6 Hussinara Khatoon v. Home Secy., State of Bihar, (1980) 1 SCC 98: 1980 SCC (Cri) 40: AIR 1979 SC 1369 7 (1992) 4 SCC 272: 1992 SCC (Cri) 870: AIR 1993 SC 8 (1989) 3 SCC 532: 1989 SCC (Cri) 612: AIR 1990 SC 71 obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's 'default'. **Similarly, when a report is submitted by the public prosecutor to the Designated Court for grant of extension under clause (bb), its notice should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him.** It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion **the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties.** This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty

of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party. We must as already noticed reiterate that the objection to the grant of bail to an accused on account of the 'default' of the prosecution to complete the investigation and file the challan within the maximum period prescribed under clause (b) of sub-section (4) of Section 20 TADA or within the extended period as envisaged by clause (bb) has to be limited to cases where either the factual basis for invoking the 'default' clause is not available or the period for completion of investigation has been extended under clause (bb) and the like. No other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the 'default' of the prosecution."

10. In *Sanjay Dutt vs State through CBI* (1994) 5 SCC 410 it was held:-

*"(2)(a) Section 20(4)(bb) of the TADA Act **only requires production of the accused** before the court in accordance with Section 167(1) of the Code of Criminal Procedure and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to clause (bb) of sub-section (4) of Section 20 of the TADA Act has to be understood in the Judgment of the Division Bench of this Court in *Hitendra Vishnu Thakur*. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose."*

Hence, it is argued proviso to sub-Section (b) of Section (2) of Section 21 of MCOCA is *pari materia* to Section 20(4) (bb) of the TADA, hence if we apply same analogy, notice ought to have been given to appellant on an application for extension of time to file charge sheet.

11. The learned APP for the State on the other hand referred to *Sharjeel Imam vs. State of NCT of Delhi* in CRL.M.C.1475/2020 decided on 10.07.2020 which notes:-

“61. There is no dispute that the counsel to whom the information was given had filed Vakalatnama on behalf of the petitioner before the Court below and was representing him in the proceedings since February, 2020, as is clear from the ordersheet dated February 12, 2020 (Annexure P5 to the petition). The very filing of the Vakalatnama suggests authority having been given to the counsel to represent the petitioner in the proceedings before the Court and to do all acts and things which may be necessary to be done for the progress and in the course of the prosecution of the case.

62. In fact, I notice, the Vakalatnama filed in these proceedings was also executed by the petitioner on February 18, 2020 while he was in custody in Tihar Jail in favour of the same counsel. On the strength of the information, the counsel could have presented herself before the Court only to know the outcome of the application / report, which may include, the Court on presentation of the application / report if not satisfied with the same, rejecting the same and not extending the time for investigation. The appearance of the counsel would have been a sufficient representation on behalf of the petitioner and this fact is also acknowledged by the counsel for the petitioner, as is seen in the table at para 10, where it is stated that notice to the accused through production or to the accused / counsel through Court is the standard in law. That apart, even this Court, in Mohd. Maroof (supra) by finding that notice has been issued by the Court to the counsels, and the accused could not be produced in the Court, has not found fault, in the order, extending the time for investigation. So it follows, the appearance of the counsel for the petitioner being sufficient representation while considering application / report of the APP, whether it is on a notice issued by the Court or on an information from the Investigating Officer, is inconsequential.”

and *Mohd.Marooof @ Ibrahim & Ors. vs. State* in CRL.M.C.3644/2014 decided on 12.05.2015 wherein it was held:

“30. No doubt, on 7th June, 2014, the accused

persons/petitioners were not produced before Court at the time of extension of time of investigation for 30 days, though it is the requirement of the principle of natural justice and for issuance of notice to the accused.

However, it has come on the record that the trial Court had issued a notice to the counsel who were appearing on behalf of the accused, they did not appear despite of having knowledge about the concerned application. One of the counsel refused to receive the notice. He did not appear when the application for extension of time of investigation for 30 days was taken up. If he had any objection about the production of accused at the time of extension, he could have appeared and pointed out the same to the trial court. The reasons given by the counsel are unacceptable. This Court after having gone through the report submitted by the Public Prosecutor allowed the prayer of the said application. Many other objections were raised by the counsel in this regard, I am of the view that while sitting in the jurisdiction of 482 Cr.P.C., the Court is not to decide the objections unless the order is perverse or it has been passed contrary to law. One of the objections is with regard to the appointment of public prosecutor by the Government. These are the issues which are to be considered at the time of framing of charge. Prima-facie, this Court is satisfied with the reasons recorded by the trial Court on the basis of the report of the Public Prosecutor. The report submitted by the Public Prosecutor is a very detailed report which indicates the progress of the investigation and specific reasons are given for the detention of the accused beyond 90 days to 120 days. All the objections raised by the petitioners are allowed to be taken by them at the time of framing of charge.”

12. The crux of the two judgments above is the notice to the counsel is a sufficient notice to the accused.

13. However, it is argued by the appellant, in Sharjeel (*supra*) and Mohd.Marroof (*supra*), the counsel of the accused was same throughout the proceedings but whereas accused Rahul Gupta changed his counsel and appointed Mr.Rajiv Mohan, Advocate instead of Sh.Mahesh Patel, Advocate and that Sh.Mahesh Patel, Advocate was never his counsel when

an application dated 24.12.2019 for extension was moved, hence there was no notice to the appellant of the application for extension of time, thus he is entitled to bail.

14. No doubt the bail under Section 167 (1)(a) Cr.P.C. per *Rakesh Paul vs. State of Assam* 2017 (15) SCC 67 and *Udai Mohanlal Acharya vs. State of Maharashtra*, (2001) 5 SCC 453 is a fundamental right, but one cannot ignore the fact the application dated 24.12.2019 when filed, its advance notice was *served* upon Sh.Mahesh Patel, Advocate who has been appearing on behalf of all accused. At such time he *did not object* that he was not a counsel for appellant. Though, Sh.Rajiv Mohan Advocate was appointed on 26.11.2019 for filing an application for bail, but Sh.Mahesh Patel, Advocate did not sought for discharge from the case qua the appellant. Rule 39 (Section IV, Chapter II of Part IV of the Bar Council of India Rules) of the Rules framed under Section 49 (1) (C) of the Advocates Act, 1961 provides as under:-

“An advocate shall not enter appearance in any case in which there is already a vakalat or memo of appearance filed by an advocate engaged for a party except with his consent; in case such consent is not produced he shall apply to the Court stating reasons why the said consent could not be produced and he shall appear only after obtaining the permission of the Court.”

15. No such consent of earlier counsel nor any permission was sought formally from Sh.Mahesh Patel, Advocate for his discharge qua the appellant, hence it cannot be said the Investigating Officer had the knowledge that Sh.Mahesh Patel, Advocate was no longer an advocate for accused Rahul Gupta. Neither such an inclination was ever shown by Sh.Mahesh Patel, Advocate on 24.12.2019 when he *accepted advance*

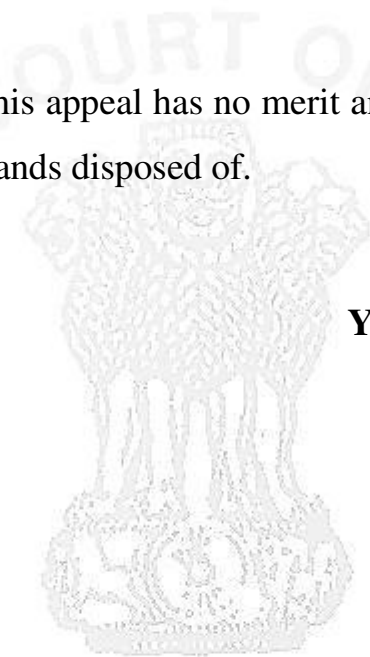
notice on behalf of all accused. Concept of parties having various counsels representing them at one point of time is not uncommon to our Courts, hence acceptance of application for extension by Sh.Mahesh Patel, Advocate on behalf of all accused, including this appellant goes against him and it cannot be said the accused had no notice of such an application. Moreso order dated 07.01.2020 of extension of period of investigation against all accused for 75 days was never challenged by any of the accused, including this appellant.

16. In view of above, this appeal has no merit and is dismissed. Pending application, if any, also stands disposed of.

YOGESH KHANNA, J.

SEPTEMBER 16, 2021

M/DU



भारतमेव जयते