

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 4215 of 2021

Shlok Rakesh Todankar .. Applicant
Versus
The State of Maharashtra .. Respondent
...

Mr. G.S.Satam for the applicant.
Mrs.Rutuja Ambekar, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 6th SEPTEMBER, 2022

P.C:-

1 By the present application, the applicant seek his release on bail u/s.167(2) of Cr.P.C read with Section 36A of the Narcotic Drugs & Psychotropic Substances Act. His application seeking default bail came to be rejected by the Special Judge, NDPS, City Civil and Sessions Court, Gr.Mumbai on 17/4/2021.

2 Heard the learned counsel for the applicant Mr.Gopal Satam and Mrs.Rutuja Ambekar, the learned APP for the State.

3 In order to appreciate the legality and correctness of the order passed by the Sessions Judge, it would be necessary to briefly refer to the important and relevant dates and events, preceding the rejection.

ANC Bandra Unit, while on patrolling duty on S.V. Road, Khar (West), Mumbai, found an individual with suspicious behaviour and when intercepted, he was found carrying a black colour sack on his shoulder, and the search, led to possession of 17 LCD papers and 1 Kg.100 gms of *ganja*. He was apprehended and arraigned as accused in C.R.No.27/2021 registered with ANC Bandra Unit for the offence punishable u/s.8(c) r/w Section 20(b), 22(c) of the Narcotics Drugs and Psychotropic Substances Act, 1985.

4 On his arrest from 3/4/2021, it was imperative for the NCB to follow the procedure prescribed u/s.36A of the NDPS Act. Sub-section (4) of Section 36A reads thus :-

“(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to 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 one hundred and eighty days”.

5 As per the said provision, stipulated period of limitation of filing the charge-sheet by the prosecution was, on or before 1/10/2021 i.e. on completion of 180 days from the date of the first remand. On 23/9/2021, the Assistant Police Inspector, ANC, Bandra Unit forwarded an application to the Special Court, seeking extension of 60 days, for filing of charge-sheet as the investigation was not complete, and the necessary details of the completed investigation and the unfinished investigation, was contained in the said application.

The Investigating Officer himself preferred an application before the learned Judge on 23/9/2021 for taking the case on Board, in the wake of the application being filed, seeking extension of time to complete the investigation. The verification on the said application was also made by the API himself.

6 On the very same day, the Special Court passed the following order :-

“SPP Ms.Geeta Nayyar for State present.

API Karkar attached to ANC Bandra Unit present.

Exh.9 – Application for taking the matter on today’s board.

O – Allowed.

Application for extension of time of 60 days to file charge-sheet.

O – Otherside to say.

Accused is at present lodged at Arthur Road Jail. It is directed to the Jail Superintendent to serve the copy of Misc. Application to accused.

Registrar Sessions, to register the NDPS Misc. Application for statistical purpose.

The case is adjourned for reply to 28/09/2021.”

Application was attempted to be served on the applicant through the Jail Superintendent, who made the following endorsement:-

“Shlok Todankar cannot sign this paper without talking with my Advocate.

Shlok Todankar”

7 Application for extension was filed on 23/9/2021, but it was kept pending, as it was neither refused nor granted.

On 28/10/2021, the learned Judge recorded as under :-

“Received new charg-sheet from Department.

SPP Ms.Geeta Nayyar for ANC present.

The perusal of case papers prima faice disclose that the accused have committed an offence under Section 8(c) punishable under Section r/w 22(c) of NDPS Act, 1985. There is sufficient ground to proceed against the accused under these sections.

Hence, issue process against the accused.

C.A. Report filed.

Issue production warrant against accused.

The case is adjourned for appearance to 18.11.2021”.

8 On 25/10/2021, the applicant responded to the application for extension by filing a response and the application was opposed specifically, contesting the grounds on which the extension was sought. The reply to the application raised the following objections :-

“(a) The said application was mainly sought on the ground of non receiving of C.A. report. The said ground is not tenable as charge-sheet can be filed without C.A. report as it would not amount to incomplete charge-sheet as held by the Hon’ble Bombay High Court in Manas Krishna T.K vs. State in CRMAB/88/2021.

(b) It is further contended in the application that statement of 2 persons is required to be recorded and one report from Bitcoin data protection officer is awaited. The grounds are also not tenable as six month time was sufficient to do that.

(c) That the case against accused is of possession of contraband where panchnama and statement of witnesses in raiding team have recorded and not of circumstantial evidence. Hence, the prosecution has recorded and not of circumstantial evidence. Hence, the prosecution has sufficient evidence to submit charge-sheet.

(d) The prosecution can submit other documents on record at later stage also and they can continue further investigation u/s.173(8) Cr.P.C.

(e) The said application does not fulfil the requirement of section 36A NDPS Act.

Hence, it is humbly prayed that the application for extension of time to submit charge-sheet may be rejected.

9 The applicant moved an application on 1/10/2021 seeking his release on default bail and the applicant sought to derive benefit of Section 167(2) of Cr.PC r/w Section 36-A of NDPS Act and claim that 181 days have passed since the date of his production before the Magistrate and the respondents have failed to file the charge-sheet within a period of 180 days.

 This application came to be rejected by the Special Judge on 17/11/2021 by recording as under :-

“It evinces to me that, the prosecution vide Exh.10 in R.A.No. 421/2021 has filed an application for further extension of time upto the quantum of 60 days for filing the charge-sheet pertaining to NDPS R.A.No. 434/2021 dated 23.09.2021. The said application is pending for hearing. The roznama dated 23/09/2021 categorically enumerates for the reply to be filed by the other side and also the Jail Superintendent was directed to serve the copy of M.A to the accused and thereafter, the Registrar Sessions was directed to register the NDPS Misc. Application for statistical purpose. In view of the same, it is evident that prior to expiry of the stipulated limitation of 180 days, the prosecution had moved such application and thereafter, on expiry of such limitation the present Bail Application is filed on behalf of applicant/accused. Thus, in view of the

same it cannot be said that, the applicant herein is entitled for such relief of enlargement on bail on account of an infeasible right being generated in this favour. Moreover, rules of procedure are handmades of justice, therefore, mere non registration of application for statistical purpose cannot be held to benefit of the accused in this regard. Thus, in view of the same, I hold that the application deserves no consideration”.

10 From the sequence of events narrated above, certain facts are not in dispute. The first fact being the period of 180 days, as prescribed u/s.36A of the NDPS Act, expired on 1/10/2021. It is not in dispute that on the very same day, the applicant filed an application for default bail. It is also not in dispute that prior to the said date, the Investigating Officer filed an application for extension on 23/9/2021. It is also not in dispute that the application was kept pending, as it was neither allowed nor rejected, meaning thereby that the extension was not granted. Another undisputed fact is about the charge-sheet, being filed on 27/10/2021, which is beyond the period of 180 days.

In the backdrop of the undisputed facts, the question that arises for determination is whether the applicant is entitled for being released on default bail.

11 Section 36A which is in pari-materia to various Sections in the special statutes like Section 21(2)(b) of MCOC

Act and Section 20(4)((b)(d) of the (The) Terrorist and Distruptive Activities (Prevention) ACT, 1987 and Section 49(2) (b) of the The Prevention of Terrorism Act, 2002 (POTA).

On reading of the said proviso appended to sub-section 4 of Section 36A of NDPS Act, it can be clearly discerned that the Special Court may extend the period of 180 days upto one year, on the report of the Public Prosecutor, informing the Court about the progress of the investigation and the specific reason for detention of the accused beyond the period of 180 days.

12 In the present case, as it can be seen that the Public Prosecutor never submitted the report, but the Investigating Officer directly preferred an application before the Court and though the Public Prosecutor was prsent on the date of hearing when the case was taken on Board, the application before the Court was the one filed by the Investigating Officer.

It is settled position of law that when law requires a particular thing to be done in a paritcular manner, then it shall be done only in that manner and in no other way.

13 The legislature intentionally contemplated submission of the report by the Public Prosecutor and it also indicated what it should comprise of. The legislature did not purposely leave it to an Investigating Officer to make the application for seeking extension of time. The legislature expect the investigation to be completed with utmost promptitude but where it becomes

necessary to extend the period for completion of investigation, the Investigating Agency, after inviting the attention of the Public Prosecutor to the said reasons, shall put up a report before the Court, apprising it about the progress of investigation and by furnishing reasons for further custody.

In case of Rajnikant Jivanlal & Ors. Vs. Intelligence Officer, NCB, 1989 (3) SCC 532, the duty cast on the Public Prosecutor was specifically highlighted in the background of the power conferred on him, to submit the report before the concerned Court when extension of custody is sought for.

14 The intention of the legislature, clearly surfacing through the provision, to the effect that the report shall be submitted by the Public Prosecutor before the Court, after proper application of mind. It is the provision designed to assist the designated Court to independently decide whether or not the extension shall be granted. It is a serious business, as the further incarceration of the accused in custody would be dependent upon the Court being satisfied for the justification offered by the public Prosecutor who seek extension of the custody since the investigation is not completed by the Investigating Officer within the stipulated period.

15 It has been time and again reiterated that the Public Prosecutor is neither the Post office of the Investigating Agency nor he is forwarding agency, but he is charged with a statutory

duty and he must apply his mind to the facts and circumstances of the Court and his report must disclose on the face of it, that he had applied his mind to the twin conditions i.e. there is progress in investigation and there are reasons for detaining the accused beyond the period prescribed.

An important duty is cast on the Public Prosecutor prepare his own independent report to assist the Special Court to decide whether the time period of custody of the applicant/accused needs to be extended beyond 90 days or 180 days. The public prosecutor shall be convinced on the submission of the Investigating Agency that there is a progress in the investigation and for the reasons offered in the report, it could not be completed.

Here, in contrast, it can be seen that in the present case, the report placed before the learned Magistrate is by the Investigating Officer himself, which is in clear breach of the mandate of law envisaged in the proviso appended to sub-section (4) of Section 36A.

16 The applicant preferred an application for being released on bail when the charge-sheet was not filed in 180 days and on the defective application which could not have been entertained. The Special Judge kept it pending though an indefeasible right had accrued to the applicant on failure to file the charge-sheet within 180 days. He availed of this right by

preferring an application, but the learned Court rejected it on a flimsy ground.

17 Very recently, the Hon'ble Apex Court in case of M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence, 2021 (2) SCC 485, has once again reiterated the concept of default bail which has been recognised as an integral part of the right of the person to personal liberty under Article 21 of the Constitution of India. It has been held that once the accused files an application for bail under the proviso to Section 167(2) of Cr.P.C, 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.

In the Law Report, Their Lordships of the Apex Court has crystallized the position on the following words :

“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\(2\)](#), [CrPC](#) 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 forthwith without any unnecessary delay after 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 In the wake of the aforesaid position of law, clearly emanating from the authoritative pronouncement of the Hon'ble Apex court, the applicant deserve his release on bail under Section 167(2) read with Section 36A of the Narcotic Drugs & Psychotropic Substances Act, 1985.

The impugned order for the aforesaid reason cannot be sustained and it is quashed and set aside. The applicant deserves his release on bail, by the following order :-

ORDER

- (a) The Applicant – Shlok Rakesh Todankar in connection with C.R.No.27/2021 registered with ANC Bandra Unit, Mumbai shall be released on bail in view of Section 167(2) of Cr.P.C. and Section 36A of the NDPS Act on furnishing P.R. bond to the extent of Rs.25,000/- with one or two sureties of the like amount.
- (b) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police

Officer. The Applicant should not tamper with evidence.

- (c) The Applicant shall make himself available as and when required by the Investigating Officer.

The Application is allowed in the aforestated terms.

(SMT. BHARATI DANGRE, J.)