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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.03.2022

DELIVERED ON : 11.03.2022

CORAM

THE HONOURABLE Mr. JUSTICE P.N. PRAKASH
AND

THE HONOURABLE Mr. JUSTICE A.A.NAKKIRAN

Crl.A.No.665 of 2021

Union of India
represented by
The Inspector of Police
National Investigation Agency
Chennai
RC No.03/2018/NIA/DLI

.. Appellant

Vs.

Mohammed Rafiqul Hassan

.. Respondent/Accused

Criminal Appeal filed under Section 21 of the National Investigation Agency Act seeking to set aside the order dated 16.11.2021 passed in Crl.M.P. No.203 of 2021 on the file of the Special Court for NIA Act Cases, Poonamallee and cancel the bail granted to the respondent herein.

For Appellant: Mr.R.Karthikeyan
Special Public Prosecutor
for NIA Act Cases

For Respondent: Mr.Isaac Mohanlal
Senior Counsel for
Mr.A.Nowfal
J U D G M E N T

P.N. PRAKASH, J.

The minimum facts that are required for deciding this criminal appeal for cancellation of bail granted to the respondent herein, are as under :

- On 23.09.2016, a Hindu activist was murdered in Coimbatore by motorcycle-borne accused, who stabbed him to death and fled away. In this connection, a case in Thudialur P.S. Crime No.735 of 2016 was registered under Section 302 IPC



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and the investigation was transferred to the Special Investigation Division of CB-CID, Coimbatore on 01.10.2016.

- The CB-CID arrested one Syed Abuthahir (A1) and Sadham @ Sadham Hussain (A2) and both of them were released on default bail under Section 167(2) Cr.P.C. on 19.06.2017 and 01.11.2017, respectively.
- On 22.01.2018, the case was transferred to the NIA, which arrested Subair (A3) and Mubarak (A4), who were also subsequently released on bail.
- The NIA, after completing the investigation, filed a final report in C.C.No.3 of 2018 before the Special Court for NIA Act Cases, Chennai (for brevity "the Special Court") against Sadham @ Sadham Hussain (A2) and Subair (A3) on 07.04.2018 and prayed for further investigation.
- During the course of further investigation, the involvement of Mohammed Rafiqul Hassan @ Hassan (A5), the respondent herein, came to light and so, a Non-Bailable Warrant was obtained by the NIA from the Special Court on 14.09.2018 and Blue Corner Notice and Look Out Circular were issued on 02.05.2019, for apprehending Hassan (A5).
- Hassan (A5) arrived at New Delhi on 09.02.2021 and was promptly arrested at the New Delhi Airport and was remanded in judicial custody in the case at hand. The NIA has completed the investigation and filed the final report in C.C.No.6 of 2021 against Hassan (A5) on 06.08.2021.
- However, when Hassan (A5) filed an application for bail in CrI.M.P.No.203 of 2021, the Special Court heard either side and by the impugned order dated 16.11.2021, has granted bail to Hassan (A5), aggrieved by which, the NIA is before this Court in this appeal.

2. Heard Mr.R.Karthikeyan, learned Special Public Prosecutor for NIA Act Cases and Mr.Isaac Mohanlal, learned Senior Counsel representing Mr.A.Nowfal, learned counsel on record for Hassan (A5).

3. It is the case of the NIA that Hassan (A5) had dropped the main accused viz., Subair (A3) at the place of occurrence in a two-wheeler and was waiting in a place nearby the scene of occurrence.

4. Mr.Karthikeyan submitted that Hassan (A5) is facing a prosecution for the offences under Sections 34, 120-B, 153-A(1) (b) and 302 IPC, besides, Sections 16(1)(a), 18 and 20 of Unlawful Activities (Prevention) Act, 1967 (for brevity "the UAP



Act") and therefore, the proviso to Section 43-D(5) of the UAP Act would apply and that bail can be granted, only if the Court is of the opinion that there are "no reasonable grounds for believing that the accusation against such person is prima facie true." In this regard, he placed strong reliance on the judgment of the Supreme Court in National Investigation Agency Vs. Zahoor Ahmad Shah Watali [(2019) 5 SCC 1].

5. Per contra, Mr. Isaac Mohanlal, learned Senior Counsel, took this Court through the impugned order and submitted that the Special Court has granted bail, after considering the entire facts and circumstances of the case, including the fact that, all the co-accused have been released on bail and that, Hassan (A5) has been in custody for more than nine months.

6. We gave our anxious consideration to the rival submissions.

7. We carefully went through the impugned order and we are indeed surprised with the reasonings given therein, for grant of bail to Hassan (A5) by the Special Court, some of which, are indubitably very specious. One of such reasonings is found in paragraph 14 of the impugned order and the same is extracted hereunder :

"14. Since all the co-accused were granted bail as stated above, detaining the petitioner alone in judicial custody, even after passing of nine months, that too after filing of charge sheet, is amount to causing injustice to the fundamental right guaranteed under Articles 14 and 21 of the Indian Constitution."

We do not understand, how Articles 14 and 21 of the Constitution of India can be invoked because, some of the co-accused were granted default bail and some of them were granted bail, on the ground that the report of the Special Public Prosecutor for extension of their remand was found to be unsatisfactory.

8. Bail is not a fundamental right, but, it is only a statutory right. When the proviso to Section 43-D(5), *ibid.* clearly states that for granting bail, the Court has to form a certain opinion, instead of doing that, the Special Court has given the following untenable reasons:

" the accused is married and was living with his wife and having permanent residence at Coimbatore. Detaining a married person, who was living with his wife, in prolonged custody is nothing but denying the right of his wife to have love and affection towards her husband and also denying the psychological and



biological needs, which amount to cruelty and also denial of human rights. . . ."

9. We place on record, our strong disapproval and deprecate the reasons given by the Special Court, for granting bail to Hassan (A5). However, both sides fairly conceded that the trial in this case has begun, four witnesses have been examined and Hassan (A5) is attending the Court regularly.

10. Under such circumstances, we are of the opinion that we should not be harsh on Hassan (A5) for the sin of the Special Court, by cancelling his bail and remanding him in custody, in the peculiar facts and circumstances of the case, especially, when the co-accused are on bail and Hassan (A5) is co-operating with the trial Court in the conduct of the trial. We make it clear that if Hassan (A5) adopts any dilatory tactics by not cross-examining the witnesses promptly, etc., it is open to the Special Court to remand him in custody under Section 309 Cr.P.C. as held by the Supreme Court in State of Uttar Pradesh Vs. Shambunath Singh [(2001) 4 SCC 667]. If he absconds, a fresh FIR can be registered against him under Section 229-A IPC and action can be taken against him, apart from taking surety action.

With the above observation and direction, this criminal appeal stands disposed of.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

gya

To

1. The Judge
Special Court for NIA Act Cases
Poonamallee
2. The Inspector of Police
National Investigation Agency
Chennai
3. The Public Prosecutor
High Court of Madras
Chennai 600 104



Copy to:

The Section Officer,
Criminal Section,
High Court, Madras.

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+1cc to Mr.R.Karthikeyan, Advocate, S.R.No.16604

+2ccs to Mr.A.Nowfal, Advocate, S.R.No.16428

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BS (CO)
SU(21/03/2022)