



Judgment

901 appeal 568.23

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.
CRIMINAL APPEAL NO. 568/2023

1. Ganesh s/o Shamrao Pendor,
Age 36 yrs., Occ. Labour,
2. Vikas s/o Suraj Pande,
Age 28 yrs., Occ. Labour,
3. Rahul s/o. Ramesh Madavi,
Age 28 yrs., Occ. Labour,
4. Rakesh s/o. Munna Pande,
Age 32 yrs., Occ. Labour

All R/o. Itwara Bazar, Wardha.

.... **APPELLANTS**

VERSUS

State of Maharashtra,
through P.S.O. Wardha City
Police Station, Wardha.

... **RESPONDENT**

Mr. Sourabh Singha Advocate h/f Mr. R.K. Tiwari, Advocate for
appellants.

Mr. S. S. Doifode, Addl. Public Prosecutor (APP) for
respondent/State.

CORAM : VINAY JOSHI AND
M. W. CHANDWANI, JJ.

DATE : 08.12.2023.

ORAL JUDGMENT (PER VINAY JOSHI, J.) :

Heard finally with the consent of both learned counsel.

2. **Admit.**

3. The appellants have been arrested in Crime No. 242/2023 by Wardha City Police, for the offence punishable under Sections 307, 143, 147, 149 of the Indian Penal Code, Sections 3, 4 read with Section 25 of the Arms Act, and Sections 3(1)(ii), 3(2), 3(4) of the Maharashtra Control of Organised Crime Act, 1999 ('MCOC Act'). The appellants have impugned herein the order dated 19.05.2023 granting extension of 30 days in filing of the charge-sheet vide Section 21(2)(b) of the MCOC Act, and consequential order dated 23.06.2023, by which the Special Court has declined to grant bail in-default. The learned APP has defended impugned orders by making exhaustive submissions. Both parties have relied on certain decisions of the Supreme Court and this Court.

4. Learned counsel Mr. Singha h/f Mr. R.K. Tiwari appearing for appellants assailed the impugned order dated 19.05.2023 granting 30 days extension mainly on two counts. Firstly, he claimed

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that extension was granted by the Special Court without application of mind. The extension was in contravention with the proviso to Section 21(2)(b) of the MCOC Act. Though extension is to be granted only on the report of Public Prosecutor, however the extension was granted on the application of the Investigating Officer which is totally illegal. Secondly, without giving an opportunity to the accused, extension application was hastily allowed on the very day, which has deprived appellants' from resisting and claiming bail in-default.

5. Mr. Doifode, learned Addl. P.P. for the respondent/State strongly opposed, thereby claiming that extension application dated 19.05.2023 was very much signed by the Public Prosecutor and thus, it cannot be termed that it was sought by the Investigating Officer. He would submit that the impugned order of extension dated 19.05.2023 was not challenged by the appellants, but they have filed regular bail application and thus, it is not open for them to raise a challenge after rejection of regular bail dated 21.06.2023. On the point of non-granting right of hearing, it has been submitted that for the said purpose, the matter can be remanded to the Trial Court for

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affording an opportunity and for fresh adjudication.

6. For the sake of convenience, material dates are stated in tabular form as below:-

DATES	PARTICULARS
01.03.2023	Appellant No.3 Rahul was arrested.
03.03.2023	Appellant No. 1 Ganesh, Appellant No. 2 Vikas and appellant No. 4 Rakesh were arrested.
19.05.2023	First Extension of 90 days for filing charge-sheet was sought in terms of Section 21(2)(b) of the MCOC Act.
19.05.2023	First extension of 30 days was granted on the same day, extending time upto 01.07.2023.
01.06.2023/ 02.06.2023	Initial period of 90 days for filing charge-sheet stood expired respectively.
17.06.2023	Applied for second extension of 60 days.
21.06.2023	Appellants/Accused applied for bail in-default and application was rejected on the same day.
23.06.2023	Second extension application was rejected.
28.06.2023	Charge-sheet has been filed.
July 2023	Regular bail application was filed.
28.07.2023	Regular bail application was rejected.

7. With the assistance of both sides, we have gone through the record made available for our perusal. Undisputedly, the initial period of 90 days stood expired on 01.06.2023 and before that on 19.05.2023, the first extension of 30 days was granted. There is no

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dispute that the appellants have applied for default bail on 21.06.2023, whilst the charge-sheet has been filed on 28.06.2023. in other words default bail has been claimed prior to the filing of charge-sheet. In the wake of above position, the principal issue falls for consideration is whether grant of extension dated 19.05.2023 under the proviso to Section 21(2)(b) of the MCOC Act, is in accordance with law.

8. For the purpose of clarity, we may refer that before extended period of 30 days is over, the second extension application was sought. Since second extension was rejected, charge-sheet was filed before expiry of extended period of 30 days. The legality of first extension dated 19.05.2023 is the core issue for consideration in this appeal. If the first extension was not in accordance with law, then consequently, the appellants are entitled for bail in default. The appellants have exercised their right by filing bail application on 21.06.2023 i.e. before filing of charge-sheet dated 28.06.2023. The learned counsel appearing for appellants took us through the first extension application dated 19.05.2023 which is apparently drafted by Sub-Divisional Police Officer ('SDPO'), Wardha addressed to the

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Special Court, filed through the Public Prosecutor. The application was signed by Mr. Sonavane, SDPO, Wardha. It also bears an endorsement of the Public Prosecutor as “submitted with due respect” with his signature and stamp. Whether such application can be considered to be in the tune of legal requirement.

9. It necessitates us to reproduce proviso to Section 21(2)(b) of the MCOC Act which is relevant for our purpose.

“21(2).

(b) after the proviso, the following proviso shall be inserted, namely :—

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

10. Learned counsel appearing for the appellants would submit that it is statutory mandate that the public prosecutor shall apply for extension by filing of report on his own satisfaction. It is submitted that the Public Prosecutor has to satisfy himself about the

progress of the investigation and justness of the reasons for grant of extension beyond initial 90 days. According to the appellants, the proviso itself contemplates that independent application of mind and personal satisfaction of the Public Prosecutor is necessary for seeking extension which is not a mere formality. In order to impress said submission, reliance is place on the decision of this Court in case of **Darshan Subhash Nandagawali Vs. State of Maharashtra** (Criminal Appeal No. 43/2023, decided on 06.06.2023). In the said decision, this Court faced situation where a joint application was filed by the Investigating Officer along with the Public Prosecutor. In that context, this Court by relying on the decision of the Supreme Court in case of **Hitendra Vishnu Thakur and Ors. Vs. State of Maharashtra and Ors., (1994) 4 SCC 602** has observed that in absence of compliance of the statutory mandate, the extension is illegal and thus, granted bail in-default.

11. In this regard, we are equally tempted to reproduce the observations of the Supreme Court in case of Hitendra Thakur (*supra*) made in para 23 of the decision which read as below:-

“23. We may at this stage, also on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority.

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The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must

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disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "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" as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to

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seek bail and the court 'shall' release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the Justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes infeasible and cannot be defeated by reasons other than those contemplated by sub-section (4) of Section 20 as discussed in the earlier part of this judgment.”

12. It is evident from the above observations that the Public Prosecutor is expected to independently apply his mind to the request of the Investigating Agency before submitting a report to the

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Special Court seeking extension. The public prosecutor is not a part of the Investigating Agency, therefore, the legislature has purposely cast duty on him to file a report after recording his satisfaction. Certainly, the Public Prosecutor is not a forwarding agency, but his role is important in seeking extension. Before undertaking said exercise, he shall verify the progress of investigation, justness for seeking extension by applying his mind. No doubt, the form of report is insignificant, but it should convey the due application of mind by the Public Prosecutor.

13. In the light of said legal position, we have examined the extension application dated 19.05.2023. The said application was apparently drafted by the SDPO directly addressed to the Special Court. The application bears outward number of the police station. It is not the case that the Investigating Officer made a report to the Public Prosecutor with a request to seek extension. At the foot of application, the Public Prosecutor has put an endorsement as “submitted with due respect” along with his signature and stamp. The reading of entire application loudly conveys that this is an application of the Investigating Officer. The application does not

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disclose any role of the Public Prosecutor apart from demonstrating his independent application of mind. The Police Officer has stated about the investigation made so far, and the areas remained to be investigated. We are unable to find a single word to indicate that whether application was even read by the Public Prosecutor apart from demonstrating his satisfaction. Merely putting an endorsement on the application moved by the Investigating Officer, would not change the colour to term it as a request on behalf of the Public Prosecutor. In the circumstances, we have absolutely no manner of doubt in our mind to hold that extension was not sought by the Public Prosecutor by applying his mind and therefore, it is not in accordance with law. The Special Judge utterly erred in allowing said application which does not meet the legal requirement, and thus order of extension vitiates.

14. The second ground is about violation of the principles of natural justice i.e. not affording an opportunity to the appellants (accused) to respond on the extension application. Admittedly, on 19.05.2023, extension application was filed, and upon hearing the learned Public Prosecutor, the Special Judge has granted extension

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on the very day. The extension order dated 19.05.2023 itself demonstrates that neither notice was issued to the accused nor hearing was given. The learned APP has conceded said position by submitting that the matter can be remanded for giving an opportunity of hearing to the accused. We are not inclined to accept said submission, as the position is quiet clear that the extension application itself is in-contravention with the legal requirement.

15. The learned counsel appearing for appellants relied on the decision of the Supreme Court in case of **Jigar alias Jimmy Pravinchandra Adatiya Vs. State of Gujarat, AIR 2022 SC 4641** to contend that grant of extension is not an empty formality and thus, the opportunity must be accorded to the accused while granting extension. Needless to say that, the accused has indefeasible right to get bail, if statutory mandate has not been complied. The order of extension directly connects with the right of the accused to claim bail in default. The above decision would squarely apply as admittedly accused was not put to notice by the Special Judge while granting extension. Therefore the impugned order of extension also fails on the ground of not giving a right of hearing to the accused.

16. Incidentally, we have noted that the first extension application dated 19.05.2023 and second extension application dated 17.06.2023 are similarly filed by the same Police Officer Sonavane along with forwarding remark of the Public Prosecutor. Both applications were directly addressed by the Police Authority with their own outward number to the Special Court. While dealing with the second extension application, this time the Special Court has put accused to the notice and after hearing both, has rejected the same. Pertinent to note that while rejecting second extension application, the Special Court has considered that the application was filed by the Police and not by the Public Prosecutor. There was total non-application of mind by the Public Prosecutor, which resulted into rejection. It requires to be noted that both extension applications are similar, but on first occasion, neither accused were heard nor the position of law was considered. However, on second occasion, while dealing with exactly the similar extension application, the Special Judge has reacted differently by rejecting the application. Obviously, after hearing the other side the Special Court

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has realized the position of law, which assumes significance.

17. The learned APP would submit that the accused have not challenged the impugned order of extension, but have applied for regular bail and therefore they cannot question the order of extension. In response, it is submitted that the impugned order was passed behind the back, and therefore, accused had no opportunity to resist or challenge the extension. When second extension was sought on 17.06.2023, the Special Court has issued a notice, on which they came to know about grant of first extension. Therefore, filing of regular bail application does not take away their right to claim bail in-default, for which otherwise they were entitled. It is apparent that while claiming first extension, neither accused were produced nor notice was issued. In the circumstances, it was quiet natural for accused to apply for regular bail. Merely applying for regular bail does not take away a right of filing appeal under Section 12 of the MCOC Act. Therefore, we are not ready to accept the submission about non-challenge of extension order.

18. The learned APP relied on the decision of the Supreme

Court in case of **Sukhjinder Singh Vs. State (N.C.T.) of Delhi, AIR 2001 SC 2941** while opposing the appeal. It is submitted that since charge-sheet has been filed, the accused have lost their right to claim bail. The facts of said case are quiet distinct. In the said decision, two crimes were registered for the same occurrence. In second crime, charge-sheet was already filed and thus, in said context, the Supreme Court has declined to release accused on bail in exercise of jurisdiction under Article 136 of the Constitution of India. In case at hand, admittedly, before filing of the charge-sheet (28.06.2023), the appellants have applied for default bail (21.06.2023) and therefore, indefeasible right has accrued in their favour. Thus being different facts, above decision would not protect the impugned orders.

19. We have held above that the first extension dated 19.05.2023 vitiates for non-compliance of statutory requirements. Having regard to that, the factual aspect needs to be considered. At the cost of repetition, we may reiterate that the position remained that accused have applied for default bail prior to the filing of charge-sheet.

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20. In catena of decisions, the law has been crystallized on the point that at the end of statutory remand period, an indefeasible right to default bail accrues to the accused. The right to bail under Section 167(2) proviso (a) of the Code of Criminal Procedure is absolute right which flows from the legislative mandate. We may refer the decision of the Supreme Court in case of **Gautam Navlakha Vs. National Investigation Agency, (2022)13 SCC 542**, wherein it is observed that right of default bail is a fundamental rights connecting to the Article 21 of the Constitution of India. The right to statutory bail arises de hors merits of the case. The supreme Court in case of **Sanjay Dutt vs State Of Maharashtra, (1994) 5 SCC 410** held that if the accused has availed his indefeasible right to default bail before the charge-sheet is filed, then such a right would not stand frustrated or extinguished by subsequent filing of the charge-sheet. This position of law has been reiterated in the latter decision in case of **Bikramjit Singh Vs. State of Punjab, (2020) 10 SC 616** and in recent decision in case of **Enforcement Directorate, Government of India Vs. Kapil Wadhawan and anr. 2023 SCC OnLine SC 972**. Moreover, in case of **Bikramjit Singh (supra)**, it has been observed that

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indefeasible right cannot be defeated by non-disposal or wrong disposal of the application for default bail. The position is quiet clear that after expiry of statutory period of 90 days and before filing of charge-sheet, the accused have applied for bail. In view of above discussion, the extension order dated 19.05.2023 is illegal, meaning thereby need not be considered. Admittedly, the accused have availed their indefeasible right before filing of charge-sheet. In the circumstances, by all means, accused are entitled for default bail.

21. While parting with the order, we may note that in quick succession, we have occasion to deal with similar challenge to the legality of extension order passed by the Special Court under the provisions of Section Section 21(2)(b) of the MCOC Act. The statutory provision is loud and clear. It specifies the prime role of the Public Prosecutor in seeking extension. Despite that, extension applications are casually filed by the Police Officers and to our dismay, the Public Prosecutors are merely putting their endorsement and nothing else. Such casual approach of the prosecution agency has cascading effect that the Police would lose the opportunity to carry further investigation in deserving cases, as well as undeserving

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culprits would get bail in-default. Therefore, the prosecution agency needs to be serious while dealing the said aspect. Apart, the Special Judges shall also be attentive about this position of law so that the rule of law would be subserved.

22. In the result, the impugned order of extension dated 19.05.2023 being contrary to the requirement of law needs to be quashed and set aside. As a consequence, the appellants are entitled for bail by quashing the said order.

23. In view of above, appeal is allowed. We hereby quash and set aside the extension order dated 19.05.2023 and consequential order of rejection of default bail dated 21.06.2023. We hereby direct the Special Court to pass forthwith the appropriate order of bail on application dated 21.06.2023 by imposing suitable conditions as he deems fit.

24. Appeal stands disposed of in above terms.

25. The Registrar (Judicial) to forward the copy of this judgment and order to the Director of Prosecution, inviting his

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attention to para 21 of the above order for information and necessary action.

(M. W. CHANDWANI, J.)

Gohane

(VINAY JOSHI, J.)