

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Jay Sengupta

CRR 837 of 2025

Tajamul Sk. @ Tajamul Haque @ Tajamul Hoque

Vs.

The State of West Bengal & Anr.

For the petitioner : Mr. Avik Ghatak
Mr. Akash Ghosh
.....Advocates

For the State : Mr. Debasish Roy, Id. PP
Mr. Rudradipta Nandy
Mr. Sanjana Saha
.....Advocates

Heard lastly on : 19.05.2025

Judgment on : 19.05.2025

Jay Sengupta, J:

1. This is an application challenging an order dated 07.02.2025 passed by the learned Judge, Special Court, NDPS, Additional Sessions Judge, 3rd Court, Malda in Special Case No. 64 of 2024 arising out of Kaliachak Police

Station Case No. 1255 of 2024 dated 13.08.2024, under Sections 21C, 25, 29, 27A of the NDPS Act, whereby the learned Judge was pleased to allow the prayer of the learned Public Prosecutor for extension of time for completion of investigation for a period of two months and the impugned order dated 10.02.2025, thereby rejecting the petitioner's prayer for recalling the order dated 07.02.2025 and rejecting further the petitioner's prayer for release on statutory bail.

2. Learned counsel for the petitioner submitted as follows. Kaliachak Police Station Case No. 811 of 2024 dated 07.06.2024 was initiated under Sections 21(c)/25/29/27A NDPS. The alleged date of occurrence was 13.08.2024 between 8.15 to 9.10 A.M. Information was purportedly received on 13.08.2024 at 10.45 A.M. Tajmul Sk., the petitioner was arrested on 13.08.2024 (in custody for 261 days as on 18.03.2025). 1.386 kg. of brown sugar was allegedly seized from the petitioner. On 07.02.2025 the learned Public Prosecutor prayed for extension of time to submit charge sheet since CFSL report of 1.386 kg of brown sugar had not been collected, more accused persons were yet to be apprehended and there was a possibility of further recovery. However, such prayer was allowed by vide an order dated 07.02.2025. On 10.02.2025 the petitioner preferred two applications before the learned Judge concerned, inter alia, praying therein to release him on statutory bail and to recall the order dated 07.02.2025. However, both the applications were rejected vide an order of the same date. The statutory limit of 180 days prescribed under Section 36A(4) of the NDPS Act was not a mechanical timeline. It was aimed at protecting personal liberality of an

individual against arbitrary pre-trial detention. Therefore, such prescribed timeframe to conclude investigation could be extended only under compelling circumstances. This Court in *Subhas Yadav v. State of West Bengal*, reported at 2023 SCC Online Cal 313, held that failure to obtain the FSL report due to systemic reasons indicated indifferent progress in investigation for which the accused ought not to suffer. The Court further held that this lapse resulting in delay in completion of investigation could not in the absence of any other aggravating circumstance justify extension of detention beyond 180 days. This judgement was aimed at ensuring that State/prosecution was not permitted to take advantage of its own failure. Therefore, the learned Court below was not justified in extending the statutorily prescribed time limit of investigation mechanically only on account of non-submission of CFSL report. The failure of the Special Court to procure presence of the accused, either physically or virtually, at the time of considering the application for extension of the investigation period rendered the extension order dated 07.02.2025 illegal. It was held in *Jigar alias Jimmy Pravinchandra Adatiya v. State of Gujarat*, reported in (2023) 6 SCC 484 and in *Sanjay Dutt v. State of Maharashtra*, reported at (1994) 5 SCC 410 by the Hon'ble Supreme Court that it was mandatory to produce the accused at the time when the question of extension of the period of investigation was being considered by the court. This was a statutory requirement that flowed from 167(2) of the Code of Criminal Procedure, 1973 corresponding to Section 187(4) of the Bharatiya Nagarik Suraksha Sanhita, 2023. Admittedly, in the present case the prayer/application for extension of the time limit of

investigation was considered and allowed without procuring, either physical or virtual, presence of the petitioner. A revisional application was maintainable against an order rejecting a statutory bail application under Section 167(2) of the Code of Criminal Procedure, 1973, corresponding to Section 187(3) of the Bharatiya Nagarik Suraksha Sanhita, 2023 read with Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985. Constitutional Courts including this Court and the Hon'ble Supreme Court consistently held that Section 167(2), Cr.P.C. gave an indefeasible right to the accused to be released on bail and if that indefeasible right of the accused was taken away by any order then such an order, was a final order and not an interlocutory order and a revision application against such an order was maintainable before this Court.

3. Learned Public Prosecutor representing the State submitted as follows. The appellant heavily relied upon the judgment of the Hon'ble Supreme Court reported in (2023) 6 SCC 484 (Jigar Vs. The State of Gujarat). Though there could not be any interpretation of any judgment, but it would be relevant to draw attention to paragraphs 5 to 14 of the said judgment wherein what was actually urged before the Hon'ble Supreme Court could be inferred. It was the case of the appellant before the Hon'ble Supreme Court that in the four cases referred in that judgment the accused persons were never made aware of the application filed by the Learned Public Prosecutor, praying for extension of time. The appellant urged that there had been violation of the judgment of the Hon'ble Supreme Court in the case of Hitendra Vishnu Thakur and Sanjay Dutt. A conjoint reading of the cases of

Hitendra Vishnu Thakur and Sanjay Dutt clearly spoke that when the application for extension of period of time made by the Learned Public Prosecutor was being heard, the accused persons should be put on notice. Further, the presence of the accused persons in the Court when such application was being taken up for consideration could be said to be sufficient service of notice upon the accused persons. In the case of Sanjay Dutt the judgment delivered was by a 5 Judges Bench whereas the case of Jigar was a judgment delivered by a Division Bench. In other words, what was laid down in Jigar was not strictly in conformity with the principles laid down by a 5 Judges Bench in Sanjay Dutt. In Sanjay Dutt's case nowhere was it stipulated that the physical presence of the accused persons was mandatory, when the application for extension for the period of time to complete investigation was taken into consideration. The Hon'ble Supreme Court in the case of Jigar heavily relied upon the provisions of Section 167(2) of the Code of Criminal Procedure which stated that at his instance while extending the period to complete investigation beyond a period of 24 hours, the accused had to be physically present before the Court for obtaining his remand either to police custody or judicial custody. He could be further remanded to custody only on his production. This, however, might be in virtual mode also. Relying on this provision, the Hon'ble Court held in paragraph 45 that the presence of the accused was mandatory. In paragraph 44 of the said judgment the Hon'ble Supreme Court held that as if, in the case of Sanjay Dutt it has been laid down that the production of the accused at that time was mandatory which was however, not to be found in the

judgment of Sanjay Dutt. Furthermore, one might refer to Sub Section (4) of Section 36A of the NDPS Act. Unlike Section 167 of the Code of Criminal Procedure, the aforesaid Section did not postulate either the presence of the accused at the time of hearing of such application for extension of the period or notice to the accused persons prior to extension of such period. Now, the Hon'ble Supreme Court in the two other cases which had been referred to in the case of Jigar namely, Devinderpal Singh Vs. Government of Capital Territory of Delhi and Ateef Nasir Mulla vs State of Maharashtra had also followed the principles laid down by the Hon'ble Supreme Court in the case of Sanjay Dutt. None of the aforesaid judgments referred to in the case of Jigar spoke about the mandatory production of the accused at the time of hearing of the application for extension of the period to complete investigation. This question came up for hearing before a Special Bench of this Court namely, Subhas Yadav Vs. The State of West Bengal (2023 SCC Online Cal 313), more particularly paragraph 31(8) of the aforesaid case which clearly stated that the only requirement was that the accused had to be notified about the hearing of such application. The Special Bench had taken into account the judgment of the Hon'ble Apex Court in the case of Jigar. Now, coming to the second point wherein the appellant had claimed that the prayer for extension given in this particular case was on the prayer of the prosecuting agency might extend the period of time on the ground that the FSL Report was not available. It was only one of the grounds on which the prayer for extension of period was sought for, but there were grounds also like apprehension of other accused persons involved in the case. The

Learned Judge had also taken into consideration that the period of extension had to be given to the investigating agency as further accused persons were required to be arrested. The said requirement clearly came within the ambit of paragraph 31(6) of the judgment in the case of Subhas Yadav.

4. I heard the learned counsels for the parties and perused the revisional application, the case diary and the written notes of submissions.

5. For a better exposition of the issue at hand, it may be necessary to quote relevant portions of Sections 167(2) of the Code of Criminal Procedure and Section 36A of the NDPS Act as under:

“167 - Procedure when investigation cannot be completed in twenty four hours.....

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

[(a) the Magistrate may authorise the detention of the accused per-son, otherwise than in the custody of the police, beyond the

period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

[(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage:]

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I. - For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

[Explanation II. - If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:]

[Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.]

.....”

“36A. – Offences triable by Special Courts. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

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(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable

only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considers -

- (i) when such person is forwarded to him as aforesaid; or*
- (ii) upon or at any time before the expiry of the period of detention authorised by him,*

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused

person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.

(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) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.]”

6. It is trite law that the elements of Section 167(2) of the Code of Criminal Procedure, 1973 become applicable with necessary changes in a proceeding under the NDPS Act in view of Section 36A of the said Act.

7. In *Hitendra Vishnu Thakur* (supra), the prime question was the requirement of notifying the accused about his right to statutory bail. Afterall, before extension of time to conduct investigation, the accused should be intimated about his right to claim the benefit of statutory bail.

8. It was in this context that the Constitution Bench of the Hon’ble Apex Court in *Sanjay Dutt* (supra), inter alia, held that there was no separate requirement of giving a written notice to the accused if the accused was

produced on that date on which the prayer would be made for extension of time and he was informed that such extension of time was being considered.

9. Therefore, the issue of whether the accused should be produced before the Magistrate physically or virtually at the time of consideration of a prayer for extension of time for investigation might not have directly been an issue in *Sanjay Dutt (supra)*. However, it would indeed be too far-fetched to assume that by dispensing with the requirement of serving written notice to an accused if the accused was produced before the Court at the time of praying for such extension, *Sanjay Dutt (supra)* implied that in an appropriate case the accused need not be produced at such time. In fact, in *Sanjay Dutt (supra)* it was clearly laid down that the accused was to inform that extension of time was being considered when he was produced in Court.

10. Relying on *Sanjay Dutt (supra)*, *Jigar (supra)*, inter alia, held that it was a mandatory requirement to produce the accused before the learned Magistrate at the time of consideration of a prayer for extension of time to investigate.

11. Thus, there is nothing in the above ratio laid down in *Jigar (supra)* that contradicts the ratio laid down by the Constitution Bench of the Hon'ble Supreme Court in *Sanjay Dutt (supra)*.

12. The above referred ratio in *Jigar (supra)* having been laid down by the Hon'ble Apex Court, is binding on all.

13. One may possibly raise an issue about whether the purported qualification made by a Special Bench of this Court in *Subhas Yadav (supra)*

that it was sufficient if the accused or his counsel remained present personally or through video linkage at the time of consideration of such extension, was wholly in keeping with the mandatory requirement as laid down in Jigar (supra) of production of the accused at such time or simply had to be read alongside Jigar (supra).

14. However, if one goes by the ratio laid down in Subhas Yadav (supra), it is elementary that a notice to a counsel of the accused should actually amount to a notice to the accused. Because, notifying the counsel of an accused cannot be a goal by itself. The whole purpose is to ensure that he is able to obtain instructions from the said accused for advancement of his submissions before the Court at the relevant time.

15. In the instant case, the statutory period was to be over on 09.02.2025, a Sunday. The application for extension of time was moved by the prosecution on the immediately preceding Friday with a notice served upon the learned advocate of the accused at 16.20 hrs., only 10 minutes before the closure of Court. The next date was a non-working Saturday. Therefore, even on facts, the said counsel would not have been able to contact his client, who was in custody, to take proper instructions from him and then advance his submissions before the learned Magistrate.

16. In other words, even if one goes by the directions passed in Subhas Yadav (supra), the prosecution failed to give adequate notice to the accused or to his learned counsel before their prayer for extension of time for investigation was considered.

17. Admittedly, the accused was neither produced before the Court physically nor virtually on that date.

18. Therefore, there is a complete violation of the ratios laid down, both in Jigar (supra) as well as Subhas Yadav (supra) as discussed above, thus, denying the indefeasible right of the petitioner to pray for statutory bail and to oppose the prayer for extension of time for investigation.

19. As regards the other point taken up that charge sheet could not have been filed without expert's report for the second quantity of contraband, in the instant case, there were several other materials appearing against the accused and several other issues taken up by the prosecution like the possibility of apprehension of the other accused in the application for extension. Thus, such contention of the petitioner cannot be sustained.

20. In view of violation of the ratios laid down by Courts, the impugned order/s remanding the accused and extending time for investigation are set aside and the petitioner is entitled to be released on statutory bail. The investigating agency, however, shall be at liberty to make a further application for extension of time after complying with the requirements of law as discussed above, whereupon the learned Special Court shall decide the issue in accordance with law.

21. Let the petitioner be released on bail subject to the satisfaction of the Special Court upon furnishing a bond of Rs.20,000/- with two sureties of like amount each, one of whom must be local on a condition to provide the petitioner's whereabouts to the Investigating Officer and not to leave the

jurisdiction of the District of Malda for a period of six months and to attend the Special Court on all dates fixed.

22. With these observations and directions, the revisional application is disposed of.

23. Urgent photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Jay Sengupta, J.)

Later:

Learned Public Prosecutor prays for stay of operation of the order.

The prayer is considered and is rejected.

(Jay Sengupta, J.)