

[NDPS Act] Investigating Officer's Request For Extension Of Time Not Substitute For Report Of Public Prosecutor: Madras High Court Reiterates

2022 LiveLaw (Mad) 497

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

G. ILANGO VAN; J.

Crl.RC(MD)No.907 of 2022; 25.11.2022

Shakil Ahamed versus Superintendent of Customs

Prayer: This Criminal Revision Case filed under Section 397(1) and 401 of Cr.P.C., praying to set aside the impugned order passed by Principal Special Court for EC and NDPS Act Cases, Madurai in Crl.M.P.Nos. 1158 and 1189 of 2022, in case OR No.1/2022-AIU-MDU, dated 13.07.2022 and enlarge the revision petitioner on statutory bail, by allowing this revision. (**Prayer amended as per order of this Court, dated 24.11.2022*)

For Petitioner: Mr. T.A.Mohamed Sikkander

For Respondent: Mr.C.Arulvadivel @ Sekar, Special Public Prosecutor for Custom

ORDER

This Criminal Revision Case has been filed to set aside the impugned orders passed in Crl.M.P.Nos. 1158, 1189 of 2022, dated 13.07.2022 by the learned Additional District Judge, Principal Special Court for EC and NDPS Act Cases, Madurai and enlarge the revision petitioner on statutory bail, by allowing this revision.

2. The facts in brief is as follows:

The petitioner is arrayed as an accused in C.C.No.488 of 2018. Pending investigation, the respondent/complainant viz., the Superintendent of Customs, AIR Intelligence Unit, Madurai Airport, filed a petition in Crl.MP.No. 1158 of 2022, seeking extension of time for completing the investigation. In the meantime, Crl.MP.No.1189 of 2022 was filed by the petitioner under Section 167(2) Cr.P.C, seeking statutory bail. Both the petitions were heard together and a common order was passed by the trial Court, by allowing the petition in Crl.MP.No.1158 of 2022 by extending the time limit and dismissing the petition in Crl.MP.No.1189 of 2022, which was filed for statutory bail. Against which, this present revision has been preferred.

3. Heard both sides.

4. The learned counsel for the petitioner would straightaway rely upon the Judgment of the Hon'ble Supreme Court in ***Jigar @ Jimmy Pravinchandra Adatiya Vs State of Gujarat*** in [2022 LiveLaw SC 794](#), wherein, it is held in paragraph Nos.30, 31 as follows:

“30. The logical and legal consequence of the grant of extension of time is the deprivation of the indefeasible right available to the accused to claim a default bail. If we accept the argument that the failure of the prosecution to produce the accused before the Court and to inform him that the application of extension is being considered by the Court is a mere procedural irregularity, it will negate the proviso added by sub-section (2) of Section 20 of the 2015 Act and that may amount to violation of rights conferred by Article 21 of the Constitution. The reason is the grant of the extension of time takes away the right of the accused to get default bail which is intrinsically connected with the fundamental rights guaranteed under Article 21 of the Constitution. The procedure contemplated by Article 21 of the Constitution which is required to be followed before the liberty of a person is taken away has to be a fair and reasonable procedure. In fact, procedural safeguards play an important role in protecting the liberty guaranteed by Article 21. The failure to procure the presence of the accused either physically or virtually before the Court and the failure to inform him that the application made by the Public Prosecutor for the extension of time is being

considered, is not a mere procedural irregularity. It is gross illegality that violates the rights of the accused under Article 21.

31. An attempt was made to argue that the failure to produce the accused will not cause any prejudice to him. As noted earlier, the grant of extension of time to complete the investigation takes away the indefeasible right of the accused to apply for default bail. It takes away the right of the accused to raise a limited objection to the prayer for the extension. The failure to produce the accused before the Court at the time of consideration of the application for extension of time will amount to a violation of the right guaranteed under Article 21 of the Constitution. Thus, prejudice is inherent and need not be established by the accused.”

5. Further, the learned counsel for the petitioner would point out the irregularities to the effect that the petition in CrI.MP.No.1158 of 2022 was not filed by the Special Public Prosecutor, but it was filed by the Investigation Officer and the only the counter-signature was obtained from the Special Public Prosecutor. According to him, this does not satisfy the requirements of Law, as pointed out by the Hon'ble Supreme Court in number of Judgments, such as **Sanjay Kumar Kedia @ Sanjay Kedia Vs Intelligence Officer in 2009(17) SCC 631**, which followed the earlier Judgment reported in **1994(4) SCC 602**, which was rendered in **Hitendra Vishnu Thakur and others Versus State of Maharashtra and others**, which was also reproduced the said fact extensively. Para No.23 of the said Judgment runs hereunder, wherein, it has been held that

“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. 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 this request or application and report, but his report, as envisaged under clause (bb), must 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.”

6. Even if the application is routed through the Public Prosecutor that will not be sufficient, he is expected to apply his mind independently, while seeking extension of time by the investigating agency. The said fact was followed by number of Judgments by the various High Courts, such as Punjab and Haryana High Court, Orissa High Court and Bombay

High Court, which need not be reproduced herein extensively, since the disputed point is very limited one.

7. Per contra, on the side of the respondent, it is stated that to the request of the investigating agency, extension application was routed through the Public Prosecutor, after his independent application of mind. The same was heard by the concerned Special Court. This is sufficient enough for finding that there was an independent application of mind by the Special Public Prosecutor.

8. The records with reference to above said petition has been called for, wherein, it came to light that the CrI.MP.No.1158 of 2022 was presented on 04.07.2022, before the Special Court and notice was ordered to the revision petitioner and his counsel on record. The learned counsel also appeared before the Court and sought time to file his objection. Thereafter only, both the petitions were taken up together for common disposal on 13.07.2022. At that time, it was submitted by the prosecution that the accused was arrested on 09.01.2022 and the petition seeking for extension of time was filed on 04.07.2022. According to the trial Court, the above said application was filed before the expiry of 180 days, provided under the NDPS Act. The statutory bail application under Section 167(2) Cr.P.C was filed by the revision petitioner on 08.07.2022.

9. The trial Court, being satisfied with the grounds mentioned in the petitions, granted extension of time to the prosecution and rejected the claim of statutory bail to the petitioner.

10. By way of filing an amendment petition, the learned counsel appearing for the petitioner, challenged the order of statutory bail in CrI.MP.No. 1189 of 2022, which was dismissed by the trial Court.

11. In view of the above said discussion, it is found that the extension of time limit granted by the trial Court is not legally sustainable and it is liable to be set aside. Consequently, the petition seeking for statutory bail, moved the revision petitioner is liable to be allowed.

12. In the result, this ***Criminal Revision Case is allowed and the orders passed by the trial Court in CrI.MP.Nos.1158 and 1189 of 2022, dated 13.07.2022 are set aside. Accordingly, the revision petitioner is ordered to be released on statutory bail, on executing a personal bond for a sum of Rs. 10,000/- (Rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the Judicial Magistrate, Thiruvaiyaru, and on further condition that the petitioner shall report before the respondent daily at 10.30 a.m. until further orders.***