

**IN THE HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

(THROUGH VIRTUAL MODE)

Reserved on: 24.06.2021
Pronounced on:06.07.2021

CRM(M) No.653/2019

ARSHAD AHMAD ALLAIE

...PETITIONER(S)

Through: - Mr. Pranav Kohli, Sr. Advocate
With Mr. Farhan Mirza, Advocate.

Vs.

UT OF J&K & ANR.

...RESPONDENT(S)

Through: - Mr. Aseem Sawhney, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) An important question of law that has arisen in the instant petition is “whether an order granting extension of period of custody of accused beyond 180 days passed by a Sessions Court in terms of Section 36-A of Narcotic Drugs and Psychotropic Substances Act, 1985 [“NDPS Act” for short hereinafter] in a case where the accused has been booked for various offences under NDPS Act read with offences under Unlawful Activities (Prevention) Act, 1967 [“UA(P) A Act”], is without jurisdiction”.

2) Before answering the aforesaid question, it is necessary to briefly, summarize the facts giving rise to the filing of the instant petition.

3) The record of the case shows that the petitioner along with other accused persons was booked in FIR No.38/2019 for offences under Section 8/21/22/27-A/29 NDPS Act and Section 13, 16, 17 and 21 UAPA Act by Police Station, Jammu. Initially the FIR was registered for offences under Section 8/21/22/27-A/29 NDPS Act only and the petitioner was arrested on 27.05.2019. However, during investigation of the case, offences under Section 13, 16, 17 and 21 UAPA Act were added on 30.07.2019.

4) After obtaining initial remand of the accused in connection with investigation of offences under NDPS Act, upon addition of offences under UA(P) Act, remand of the accused from time to time, was obtained by the Investigating Agency from Special Court designated under Section 22 of the National Investigation Agency Act [“NIA Act” for short]. Ultimately, the judicial remand for extending the period of investigation beyond 90 days in terms of Section 43-D of UA(P) Act was granted by the Designated Court under NIA Act, in terms of its order dated 23.08.2019. The extended period of judicial custody of the accused including that of the petitioner expired on 22.11.2019

5) After the expiry of extended period of custody granted by the Designated Court under NIA Act, the Investigating Agency approached the Court of Principle Sessions Judge, Jammu, with an application seeking extension of period of investigation beyond 180 days in terms of Section 36-A of NDPS Act. The application came to be assigned to learned Additional Sessions Judge, Jammu, who vide his order dated 22.11.2019 extended judicial custody of the accused including that of the petitioner herein for a further period of 20 days. It is this order of learned Additional Sessions Judge, Jammu, which has been challenged by the petitioner through the medium of instant petition.

6) The main contention of the petitioner is that the order granting or extending the judicial custody of the accused in the instant case could be passed only by a Special Court Designated under NIA Act and not an ordinary Sessions Judge. Thus, according to the petitioner, the impugned order extending the judicial custody of the petitioner is without jurisdiction and, therefore, non-est in the eyes of law. On this premise, it is urged that once the period of 180 days of petitioner's custody had expired, he was entitled to be enlarged on default bail, particularly when he had made an application for grant of such relief before the Designated Court under NIA Act as the investigating agency had failed to file the challan against the petitioner upon the expiry of aforesaid statutory period of 180 days.

7) The petition has been resisted by the respondents by filing a reply thereto. In their reply, respondents, besides narrating the facts of the case, have contended that the petitioner has not only been booked for offences under UA(P) Act but he has also been booked for various other offences under NDPS Act, as such, the learned Additional Sessions Judge was well within his jurisdiction to extend the custody of the petitioner beyond 180 days in terms of Section 36-A of NDPS Act. It has been averred that the petitioner and co-accused are involved in serious offences relating to narco terrorism as they have links with anti-national elements residing across the border and during investigation of the case, commercial quantity of heroin along with a huge amount of cash has been seized from the possession of the petitioner and his associates. On the basis of these submissions, the respondents have sought dismissal of the petition.

8) I have heard learned counsel for the parties and perused the record of the case.

9) It has been vehemently contended by learned Senior counsel appearing for the petitioner that since petitioner was not only booked for offences under various provisions of NDPS Act but he was also booked for various other offences under UA(P) Act, as such, it was only the Designated Court under NIA Act which had the jurisdiction to remand the petitioner to custody from time to time and once maximum period of custody of 180 days had expired, the same could not have been extended by having resort to the provisions contained in

Section 36-A of NDPS Act. According to learned counsel, the extended period of custody of the petitioner beyond 180 days granted by learned Additional Sessions Judge, Jammu, is without jurisdiction and non-est in the eyes of law and, therefore, once the petitioner had moved the Designated Court under NIA Act for grant of compulsive bail upon expiry of 180 days of his custody, there was no option for the Court but to enlarge him on bail. In support of his contention, learned Senior counsel appearing for the petitioner has heavily relied upon the judgment of Supreme Court in the case of **Bikramjit Singh v. State of Punjab, (2020) 10 SCC 616**, wherein it has been held that extension of time for investigation granted by a Magistrate in respect of a case involving offences under the provisions of UA(P) Act being without jurisdiction, therefore, the appellant in that case was entitled to 'default bail' under Section 167(2) of Cr. P. C. as modified by Section 43-D of the UA(P) Act.

10) *Per contra*, learned AAG has contended that the petitioner was not only booked for various offences under UA(P) Act but he was also booked for various other offences under NDPS Act, as such, learned Additional sessions Judge, Jammu, was well within his jurisdiction to extend the period of custody of the petitioner beyond 180 days.

11) Before determining the merits of rival contentions of learned counsel for the parties, we need to notice the relevant provisions governing remand of accused to custody as contained in UA(P) Act and NDPS Act.

12) Section 43-D of UA(P) Act provides for modified application of certain provisions of the Code. It reads as under:

“43D. Modified application of certain provisions of the Code.—(1) *Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and “cognizable case” as defined in that clause shall be construed accordingly.*

(2) *Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—*

(a) *the references to “fifteen days”, “ninety days” and “sixty days”, wherever they occur, shall be construed as references to “thirty days”, “ninety days” and “ninety days” respectively; and*

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

“Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with 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, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.”

(3) *Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that—*

(a) *the reference in sub-section (1) thereof—*

(i) *to “the State Government” shall be construed as a reference to “the Central Government or the State Government.”;*

(ii) *to “order of the State Government” shall be construed as a reference to “order of the Central Government or the State Government, as the case may be”; and*

(b) *the reference in sub-section (2) thereof, to “the State Government” shall be construed as a reference to “the Central Government or the State Government, as the case may be”.*

(4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.”

13) Clause (b) of sub-section (2) of Section 43D, as quoted above, provides that if it is not possible to complete the investigation within a period of 90 days, the Court, if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the period of 90 days, is empowered to extend the said period up to 180 days.

14) The ‘Court’ has been defined in Section 2(d) of the UA(P) Act to mean a criminal court having jurisdiction under the Code to try offences under the Act and includes a Special Court constituted under Section 11 or under Section 22 of the NIA Act, 2008.

15) From this, it is clear that jurisdiction to extend detention of an accused beyond the period of 90 days in relation to a case where the accused is booked for offences under UA(P) Act, which is included in the Schedule appended to NIA Act, vests with Special Court constituted in terms of provisions of NIA Act.

16) So far as the relevant provisions of NDPS Act are concerned, Section 36-A provides for modified application of certain provisions of Code of Criminal Procedure. It reads as under:

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

- (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 (2-A) 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, 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, 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 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, the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.

17) From a perusal of the aforesaid provision it is clear that initially detention of a person, who is booked for an offence under NDPS Act, can be authorized by a Judicial Magistrate for a period not exceeding fifteen days and by an Executive Magistrate for a period not

exceeding seven days, where-after, in the cases that are triable by a Special Court, the person detained has to be forwarded to the Special Court having the jurisdiction.

18) Proviso to sub-section (4) of Section 36-A, as quoted above, gives jurisdiction to Special Court to extend the custody of a person who is accused of offences under NDPS Act beyond 180 days up to one year on the report of the Public Prosecutor indicating progress of the investigation and the specific reasons for detention of the accused beyond said period of 180 days.

19) Section 36-D of the NDPS Act provides for a situation where Special Courts in terms of Section 36 of the NDPS Act have not been constituted. Since in the Union Territory of Jammu and Kashmir, Special Courts have not been constituted, as such, the aforesaid provision assumes significance. The same is, therefore, required to be noticed. It reads as under:

“36D. Transitional provisions.—(1) Any offence committed under this Act on or after the commencement of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 (2 of 1989), which is triable by a Special Court shall, until a Special Court is constituted under section 36, notwithstanding anything contained in the Code of Criminal Procedure, 1973, be tried by a Court of Session.

(2) Where any proceedings in relation to any offence committed under this Act on or after the commencement of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 (are pending before a Court of Session, then, notwithstanding anything contained in sub-section (1), such proceeding shall be heard and disposed of by the Court of Session:

Provided that nothing contained in this sub-section shall affect the power of the High Court under section 407 of the Code of Criminal Procedure, 1973 to transfer any case or class of cases taken cognizance by a Court of Session under sub-section (1).”

20) From a perusal of the aforesaid provision it becomes clear that every offence under NDPS Act, which is triable by a Special Court, shall, until a Special Court is constituted, be tried by a Court of Session. The question arises whether a Sessions Court would exercise jurisdiction of a Special Court including the jurisdiction to remand the accused to custody during the investigation of the case and take cognizance of offences or would it only hold trial of the offences under NDPS Act as a Court of Session.

21) There are divergent opinions of various High Courts on the above issues. Delhi High Court and Punjab & Haryana High Court have taken a view that till Special Court under Section 36 of the NDPS Act is constituted, a Judicial Magistrate/Metropolitan Magistrate can give remand of accused beyond a period of fifteen days under Section 167(2) of the Code as he is empowered to exercise this power under Section 36A of the Act, meaning thereby that a Sessions Court, in cases relating to offences under NDPS Act, cannot exercise powers of a Special Court so far as the same relates to taking of cognizance of offences or remanding accused to custody during investigation of the case. A Full Bench of the Delhi High Court has taken the aforesaid view in the case of **Rakesh Kumar vs. The State, 1994 CriLJ 1942**. A Full Bench of Punjab and Haryana High Court

has taken a similar view in the case of **Janta Singh v. State of Punjab, 1996 CriLJ 1185.**

22) A contrary view on this issue has been taken by Bombay High Court in the case of **Suryakant Ramdas and others vs. State of Maharashtra, 1990 (1) MhLj 124**, by holding that the Court of Sessions shall have all the powers, duties and obligations which the Special Court has been given and that Sessions Judge was empowered to authorize detention as also to take cognizance of the offences and then proceed to trial by following the procedure prescribed under NDPS Act. A similar view has been taken by the High Court of Madras in **P. R. Muthu v. State, 1992 (1) Crimes 1038** and High Court of Kerala **In Re: State Circle Inspector of Excise and Ors., 1992 CriLJ 570** and **In Re: An Accused, 1992(1) Crimes 1030.**

23) The controversy seems to have been set at rest by the Supreme Court in the case of **Supreme Court Legal Aid Committee Representing Under trial Prisoners v. Union of India and others, (1994) SCC 731**, by holding that on account of non-obstinate clause in Section in 36D(1)(a) of the NDPS Act, there would be no question of the Magistrate going through the exercise of committal proceedings in respect of the offences triable by the Court of Session in terms of Section 36D of the Act. Para 11 of the judgment is relevant to the context and the same is reproduced as under:

“11. Section 36 provides for the Constitution of Special Courts and Section 36A(l)(a) says that notwithstanding anything contained in the Code,

all offences under the Act 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. On a conjoint reading of these two provisions it becomes clear beyond my manner of doubt that once a Special Court (or more than one) has been constituted for an area or areas in which the offence has been committed, then notwithstanding anything contained in the Code, the Special Court alone will have jurisdiction and all other Courts exercising jurisdiction prior to the Constitution of the Special Courts will cease to have jurisdiction. Sub-section 36A(1)(a) and (d) which also begin with a non-obstante clause - notwithstanding anything contained in the Code - provide that a Special Court may, upon a perusal of the police report of the facts constituting an offence under the Act or upon a complaint made by an officer of the concerned Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial. This is a provision which is analogous to Section 190 of the Code. It is dear from this provision that a Special Court may take cognizance of an offence without the accused being committed to it for trial. Section 36C makes the provisions of the Code applicable to proceedings before a Special Court, save as otherwise provided in the Act, and says that the Special Court shall be deemed to be a Court of Session. That brings us to Section 36D which is a transitional provision. Under Sub-section (1) of Section 36D any offence committed under the Act on or after the commencement of the Amendment Act, 1988, until a Special Court is constituted under Section 36, shall, notwithstanding anything contained in the Code, be tried by a Court of Session. The non-obstante clause in this provision makes it clear that until a Special Court is constituted under Section 36, the Court of Session shall try any offence committed on or after the commencement of the Amending Act and no other Court including the Magistrate's Court will have jurisdiction to try an offence under the Act. Sub-section (2) of Section 36D further provides that nothing in Sub-section (1) shall be construed to require the transfer to a Special Court of any proceeding in relation to an offence taken cognizance of by the Court of Session under Sub-

section (1) and the same shall be continued, heard and decided by the latter Court. As we have pointed out earlier before this group of sections came to be introduced in the Act by the Amending Act 2 of 1989 with effect from 29th May, 1989, the offences under the Act were triable by different Courts under the Code depending on the punishments provided therefore. But after the introduction of this group of sections in the Act, the legislature, with a view to speeding up the trial provided for the Constitution of a Special Court and until such Court was constituted it provided by Sub-section (1) of Section 36B that the Court of Session will have jurisdiction to try any offence committed under the Act; the provisions in the Code notwithstanding. The effect of this provision is to vest jurisdiction in the Court of Session alone during the transitional period in respect of offences under the Act even where the punishment prescribed is three years or less. Ordinarily the Magistrate's Court would have power to try the offence under the Code but by this provision the power is vested in the Court of Session alone and, therefore, the Courts of the Magistrate, 1st Class, Metropolitan Magistrates, Chief Judicial Magistrates and Chief Metropolitan Magistrates would cease to have jurisdiction. Sub-section (1) of Section 36A overrides the provisions of the Code. So, from the date of its introduction on the statute book the Magisterial Courts ceased to have jurisdiction or power to try any offence committed under the Act even if the punishment prescribed is three years or less since any the Court of Session is empowered to deal with such cases. There would, therefore, be no question of the Magistrate going through the exercise of committal proceedings as on account of the non-obstante clause in Section 36D(1)(a), all offences under the Act become triable only by the Court of Session till the Constitution of Special Courts and thereafter by the Special Court. Ordinarily, therefore, cases pending before the Court of Session by virtue of Section 36D(1) would be transferred to the Special Court, but Sub-section (2) of Section 36D carves out an exception in relation to an offence of which the Court of Session has already taken cognizance. Where the Court of Session has already taken cognizance under Sub-section (1) of Section 36D that Court will be entitled to hear and dispose of the case and will not be required to transfer the same to

the Special Court of the area by virtue of the exception carved out by Sub-section (2) of Section 36D. On a conjoint reading of Sections 36, 36A to 36D, it seems clear to us that after the insertion of these provisions all offences under the Act have to be tried by the Special Court for the area constituted under Section 36. That is the thrust of Clause (a) of Sub-section (1) of Section 36A. But the legislature was aware that there may be a time-gap between the coming into force of these provisions w.e.f. 29th May, 1989 and the Constitution of a Special Court. This period which is a transitional period is taken care of by Section 36D of the Act. Under this provision during the transitional period offences committed under the Act would be tried by the Court of Session alone notwithstanding anything to the contrary contained in the Code. But once the Special Court is constituted under Section 36 that Court alone would have jurisdiction to try the offences under the Act save and except those in relation where to the Sessions Court has already taken cognizance. It is not necessary to elaborate on when cognizance is understood to have been taken because that is fairly well- settled by a catena of decisions of this Court, vide decisions based on an interpretation of Section 190 of the Code. Also see para 7 of Kishan Singh v. State of Bihar.”

(Emphasis supplied)

24) From the afore-quoted observations of the Supreme Court, it is clear that until Special Courts in terms of Section 36 of the NDPS Act are constituted, a Court of Session will have jurisdiction not only to try the offences committed under the Act but it will also have jurisdiction to take cognizance of such offences without the necessity of going through the committal proceedings.

25) The position is further clarified by the provisions contained in Section 36-C of the NDPS Act, which provide for application of Code of Criminal Procedure to the proceedings before a Special Court. It reads as under:

***“36C. Application of Code to proceedings before a Special Court.—Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.*”**

26) From a perusal of the aforesaid provision, it is revealed that only those provisions of the Code would apply to the proceedings pertaining to offences triable by Special Court which are not inconsistent with the provisions of the NDPS Act. It further provides that a Special Court shall be deemed to be a Court of Session. Thus, during the transitional period when a Court of Session fills in the void created by non-constitution of Special Courts, it has to follow the same procedure as prescribed by the provisions contained in NDPS Act read with those provisions of the Cr. P. C, which are not inconsistent with the NDPS Act. The provisions of NDPS Act give jurisdiction to the Court competent to try the offences under the said Act i.e. Special Court to take cognizance of offence as an original court [Section 36A(1)(d)] and to exercise powers of a Magistrate under Section 167 of Cr. P. C [Section 36A(1)(c)]. As a necessary corollary to this, the Sessions Court, while exercising the jurisdiction of a competent court in the absence of a Special Court would also exercise the same powers and follow the same procedure as a Special Court constituted under the Act would do. This is clear from the non-obstinate clause appearing at the fag end of sub-section (1) of Section

36D of the Act. Therefore, the expression “be tried by a Court of Session” appearing in sub-section (1) of Section 36D of the Act has to be given a harmonious and wide construction so as to include within it the power to take cognizance of offences under the Act and to exercise all other ancillary powers of a Special Court.

27) Once it is concluded that a Court of Session, during the transitional period until constitution of Special Courts, has jurisdiction to take cognizance of offences under the said Act, it can safely be stated that the said Court has also power to grant and extend the period of detention of an accused beyond fifteen days in accordance with the provisions contained in Section 36-A of the NDPS Act. Therefore, I would respectfully beg to differ with the view expressed by the Full Benches of Delhi High Court and Punjab & Haryana High Court and concur with the views expressed of the High Courts of Bombay, Madras and Kerala on this issue.

28) Having held that with respect to the offences under UA(P) Act, the jurisdiction to grant and extend the period of remand vests with the Special Court constituted under NIA Act and jurisdiction to grant and extend remand beyond fifteen days in respect of the offences under NDPS Act vests with the Sessions Court having jurisdiction in the area concerned until a Special Court is constituted, let us now proceed to find an answer to the question of law that has arisen in the instant case.

29) There is no dispute to the fact the petitioner has been booked for various offences under UA(P) Act as well as NDPS Act. Both these legislations are special in nature and provide for constitution of Special Courts. The petitioner was initially booked only for the offences under NDPS Act and, accordingly, he was remanded to custody from time to time by the orders passed by the concerned Sessions Court. Once the offences under UA(P) Act were added, he was produced before the Special Court Designated under NIA Act, at Jammu and his remand in custody was extended by the said Court from time to time, which included the extension of his remand beyond 90 days up to 180 days.

30) It is required to be noticed here that Special Court Designated [3rd Additional District and Sessions Court (TADA/POTA)] under NIA Act at Jammu is basically a Sessions Court and by virtue of SRO 149 dated 1st of March, 2019, issued by erstwhile Government of Jammu and Kashmir in terms of Section 22 of NIA Act, it has been designated as a Special Court for trial of Scheduled offices investigated by the State police. So the said Court is not only competent to grant remand in respect of the offences under UA(P) Act but it is also vested with jurisdiction to remand accused to custody in respect of the offences under NDPS Act. Thus, no difficulty is posed so far as remand of petitioner to custody by the said Court up to the expiry of 180 days is concerned. Even otherwise, Section 14 of the

NIA Act vests jurisdiction with a Special Court to try any other offence while trying offences under UA(P) Act.

31) Section 43-D of the UA(P) Act does not provide for extension of custody of an accused beyond 180 days. Since the investigating agency, in order to complete the investigation, required further custody of the petitioner, as such, it availed the option of seeking further custody of the accused in respect of the offences under NDPS Act, as Section 36A of the said Act makes a provision for extension of custody of an accused beyond 180 days up to one year. The Investigating Agency, accordingly, made an application before Principle Sessions Judge, Jammu. It is clearly indicated in the said application that the Investigating Agency has sought extension of period of custody of the petitioner in connection with investigation of offences under NDPS Act. The Court of 3rd Additional Sessions Judge, Jammu (Special Court under NIA Act) being a Sessions Court, was also competent to adjudicate upon the aforesaid application of the investigating agency but it seems that the application was assigned by Principle Sessions Judge, Jammu, to Additional Sessions Judge, Jammu. As already held, a Sessions Court having jurisdiction in the area concerned has the power to grant and extend the period of custody in a case relating to offences under NDPS Act, as such, there was no legal bar or impediment for the Court of Additional Sessions Judge, Jammu, to entertain and decide the said application. It is so because the accused including the petitioner, were not only facing

investigation for offences under UA(P) Act but they were also being investigated for offences under NDPS Act, as a result of which, the Investigating Agency was entitled to seek custody of the accused beyond 180 days subject to fulfillment of conditions laid down in proviso to sub-section (4) of Section 36A of NDPS Act. The ratio laid down by the Supreme Court in **Bikramjit Singh's** case (supra) is, therefore, not applicable to the facts of the instant case.

32) For the foregoing reasons, the answer to the legal question formulated in para (1) of this judgment has to be in negative. Accordingly, it is held that in a case where an accused is facing investigation for offences under UA(P) Act together with offences under NDPS Act, concerned Sessions Judge, until a Special Court under Section 36 of NDPS Act is constituted, is vested with jurisdiction to extend the custody of such an accused beyond the period of 180 days subject to fulfillment of the conditions mentioned in proviso to sub-section (4) of Section 36A of NDPS Act.

33) It has been vehemently contended by learned Senior counsel appearing for the petitioner that the impugned order passed by learned Additional Sessions Judge, Jammu, whereby judicial custody of the petitioner has been extended beyond the period of 180 days, is not in accordance with law, inasmuch as the conditions prescribed under proviso to sub-section (4) of Section 36-A of NDPS Act are not fulfilled. Taking his argument further, the learned Senior counsel has contended that neither any notice was issued to the petitioner nor does

the impugned order indicate that progress of investigation and specific reasons for detention of the accused were brought to his notice by the Public Prosecutor. The learned counsel has, in support of his contention, referred to the judgment of the Supreme Court in the case of **Hitendra Vishnu Thakur and others vs. State of Maharashtra and others, (1994) 4 SCC 602**, and **Sanjay Kumar Kedia v. Intelligence Officer, NCB and anr. (2009) 17 SCC 631**.

34) So far as proviso to sub-section (4) of Section 36-A of the NDPS Act is concerned, it lays down that if it is not possible to complete the investigation within 180 days, the custody of an accused alleged to have committed offences under NDPS Act can be extended up to one year subject to the following conditions:

- (1) there has to be a report of the Public Prosecutor indicating the progress of investigation;
- (2) Specific reasons for detention of accused beyond the period of 180 days have to be spelled out.

35) Coming to the application, on the basis of which impugned order granting extension in custody of the petitioner beyond 180 days has been passed, it becomes clear that in the said application a detailed account with regard to progress of investigation has been given by the Investigating Officer. The application also spells out the reasons as to why extension in custody of the accused was required.

36) Learned Additional Sessions Judge, Jammu, has, after taking note of the progress of investigation as indicated in the application of the Investigating Agency and after perusal of the case diary, recorded the reasons for extending custody of the accused including that of the petitioner beyond the period of 180 days. The order has been passed in presence of the accused including the petitioner and, as such, a separate notice was not required to be issued to the petitioner. Thus, I do not find any infirmity or illegality in the impugned order passed by the learned Additional Sessions Judge, Jammu, and the same does not call for any interference by this Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure or in exercise of its revisional jurisdiction.

37) For the foregoing discussion, I do not find any merit in this petition, the same is, accordingly, dismissed.

38) Before parting, this Court expresses its anguish and dismay for the manner in which the successive governments of erstwhile State of Jammu and Kashmir and Union Territory of Jammu and Kashmir have dragged their feet on constitution and setting up of Special Courts in terms of Section 36 of NDPS Act in this part of the Country. This state of affairs is continuing despite the lapse of more than three decades from the date of enactment of NDPS Act. There is high pendency of cases relating to offences under NDPS Act in the Union Territory and in the absence of Special Courts, these cases are being tried by ordinary Sessions Courts thereby resulting in delay in

disposal of these cases. Thus, the very object of the Act is getting defeated.

39) Taking note of the above situation, the Supreme Court has, in the case of **Thana Singh vs. Central Bureau of Narcotics, (2013) 2 SCC 590**, issued directions to a few States including the State of Jammu and Kashmir to set up Special Courts. Para 15 of the judgment is relevant to the context and the same is reproduced as under:

“15. Therefore, we issue the following directions in this regard:

15.1. Each state, in consultation with the High Court, particularly the states of Uttar Pradesh, West Bengal and Jammu & Kashmir (where the pendency of cases over five years is stated to be high), is directed to establish Special Courts which would deal exclusively with offences under the NDPS Act.

15.2. The number of these courts must be proportionate to, and sufficient for, handling the volume of pending cases in the State.

15.3. Till exclusive courts for the purpose of disposing of NDPS cases under the NDPS Act are established, these cases will be prioritized over all other matters; after the setting up of the special courts for NDPS cases, only after the clearance of matters under the NDPS Act will an NDPS court be permitted to take up any other matter.”

(Emphasis supplied)

Even the aforesaid directions of the Supreme Court seem to have fallen on deaf ears of the authorities and the same have been unable to wake up the authorities from the deep slumber.

40) It is high time that the concerned authorities of the Government of Union Territory of J&K, take immediate steps to set up Special Courts in the Union Territory in consultation with the High Court so that object of speedy disposal of cases relating to offences under NDPS Act is fulfilled and the directions of the Supreme Court are complied with in the right earnest.

41) Copies of this judgment be placed before the Chief Secretary of the Government of Union Territory of J&K, and the Registrar General of the High Court of J&K, for taking immediate necessary steps in the matter.

(Sanjay Dhar)
Judge

Srinagar
06.07.2021
“Bhat Altaf, PS”

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No