IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.02.2024

PRONOUNCED ON : 07.02.2024

CORAM

THE HONOURABLE MR. JUSTICE M.S.RAMESH
AND

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Crl.MP.No.19676 of 2023 in Crl.A.SR.No.52810 of 2023

Buhari @ Kichan Buhari .. Petitioner/A15

Versus

State rep. by
The Additional Deputy Superintendent of Police,
Special Investigation Division, Crime Branch,
CID, Madurai.
(Cr.No.1/2013 of CBCID) .. Respondent/Complainant

Prayer:- Criminal Miscellaneous Petition filed under Section 389[1] of Cr.P.C., to condone the delay of 43 days in preferring the above appeal against the judgment passed in Crl.M.P.No.645 of 2023 on the file of the Special Court, under the National Investigation Agency Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee dated 09.05.2023.

For Petitioner : Mr.S.Manoharan

For Respondent : Mr.E.Raj Thilak

Additional Public Prosecutor

Amicus Curiae : Mr.AR.L.Sundaresan, Sr. Counsel
Additional Solicitor General of India
assisted by Mr.R.Karthikeyan

ORDER

[Order of the Court was delivered by SUNDER MOHAN, J]

This instant Criminal Miscellaneous Petition has been filed seeking to condone the delay of 43 days in preferring the appeal beyond the period of 90 days against the judgment passed in Crl.M.P.No.645 of 2023 on the file of the Special Court, under the National Investigation Agency Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, dated 09.05.2023.

2. As per Section 21(5) of the National Investigation Agency Act, 2008 (hereinafter referred to as the 'NIA Act'), the High Court shall not entertain any appeal beyond the period of 90 days.

3. The challenge is to the dismissal of a bail order. In view of Section 21(4) of the NIA Act and the judgment of the Hon'ble Apex Court

interpreting the said provision, the petitioner/appellant is also not entitled to file an application under Section 439 of the Cr.P.C. If the petitioner/appellant is denied the right of appeal and thereby the right of bail, because of the procedural restriction, it would amount to a violation of his fundamental right under Article 21 of the Constitution of India. Therefore, considering the importance of the issue and in the light of the conflicting views expressed by different High Courts, we requested Mr.AR.L.Sundaresan, the learned Senior counsel and the Additional Solicitor General of India to act as an *Amicus Curiae* to assist us in deciding this issue. We also requested Mr.E.Raj Thilak, the learned Additional Public Prosecutor, to render assistance in the matter.

4. The learned counsel for the petitioner/appellant submitted that the Delhi High Court and the Jammu & Kashmir High Court in *Farhan Shaikh Vs. State (National Investigation Agency)*, reported in 2019 SCC OnLine Del 9158 and *Chief Investigating Officer, Jammu Vs. 3rd Additional Sessons Judge District Court, Jammu* [Crl.A(D) No.46/2022 dated 13.12.2022], respectively, have taken a view that Section 21 of the NIA Act, does not

exclude Section 5 of the Limitation Act and further held that the word '*shall*' shall be read as '*may*' in the 2nd proviso to Section 21(5) of the NIA Act, considering the hardship that would be caused to the litigants if the provision is considered to be mandatory. Therefore, the learned counsel submitted that this Court may condone the delay by applying Section 5 of the Limitation Act, since the word '*shall*' has to be read as '*may*'.

5 (i) Mr.AR.L.Sundaresan, learned Senior counsel submitted that the Calcutta High Court and Kerala High Court, in *Sheikh Rahamtulla @ Sajid @ Buhan Sajid @ Burhan Sheikh @ Surot Ali vs. National Investigation Agency* [CRA (DB) 231/2022 dated 01.03.2023] and *Nasir Ahammed Vs. National Investigation Agency* [2015 SCC OnLine Ker 39625], respectively, took a view that Section 21(5) of the NIA Act is mandatory.

(ii) The learned Senior Counsel further submitted that Delhi High Court and Jammu & Kashmir High Court, have taken a view that Section 5 of the Limitation Act would be applicable, and the word '*shall*' used in the 2nd proviso of Section 21(5) has to be read as '*may*' and the Appellate Court

would be well within its powers to condone the delay and entertain the appeal, even after the expiry of 90 days.

(iii) The learned Senior counsel further pointed out the judgment of the Bombay High Court in ***Faizal Hasamali Mirza Vs. State of Maharashtra,*** reported in **2023 SCC OnLine Bom 1936**, wherein the Bombay High Court had considered all the judgments and held that the applicability of Section 5 of the Limitation Act is not ruled out under the provisions of the NIA Act and that the word '*shall*' should be read as '*may*'. The learned Senior counsel, however, submitted that the reasoning given by the Bombay High Court and the two other High Courts, which held that Section 5 of the Limitation Act is applicable, is flawed.

(iv) The learned senior counsel submitted that the applicability of the Limitation Act is excluded and read to us Section 29(2) of the Limitation Act and submitted that the proviso to Section 21(5) of the NIA Act expressly excludes the applicability of Section 5 of the Limitation Act, and therefore, by virtue of Section 29(2) of the Limitation Act, the provisions

contained in Sections 4 to 24 of the Limitation Act, would not be applicable to an appeal filed under the NIA Act.

(v) The learned Senior counsel also submitted that, in the absence of any challenge to the proviso to Section 21(5) of the NIA Act, the Courts cannot read down the provision when there is no ambiguity in view of the decision of the Hon'ble Supreme Court in ***Arup Bhuyan vs. State of Assam*** reported in **(2023) 8 SCC 745**.

(vi) The learned senior counsel therefore submitted that though this provision would cause hardship to the accused who intended to challenge the judgment of conviction or rejection of bail order, unless there is a challenge to the constitutional validity of this provision, there cannot be any interpretation contrary to the plain language of the statute.

6. (i) Mr.E.Raj Thilak, the learned Additional Public Prosecutor, pointed out the decision of the Hon'ble Supreme Court in ***Sita Ram & Others Vs. State of Uttar Pradesh***, reported in **(1979) 2 SCC 656**, where

the Hon'ble Supreme Court held that procedural law is only a handmaid of justice and cannot be allowed to extinguish the substantive right.

(ii) The learned Additional Public Prosecutor also pointed out parliamentary debates where the Hon'ble Minister who moved the Bill stated that the restrictions for the grant of bail would not bind the High Courts and the Supreme Court and it would only apply to the trial Court.

7. We have carefully considered all the submissions made by Mr.AR.L.Sundaresan, learned Senior Counsel/Amicus Curiae, Mr.S.Manoharan, the learned counsel for the petitioner/appellant and Mr.E.Raj Thilak, the learned Additional Public Prosecutor, appearing for the State.

8.(i) The Kerala High Court in ***Nasir Ahammed's case*** [cited supra] held that as per Section 29(2) of the Limitation Act, Section 5 of the

Limitation Act would not be applicable to an appeal under the NIA Act, as its applicability is expressly excluded by the proviso to the NIA Act, and therefore held that the High Court has no powers to condone the delay beyond the period of 90 days.

(ii) Similarly, the Calcutta High Court in ***Sheikh Rahamtulla's case*** [cited supra] held that Section 21 of the NIA Act is mandatory and as such a delay beyond the period of 90 days cannot be condoned.

(iii) The Jammu & Kashmir High Court in National Investigating Officer through its ***Chief Investigating Officer, Jammu Vs. 3rd Additional Sessions Judge District Court, Jammu*** [Crl.A(D) No.46/2022 dated 13.12.2022] held that Section 21 of the NIA Act has not expressly excluded the applicability of the Limitation Act and therefore, Section 5 of the Limitation Act, would be applicable and further held that the word '*shall*' has to be read as '*may*'.

(iv) Similar view was taken by the Delhi High Court in ***Farhan***

Shaikh Vs. State (National Investigation Agency), reported in 2019 SCC OnLine Del 9158.

(v) After considering the aforesaid views, the Division Bench of the Bombay High Court in ***Faizal Hasamali Mirza's case*** [cited supra] also held that Section 5 would be applicable for an appeal filed under Section 21 of the NIA and further held that the word '*shall*' shall be read down and read as '*may*'.

9. (i) Section 29(2) of the Limitation Act, 1963 reads as follows:

> "Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

(ii) The above provision would show that Sections 4 to 24 of the Limitation Act shall apply only in so far as, and to the extent to which, they are not expressly excluded by any special or local law.

10. The NIA Act is a special Law. Section 21(5) of the NIA Act, 2008 reads as follows:

> "**21. Appeals.**
>
> (1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.
>
> (2) Every appeal under sub-section (1) shall be heard by a bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.
>
> (3) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, sentence or order including an interlocutory order of a Special Court.
>
> (4) Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.
>
> (5) Every appeal under this section shall be preferred within a period of thirty days from the date of the

judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days:

Provided further that no appeal shall be entertained after the expiry of period of ninety days."

11. The two provisos expressly exclude condonation of delay beyond the period of 90 days. If Section 5 of the Limitation Act, were to be made applicable, there would be no necessity for the two provisos. The first proviso empowers the High Court to entertain the appeal beyond the period of 30 days if sufficient cause is shown, provided it is within the period of 90 days. The further proviso states that no appeal shall be entertained beyond the period of 90 days. Therefore, it is clear that the NIA Act expressly excludes the applicability of Section 5 of the Limitation Act.

12. Therefore, we are in agreement with the view taken by the Kerala High Court (Nasir Ahammed's case) in holding that, by virtue of Section 29(2) of the Limitation Act, Section 5 of the said Act is not applicable for

an appeal filed under Section 21 of the NIA Act.

13. The 2nd proviso to Section 21(5) of the NIA Act employs the word '*shall*'. The Jammu & Kashmir High Court, Delhi High Court, and Bombay High Court have held that the word '*shall*', shall be read as '*may*'. The observations were made while disposing of a condone delay application in an appeal under Section 21 of the NIA Act.

14. The Hon'ble Supreme Court in ***Arup Bhuyan's case*** [cited supra] while setting aside the judgment of the Assam High Court which read down a substantive penal provision under Section 10(a)(i) of the Unlawful Activities (Prevention) Act, 1967 [hereinafter referred to as the 'UAPA Act', while hearing an appeal, held that in the absence of a challenge to the constitutional validity, the Court cannot read down a provision. The Hon'ble Supreme Court further held that the Union of India also has to be heard before reading down any provision under the Central legislation. The relevant observations read as follows:

> 59. Now so far as the reading down of Section 10(a)(i) of the

UAPA, 1967 by this Court in the case of Arup Bhuyan v. State of Assam ((2011) 3 SCC 377 is concerned, at the outset it is required to be noted that such reading down of the provision of a statute could not have been made without hearing the Union of India and/or without giving any opportunity to the Union of India.

60. When any provision of Parliamentary legislation is read down in the absence of Union of India it is likely to cause enormous harm to the interest of the State. If the opportunity would have been given to the Union of India to put forward its case on the provisions of Section 10(a)(i) of the UAPA, 1967, the Union of India would have made submissions in favour of Section 10(a)(i) of the UAPA including the object and purpose for enactment of such a provision and even the object and purpose of UAPA. The submission made by Shri Parikh, learned Senior Counsel relying upon the decision of this Court in the case of Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., ((1983) 1 SCC 147) that it is ultimately for the Court to interpret and read down the provision to save any provision from declaring as unconstitutional is concerned, it is true that it is ultimately for the Court to interpret the law and/or particular statute. However, the question is not the power of the Courts. The question is whether can it be done without hearing the Union of India?

61. Even otherwise in absence of any challenge to the constitutional validity of Section 10(a)(i) of the UAPA there was no question of reading down of the said provision by this Court. Therefore, in absence of any challenge to the constitutional validity of Section 10(a)(i) of UAPA, 1967 there was no occasion for this Court to read down the said provision.

62. Even otherwise as observed and held by this Court in the case of Subramanian Swamy and others vs. Raju through Member, Juvenile Justice Board and Anr., ((2014) 8 SCC 390) reading down the provision of a statute cannot be resorted to when the meaning of a provision is plain and unambiguous and the legislative intent is clear. This Court has thereafter laid down the fundamental principle of "reading down doctrine" as under:

> "61...Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality."

At the cost of repetition, it is observed that reading down a particular statute even to save it from unconstitutionality is not permissible unless and until the constitutional validity of such provision is under challenge and the opportunity is given to the Union of India to defend a particular parliamentary statute.

63. In view of the above in all the aforesaid three decisions, this Court ought not to have read down Section 10(a)(i) of the UAPA, 1967 more particularly when neither the constitutional validity of Section 10(a)(i) of the UAPA, 1967 was under challenge nor the Union of India was heard."

15. In the above case, the Hon'ble Supreme Court was dealing with the case where the High Court had read down a substantive provision of law in the absence of challenge to its constitutional validity. Therefore, we are of the view that, ordinarily in the absence of any specific challenge to the constitutional validity, we cannot read down the provision of a statute, when the language is unambiguous and the intent of the legislation is clear. However, we may hasten to add that in a case of this nature, where bail has been refused by the trial Court, which is challenged belatedly in an appeal, the important question would be whether the literal meaning of the provision would affect the fundamental rights of an accused.

16. The applicability of procedure under the NIA Act for offences under the UAPA Act, is no longer *res integra*. A Full Bench judgment of this Court in ***Jaffar Sathiq vs. State***, reported in *2021 SCC OnLine Mad 2593,* has made that position clear. Under Section 21(4) of the NIA Act, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail. This provision also came up for consideration before the Hon'ble Supreme Court in ***State of Andhra Pradesh Vs. Mohd.***

Hussain, reported in **2014(1) SCC 258**. The Hon'ble Supreme Court held as follows:

> "27.1. Firstly, an appeal from an order of the Special Court under NIA Act, refusing or granting bail shall lie only to a bench of two Judges of the High Court.
>
> 27.2. And, secondly as far as prayer (b) of the petition for clarification is concerned, it is made clear that inasmuch as the applicant is being prosecuted for the offences under the MCOC Act, 1999, as well as The Unlawful Activities (Prevention) Act, 1967, such offences are triable only by Special Court, and therefore application for bail in such matters will have to be made before the Special Court under the NIA Act, 2008, and shall not lie before the High Court either under Section 439 or under Section 482 of the Code. The application for bail filed by the applicant in the present case is not maintainable before the High Court.
>
> 27.3. Thus, where the NIA Act applies, the original application for bail shall lie only before the Special Court, and appeal against the orders therein shall lie only to a bench of two Judges of the High Court."

17. Therefore, the petitioner/appellant cannot approach this Court under Section 439 Cr.P.C. as well. In such circumstances, if the accused, for some reason, is unable to file an appeal against the rejection of his bail order or against the judgment of conviction within 90 days, and if his appeal

is not entertained, it would infringe the fundamental rights of the accused. As held by the Bombay High Court, the reasons for the accused for not challenging the rejection of the bail order on time can be several, such as lack of legal knowledge, lack of financial assistance, or no assistance from any family member or friend to engage a lawyer. No doubt, the right to file an appeal is a statutory right, and the statute can place restrictions. However, it is well settled that the Right of Appeal from the judgment of conviction affecting the liberty of a person is a fundamental right that has to be read into Article 21 of the Constitution of India. In this regard, we may refer to the observations of the Hon'ble Supreme Court in ***Dilip S. Dahanukar Vs. Kotak Mahindra Co. Ltd.,*** reported in (2007) 6 SCC 528. The relevant observations read as follows:

> "12. An appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is provided for under Section 374 of the Code. Right of Appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 is also a Fundamental Right. Right of Appeal, thus, can neither be interfered with or impaired, nor can it be subjected to any condition."
>
> "66. The right to appeal from a judgment of conviction vis-a-vis

the provisions of Section 357 of the Code of Criminal Procedure and other provisions thereof, as mentioned hereinbefore, must be considered having regard to the fundamental right of an accused enshrined under Article 21 of the Constitution of India as also the international covenants operating in the field."

18. When a right of an appeal against conviction is a fundamental right, there cannot be any doubt that the right to file an appeal against the rejection of bail is also a fundamental right. A procedural law cannot be allowed to extinguish a fundamental right.

19. In a case where the Hon'ble Supreme Court was dealing with the provisions of Order VIII Rule 1 C.P.C., which restricted the filing of the written statement beyond the period of 90 days, the Hon'ble Supreme Court held that the provision being in the domain of procedural law has to be held to be directory and not mandatory. The Hon'ble Supreme Court, at paragraph Nos.26 to 30, 33, and 46(iv), held as follows

"26. The text of Order VIII, Rule 1, as it stands now, reads as under : -

"1. Written statement.--- The defendant shall, within thirty days from the date of service of summons on him,

present a written statement of his defence: Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

27. Three things are clear. Firstly, a careful reading of the language in which Order VIII, Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order VIII, Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.

28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to

advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774, are pertinent:-

> "The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justiciae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence --- processual, as much as substantive."

29. In The *State of Punjab and Anr. v. Shamlal Murari and Anr.* (1976) 1 SCC 719, the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that

> "Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

In *Ghanshyam Dass and Ors. v. Dominion of India and Ors.* (1984) 3 SCC

46, the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to sub- serve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle.

30. It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words __ "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

33.As stated earlier, Order VIII, Rule 1 is a provision contained in the CPC and hence belongs to the domain of procedural law. Another feature noticeable in the language of Order VIII Rule 1 is that although it appoints a time within which the written statement has to be presented and also restricts the power of the Court by employing language couched in a negative way that the extension of time appointed for filing the written statement was not to be later than 90 days from the date of service of summons yet it does not in itself provide for penal consequences to follow if the time schedule, as laid down, is not observed. From these two features certain consequences follow.

46. We sum up and briefly state our conclusions as under:-

(i)....

(ii)....

(iii)...

(iv) The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though, the language of the proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away."

20. In the above judgment, the Hon'ble Supreme Court quoted with approval the observations made by Hon'ble Justice Krishna Iyer in *Sushil Kumar Sen Vs. State of Bihar [(1975) 1 SCC 774]*.

21. We may quote another observation made by Hon'ble Justice Krishna Iyer in ***Sita Ram's case*** [cited supra], which reads as follows:

"41. Going to the basics, an appeal "is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below.... An appeal, strictly so called, is one "in which the

question is, whether the order of the court from which the appeal is brought was right on the materials which that court had before it" (per Lord Davey, Ponnamma v. Arumogam, (1905) A.C. at p.390) .... A right of appeal, where it exists, is a matter of substance, and not of procedure (Colonial Sugar Refining Co. v. Irving, (1905) AC 369; Newman v. Klausner, (1922) 1 K.B. 228.". Thus, the right of appeal is para mount, the procedure for hearing canalises so that extravagant prolixity or abuse of process can be avoided and a fair workability provided. Amputation is not procedure while pruning may be.

42. Of course, procedure is within the Court's power but where it pares down prejudicially the very right, carving the kernal out, it violates the provision creating the right. Appeal is a remedial right and if the remedy is reduced to a husk by procedural excess, the right became a casualty. That cannot be.

43. So we cannot out down but may canalise the basic right by invoking Article 145(1)(b).”

22. In ***Union of India Vs. K.A.Najeeb,*** reported in (2021) 3 SCC 713, the Hon'ble Supreme Court held that the rigour of Section 43-D(5) of the UAPA would melt down, if there was a violation of a fundamental right under Article 21 of the Constitution of India, and the Constitutional Courts would not be bound by the restrictions in Section 43-D(5) of the UAPA. The relevant observations read as follows:

> *"17. It is thus clear to us that the presence of statutory restrictions like Section 43 – D (5) of UAPA per-se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Whereas at commencement of proceedings, Courts are expected*
>
> *to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safegaurd against the possibility of provisions like Section 43 – D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."*

23. Thus, in a case of this nature, where a provision in the procedural law has the effect of extinguishing a fundamental right, we may read down the provision. If the petitioner/appellant is denied his right of appeal in spite of showing sufficient cause for the delay in filing the appeal, it would be denying his fundamental right, which cannot be permitted by any Court much less a Constitutional Court. Therefore, we are of the view that the 2nd proviso to Section 21(5) of the NIA Act, has to be read down, and the word '*shall*' shall be read as '*may*' in respect of appeals, which, if not entertained

would amount to a violation of a fundamental right. The appeal challenging the judgment of conviction and the appeal challenging rejection of bail, in our view, are filed in exercise of one's fundamental right. The other appeal that we can think of which would involve the fundamental right of an accused is against an order cancelling his bail. Therefore, in those types of appeals, which are filed with a delay, the word '*shall*', shall be read as '*may*'.

24. As stated earlier, we are doing so notwithstanding that there is no challenge to these provisions, firstly, because the Hon'ble Supreme Court in *Kailash's case* [cited supra] read down a provision relating to the restriction of filing the written statement beyond the period of 90 days and also because the fundamental right of a citizen cannot be denied by a procedural law, which has to be treated only as handmaid of justice and not its mistress. To quote once again the observations of Justice Krishna Iyer, it can only be a lubricant and not a resistant in the administration of justice, more so in a case where the procedure itself has the effect of extinguishing a fundamental right.

25. However, we make it clear that we cannot hold that the word, '*shall*' shall be read as '*may*' in case of an appeal filed against any other order other than what is mentioned in paragraph No.23 of this order, unless there is a challenge to Section 21(5) of the NIA Act.

26. Therefore, we are of the view that in the instant case, the application for condonation of delay is maintainable, and since the petitioner/appellant has shown sufficient cause, the delay of 43 days in preferring the appeal is condoned. The Criminal Miscellaneous Petition stands allowed.

27. The Registry is directed to number the Criminal Appeal and list the same for admission in the usual course, if it is otherwise in order.

28.We hereby record our appreciation for the valuable assistance rendered by Mr.AR.L.Sundaresan, learned Senior counsel/Amicus curiae, who was ably assisted by Mr.R.Karthikeyan, learned Advocate, and also for the assistance rendered by Mr.E.Raj Thilak, learned Additional Public Prosecutor.

[M.S.R.,J.] [S.M.,J.]
07.02.2024

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Issue order copy by 08.02.2024
Upload the order copy forthwith.

Index: Yes/No
Speaking/Non-speaking order
Neutral Citation : Yes/No

M.S.RAMESH, J

and

SUNDER MOHAN, J

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To

1. The Special Court,
under the National Investigation Agency Act, 2008
(Sessions Court for Exclusive Trial of Bomb Blast Cases),
Chennai at Poonamallee

2. The Additional Deputy Superintendent of Police,
Special Investigation Division, Crime Branch,
CID, Madurai.

3.The Public Prosecutor,
Madras High Court,
Chennai – 600 104.

Pre-delivery order made in
Crl.MP.No.19676 of 2023
in Crl.A.SR.No.52810 of 2023

07.02.2024