

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CrIA(D) No. 46/2022

CrIM No. 1474/2022

Reserved on 23.11.2022
Pronounced on 13..12.2022

**National Investigation Agency Through Its
Chief Investigating Officer, Jammu**

...Petitioner(s)/Appellant(s)

Through: Mr. Vishal Sharma, DSGI.

Vs.

**3rd Additional Sessions Judge District Court
Jammu**

...Respondent(s)

Through:

CORAM:

HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

J U D G M E N T

Sanjeev Kumar, J.

1 Chief Investigating Officer of National Investigating Agency (NIA) Sanjay Nagpal along-with public prosecutor filed an application under Section 267 of CrPC before the Court of Special Judge U/S 11 of the NIA Act (3rd Additional Sessions Judge) ["the trial court" for short] seeking production warrant against one Abdul Jabbar @ Jabbar S/o Abdul Habib R/o H. No. 3919 Urdu Bazar near Jagat Cinema Chandni Chowk Delhi lodged in judicial custody in District Jail Bilaspur in FIR No. 288/2017.

2 In the application, it was pleaded that NIA New Delhi has registered a case bearing No. RC-16/2016/NIA/DLI dated 16th December 2016 for commission of offence under Section 17 of The Unlawful Activities (Prevention) Act, 1967.

3 The case relates to large scale transfer of funds from Pakistan to India through the import of California almonds and other items via cross LoC trade facilitation centres located at Salamabad, Uri, and Chakkan-da-Bagh, Poonch, for their purported use for fomenting terrorism in J&K. It was claimed by the appellant herein in his application that during investigation, Mr. Abdul Jabbar has been found to be involved in the said LoC trade and is aware of several incriminating facts relating to the mechanism adopted by the accused to facilitate transfer of funds illegitimately for fomenting terrorism in the Union Territory of Jammu and Kashmir. It was also averred in the application that during his examination in the jail, Mr. Abdul Jabbar had expressed his willingness to make his statement under Section 164 CrPC with regard to his acquaintance with the facts and circumstances of the case under investigation. It was thus pleaded that the statement of Abdul Jabbar was required to be recorded under Section 164 CrPC for taking the investigation further. The application was considered by the trial court and the same was rejected solely on the ground that the Court was not competent to issue production warrant under Section 267 CrPC during investigation and when no case is pending adjudication before the Court against the person against whom warrants have been sought to be issued. The trial court vide its order dated 6th May 2022 passed on the application of the appellant herein rejected the prayer of the appellant for issuing production warrants against Abdul Jabbar for recording his statement under Section 164 CrPC before the competent Magistrate in connection with case RC-17/2016/NIA/DLI. It is this order of the trial court which is appealed against before us under Section 21 of the National Investigation Agency Act, 2008 [NIA Act]. The appellant also prays, in the alternative, to invoke the inherent jurisdiction of the court vested by Section

482 of the CrPC 1973 for setting aside and quashing the order dated 6th May 2022 passed by the trial court.

4 Indisputably, there is no criminal trial or enquiry pending before the trial court and the matter is at the stage of investigation which is being carried out by NIA in the crime registered as RC-17/2016/NIA/DLI dated 16th December 2016. The appellant has preferred this appeal under Section 21 of the NIA Act which prescribes or lays down 30 days period for filing an appeal with discretion given to the court to condone the delay on the sufficient cause being shown but not beyond the period of 90 days. Indisputably, in the instant case, the appeal is preferred beyond the period of 90 days and therefore the same is accompanied by an application for condonation of delay of 40 days. We find that the appellant has sufficiently explained the delay of 40 days beyond the period of 90 days provided under second proviso and, therefore, condone the same.

5 After hearing Mr. Vishal Sharma, learned DSGI, this court vide its order dated 9th November 2022 asked him to come prepared on following two aspects:-

- i) Whether delay beyond the period of ninety (90) days in filing appeal under Section 21 of the National Investigation Agency Act can be condoned?
- ii) Whether the order passed by the Special Judge NIA court rejecting application of the appellant seeking production warrants against witness is an interlocutory order and, therefore, not appealable under Section 21 of NIA Act?

6 Mr. Sharma has addressed his arguments on both these aspects.

7 After hearing Mr. Sharma and having gone through the record, we are of the opinion that there is another equally important question that arises for determination in this appeal which is as under:-

- (iii). Whether a criminal court or for that matter Special Judge NIA can refuse to issue production warrant under Section 267 CrPC when no case is pending trial or enquiry before it. In other words, whether criminal court under

Section 267 CrPC can be approached for issue of production warrant for recording the statement of a person acquainted with the facts and circumstances of the crime during investigation.”

8. These three questions have directly fallen for consideration and determination in this case.

9 Since the application was filed by the appellant under Section 267 CrPC before the trial court at the investigation stage, as such, obviously there could be no party or person on the opposite side. The matter before us, in essence, is not adversarial.

10 Having heard Mr. Sharma, learned DSGI appearing for the appellant and perused the material on record, it is necessary to first set out Section 21 of the NIA Act:

“**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 From plain reading of Section 21, it clearly transpires that this Section has overriding effect on the Code of Criminal Procedure 1973 and

provides unequivocally that an appeal shall lie from any judgment, sentence or order, not being an interlocutory order passed by Special Court to the High Court both on facts and law.

12 With regard to limitation, sub-section (5) of Section 21 clearly prescribes a period of 30 days for filing appeal from the date of judgment, sentence or order appealed from. The High Court is, however, given discretion to entertain an appeal after the expiry of said period of 30 days if it is satisfied that appellant had sufficient cause for not preferring the appeal within the period of 30 days. This is so provided in the first proviso to sub-section (5). However, the second proviso to sub-section (5) curtails the discretion of the High Court to entertain appeal after the expiry of period of 90 days. The expression “shall” used in second proviso prima facie indicates that the provision is mandatory in nature. This provision however has been viewed, understood and interpreted by different High Courts differently. One view is that once the statute provides for filing of appeal a period of 30 days and gives discretion to the appellate court to condone the delay, subject of-course to the showing of sufficient cause, beyond the period of 30 days but not beyond the expiry of 90 days from the date of judgment, sentence or order appealed from, the courts cannot by entering into interpretative process re-write the mandatory provision, in that, it would amount to legislation by courts.

13 The other view is that the word “shall” used in the 2nd proviso must be read in its context and having due regard to the object of legislation. Interpreting the word “shall” used in second proviso to sub-section (5) as mandatory may in some cases take away the right of the accused or the prosecution, as the case may be, to avail of remedy of appeal. It is thus opined that having regard to the fair trial rights of the accused implicit in Article 21 of the Constitution of India, the word “shall” used in second proviso to sub-

section (5) of Section 21 must be read as ‘may’ and on sufficient cause being shown, the court would be well within its powers to condone the delay and entertained the appeal even after the expiry of period of 90 days.

14. Former view is taken by the Kerala High Court in the case of **Nasir Ahmad vs. National Investigation Agency 2015 SCC Online Ker 39625**, whereas the later view is taken by the Delhi High Court in the case of **Farhan Shaikh vs. State (NIA) 2019 SCC Online Del 9158**.

15. We have considered the entire issue with the benefit of having gone through both the contrary views and we are of the opinion that the view taken by the Delhi High Court is more pragmatic and furthers the ends of justice.

16. Briefly put our reasons to fall in line with the judgment of the Delhi High Court are given below.

17. Admittedly, Section 21 of the NIA Act does not contain any provision akin to Section 5 of the Limitation Act whereunder the High Court under Section 21 of the Act can exercise its discretion to condone the delay beyond the period of 90 days. It is equally true that Section 21 of the NIA Act provides period of limitation for filing the appeal different from the period prescribed for filing the appeal by the Schedule of the Limitation Act. Section 29(2) of the Limitation Act reads thus:

“29. **Savings**

1.....
.....

(2) 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”.

3.....
4.....”

18. From a plain reading of Section 29 (2) of the Limitation Act, it is abundantly clear that 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 prescribed by the Schedule. For the purpose of determining the 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 insofar as, and to the extent they are not expressly excluded by such special or local law.

19. The point that arises for determination is, whether NIA Act, in particular Section 21 thereof expressly excludes the application of Sections 4 to 24 of the Limitation Act for determining the period of limitation for filing an appeal under NIA Act. One view is that by providing for condonation of delay after the expiry of 30 days' period prescribed for filing appeal, but not beyond 90 days from the date of judgment, sentence or order appealed from, the application of Section 5 of the Limitation Act is expressly excluded. The other view is that exclusion of Sections 4 to 24 must be express and not by necessary implication. We are, however, inclined to go by the later view. This is because Section 21 of the NIA Act has nowhere specifically excluded the application of Sections 4 to 24 (inclusive) for determining the period of limitation prescribed for filing appeal under Section 21 of the Act. There is, of course, similar provision in first proviso to Section 21(5) which gives discretion to the High Court to entertain an appeal after expiry of period of limitation of 30 days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within a period of 30 days. However, second proviso

to Section 21(5) of the Act ordains that no appeal shall be entertained after the expiry of period of 90 days.

20 Having regard to the object of the NIA Act and the right of the accused to fair trial, the word “shall” used in second proviso to Section 21(5) of the Act deserves to be read as “may”, else the right of appeal given to the accused against his conviction would become a causality if the doors of the Appellate Court are shut to him on the ground of limitation. The right to fair trial is a right vested in the accused under Article 21 of the Constitution. The right of appeal, wherever it is provided, is a matter of substance and essentially a remedial right. If this remedy is put in jeopardy by creating bar of limitation and leaving no discretion in the Court to condone the delay even in well deserving cases, it would render the remedy otiose. We, therefore, cannot put any construction or interpretation on a provision that has the effect of taking away the fair trial right of the accused. It is in this context, we must hold that right of the accused to avail the remedy of appeal is a substantive and concomitant right of fair trial. This is in this background, the Delhi High Court in the case of **Farhan Sheikh vs. State (National Investigation Agency), 2019(7) AD (Delhi) 233**, has taken the view that the word “shall” used in second proviso to Section 21(5) shall be read as “may” and that the second proviso is directory in nature. The Court further observed that the High Court shall have the discretion to condone the delay in appropriate cases even after expiry of period of 90 days. The Delhi High Court rightly did not agree to lift and apply decisions based on the interpretation of civil provisions, rendered in the context of civil and taxing statutes. What is held by the Division Bench of Delhi High Court in Farhan Sheikh’s case (supra) is condensed in para (89) of the judgment which reads thus:

“89. Thus, so far as the constitution of NIA is concerned, it a complete code. However, the same cannot be said about the substantive offences, and the procedural laws which would be applicable for the purpose of investigation and conduct of trial of such offences. To the extent that Section 16 of the NIA Act prescribes powers of Special Courts, the same would prevail. However, in respect of matters not dealt with under the Act relating procedures, and the substantive offences, it is the provisions of the Code and the substantive laws enumerated in the schedule to the Act, which would be relevant. Even if, the Act is considered to be complete Code in so far as it provides the right of appeal, in the light of the aforesaid discussion, we are inclined to hold that the prescription of limitation in Section 21(5) of the NIA Act is directory and not mandatory and that the High Court is empowered to entertain and consider application under Section 5 of the Limitation Act seeking condonation of delay in filing the appeal. The said application is maintainable”.

21 The Delhi High Court has placed strong reliance upon the Full Bench Judgment of Allahabad High Court rendered in WP (Crl.).8/2018, decided on 10.10.2018, wherein the Full Bench has held similar provision contained in second proviso to Section 14 (A)(3) of the Scheduled Castes and the Scheduled tribes (Prevention of Atrocities) Act, 1989, violative of Article 14 and 21 of the Constitution. The reasons and the grounds on which the impugned proviso was struck down, are summed up in para (80) of the judgment of the Full Bench of Allahabad High Court, which, for facility of reference, is reproduced hereunder:

“80. We are also for reasons which follow convinced that the provision is liable to be struck down even on the ground of manifest arbitrariness. There appears to be no legal justification for denuding the aggrieved person of the right of establishing before a superior court that there existed sufficient cause which constrained him from being able to exercise his right of preferring an appeal within the period of limitation prescribed under the 1989 Act. The objective of a "speedy trial" also would not justify the imposition of this fetter. We bear in mind that the right of appeal is not available against interlocutory orders. From the language employed in sub section (2) it is evident that it would cover only judgments, sentences and orders albeit those which can be recognised as "intermediate" in character. The

only exception in the case of interlocutory orders which the legislation carves out are orders granting or refusing bail. The submission, therefore, that a provision for condonation of delay would negate the principal legislative intent is clearly devoid of substance. The submission that the second proviso to sub section (3) is in furtherance of the primary legislative objective of a speedy trial though attractive at first blush, clearly pales in comparison when we weigh in the balance the chilling consequences which are bound to follow on the curtains falling upon the expiry of 180 days against the avowed legislative policy of a speedy conclusion of proceedings under the 1989 Act. Bearing in mind the principles enunciated in Shayara Bano, we are constrained to hold that in failing to preserve the right to seek condonation of delay that too at the stage of a first appeal, the legislature has clearly acted capriciously and irrationally. It has left an aggrieved person without a remedy of even a first appeal against any judgment, sentence or order passed under the 1989 Act on the expiry of 180 days. As we contemplate the fatal consequences which would visit an aggrieved person on the expiry of 180 days, we shudder at the deleterious impact that it would have and find ourselves unable to sustain the second proviso which must necessarily be struck down, as we do, being in violation of Article 14 and 21 of the Constitution."

22 Although the judgments rendered by the Allahabad High Court in the aforesaid case and the Delhi High Court in the case of Farhan Sheikh (supra) have been rendered in the context of fair trial rights of the accused, yet Section 21 does not make any distinction between the right of the accused and the right of prosecution to file an appeal against any judgment, sentence or order. If the delay in filing the appeal by the accused beyond the period of 90 as provided in second proviso to sub-Section 5 of Section 21 of the NIA Act can be condoned by the High Court in appropriate cases, we see no reason as to why the similar treatment cannot be accorded to the prosecution. The Division Bench judgment rendered by the Kerala High Court in the case of **Nasir Ahammed vs. National Investigation Agency, (2016) Cri LJ 1101** in which a contrary view is taken, has not taken into account the fair trial rights of the accused which would include right of the accused to avail the remedy of

appeal. The Division Bench of Kerala High Court in the aforesaid case has interpreted the second proviso to sub-Section 5 of Section 21 of the NIA Act by relying upon the decisions rendered in the context of civil or taxing statutes and without having regard to the scope, object, context and subject matter of the NIA Act.

23 In view of the above, we are of the considered view that the word “shall” used in second proviso to sub-Section 5 of Section 21 of the Act must be read as “may” and that the High Court shall have the discretion to condone the delay even beyond the period of 90 days in appropriate cases, provided the appellant satisfies the Court that he had sufficient cause for not preferring the appeal even after expiry of period of 90 days as provided in the second proviso to sub-Section 5 of Section 21 of the NIA Act.

24 The application of the appellant seeking condonation of delay is held maintainable and the same, for the reasons stated therein, is allowed. Delay in filing appeal is, thus, condoned.

25 We now turn to question No.2 i.e whether the order passed by the Special Judge, NIA Court rejecting application of the applicant seeking production warrant against witness is an interlocutory order and, therefore, not appealable under Section 21 of the NIA Act.

26 We have already reproduced Section 21 of the NIA Act hereinabove and a perusal whereof makes it crystal clear that an appeal shall lie from any judgment sentence and order not being an interlocutory order. The NIA Act does not define the term “interlocutory orders”. The interlocutory orders would mean and include orders which are not the final orders and do not determine the vital rights of the parties.

27 In the instant case, the appellant is seeking production warrants against the witness for recording his statement under section 164 Cr.P.C which,

as per the appellant, is essential to take the investigation further . The rejection of the application has terminated the controversy before the Court and has adversely affected the vital right of the investigating agency to effectively investigate the matter and take the investigation to logical end. Such orders which affect the vital rights of the parties cannot be said to mere interlocutory orders. Nor the impugned order has been passed by the trial Court at any interlocutory stage in the trial.

28 Viewed from the aforesaid angle, we are of the considered opinion that the impugned order is not an interlocutory order within the meaning of the term used in sub-Section (1) of Section 21 and, therefore, hold the appeal against such order maintainable.

29 Having answered the questions 1 and 2, it is time to advert to question No.3 i.e whether a criminal court or for that matter, a Special Judge NIA can refuse to issue production warrants under section 267 of the Code of Criminal Procedure when no case is pending trial or enquiry before it. Section 267(1) of the Cr.P.C under which the appellant had moved an application before the trial Court reads as under:

“267. Power to require attendance of prisoners.

(1) Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court,-

(a) that a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him, or

(b) that it is necessary for the ends of justice to examine such person as a witness, the Court may make an order requiring the officer in charge of the prison to produce such person before the Court for answering to the charge or for the purpose of such proceeding or, as the case may be, for giving evidence.

(2).....

(3).....

30 Form a plain reading of Section 267(1), it clearly transpires that a Criminal Court, in the course of an enquiry, trial or *other proceedings* under the Code of Criminal Procedure, can direct a person confined or detained in a prison to be produced before the Court for answering to a charge of an offence or for the purpose of any proceedings against him. The criminal Court is further empowered to direct the officer in-charge of the prison to produce any person who is required to be examined as a witness for the purpose of giving evidence. The word “proceedings” used in Section 267 is of paramount importance and, therefore, before we proceed further, it is necessary to analyse its meaning, ambit and scope. Section 2(h) of the Cr.PC clearly provides that the word “investigation” includes all proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than Magistrate) who is authorized by a Magistrate in this behalf. The Bombay High Court in the case of **State of Maharashtra vs. Yadav Kohachade, 2000 Cri.LJ 959** and the Allahabad High Court in the case of **Ranjeet Singh vs. State of U.P 1995 Cri.LJ 3505** have taken the view that the word “proceedings” used in Section 267(1)(a) would mean and include an action or prosecution and sometimes as meaning a step in an action and, therefore, would include arrest, remand, interrogation and the investigation.

31 A Single Bench of Delhi High Court in the case of **Harshad S. Mehta vs. CBI, 1992(3) CCR 2793** has taken a contrary view and has held that an “investigation” by the police is excluded from the expression “or for the purpose of any other proceedings”. However, the entire issue was considered by the Full Bench of Rajasthan High Court in a case of **State of Rajasthan vs. Santosh Yadav, 2005 (2) Crimes 272** and the Full Bench of Rajasthan, after surveying the entire case law on the issue, concluded its opinion as under:

“28. A bare reading of [Section 2\(h\)](#) CrPC would show that "all the proceedings" conducted by a police officer for collecting evidence come under the definition of "investigation". The words "all the proceedings" referred in [Section 2\(h\)](#) in our considered opinion would also include the expression used in the words "other proceeding under this Code" ([Section 267\(1\)](#)), "for the purpose of any proceedings against him" ([Section 267\(1\)\(a\)](#)) and "for the purpose of such proceeding" (last portion of [Section 267\(1\)](#)). In order to further the ends of justice wider meaning is required to be given to the word "proceeding" used in [Section 267](#) CrPC. Had the Legislature intended to give restrictive meaning to the words "other proceeding under the Code" ([Section 267](#)), they would not have used the expression "for the purpose of any proceedings against him" in [Section 267\(1\)\(a\)](#).

29. The Apex Court in *CBI v. Anupam J. Kulkarni* (supra), without quoting [Section 267](#) CrPC, clarified that if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case, they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such, situation he must be formally arrested in connection with other case and then obtain the order of the Magistrate for detention in police custody.

30. Thus, we are inclined to hold that the words "other proceeding under this Code" occurring in [Section 267](#) and the words "or for the purpose of any proceeding" used in [Section 267\(1\)\(a\)](#) are compendious and include proceedings of an investigation. With great respect we disagree with the judgments rendered by learned Single Judge of Delhi High Court in *Harshad S. Mehta* (supra), and two learned Judges of the Rajasthan High Court in *Bharti Sachdeva* (supra). We are of the view that in these two judgments the general words "other proceeding" occurring in [Section 267](#) CrPC have not been analysed in right perspective.

31. In view of what we have discussed herein above we answer the question referred to us as under:-

"The Police can seek permission to remove an accused from judicial custody to police custody for completion of investigation in another case and for this purpose production warrant under [Section 267](#) CrPC. can be issued. The expression "other proceeding" used in [Section 267\(1\)](#) and "for the purpose of any proceedings" occurring in [Section 267\(1\)\(a\)](#) would include "investigation" as defined under [Section 2\(h\)](#) CrPC.

32 Notwithstanding the contrary view taken by the Delhi High Court in the case of *Harshad S. Mehta* (supra), we are inclined to go by the opinion rendered by the Full Bench of Rajasthan High Court in the aforesaid case and

hold that the expression “other proceedings” used in Section 267(1) and “for the purpose of any proceedings” occurring in Section 267(1)(a) would include “investigation”.

33 In view of the discussion made above, and having given our answers to the questions formulated above, we now proceed to deal with the case on hand. The trial Court has rejected the application of the appellant seeking production warrants against Abdul Jabar lodged in District Jail Bilaspur in connection with FIR No. 288/2017 for the purpose of recording his statement under Section 164 CrPC. The application was moved by the appellant under Section 267 CrPC during the course of investigation. The application has been rejected solely on the ground that no production warrant as prayed for by the appellant under Section 267 CPC could be issued by the Court when no case is pending adjudication against such person in the said Court.

34 We have already held that the expression “other proceedings” which occurs in Section 267 CrPC includes investigation and, therefore, a Criminal Court within whose jurisdiction the crime is committed and in respect whereof a production warrant is sought, cannot reject the application for production warrant simply on the ground that no case is pending before it. The order of the trial Court, therefore, is not sustainable in law. The order impugned passed by the trial Court, as held above, cannot be termed as mere interlocutory and, therefore, we hold the appeal under Section 21 of the NIA Act maintainable against the impugned order.

35 We have already held that the provisions of second proviso to subsection 5 of Section 21 of the Act are directory in nature and, therefore, an application for condonation of delay under Section 5 of the Limitation Act is maintainable.

36 In view of the foregoing discussion, we allow this appeal and quash the order passed by the trial Court. The trial Court shall consider the application of the appellant afresh and pass appropriate orders that may be warranted in law.

(MOHAN LAL)
JUDGE

(SANJEEV KUMAR)
JUDGE

JAMMU
13 .12.2022
Sanjeev

Whether order is speaking: Yes
Whether order is reportable: Yes

