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

Reserved on: 04.04.2023
Pronounced on:07.04.2023

CRM(M) No.340/2022
CrlM No.1004/2022

RIZWAN BASHIR DHOBI ... **PETITIONER(S)**

Through: - Mr. Umar Mushtaq, Advocate.

Vs.

UT OF J&K …**RESPONDENT(S)**

Through: - Mr. Sajad Ashraf, GA.

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

JUDGMENT

1) The petitioner has challenged order dated 02.08.2022 passed by 1st Additional Sessions Judge, Srinagar (hereinafter referred to as 'the court below), whereby ten days extension for completing the investigation beyond 180 days has been granted to the Investigating Agency to complete the investigation in FIR 9/2022 for offences under Section 8/21, 22, 27-A and 29 of the NDPS Act registered with Police Station, Nowhatta, Srinagar.

2) According to the petitioner, he was arrested by the police on 03.02.2022 in the aforesaid FIR which has ben registered against him and other five co-accused. It has been submitted that the petitioner filed an application claiming default bail before the learned 3rd Additional Sessions Judge, Srinagar, on 2nd August, 2022 i.e., on 180th day and the

same was listed on 3rd August, 2022. However, on 2nd August, 2022, itself, on an application filed by respondent before the court below, the impugned order came to be passed whereby extension of ten days beyond the period of 180 days for completing the investigation has been granted to the respondent.

3) The petitioner has challenged the impugned order on the ground that the requirements of Section 36-A of the NDPS Act are not fulfilled in the instant case and that the court below has ignored this aspect of the matter while passing the impugned order thereby causing miscarriage of justice. It has been further contended that no notice was given to the petitioner prior to passing of the impugned order and, as such, the principles of natural justice have been violated.

4) The petition has been contested by the respondent by filing a reply thereto. In its reply, the respondent, has, besides narrating the facts which led to the lodging of FIR against the petitioner and co-accused, contended that the petitioner is involved in a heinous offence relating to trafficking of drugs, as such, he cannot be enlarged on bail. It has been submitted that the conditions laid down in Section 37 of the NDPS Act are not satisfied in the instant case, as such, concession of bail cannot be granted to the petitioner. The respondent has further contended that the impugned order passed by the court below is perfectly in accordance with law and does not call for any interference from this Court

5) I have heard learned counsel for the parties and perused the record including the record of the court below.

6) There is no dispute to the fact that the petitioner is involved in a case relating to possession of commercial quantity of drugs and there is also no dispute to the fact that the petitioner can be granted bail on merits only if he is able to carve out a case after fulfilling the conditions laid down in Section 37 of the NDPS Act. However, in the instant case the petitioner had claimed bail before the court below on the ground that the Investigating Agency had defaulted in completing the investigation within the time stipulated under Section 36-A of the NDPS Act read with Section 167 of the Cr.P.C. It is contended by learned counsel for the petitioner that the extension of period in completing the investigation granted by the court below in favour of the Investigating Agency is contrary to law and, as such, the petitioner is entitled to grant of default bail.

7) In order to understand and determine the merits of the contentions raised by learned counsel for the petitioner, it would be necessary to have a look at the provisions contained in Section 36-A of the NDPS Act which provides for modified application of the provisions of Section 167 of the Cr. P. C to offences under NDPS Act. It reads as under:

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

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

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

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

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

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

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

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the

Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

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

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

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

8) From a perusal of the aforesaid provisions, it is clear that maximum period of 90 days fixed under Section 167(2) of the Cr. P. C has been extended to 180 days for certain categories of offences under the NDPS Act. Proviso to sub-section (4) of Section 36-A of the NDPS Act lays down that the period of 180 days can be extended by the court upto one year on the report of the Public Prosecutor indicating the progress of the investigation and for specific reasons for the detention of the accused beyond the period of 180 days.

9) The Supreme Court in the case of **Hitendra Vishnu Thakur and others v. State of Maharashtra,** (1994) 4 SCC 602, while considering the provisions contained in sub-section (4) of Section 20 of TADA, which are in *pari materia* to sub-section (4) of Section 36-A of the NDPS Act, held that extension could be granted subject to satisfaction of certain conditions. The Court has, while emphasizing upon importance of the report of the Public Prosecutor, observed as under:

> *"….. A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The Public Prosecutor is expected to independently apply his mind to the request of the investigating agency before Submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A Public Prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the Public Prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The Public Prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period" as occurring in clause (bb) in sub-section (2)*

> *of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the Public Prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the Public Prosecutor…."*

10) The Court further held that although there is nothing in the relevant provision s of TADA which specifically provide for issuance of a notice to the accused, yet there is necessity for issuance of such a notice to the accused before extending the period for completing of investigation beyond 180 days. Relevant excerpts of the judgment are reproduced as under:

> *"….It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party."*

11) The aforesaid ratio laid down by the Supreme Court in **Hitendra Vishnu Thakur's** case has been followed and adopted by the Supreme Court in the case of **Sanjay Kumar Kedia @ Sanjay Kedia vs.**

Intelligence Officer, Narcotics Control Bureau & anr. (2009) 17 SCC 631. While considering the provisions contained in Section 36-A of the NDPS Act, the Supreme Court in the aforesaid case noted that even if the application for extension of time is either routed through the Public Prosecutor or supported by him would not make the said application a report of the Public Prosecutor.

12) In the case of **State of Maharashtra v. Surendra Pundlik Gadling and Ors.,** (2019) 5 SCC 178, the Supreme Court emphasized the proposition of law that the Public Prosecutor, in the scheme of the provisions contained in Section 43D of the UAPA Act, has an important role to play and he has to frame his independent opinion as to whether there is any requirement for extension in custody of the accused. Paras 36 and 37 of the aforesaid judgment are relevant to the context and the same are reproduced as under:

> *"36.No doubt, in para 23 of Hitendra Vishnu Thakur case, this Court laid emphasis on the importance of the scrutiny by a public prosecutor so as to not leave the detenu in the hands of the IO alone, being the police authority. The public prosecutor, thus, has the option to agree or disagree with the reasons given by the IO for seeking extension of time but in the facts of the present case, the second document in the form of an application shows scrutiny of the first document and thereafter details grounds and expanded reasons for the requirement of further time to complete the investigation.*
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> *37. Undoubtedly the request of an IO for extension of time is not a substitute for the report of the public prosecutor but since we find that there has been, as per the comparison of the two documents, an application of mind by the public prosecutor as well as an endorsement by him, the infirmities in the form should not entitle the respondents to the benefit of a default bail when in substance there has been an application of mind. The*

detailed grounds certainly fall within the category of "compelling reasons" as enunciated in Sanjay Kedia case."

13) From the foregoing analysis of law on the subject, it is clear that before a court grants extension in detention of the accused beyond the period of 180 days in terms of Section 36-A of the NDPS Act, the following conditions have to be satisfied:

1. That there is a report of the Public Prosecutor;
2. That the report of the Public Prosecutor indicates the progress of investigation;
3. That the report should specify the compelling reasons for seeking detention of the accused beyond the period of 180 days;
4. That a prior notice has to be issued to the accused;

14) In the light of the foregoing position of law, let us now examine the validity of the impugned order dated 02.08.2022, whereby detention of the petitioner has been extended by ten days beyond the period of 180 days.

15) The record of the court below shows that on 02.08.2022, a communication was addressed by Sub Divisional Police Officer, Investigating Officer, Khanyar, Srinagar, to the Public Prosecutor, District Court, Srinagar, in which a prayer was made for grant of extension of remand of the accused for a period of six months. In the said communication, the reasons for making such a prayer have also

been indicated. It seems that the said communication was presented before the learned court below along with an application for grant of remand of accused signed by the Investigation Officer.

16) It is on the basis of this application and communication dated 02.08.2022 addressed by SDPO/IO to the Public Prosecutor that the learned court below has passed the impugned order. There is no report of the Public Prosecutor on record of the court below nor there is any reference to any such report of the Public Prosecutor in the impugned order. In fact, the communication of the Investigating Officer indicating the progress of investigation has not even been addressed to the learned Sessions Judge but still then the learned Sessions Judge obliged the respondent by passing the impugned order. The course adopted by learned Sessions Judge appears to be an absolute mechanical exercise and reflects non-application of mind on his part. Even the notice has not been issued to the accused before passing the impugned order extending their detention by ten days.

17) As has been already discussed hereinbefore, the report of a Public Prosecutor indicating the progress of investigation is not an empty formality. The Public Prosecutor, being an independent statutory authority, is expected to apply his independent mind to the material produced before him by the Investigating Agency and thereafter take a decision as to whether or not extension of time in completing the investigation is justified in the facts and circumstances of the case. In the instant case, as already noted, no such report of the Public

Prosecutor was before the learned Sessions Judge and not even the Investigating Officer had addressed any application to him indicating the progress of investigation. The learned Sessions Judge has also ignored the mandate laid down by the Supreme Court in **Hitendra Vishnu Thakur's** case as followed in **Sanjay Kedia's** case whereby it has been made mandatory for a court to issue prior notice to the accused before granting extension in remand.

18) For what has been discussed hereinbefore, the impugned order passed by the court below is not sustainable in law and the same deserves to be quashed.

19) The petitioner has placed on record certified true copy of the application dated 2nd August, 2022, moved by him before the court below, whereby he had sought statutory/default bail on account of the fact that the respondent had failed to complete the investigation within the period 180 days but because of the impugned order passed by the court below, the said application came to be dismissed on 05.08.2022 on the ground that the same has been rendered infructuous. The fact of the matter, however, remains that the petitioner had availed his indefeasible right to statutory bail immediately when the period of 180 days had expired and the same cannot be defeated by subsequent filing of the challan by the investigating Agency. The petitioner is, therefore, entitled to grant of statutory/default bail notwithstanding the fact that the respondent is stated to have filed the challan subsequently.

20) For the foregoing reasons, the petition is allowed and the impugned order dated 02.08.2022, passed by 1st Additional Sessions Judge, Srinagar, is quashed and the petitioner is admitted to bail subject to the following conditions:

(I) That he shall furnish bail bond and personal bond in the amount of Rs.1.00 lac (rupees on lac) with two sureties of the like amount to the satisfaction of the trial court;

(II) That he shall not tamper with the prosecution witnesses/evidence;

(III) That he shall appear before the trial court on each and every date of hearing;

(IV) That he shall not leave the territorial limits of Union Territory of J&K without prior permission of the trial court;

(V) That he shall not indulge in similar activities;

21) It shall, however, be open to the respondent to seek cancellation of bail on merits in the light of the law laid down by the Supreme Court in the case of **State through Central Bureau of Investigation vs. T. Gangi Reddy @ Yerra Gangi Reddy,** 2023 LiveLaw (SC) 37

(SANJAY DHAR)
JUDGE

Srinagar,
06.04.2023
"Bhat Altaf, PS"

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