

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

C.R.M No. 8389 of 2021

Naimuddin Laskar @ Naim

Vs.

The State of West Bengal

For the Petitioner : Mr. Ayan Bhattacharjee, Adv.
Mr. Sharequl Haque, Adv.
Mr. Aditya Ratan Tiweary, Adv.
Mr. Subhajit Manna, Adv.
Mr. Suman Majumder, Adv.

For the State : Mr. Sanjay Bardhan, Adv.

Heard on : March 11, 2022

Judgement on : March 11, 2022

DEBANGSU BASAK, J.:-

1. Petitioner seeks default bail in connection with Sankrial Police Station Case No.862 of 2020 dated September 21,2020

under Section 20(b)(ii)(c) of the Narcotic Drug and Psychotropic substances Act ,1985.

2. Learned Advocate appearing for the petitioner submits that the petitioner is entitled to default bail in terms of Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985. He submits that the petitioner was arrested on September 21, 2020. 180 days from September 21, 2020 expired on March 20, 2021. A put up petition was filed on March 19, 2021 at the behest of the State whereupon, the learned Judge extended the time in terms of Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 without notice to the petitioner. He refers to **(2009) 17 SCC 631 (Sanjay Kumar Kedia @ Sanjay Kedia vs. Intelligence Officer, Narcotics Control Bureau & Anr.)** and submits that the petitioner as the accused was entitled to notice of the application for extension of time made under Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985. No notice of such application being given, the order extending time of Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 is a nullity. He refers to **(2019) 5 SCC 178 (State of Maharashtra vs. Surendra Pundlik Gadling**

& Ors.) and submits that the application for extension was filed by the Investigating Officer and not by the Public Prosecutor and, therefore, the application itself was bad in law. The learned Judge erred in law in entertaining such an application and passing an order of extension thereon.

3. Relying upon **(2016) 4 C CR. LR (Cal 535 (Moraful Saikh @ Morful Saikh)** he submits that in the facts of the present case since there is a default in filing an application for extension within 180 days and since the order extending time passed on March 19, 2021 is a nullity, there was no charge-sheet within the prescribed time period of 180 days. Relying upon **2021 (5) SCALE 346 (Fakhrey Alam vs. The State of Uttar Pradesh)**, learned Advocate appearing for the petitioner submits that default bail is a fundamental right of the accused.

4. In the facts of the present case, learned advocate for the petitioner submits that there was an application for bail which was taken up for consideration by the jurisdictional Court on March 22, 2021 when the jurisdictional Court did not grant bail to the petitioner on the ground that time to file the charge-sheet stood extended on March 19,2021. He submits that a fresh application for bail was filed on April 17, 2021

whereupon the jurisdictional Court not appreciating that there was no charge-sheet filed within time and, therefore, the petitioner was entitled to default bail, refused to grant bail to the petitioner. He draws the attention of the Court to the fact that the charge sheet was filed on April 19, 2021. Such charge-sheet filed on April 19, 2021 cannot be treated to be one filed within the time stipulated under Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 since the order of extension dated March 19, 2021 was a nullity. In such circumstances, he prays for default bail for the petitioner.

5. Learned Advocate appearing for the State submits that the petitioner is not entitled to default bail in terms of Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985. He submits that the petitioner never approached the jurisdictional Court seeking bail on the ground of default in filing the charge-sheet within time. The petitioner not having done so, should not be allowed to argue such point presently. He submits that the time to file the charge-sheet initially expired on March 20, 2021 taking into consideration the date of arrest of the petitioner on September 21, 2020. There was an application for extension of time filed on March 19, 2021

which was within the period of initial 180 days and the same was allowed by the jurisdictional Court on March 19, 2021 itself. Consequently since application for extension of time was made within the prescribed period of 180 days, and since the statute does not require notice of such application to be served upon the accused, the question of the police or the State failing to apply for extension within time does not arise. In support of such contention he relies upon **(2021) 2 SCC 485 (M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence)**. He submits that it was the incumbent duty of the petitioner to serve a copy of the application for default bail upon the prosecution and the State prior to the same being considered. According to him the petitioner is not entitled to default bail as prayed for.

6. The petitioner herein was arrested on September 21, 2020. 180 days from the date of his arrest expired on March 20, 2021. Within the period of 180 days from the date of his arrest an application for extension of time to submit the charge-sheet under Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 was filed by the police before the jurisdictional Court. The petitioner raises the issue of non-

service of such application on him and the application being disposed of ex parte against him.

7. We called for the original case records of the jurisdictional Court for our perusal in view of the claim of the petitioner of non-service of the application on him. We perused the case records as called for. We perused the application for extension filed on March 19, 2021 itself. On perusal of the application filed on March 19, 2021, we observed that the application was made by the police and that it was filed by the Additional Public Prosecutor. We also observed that the application did not contain any endorsement to the effect of such application was served either on the accused or on the learned Advocate for the accused. The accused was not produced before the jurisdictional Court on March 19, 2021 also.

8. In the course of hearing, the State did not endeavour to establish that the application for extension filed on March 19, 2021 was moved by upon notice to the accused or to the learned Advocate for the accused. The State, however, contends that no notice of such application is required to be given since the application for extension was filed within the prescribed

period of 180 days and no prejudice was caused to the petitioner by the application or the order passed thereon.

9. In **Sanjay Kumar Kedia (Supra)** itself the provisions of Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 was considered. It is of the following view :

“12. The maximum period of 90 days fixed under Section 167(2) of the Code has been increased to 180 days for several categories of offences under the Act but the proviso authorises a yet further period of detention which may in total go up to one year, provided the stringent conditions provided therein are satisfied and are complied with. The conditions provided are:

- (1) a report of the Public Prosecutor,*
- (2) which indicates the progress of the investigation, and*
- (3) specifies the compelling reasons for seeking the detention of the accused beyond the period of 180 days, and*
- (4) after notice to the accused.”*

10. In our view **Sanjay Kumar Kedia (Supra)** requires the application for extension to be moved upon notice to the accused. It is one of the mandatory conditions as observed in paragraph 12 of **Sanjay Kumar Kedia (Supra)**.

11. In the facts of the present case, no notice of the application for extension of time was served upon the accused. On the test of the ratio laid down in **Sanjay Kumar Kedia (Supra)**, therefore, the application for extension not being brought to the notice of the accused, is *non est*. The order passed thereon, consequently, would be a nullity. The irregularity in the application for extension of time and the order granting extension merely opens up a window of opportunity to the accused for the period from March 21, 2021 till April 19, 2021 to apply for and obtain default bail.

12. It is the contention of the State that the application for extension need not be moved upon notice to the accused. With respect, such contention cannot be accepted not only in view of the ratio laid down in **Sanjay Kumar Kedia (Supra)** but also on the principles of natural justice. In an adversarial proceeding, the requirement to adhere to the principles of natural justice is imbedded in a statute governing the adjudicating process unless the same is expressly excluded by statute. The right to a fair trial is fundamental to the rule of law. Right to fair trial is recognized as a part right to life enshrined in Article 21 of the Constitution of India. Compliance

with the principles of natural justice ensures a fair trial. Audi alteram partem or hear the other side is one of the fundamental pillars of the principles of natural justice. The principle audi alteram partem needs to be applied at every stage of an adversarial proceeding to ensure a fair trial, unless its applicability is expressly ousted by statute. Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 does not expressly exclude the application of the principles of natural justice. An accused is entitled to a notice of an application for extension made under Section 36A(4) so that he is in a position to oppose the same if need be. An order granting extension under Section 36A(4) would adversely affect the right to obtain bail for the accused. An application for extension of time is required to be made on notice to the accused particularly when such accused is in custody. When the accused is not in custody, the question of expiry of 180 days from the date of his arrest does not arise. The accused being produced before the Court on the date of filing of the application for extension or on the date of any order being passed thereon would constitute sufficient notice to the accused of such application.

13. The contention of the petitioner that since the application for extension of time was filed by the police and not by the Public Prosecutor as noted in **Sanjay Kumar Kedia (Supra)** and therefore, the application is bad in law, however cannot be accepted. In **Surendra Pundlik Gadling (Supra)** the Supreme Court held that an application for extension of time of the police filed by the Public Prosecutor to be considered as being filed by the Public Prosecutor after application of mind by him. Therefore, in the facts of the present case following the ratio of **Surendra Pundlik Gadling (Supra)**, we are of the view that the application of the police which was filed through Additional Public Prosecutor cannot be faulted.

14. In **Fakhrey Alam (Supra)** it was observed that since liberty is a Constitutional right, time periods prescribed is breached then a valuable right of default bail accrues to the accused. In **Moraful Saikh @ Morful Saikh (Supra)** no report was filed by the Public Prosecutor within the period of 180 days and, therefore, the Court was of the view that the accused therein rightly invoked the right of default bail.

15. **M. Ravindran (Supra)** is of the following view :

“20.1. The observations made in Hitendra Vishnu Thakur and Sanjay Dutt to the effect that the application for default bail and any application for extension of time made by the Public Prosecutor must be considered together are, in our opinion, only applicable in situations where the Public Prosecutor files a report seeking extension of time prior to the filing of the application for default bail by the accused. In such a situation, notwithstanding the fact that the period for completion of investigation has expired, both applications would have to be considered together. However, where the accused has already applied for default bail, the Prosecutor cannot defeat the enforcement of his indefeasible right by subsequently filing a final report, additional complaint or report seeking extension of time.

20.2. It must also be added and it is well settled that issuance of notice to the State on the application for default bail filed under the proviso to Section 167(2) is only so that the Public Prosecutor can satisfy the court that the prosecution has already obtained an order of extension of time from the court; or that the challan has been filed in the designated court before the expiry of the prescribed period; or that the prescribed period has actually not expired. The prosecution can accordingly urge the court to refuse granting bail on the alleged ground of default. Such issuance of notice would avoid the possibility of the accused obtaining default bail by deliberate or inadvertence suppression of certain fact and also guard against multiplicity of proceedings.

20.3. However, Public Prosecutors cannot be permitted to misuse the limited notice issued to them by the court on bail applications filed under Section 167(2) by dragging on

proceedings and filing subsequent application/reports for the purpose of “buying extra time” and facilitating filing up of lacunae in the investigation by the investigating agency.”

16. In the facts of the present case, since the application for extension of time in terms of Section 36A(4) of the Narcotic Drugs and Psychotropic Act, 1985 was moved and an order obtained without notice of such application upon the petitioner, in the eye of law, there was no valid application for extension of time in terms of Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 so far as the petitioner is concerned. The charge-sheet was filed on April 19, 2021 which was beyond the stipulated period of 180 days which expired on March 20, 2021. There was an application for bail filed on April 17, 2021 which was therefore, prior in point of time than filing of the charge-sheet. As on April 17, 2021 there was no application for extension of time pending since the application filed on March 19, 2021 was already disposed of. Therefore, the scenario of an application for extension being pending even though made beyond time at the time of the application for default bail, as envisaged in paragraph 20.1 of

M. Ravindran (Supra) did not arise in the facts of the present case.

17. In facts of the present case, therefore, the jurisdictional Court was required to consider the prayer for bail filed on April 17, 2021 as one made in terms of Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985. The jurisdictional Court erred in not granting bail to the petitioner on the default of filing of the charge-sheet by the State within the initial prescribed period of 180 days from the date of arrest.

18. In view of the discussions above, since the application for bail filed on April 17, 2021 which was prior to the filing of the charge-sheet, we are of the view that the petitioner is entitled to default bail.

19. Accordingly, we direct that the petitioner shall be released on bail upon furnishing a bond of Rs.50,000/- (Rupees Fifty Thousand only) with two sureties of like amount each, one of whom must be local, to the satisfaction of the learned Judge, Special Court under NDPS Act, Howrah, subject to condition that the petitioner shall appear before the learned trial Court on every date of hearing until further orders and shall not intimidate witnesses and/or tamper

with evidence in any manner whatsoever and/or commit similar offence. In the event, the petitioner fails to appear before the trial Court without any justifiable cause, or acts in breach of the conditions of the bail the trial Court shall be at liberty to cancel the bail of the petitioner in accordance with law without further reference to this Court.

20. The prayer for bail is allowed.

21. CRM 8389 of 2021 is disposed of.

[DEBANGSU BASAK, J.]

22. I Agree.

[BIBHAS RANJAN DE, J.]