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HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR
(through video conference)

CrIA (D) no.02/2019
CrIM no.238/2020; 239/2020; 331/2020; 642/2019
c/w CRA no.09/2019

Reserved on: 23.03.2021

Pronounced on: 26.07.2021

Showkat Ahmad Sofi

..... Appellant(s)

Through: Mr Shafqat Nazir Advocate in
CrIA(D) no.02/2019
Mr Z.A.Qureshi, Sr. Advocate with Ms
Rehana, Advocate in CRA no.09/2019

Versus

State of J&K and others

.....Respondent(s)

Through: Mr B.A.Dar, Sr. AAG

CORAM:

**HON'BLE MR JUSTICE DHIRAJ SINGH THAKUR, JUDGE
HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE**

JUDGEMENT

Per: Koul-J

1. The Appeals on hand are directed against the composite Order dated 25th May 2019, passed by the court of Special Judge designated under NIA Act, Srinagar, (for short "*Trial Court*"), rejecting bail applications of appellants, on the grounds made mention of therein.
2. Heard and considered.
3. Appellants have been arrested in connection with case FIR no.85/2018 under Section 120-B RPC, 17, 18, 38, 39 and 40 ULA(P) Act registered in police station Panthachowk, Srinagar. They preferred applications before the Trial Court for grant of bail. The Trial Court by order impugned dismissed the applications.

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4. According to learned counsels for appellants, impugned order is bad in law as right to personal liberty is a cherished right of every citizen as provided under Article 21 of the Constitution. It is contended that appellants have been falsely implicated in abovementioned FIR as they have never been involved in any criminal activity. They also state that there are great contradictions in the police story as one fails to understand as to what role has been played by appellants in the alleged activities. The investigating agency is stated to have given contradictory statements with regard to recovery of money from appellants and other co-accused.

Another submission of learned counsels for appellants is that police agency has to complete investigation of the case within a period of 90 days and after its expiry, accused has an indefeasible right of being released on bail. They also aver that there was no formal request from public prosecutor to extend period of detention.

The Trial Court is said to have extended the detention of accused/ appellants beyond the period of ninety days in terms of orders dated 28th February 2019, 7th March 2019, 27th March 2019 and 10th April 2019. It is vehemently averred that abovementioned orders have been passed by the Trial Court on the applications of Investigating Officer (I.O.) and there had been no application, as was required in law, to be filed by Public Prosecutor under and in terms of provisions of Section 43D(2)(b) of ULA(P) Act and therefore, appellants are entitled to default bail.

Mr Shafqat Nazir, learned counsel for appellant in CR no.02/2019 has also vehemently stated that there is no report of public prosecutor indicating progress of investigation and specific reasons for detention of accused beyond the period of ninety days. It is also insisted by him that neither there is any report of public prosecutor nor any specific reason has been given by the Trial Court to extend detention of accused and therefore irrespective of the time having

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been extended by the trial Court, the appellant on expiry of ninety days is entitled to be released on bail on ground of default.

It is also contended that it was incumbent upon Trial Court to release appellants on bail in default of investigation being completed within the statutory period of ninety days.

5. Taking into account the submissions made by learned counsels for parties, it would be apt to go through the provisions of Section 43D of ULA(P) Act and for ready reference, Section 43D(2)(b) is imperative to be reproduced hereunder:

“43D. Modified application of certain provisions of the Code.-

XXXXXXXXXXXXXXXXXXXXX

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

XXXXXXXXXXXXXXXXXXXXX

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

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“Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:”

6. The provisions of Section 43D(2)(b), thus, envisage that if it is not possible to complete the investigation within a period of ninety days, the Public Prosecutor is required to approach the Court with a report in which he should give the progress of investigation and specific reasons for detention of the accused beyond the said period of ninety days. And if the Court is satisfied with the report of the Public Prosecutor, it may extend the said period of ninety days up to one hundred and eighty days.
7. When the present case is examined in the context of provisions of Section 43D(2)(b) of ULA(P) Act, the Trial Court has misdirected itself while passing impugned order. It is pertinent to mention here that status of the prosecutor is not a part of the investigating agency as it is an independent statutory authority. The Supreme Court in *State of Maharashtra v. Surendra Pundlik Gadling and others, (2019) 5 SCC*

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178, has held that status of the Prosecutor was not a part of the investigating agency, but was an independent statutory authority and by considering the case of *Hitendra Vishnu Thakur and others v. State of Maharashtra and others, (1994) 4 SCC 602*, the Supreme Court has held:

“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.

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.

38. We are, thus, not able to persuade ourselves to agree with the conclusions of the learned single Judge of the Bombay High Court in the impugned order and hold that the respondents would not be entitled to the benefit of default bail and consequently the impugned order is set aside.

39. We may, however, clarify that since the charge-sheet has been filed, any observations made by us herein, would not, in any manner, affect the right of the respondents to seek regular bail from the trial court, if so advised, which would be decided on its own merits by the trial court. The appeal is allowed leaving the parties to bear their own costs.”

8. From the above it comes to fore that emphasis has been laid by the Supreme Court on the importance of scrutiny by a Public Prosecutor so as not to leave a detenu in the hands of I.O. alone, inasmuch as Public Prosecutor has an option to agree or disagree with the reasons given by I.O. for seeking extension of time. Besides, request of I.O. for extension of time is not a substitute for report of public prosecutor under the provisions of Section 43D (2)(b) of ULA(P) Act.
9. The Supreme Court in *Union of India v. Nirala Yadav, (2014) 9 SCC 457*, on the issue of grant of default bail has held that on expiry of period of 90 or 60 days, as the case may be, an indefeasible right accrues in favour of accused for being released on bail on account of

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default by investigating agency in completion of investigation within the period prescribed and accused is entitled to be released on bail. This view was reiterated in *Rakesh Kumar Paul v. State of Assam*, 2018 Cri.L.J.155. This was a case in which charge sheet had not been presented within time prescribed under Section 167 (2) of the Code of Criminal Procedure and applicant had applied for bail on failure of such presentation of charge sheet. A plea was taken that since charge sheet was not presented, applicant was not entitled to default bail. The Supreme Court did not agree with the said contention and said that it was concerned with interregnum between the period when no charge sheet was filed, during which period applicant had availed of his indefeasible right of default bail. The Supreme Court held applicant entitled to grant of default bail.

10. In the present case, the Trial Court in effect has not at all dealt with right of appellants to grant of default bail, even when application(s) were filed by them. It is also not denied that the Charge Sheet/Challan has been filed beyond the period of ninety days and, therefore, in in those circumstances, notwithstanding the subsequent filing of challan, appellants could not have been deprived of their right to the benefit of default bail.

11. For the reasons discussed above, the instant Appeals are allowed. Impugned Order dated 25th May 2019, passed by the court of Special Judge designated under NIA Act, Srinagar, is set-aside. The appellants are held entitled to bail in the aforesaid FIR, which is pending trial in the court of Special Judge designated under NIA Act, Srinagar, subject to their furnishing personal bond in the amount of Rs.1,00,000/- each with two sureties each of the like amount to the satisfaction of the learned Presiding Officer, subject to the following conditions:

a. that appellants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the

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facts of the case so as to dissuade him to disclose such facts to the court or to any other authority;

- b. that appellants shall not do anything directly or indirectly to influence the witnesses for the prosecution nor to tamper with the evidence to be adduced against them;
 - c. that appellants shall remain present before the Court on the dates fixed for hearing of the case, for any reason due to unavoidable circumstances for remaining absent he has to give intimation to the court and make a proper application for permission to be present through counsel;
 - d. that appellants shall surrender their passport, if any, if not already surrendered before the Trial Court within one week and if they are not holder of the same, that fact should be supported by an affidavit. In case they have already surrendered the passport that fact should be supported by an affidavit;
 - e. that appellants shall not leave the territorial jurisdiction of Trial Court without prior permission of the Court;
12. It is, however, made clear that this would not preclude or otherwise prevent arrest or rearrest of appellants on cogent grounds in respect of subject charge and upon arrest or rearrest, appellant would be entitled to apply for grant of regular bail, which should be considered on its own merits.
13. Appeals are, accordingly, **disposed of**.
14. Record of the Trial Court, if summoned/received, be sent down along with copy of this judgement.

(Vinod Chatterji Koul)
Judge

(Dhiraj Singh Thakur)
Judge

Srinagar
26.07.2021
Ajaz Ahmad, PS

Whether approved for reporting: Yes / No