

(2014) 04 BOM CK 0058

In the Bombay High Court

Case No : Criminal Writ Petition No. 702 of 2013

Chhannulal Pandurang Shende

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 08-04-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2)
Explosive Substances Act, 1908 — Section 4, 5
Maharashtra Control of Organised Crime Act, 1999 — Section 21
Penal Code, 1860 (IPC) — Section 120B
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 20(4), 20(4)(bb)
Unlawful Activities (Prevention) Act, 1967 — Section 13, 18, 39, 43, 43(d)(2)

Citation : (2014) ALLMR(Cri) 2424

Hon'ble Judges : P.B. Varale, J

Bench : Single Bench

Advocate : S.V. Sirpurkar, Advocate for the Appellant; T.H. Udeshi, Addl. P.P, Advocate for the Respondent

Final Decision : Dismissed

Judgement

P.B. Varale, J.—Heard Mr. S.V. Sirpurkar, learned counsel for the petitioners and Ms. T.H. Udeshi, learned Additional Public Prosecutor for the State. RULE. Rule returnable forthwith. By the present criminal writ petition, the petitioners are challenging the common order passed by the learned Sessions Judge, Gadchiroli, dated 18.10.2013 hereby allowing Misc. Cri. Application Nos. 32, 33, 34 and 35 of 2013 filed by the State seeking extension of MCR of the petitioners. The petitioners are the accused in Crime No. 3001/2013, registered at Bhamragad police station for the offences punishable under Sections 4 and 5 of the Explosive Substances Act and 3/25 of the Arms Act and Sections 13, 18 and 39 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as "the UAP Act") read with Section 120B of the Indian Penal Code.

2. Brief facts giving rise to the present petition can be summarized as follows:-

A report was lodged at the instance of Shri Anant Salunke, P.S.I. attached to Bhamragad police station, Dist. Gadchiroli. On receiving secret information, an Ambulance vehicle was apprehended. In search of said vehicle, police found the petitioners in the vehicle and further found that the vehicle was carrying the material namely 4 detonators, a box containing gelatin, 8 tarpaulin, one medical box containing medicines, 10 live cartridges and AK-47 fire arm. On an enquiry, it was revealed that the material in the vehicle was being transported for naxalites. The petitioners/accused were apprehended and arrested on the very day i.e. on 25.6.2013. An application u/s 43(d)(2) of UAP Act read with Section 167 of Cr.P.C. was filed by the Public Prosecutor on behalf of the State in the Court of learned Sessions Judge, Gadchiroli seeking extension of the Magisterial Custody Remand (MCR) of these petitioners on the ground that the investigation is still in progress. The application was opposed by the petitioners. The learned Sessions Judge found favour with the State and accordingly allowed the application with a direction that the Investigating Officer to complete the investigation within one month and file charge-sheet in the Court. The stipulated period was to expire on 19.10.2013 and a day prior to the expiry of stipulated period i.e. on 18.10.2013, the State again filed applications seeking further extension of 60 days. These applications were also opposed by the petitioners. The learned Sessions Judge on the same day i.e. on 18.10.2013 by allowing the applications, granted further extension of one month. Being aggrieved by said order, the petitioners are before this Court by way of this criminal writ petition.

3. It will be useful to refer certain events occurred subsequent to filing of the present petition. The present petition was filed in this Court on 24.10.2013. The petition was circulated before the Division Bench of this Court. The Division Bench of this Court, by order dated 29.10.2013, issued notice to the State, returnable on 18.11.2013. On 18.11.2013, the Division Bench of this Court, at the request of the learned counsel for the petitioners, granted liberty to move the matter before the learned Single Judge of this Court and accordingly, the matter was listed before the learned Single Judge from time to time. The charge-sheet in this case has been filed on 18.11.2013.

4. Learned counsel for the petitioners, by inviting my attention to the relevant provisions of Sec. 43D and 43D(2)(a) and (b) of the UAP Act, submitted that said provisions would come into play on satisfying two important conditions of sub-section 2(b) of Section 43 of the Act. He submitted that such an extension can be granted on satisfaction of the learned Judge on the report of the Public Prosecutor indicating progress of the investigation. The learned counsel further submitted that the scheme of the Act thus provides that the report must be of the Public Prosecutor indicating progress of the investigation and the specific reasons for detention of the accused beyond the period of 90 days and the order passed by the learned Judge should reflect the satisfaction of the Judge. Learned counsel for the petitioners submitted that satisfaction of the learned Judge is dependent upon his application of mind. Learned counsel for the petitioners vehemently submitted that all these basic requirements are missed by the

learned Sessions Judge and resulted in passing an erroneous order thereby curtailing the liberty of present petitioners. Learned counsel for the petitioners also submitted that the provisions of Section 43D of the UAP Act are in pari materia with the provisions of Section 21 of the Maharashtra Control of Organised Crime Act, 1999 (MCOCA).

In support of his submissions, learned counsel for the petitioners placed reliance on the judgments of the Apex Court reported in AIR 1994(4) Supreme Court Cases 602, in the case of Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, in the case of Uday Mohanlal Acharya Vs. State of Maharashtra, in case of Uday Mohanlal Acharya vs. State of Maharashtra.

5. Per contra, learned Additional Public Prosecutor for the State supported the impugned order passed by the learned Sessions Judge. She submitted that the report was filed by the Public Prosecutor giving all the details in respect of the progress in the investigation and the reasons seeking extension of MCR of the petitioners. Learned APP submitted that the petitioners have not availed of the right accrued on the petitioners u/s 167 of Cr.P.C. She further submitted that an application seeking default bail filed by these petitioners/accused has been rejected by the learned Court i.e. J.M.F.C., Aheri on 30.10.2013. The said order rejecting bail application was not challenged by the petitioners and as such it attained finality. She further submitted that on the backdrop of the fact that now the charge-sheet has been filed, it cannot be said that the applicants are entitled to seek the relief u/s 167 of Cr.P.C. Learned APP placed reliance on the judgment of the Apex Court reported in Sanjay Dutt Vs. State through C.B.I., Bombay, in the case of Sanjay Dutt.vs. State through C.B.I. Bombay (II).

6. On the backdrop of the submissions of the learned counsel for the petitioners and learned APP for the State and on the backdrop of the judgments relied upon by them, now I shall proceed to deal with the controversy involved in the present petition.

7. Perusal of the record shows that in the application dated 18.9.2013, seeking first extension, the learned Public Prosecutor had stated that the accused were apprehended by the police while transporting the material namely explosives, medicines, bullets of AK-45 and it was revealed that along with apprehended accused, one Bandopant Mallelwar and Ravindra Karpe were involved in the said offence. It was farther stated that in the process of investigation, one Narendra Mallelwar, the brother of Bandopant Mallelwar was also found involved in the crime and accordingly, they were added as an accused in the Crime. Accused Bandopant Mallelwar was arrested on 07.8.2013, whereas accused Dr. Ravindra Karpe was granted anticipatory bail. Accused Narendra Mallelwar was to be arrested and the investigation was in progress. In the said application, the other reasons were also given namely, the investigating officer was required to remain present before the Hon''ble High Court for giving instructions to the Public Prosecutor for filing reply to the bail applications filed on behalf of Dr. Ravindra Karpe. The investigation was in progress and though on arrest of the accused

persons, a chain was established with the other accused persons, the other accused persons were absconding and the investigation could not get proper speed. It was further stated that apart from Bandopant Mallelwar and Narendra Mallelwar, role of other accused persons namely Vipul Channawar and Chandulal Shende was revealed and the investigating officer was again required to attend the Sessions Court along with the necessary material such case diary and investigation papers for assisting the Public Prosecutor to file reply to the respective anticipatory bail applications filed by accused Vipul Channawar and Chandulal Shende. It was further stated in the application that there was sufficient material reflecting the conspiracy hatched by the accused persons and some of the accused being absconders, the investigation was not completed within the period of 90 days and as such, extension was sought. The learned Sessions Judge, by order dated 19.09.2013, allowed the application and granted a month's time to complete the investigation. This order was not challenged by the petitioners before the expiry of one month. The State then again filed applications seeking extension of MCR of the petitioners for 60 days on one of the grounds that on registration of the crime, the investigation was carried out by the Sub-Divisional Police Officer, Bhamragad and recently, it has been transferred to the Sub-Divisional Police Officer, Chamorshi. These applications also came to be allowed partly by the learned Sessions Judge by common order dated 18.10.2013 and the same is under challenge before this Court.

8. It was the submission of the learned counsel for the petitioners that the applications fell too short to show any reason that the investigation was in progress. Though, earlier the period of MCR was extended by one month, there was no progress in the investigation. The application failed to show the requirements of Section 41D(2)(b) of the Act namely the report of the Public Prosecutor indicating progress of the investigation and specific reasons as well as satisfaction of the Court. On the backdrop of these submissions, perusal of the applications seeking extension show that the stages of the progress of investigation are referred to therein and those are namely,

(1) Arrest of accused Bandopant Mallelwar and Narendra Mallelwar was effected on 07.8.2013 and 20.09.2013, respectively. The event of arrest of these accused is a step ahead to the earlier application i.e. application dated 18.9.2013, in which it was stated that accused Bandopant Mallelwar and Narendra Mallelwar are not yet to be arrested and they would be arrested soon.

(2) On 26.9.2013, statements of certain witnesses were recorded. These statements include the statements of independent witnesses as well as forest officials. The independent witnesses are namely Mangesh Barse, Vilas Kannake and Shankar Mohanda. From these statements, involvement of other accused namely Raghu @ Pratap @ Irpa @ Mudela Sailu, Dinesh @ Dayaram Naitam and Vikram @ Wasudeo Bukka Atram and their links with other naxal activists, was revealed. The statements of some other witnesses i.e. the members of Special Unit established for anti-naxal operations, were also recorded. The statements of

some witnesses, who were resident of area under jurisdiction of Reguntha police station, were also recorded.

(3) On 08.10.2013, an order of the District Magistrate in respect of sanction was obtained. On the same day, documents of the crime were forwarded to the Additional Superintendent of Police, Aheri for verification, which were received on 09.10.2013. On 10.10.2013, a proposal was sent to the Government through Addl. Supdt. Of Police, Gadchiroli. On 11.10.2013, the proposal was sent after scrutiny and on 14.10.2013, it was presented before the D.I.G., Gadchiroli Range, Camp Nagpur. On 16.10.2013, a letter was issued to Naxal Cell, Gadchiroli for supply of information about absconding accused and the same was awaited.

Thus, it is clear from above that in the process of investigation, the steps in respect of recording the statements of witnesses and other actions, were taken and as such it also took some time. Raising these grounds, the Public Prosecutor submitted the report. The learned Sessions Judge, dealing with these grounds and also on the backdrop of the reported judgments relied upon by the parties, allowed the applications partly.

9. Insofar as first submission of the learned counsel for the petitioners that there is no reflection of the reasons in the application, I am unable to accept the submission of the learned counsel in view of the occurrence of the events referred to above. Insofar as submission of Learned counsel for the petitioners that the order passed by the learned Sessions Judge nowhere reflects the satisfaction of the learned Judge, in my opinion this submission also cannot be accepted as the learned Sessions Judge observed in the order that he had gone through the case diary. He further observed that while the earlier applications seeking extension of time were submitted, one accused Narendra Mallelwar was remained to be arrested. He further observed that arrest of accused Narendra Mallelwar was effected on 20.09.2013, the sanction was sought and the sanction was awaited. At the same time, learned Judge observed that on a perusal of the statements of witnesses, it revealed that the meetings of the persons actively involved in naxal activities were conducted and involvement of some more accused was revealed. The learned Sessions Judge, thus, by observing these facts arrived at a conclusion that the investigating officer has rightly utilized the period granted earlier for conducting the investigation and satisfying with the progress in the investigation, granted further extension and directed the I.O. to complete the investigation and file charge-sheet within one month from the date of the order.

10. Learned counsel for the petitioners by placing heavy reliance on the judgment of the Apex Court in Hitendra Thakur's case (supra) submitted that though in the reported case, the Apex Court was considering the provisions of the TADA Act, it observed thus:-

It is immaterial whether the application for bail on the ground of "default" u/s

20(4) is filed first or the report as envisaged by clause (bb) is filed by the Public Prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released.

11. Thus, it was the submission of the learned counsel for the petitioners that the investigation was not completed within the stipulated period and the extension, though sought by the investigating agency, was not granted by the learned Court and the same was pending before the Court after expiry of the period of 90 days. As such, the petitioners were entitled for their discharge on bail. I am unable to accept the submission of the learned counsel that Section 43D of the UAP Act deals with the modified applications of certain provisions of Cr.P.C. Section 43D(2)(b) of the Act deals with the modified application of Section 167 of Cr.P.C. and it gives an opportunity to the investigating agency to seek extension showing specific and sufficient reasons indicating the progress of investigation and the satisfaction of the Court on the report of the Public Prosecutor indicating the reasons.

12. At the cost of repetition, it is again stated that the special reasons were shown in the report of the Public Prosecutor and the learned Sessions Judge dealt with those reasons while partly allowing the applications for extension. Though, learned counsel for the petitioners made an attempt to submit that except the reason of awaiting sanction, there is no other reason in the order. This contention of the learned counsel cannot be accepted as the reasons namely the subsequent events like arrest of absconding accused, collection of material in the process and recording statements of independent witnesses, forest officials and the members of anti-naxal activity squad revealing the role of other accused persons, are considered by the learned Sessions Judge.

13. Learned counsel for the petitioners also placed reliance on the judgment of the Apex Court reported in Sanjay Datt's case (supra), particularly paragraphs 45, 47 and 48 thereof. As the judgment refers to the observations of the Apex Court in the Hitendra Thakur's case, it will be useful to refer to the observations of the Apex Court, particularly in paragraph 48-

We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4) (bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan.

14. In the present matter, the petition was filed along with an application for grant of bail on 24.10.2013. The charge-sheet has been filed on 18.11.2013. Thus, taking into consideration these facts on the backdrop of the observations of the Apex Court in para 48 of Sanjay Datt's case, referred to above, in my opinion, the petitioners cannot claim grant of bail as an indefeasible right accrued in them, because the investigating agency has sought extension of the custody remand of the petitioners and accordingly the same was granted under the orders of the learned Sessions Judge. The charge-sheet was filed by the investigating agency by availing the remedy of an extension and in my opinion, grant of extension by the learned Sessions Judge, cannot be faulted with.

15. Learned counsel for the petitioners also placed reliance on the judgments of the Apex Court as well as this Court, reported in T.N. Civil Supplies Corpn. Workers Union Vs. T.N. Civil Supplies Corpn. Ltd. and Others, Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, Mohammad Allimuddin Vs. State of Maharashtra, (2009) 17 Supreme Court Cases 631 : [2010 ALL MR (Cri) 1310 (S.C.)] (Sanjay Kumar Kedia alias Sanjay Kedia vs. Intelligence Officer, Narcotics Control Bureau and another). In my opinion, these reported judgments would be of no help to the petitioners.

16. Learned APP has relied on the latest judgment of the Apex Court, reported in AIR 2011 SC (Supp) 755, in the case of Sadhvi Pragyna Singh Thakur vs. State of Maharashtra. In this case, the Apex Court dealing with nearly an identical situation, observed thus-

21. There is yet another aspect of the matter. The right u/s 167(2) of Cr.P.C. to be released on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. In other words, even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost. After the filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits.

(emphasis supplied)

17. The Apex Court then by considering the judgments in Sanjay Datt and Uday Acharya's case observed thus-

23. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, before the consideration of the same and before being released on bail if charge-sheet is filed, the said right to be released on bail, can be only on merits. So far as merits are concerned, the learned counsel for the applicant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all.

(emphasis supplied)

18. Looking to the controversy involved in this petition, it will be useful to refer to the another judgment of the Apex Court reported in Redaul Hussain Khan Vs. National Investigation Agency, in the case of Redaul Hussain Khan vs. National Investigation Agency. In this case, an extension was sought by the investigating agency u/s 43D(2)(b) of the UAP Act. On disclosure of certain material against the petitioner therein that he was receiving the amount from an extremist organization and considering reply to the same that the money seized from the possession of the petitioner was in respect of a Lease Agreement entered into by his mother and he was holding the money on her behalf, the Apex Court observed that the recovery of the amount from the petitioner's custody would require further investigation into the allegations made not against the petitioner but the other accused persons as well and held that the extension sought by the agency and granted by the learned Sessions Judge was justified and also held that denial of bail to the petitioner could not have been interfered with. In the present matter also, in the process of investigation, certain facets were unearthed. The first extension was utilized properly in the process of investigation to unearth the other material and the links of other accused with the naxal activities.

19. Thus, in my opinion, considering the above referred aspects, I found no fault with the order passed by the learned Additional Sessions Judge, Gadchiroli in granting extension of MCR by order dated 18.10.2013 and the petition deserves to be dismissed.

20. In the result, the criminal writ petition is dismissed. For the reasons discussed above, the prayer for grant of bail to the petitioners as an indefeasible right accrued in favour of them as a "default bail", is also rejected.

21. Needless to state that the petitioners may avail the remedy of filing an application for regular bail before the learned Special Judge, if they so desire. Rule discharged. Criminal Writ Petition is disposed of accordingly.