
(2011) 07 RAJ CK 0054
In the Rajasthan High Court
Case No : Criminal Appeal No. 618 of 2011

Nab Kumar Sarkar @ Swami Asimanand	APPELLANT
Vs	
State of Rajasthan and Another	RESPONDENT

Date of Decision : 26-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 173(2), 397
Explosive Substances Act, 1908 — Section 3
National Investigation Agency Act, 2008 — Section 21
Penal Code, 1860 (IPC) — Section 295, 302, 307, 323
Unlawful Activities (Prevention) Act, 1967 — Section 43D(2)

Citation : (2011) 4 RLW 3308

Hon'ble Judges : S.S. Kothari, J;Raghuvendra Singh Rathore, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Hon"ble Rathore, J.—This criminal appeal u/s 21 of National Investigation Agency Act, 2008 has been filed against the order dated 07.05.2011 passed by the Special Judge, National Investigation Agency, Rajasthan, Jaipur whereby the application (No.47/2011) for bail-filed by the accused-appellant had been rejected.

2. The prosecution case was initiated on lodging of a First Information Report (No.85/2007), at Police Station Dargah, Ajmer for the offences u/s 302, 307, 323 and 295 IPC and also u/s 3 of Explosive Substances Act. Thereafter, during the pendency of the investigation/which commenced after lodging of the said report, the case was handed over to the National investigation Agency, New Delhi by Government of India, vide order dated 01.04.2011. Therefore, the investigation in the present matter was conducted by the Agency from 06.04.2011 onwards and an F.I.R. (No.4/2011) came to be registered by the National Investigation Agency.

3. Later on an application for grant of bail came to be filed by the accused-

appellant before the Special Judge, Jaipur, under the National Investigation Agency Act, 2008, primarily on the ground that he is entitled for bail u/s 167(2) Cr.P.C. because the investigation agency had failed to file challan within the statutory period. Further, it was the case of the accused-appellant that the order dated 19.04.2011 passed by the learned Chief Judicial Magistrate, Ajmer on an application filed by the prosecution seeking extension of time to 180 days for filing of challan, is illegal. Therefore, bail was sought by the accused-appellant on the premise that there is violation of statutory provisions and as such he is entitled to be released on bail.

4. Learned counsel for the appellant has reiterated the submissions made before the learned Special Judge and has prayed that as the impugned order passed by the learned court below on 07.05.2011 is illegal and erroneous, the accused-appellant be granted indulgence of bail by this Court. He has also submitted that the order passed by the learned Chief Judicial Magistrate on 19.04.2011 was without jurisdiction and a nullity because it was the Special Court alone, under the Act of 2008, which is empowered to pass such an order. Accordingly, he has submitted that the order of extension of time, passed by the learned Magistrate, for filing of challan within 180 days is illegal and of no consequence. In support of his submissions, the counsel for the appellant has placed reliance on the following judgments:

(1) Rangku Dutta @ Ranjan Kumar Dutta vs. State of Assam (Criminal Appeal No.2307 of 2009 decided on 20.05.2011; (2) Kiran Singly vs. Chaman Paswan, 1954 Law Suit (SC) 65; (3) Kaushalya Devi vs. K L Bansal, 1968 Law Suit (SC) 352; (4) Shaukat Hussain vs. Bhuneshwari Devi, 1972 Law Suit (SC) 389; (5) Union of India vs. Swaran Singh, 1995 Law Suit (SC) 669; (6) Sarup Singh @ Anr. vs. Union of India & Anr; 2010 Law Suit (SC) 833; (7) J Kodanda Rami Reddy vs. State of A.P. & Ors., 2010 Law Suit (SC) 779; (8) V Swarajyalaxmi vs. Authorised Officer, Land Reforms, Medak, 2003 Law Suit (SC) 477; (9) State of Tamil Nadu vs. ParmasivA.P.andian, 2001 Law Suit (SC) 1431; (10) State of Bihar vs. Rambalak Singh, 1966 Law Suit (SC) 18 and in the last, Ashruff vs. State of Kerala (Bail Application No. 5134 of 2010) decided by learned Single Judge of the High Court of Kerala on 22.10.2010.

5. On the other hand, counsels appearing for prosecution have submitted that so far as the order of extension of time, for filing of challan by the investigation agency, passed by the learned Chief Judicial Magistrate is concerned, the same was passed on 19.4.2011 at a time when a Special Court under the National Investigation Agency Act, had not been constituted and the same came into existence only on 26.4.2011. Further, they have submitted that after the passing of the aforesaid order by the learned Chief Judicial Magistrate, the accused-appellant had preferred a revision petition (68/2011) u/s 397 Cr.P.C. before the learned Sessions Judge, Ajmer but without any success as the same came to be dismissed on 27.5.2011. In the last, it has been submitted on behalf of the prosecution that the order passed by the learned Chief Judicial Magistrate had

not been set aside by any Higher Court, as such, it has become final and even in case where an order is passed without jurisdiction, the same has to be so declared by a Higher Court. In the instant case, the accused-appellant himself had approached the revisional Court challenging the order of learned Chief Judicial Magistrate but the same was dismissed and no further challenge to the order of learned Sessions Judge, Ajmer dated 27.5.2011, in the revision petition, had been made.

6. We have given our anxious and thoughtful consideration to the submissions made by the learned counsels for the rival parties and carefully perused the provisions of the National Investigation Agency Act, 2008 as well as the Unlawful Activities (Prevention) Act, 1967, as amended in the year 2008. The Special Judge had rejected the bail application of the accused-appellant, by the impugned order dated 07.05.2011, mainly on the ground that on the application filed by the prosecution the learned Chief Judicial Magistrate had ordered for extension of time for filing challan within A.P. period of 180 days. In the instant case, challan has undisputedly been filed within that period i.e. on 18.07.2011. It is also a fact that the appellant had preferred a revision petition before the learned Sessions Judge, Ajmer, challenging the order dated 19.04.2011 passed by the learned Chief Judicial Magistrate, Ajmer (Misc. Application No.85/2007), whereby the application filed by the prosecution for extension of time to file challan was allowed. The said revision petition came to be dismissed on 27.05.2011.

Subsequent to the passing of the order by the revisional Court, the accused-appellant had chosen not to challenge the same in a higher Court. In other words, the order for extension of time passed by Chief Judicial Magistrate on 19.04.2011 was in existence on the date of passing of the impugned order on 07.05.2011. The bail application of the accused was therefore dismissed by the learned court below as the order of extension of time for filing challan had become final, after dismissal of the revision petition on 27.05.2011.

7. So far as the case law cited on behalf of accused-appellant is concerned, it would suffice to say that the same is not applicable in the instant case. The case of Kiran Singh (supra); Kaushalya Devi (supra); Shaukat Hussain (supra) Union of India vs. Swaran Singh (supra); Sarup Singh (supra); J. Kodanda Rami Reddy (supra); V. Swarajyalaxmi (supra) were the matters relating to civil proceedings and the Hon''ble Apex Court while dealing with the fact situation in those cases had laid down the principles. As regards the case of State of Tamil Nadu vs. ParmasivA.P. andian it is to be noted that it was an appeal in respect of the provisions under the Essential Commodities (Special Provision) Act, 1981. Similarly, the case of State of Bihar vs. Rambalak Singh, the Hon''ble Supreme Court was dealing with the matter under the Provision of Preventive detention and interim bail was granted to the detainee.

8. In the case of Ashruff (supra) the learned Single Judge of the Kerala High Court was considering a bail application filed on behalf of the accused-persons

against whom first information report was registered for the offences under the Indian Penal Code, Explosive Substances Act and Unlawful Activities (Prevention) Act 1967. It may be mentioned that unlike the, present case, the jurisdiction of the Magistrate to extend remand of the accused persons was not questioned by anyone at any point of time in the said case. Even during the hearing of the bail application want of jurisdiction of Magistrate to extend the remand period of accused-persons in view of the operation of the N.I.A. Act was not argued before the High Court. The High Court of Kerala had observed that it was not inclined to straightaway direct the release of those petitioners even after completing 90 days of detention. It was of the view that the matter has to be dealt with by the Court of Sessions, which should be given opportunity to consider the necessary reports u/s 43D(2)(b) of the U.A. Act to be filed by the Public Prosecutor concerned.

It is significant to note that the final report u/s 173(2) Cr.P.C., in the case of Ashruff (supra), had not been laid before the Magistrate by that time. It had been observed that the offence alleged against the petitioners were of grave nature involving terrorist activity. Further, it was taken into account that the investigation agency; the Public Prosecutor; the Advocate appearing on behalf of the accused persons and even the Magistrate were all in the dark and blissfully ignorant about the impact of the provisions of the N.I.A. Act. In such a situation the Kerala High Court ordered that the Sessions Judge shall pass appropriate orders expeditiously on the reports filed by the Public Prosecutor after causing production of the accused persons before the Court and after informing them about the consideration by the Court of said reports of the Public Prosecutor. Until then the remand of the accused persons was to be extended by a Sessions Judge for appropriate periods unless he finds good reasons for the release of any of the accused persons. All requests for extension of remand to any of the accused persons were to be made before the Court of Sessions, Ernakulam.

9. In the present case there is no dispute about the fact that after lodging of the First Information Report at Police Station Dargah, Ajmer on 11.10.2007 the case was subsequently taken over by National Investigation Agency, New Delhi on 06.04.2011. An application on behalf of the prosecution was filed before the learned Chief Judicial Magistrate whereupon he passed an order of extending the period to file challan within 180 days, by his order dated 19.04.2011. The Court of Special Judge under the N.I.A. Act had been constituted on 26.04.2011. The accused-appellant had challenged the order of learned Chief Judicial Magistrate passed on 19.04.2011 by filing a revision petition u/s 397 Cr.P.C. before the Sessions Court. The said revision petition came to be dismissed on 27.05.2011. Thereafter the order of the learned Sessions Judge was not challenged in any higher Court. In other words, the accused-appellant had opted to challenge the order passed by the learned Chief Judicial Magistrate on 19.04.2011 by way of revision petition, but unsuccessful and the same was dismissed on 27.05.2011. Consequently, the order of extension of time to file challan within 180 days still survives. Therefore, in our considered opinion the case of Ashruff (supra) decided

by the Kerala High Court has no assistance to the accused-appellant in the present case.

10. Moreover, in face of the aforesaid circumstances, this Court while considering the bail application of the accused on the ground of entitlement under the provision of 167 (2) Cr.P.C. cannot go into the question of legality or otherwise correctness of the order passed by the learned Chief Judicial Magistrate on 19.04.2011, for extension of time to the investigation agency for filing challan within 180 days, otherwise it may tantamount to setting aside the order dated 27.05.2011 passed by the Session Court in a revision petition filed against the said order, which has become final. Apart from the fact that the accused-appellant did take a chance to challenge the order of extension of time passed by the learned Chief Judicial Magistrate but without any success, in our view, even if the said order is illegal and without jurisdiction it ought to have been taken to the higher Court after dismissal of the revision petition by the Sessions Judge on 27.05.2011. Until and unless the order of the Chief Judicial Magistrate dated 19.04.2011 is set aside by a Competent Court of Law, the ground for bail to the accused for violation of provisions of 167 (2) Cr.P.C. does not survive.

11. An order which is illegal or without jurisdiction has to be so declared and set aside by the higher Court, particularly in the instant case when the accused-appellant did file revision petition before the Court of Sessions, Ajmer but was unsuccessful. This view of ours is supported by the principles laid down by the Hon'ble Supreme Court in the case of *State of Punjab & others vs. Gurdev Singh, Ashok Kumar*; AIR 1991 Supreme Court 2219. The Hon'ble Supreme Court has observed in paras 6, 7 and 8, which reads as under:

6. But none the less the impugned dismissal order has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or Court. In *Smith vs. East Elloe Rural District Council*, (1956) AC 736 at p. 769 Lord Redcliffe observed.

An order even if not made in good faith is still an act capable of legal consequences, it bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

7. Apropos to this principle, Prof. Wade states: the principle must be equally true even where the "brand of invalidity" is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the Court (see: *Administrative Law* 6th Ed. p. 352). Prof. Wade sums up these principles:

The truth of the matter is that the Court, will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiffs lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal

reason. In any such case the "void" order remains effective and is in reality valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another. (Ibid p.352)

8. It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. If the statutory time limit expires the Court cannot give the declaration sought for.

12. For the aforesaid reasons, we are of the considered opinion that no case for grant of bail is made out in favour of the accused-appellant, particularly in view of the order passed by the learned Chief Judicial Magistrate on 19.04.2011 whereby the period for filing of challan was extended to 180 days. Therefore the ground raised by the accused-appellant that he is entitled for bail on the basis of violation of the provision of Section 167(2) Cr.P.C. is not sustainable.

13. Consequently, this appeal is dismissed as being devoid of merits.