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(2014) 09 GAU CK 0042

In the Gauhati High Court

Case No : Crl. A. No. 117 of 2014

Y. Brajabidhu Singh — APPELLANT

Vs

National Investigation Agency — RESPONDENT

Date of Decision : 26-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 227, 228, 28, 437
Evidence Act, 1872 — Section 30
Maharashtra Control of Organised Crime Act, 1999 — Section 24, 3(2)
National Investigation Agency Act, 2008 — Section 21(4)
Penal Code, 1860 (IPC) — Section 109, 120B, 121A, 415, 420
Prevention of Corruption Act, 1988 — Section 13
Unlawful Activities (Prevention) Act, 1967 — Section 17, 18, 20, 21, 43-D(5)

Citation : (2014) 5 GLT 10

Hon'ble Judges : Prasanta Kumar Saikia, J;C.R. Sarma, J

Bench : Division Bench

Advocate : G. Singh, Advocates for the Appellant; D.K. Das, Standing Counsel, Advocates for the Respondent

Judgement

C.R. Sarma, J.—The instant appeal, filed under Section 21(4) of the National Investigation Agency Act, 2008 (hereinafter referred to as "the Act", 2008'') is directed against the order, dated 14.03.2014, passed by the learned Special Judge, National Investigation Agency (for short, NIA), Assam, Guwahati, in Spl. NIA Case No. 01 of 2010, rejecting the application, filed by the appellant, under Section 437 of the Code of Criminal Procedure (hereinafter called the "Cr.P.C") for grant of bail. The relevant facts, necessary for disposal of this appeal, may, in brief, be stated as follows:

"The appellant has been arrested on 30.10.2009 by the NIA in connection with Special (NIA) Case No. 1 of 2010, under Sections 120B, 121A IPC and Sections 17, 18, 20 and 21 of the Unlawful Activities (Prevention) Act, 1967, (hereinafter referred to as the UA(P) Act.). The allegations, brought against the appellant are that he, along with others, entered into a criminal conspiracy to wage war against the Nation and arranged fund for terrorist acts threatening the unity,

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integrity, security and sovereignty of India."

2. At the close of the investigation, NIA submitted charge-sheet against the appellant (A-24) and others for the said offences and forwarded them to the Court to stand trial. Subsequently, a supplementary charge-sheet has been filed under Sections 120B/121A IPC and Section 18 read with Sections 17, 20 and 21 of the UA(P) Act. Considering the materials, on record, the learned Special Judge framed charges under Sections 120B, 121A of IPC r/w Sections 17, 18, 20 and 21 of UA(P) Act, 1967, to which the accused persons, including this appellant, pleaded not guilty. The appellant did not challenge the order of framing charge. Hence, the charge, so framed, attained finality and accordingly, trial commenced. Some of the prosecution witnesses have already been examined.

3. During the pendency of the trial, the appellant, by filing an application under Section 437 Cr.P.C. has prayed for release on bail and the prayer for bail has been objected by the NIA.

4. Having heard both the parties and considering the materials, on record, the learned trial Judge, by the impugned order, dated 14.03.2014, rejected the prayer for bail.

5. We have heard Mr. G. Singh, learned Counsel, appearing for the appellant and Mr. D.K. Das, learned Standing Counsel, NIA.

6. Mr. G. Singh, learned Counsel, appearing for the appellant, taking us through the materials, on record, has submitted that the appellant is no way involved with the alleged offence and that there is no reasonable ground for further detention of the appellant. It is also submitted that the prosecution, by the evidence so far adduced, failed to establish the involvement of the appellant with the allegations made in this case and as such, the learned trial Judge committed error by refusing to release the appellant, on bail.

7. In support of his contention, the learned Counsel for the appellant has relied on the decisions, held the in the cases of;

"(i) Oinam Moniton Singha Vs. National Investigating Agency, ;

(ii) Chenna Boyanna Krishna Yadav Vs. State of Maharashtra and Another, ;

(iii) Sanjay Chandra Vs. CBI, ;

(iv) Mrs. M. Londhoni Devi v. The National Investigation Agency, (Crl. A. 73 of 2011, date of decision 01.07.2011); and

(v) Sougaijam Rakesh Singh v. The National Investigation Agency, (Crl. Appeal No. 146 of 2011, dated of decision 27.01.2012)."

8. Refuting the said argument, advanced by the learned Counsel for the appellant, Mr. D.K. Das, learned Standing Counsel, NIA, has submitted that the charge, framed against the appellant for the offences under the UA(P) Act, not being challenged attains finality and therefore, in view of the restriction, provided

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by Section 43-D(5) of the UA(P) Act, the petitioner is not entitled to be released on bail at this stage. Supporting the impugned order, the learned Standing Counsel, NIA has further submitted that there are many other witnesses to be examined and that this is not the proper stage to hold the petitioner not guilty of the offences charged against him.

9. Admittedly, in the present case, the learned trial Judge has framed charges for the offences under Sections 120B, 121A IPC and under Sections 17, 18, 20 and 21 of UA (P) Act.

Sections 227 and 228 Cr.P.C., which provide the provision for consideration of charge by a Court of Sessions, read as follows.

"227. Discharge.--If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

"228. Framing of charge.--

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to me Chief Judicial Magistrate, [or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

Section 43-D(5) of the UA(P) Act, which reads as follows, provides the restriction in granting bail.

"43-D(5) - Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under

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section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true."

The basis for satisfaction regarding existence of a prima-facie true case is the evidence/materials revealed by the case diary or the report submitted under Section 173 Cr.P.C. Such finding is not dependent on the evidence, rendered during the trial. So for disposing an application for bail, the evidence collected by the Investing Officer, during the investigation and the report, submitted under Section 173 Cr.P.C. are to be considered. As provided by Sections 227 and 28 Cr.P.C. for framing charge, the evidence and such other materials, collected by the Investigating Officer are to be considered.

In view of Section 228 Cr.P.C., charge can be framed in the event of existence of ground for presuming that the accused has committed the offence.

10. A criminal Court after framing the charge, on the basis of the incriminating evidence, collected by the investigating agency, can''t review/modify its order. The only option is to proceed with the trial and pass necessary order at the end of the trial. However, the aggrieved party may challenge the correctness of the charge, before the appropriate forum, by filing appropriate application.

In the case at hand, though some of the witnesses have been examined, there are other witnesses, who are yet to be examined. Hence, it can''t be held, at this stage, that the charges are unfounded and liable to be set aside. In view of the said statutory provisions, the framing of the charge clearly indicates existence of a prima-facie case for trial.

11. The decision in the case of Mrs. M. Londhoni Devi (Supra) was rendered before framing of the charge. In this case, a Division Bench of this Court held that no prima-facie case was made out against the appellant. But in the present case, the charge has been framed thereby holding existence of a prima-facie case. Hence, the decision made in the case of Mrs. M. Londhoni Devi (Supra), will not help the appellant.

12. In the case of Sougaijam Rakesh Singh (supra), prayer for bail was made after submission of the charge-sheet and before the trial Court framed the charge. The appellate Court, while granting bail, came to the findings that the evidence of witnesses might not be enough to convict the appellant in view of Section 30 of the Evidence Act. It is submitted that the matter has been carried to the Hon''ble Supreme Court and that the same is pending for disposal. In view of pendency of the matter before the Apex Court, the appellate Court''s decision can''t be accepted as final. That apart, in the said case, no charge was framed. Therefore, the fact situation of the said case is not similar to the present one.

13. In the case of Oinam Moniton Singha (supra), it has teen held that the power of the High Court as an appellate Court under Section 21(4) of the NIA Act is co-extensive with the powers of the Special Court. In the said case, in view of the ban imposed by Section 43-D(5) of UA(P) Act, the Court dismissed the appeal

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and thereby refused to grant bail.

14. In the case of Sanjay Chandra (supra), the Court decided the bail matter in a case involving Section 13 of the Prevention of Corruption Act, 1988 and Sections 415, 420, 109, 463, 464 and 471 of IPC. In the said case, there was no statutory ban as provided by Section 43-D(5) of UA(P) Act. Therefore, in our humble opinion, the decision held in the said case will not be applicable in the case at hand.

15. In the case of Chenna Boyanna Krishna Yadav (supra), the Hon''ble Supreme Court observed:

"At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the appellant has committed offences under Section 3(2)or Section 24 of MCOCA. What is to be seen is whether there is a reasonable ground for believing that the appellant is not guilty of the two offences, he has been charged with, and further that he is not likely to commit an offence under MCOCA while on bail."

16. In view of the above, considering entire aspect of the matter, we have no hesitating in holding that unless the charge, already framed against the accused/ appellant, is challenged and set aside, there can be no scope, during the trial, to hold that the acquisition against the appellant is not prima-facie true. For, a decision, contrary to the order passed at the time of framing the charge, will result discharge of the appellant, which can''t be done at this stage.

In the case at hand, the framing of the charge for the offences under the UA(P) Act, the correctness of which has not been challenged, is it self sufficient to hold that there is ground for presuming that the accused i.e. the appellant has committed the alleged offences. Therefore, there is no difficulty in holding that the acquisition is prima-facie true. That apart, in view of non examination of all the witnesses, it can''t be held that the prosecution has failed to make out a case against the appellant.

In view of above discussion, we don''t find it to be a fit case to release the appellant, on bail. Therefore, we are inclined to hold that the learned trial Judge committed no error by refusing to grant the prayer for bail. This appeal lacks merit. Accordingly, the appeal is dismissed.

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