

SANJAY KUMAR KEDIA @ SANJAY KEDIA

v.

INTELLIGENCE OFFICER, NARCOTIC CONTROL
BUREAU AND ANR.

(Criminal Appeal Nos. 2008-2009 of 2008)

AUGUST 20, 2009*

[HARJIT SINGH BEDI AND DR. B.S. CHAUHAN, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985:

s. 36-A (4), proviso – Extension of custody to complete investigation – Conditions to be satisfied – Held: In the instant case, there was no application of mind by the public prosecutor – Progress of investigation was not indicated – Compelling reasons which required extension of custody beyond 180 days were not shown – Both the extensions being contrary to law, struck down.

s. 36-A (4), proviso read with s. 167 (2) Cr. P.C. – Application for bail on the ground that investigation was not completed within the extended time – Extensions having been held contrary to law, appellant released on bail.

The appellant was arrested on 12.2.2007 on the allegations that he committed offences punishable u/ss 24, 29, 30 and 38 of the Narcotic Drugs and Psychotropic Substances Act, 1985. On 2.8.2007 respondent no.1 applied for and was granted extension of time u/s 36-A (4) of the Act and custody of accused to complete the investigation and file the complaint. Again on 30.1.2008 respondent no. 1 applied for and was allowed time till 13.2.2008. On 4.2.2008 the appellant filed an application for bail on the ground that the investigation was not completed within the extended period. The application was rejected. The appellant filed revision petitions before

* Judgment Received on 6.2.2010.

A the High Court challenging the orders granting the second extension and rejecting his bail application. The High Court dismissed both the petitions. Aggrieved, the accused filed the appeals.

B Allowing the appeals, the Court

HELD: 1.1. The proviso to s. 36-A (4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 authorizes the period of detention which may in total go upto one year, provided the stringent conditions laid down therein are satisfied and complied with. The conditions provided are: (1) a report is given by the public prosecutor; (2) which indicates the progress of the investigation; (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. [Para 9] [562-D-G]

1.2. The application dated 2.8.2007 shows that it has been filed by the investigating officer of respondent no.1 and does not indicate even remotely any application of mind on the part of the public prosecutor. It further does not indicate the progress of the investigation, nor the compelling reasons which required an extension of custody beyond 180 days. This application was allowed by the Special Judge on the day on which it was filed which also reveals that no notice had been issued to the accused and he was not even present in court on that day. The second application dated 30.1.2008 is even more incomprehensible. A bare perusal of this application would reveal that it does not even remotely satisfy the tests laid down in *Hitendra Vishnu Thakur's* case. Thus the extensions granted to the investigating department under the proviso to s. 36-A (4) did not satisfy the conditions laid down therein and both the extensions, therefore, being contrary to law, must be struck down accordingly. [Para 14 and 16] [566-F-H; 567-A-B-G; 568-B-C]

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Hitendra Vishnu Thakur and others v. State of Maharashtra and Others 1994 (4) SCC 602 and Uday Mohanlal Acharya vs. State of Maharashtra (2001) 5 SCC 453, relied on. A

1.3. As regards the rejection of the application for bail filed by the accused under the default clause, the Special Judge observed that the period of investigation was extended on two occasions and the complaint had been filed before that expiry of the last extended date and as the allegations were serious, the appellant was not entitled to bail. The High Court while noticing the decision in *Hitendra Vishnu Thakur's* case has deviated from its observations and side stepped the very categorical directions given by this Court, on wholly irrelevant considerations. In this view of the matter, the orders dated 13.2.2008 and 5.9.2008 passed by the Special Judge and the High Court, respectively, are set aside and the appellant is directed to be released on bail. [Para 17 and 20] [568-C-F; 571-C] B
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Case Law Reference: E

1994 (4) SCC 602 relied on Para 4

(2001) 5 SCC 453 relied on Para 4

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2008-2009 of 2008. F

From the Judgment & Order dated 05.09.2008 of the High Court of Calcutta in C.R.R. Nos. 411 and 765 of 2008.

U.U. Lalit, Manoj Prasad, for the Appellant. G

Avijit Bhattacharjee, Bikas Kargupta, for the Respondents.

The following Order of the Court was delivered

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O R D E R

These appeals arise out of the following facts:

1. The appellant was arrested on 12th February, 2007 for offences punishable under Sections 24, 29, 30 and 38 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the 'Act') and was produced before the Special Judge who remanded him to judicial custody for fifteen days, the period being extended from time to time. The appellant also moved an application for bail before the Special Judge. This application was rejected on 28th May, 2007 whereafter the appellant moved the Calcutta High Court. This application was rejected on 7th June, 2007. The appellant, aggrieved by the order of 7th June 2007, preferred a special leave petition in this Court on 10th July, 2007 which too was dismissed on 3rd December, 2007. It appears that as the period of 180 days fixed under Section 36A (4) of the Act read with Section 167 (2) of Code of Criminal Procedure, 1973 (hereinafter called the Code) was to expire on 10th August, 2007, Respondent No.1, the Narcotics Control Bureau, filed an application under Section 36A (4) on 2nd August, 2007 seeking a further period of six months for the completion of the investigation and the filing of the complaint. The Special Judge allowed this application by Order dated 2nd August, 2007. As the extended period would have expired on 2nd February, 2008, the Bureau, moved yet another application under Section 36A (4) of the Act which too was allowed on 30th January 2008 and the time for the completion of the investigation was extended to 13th February 2008, which would have (statedly) brought the total custody to 1 year and 2 days.

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2. The appellant moved another application for bail under Section 36A (4) of the Act read with Section 167 (2) of the 'Code' on 4th February, 2008 on the plea that the investigation had not been completed within the stipulated period of time fixed by the Special Judge. This application was rejected on

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13th February, 2008. The appellant also moved CRR No.411 of 2008 in the Calcutta High Court on 7th February, 2008 against the Order dated 30th January, 2008 whereby an extension of six months had been granted. The complaint was also filed by respondent No.1 on the 7th February 2008. The appellant filed CRR No.765 of 2008 before the Calcutta High Court challenging the order dated 13th February, 2008 rejecting the application for bail. On 6th August, 2008, a learned Single Judge of the Calcutta High Court released both the CRR's aforementioned for want of jurisdiction as they were required to be heard by a Division Bench. Both the matters came before the Division Bench and were dismissed by order dated 5th September, 2008. The present appeal has been filed impugning this order.

3. Leave was granted in this matter on 5th December, 2008 and though, both the respondents i.e. the Narcotic Control Bureau and the State of West Bengal have been served, the former has not put in appearance despite the passage of almost a year. The State of West Bengal Respondent No.2 however, which is not really the contesting party, has filed a counter and is also represented by its counsel, Mr. Avijit Bhattacharjee. He, at the very outset, pointed out that he felt gravely handicapped on account of the non-appearance of respondent No.1, the primary party respondent, but he has chosen to go ahead as it appears that the first respondent was not interested in contesting the case.

4. The broad facts given above have not been controverted by the respondents. Mr. Lalit, the learned counsel for the appellant has made two submissions before us:

- (i) the two applications for extension dated 10th July, 2007 and 30th January, 2008 did not satisfy the conditions laid down in Section 36A (4) of Act and were without notice to the accused and as such the orders were a nullity and any extension of time beyond 180 days was, therefore, contrary to law.

A For this submission he has placed reliance on the case of *Hitendra Vishnu Thakur and others Versus State of Maharashtra and others* [1994 (4) SCC 602].

B (ii) that as the second extension would have ended on 2nd February, 2008 and the appellant had filed an application for bail under Section 36A (4) of the Act on 4th February, 2008, the said application was pending for consideration before the Special Judge when the complaint had been filed on the 7th
C February, 2008, the subsequent act of the filing the complaint did take away the right which had accrued to the appellant on 2nd February, 2008 as had been held by this Court in *Uday Mohanlal Acharya Versus State of Maharashtra* [2001 (5) SCC 453].
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5. Mr. Bhattacharjee, has, however, supported the judgment of the Special Judge and the High Court by submitting that two applications for extension of time had been made by respondent no.1 in accordance with the provisions of Section
E 36A (4) of the Act and that the Special Judge, had, after applying his mind, granted the extensions. He has, further, pointed out that both the Special Judge and the High Court had taken all relevant factors into consideration and keeping in view the larger purpose behind the Act and the great social and legal
F ramifications, which it raised, required that it should be strictly enforced.

6. He has also pointed out that the submission that the period of 180 days had ended on 2nd February, 2008 was incorrect as the calculations would show that this period was
G to expire on 8th February, 2008 and the complaint having been filed a day earlier made the ratio of the judgment in *Uday Mohan Lal Acharya's* case (supra), inapplicable.

7. We have considered the arguments of learned counsel
H for the parties. Section 167 of the Code deals with the

procedure wherein investigation cannot be completed in 24 hours and the various sub-sections provide for the maximum period beyond which a person cannot be detained and this period varies between 60 and 90 days keeping in view the gravity of the offence - the maximum period of 90 days being provided with respect to offences punishable with death etc. and 60 days for other offences, and if the investigation is not completed within this period, the accused is entitled to bail under Section 167 sub-section (2) if he makes an application for that purpose and is prepared to furnish bail. It will be seen that Section 167 does not envisage an extension of the period of detention of an accused in custody beyond the specified periods. The legislature, however, thought in its wisdom, that certain special categories or situations required that the investigating agencies should be given more time to investigate a matter and to file their complaint or charge-sheets and such provisions have been made under special statutes.

8. The Terrorist and Disruptive Prevention Act, 1987 (hereinafter called the 'TADA') and the Act are two such special legislations. Section 36A (4) of the Act in so far as is relevant, reads as under:

"Section 36 A.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) xxxx

(b) xxxx

(c) xxxx

(d) xxxx

(2) xxxx

(3) xxxx

A (4) In respect of persons accused of an offence punishable
under Section 19 or Section 24 or section 27 A or for
offences involving commercial quantity the references in
sub-section (2) of section 167 of the Code of Criminal
B Procedure, 1973 (2 of 1974), thereof to “ninety days”,
where they occur, shall be construed as reference to “one
hundred and eighty days”:

Provided that, if it is not possible to complete the
investigation within said period of one hundred and eighty
C days, the Special Court may extend the said period up to
one year on 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 one hundred and eighty days.

D (5) xxxx

9. 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 authorizes
E a yet further period of detention which may in total go upto 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,
- F (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
G days, and
- (4) after notice to the accused.

10. The question to be noticed at this stage is as to
whether the two applications for extension that had been filed
H by the public prosecutor seeking an extension beyond 180

days met the necessary conditions. We find that the matter need not detain us as it is no longer *res integra* and is completely covered by the judgment of this Court in *Hitendra Vishnu's case* (supra). In this case, the Bench was dealing with the proviso inserted as clause (bb) in Sub-section (4) of Section 20 of TADA, which is *parimateria* with the proviso to Sub-Section (4) of Section 36-A of the Act. This Court accepted the argument of the accused that an extension beyond 180 days could be granted but laid a rider that it could be so after certain conditions were satisfied. It was observed :

“It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party.

11. Mr. Lalit, has further contended that the two applications for extension of time could not, by any stretch of imagination, be said to be reports of the public prosecutor as envisaged under Section 36A (4) and has again referred us to the case *ibidem*:

A public prosecutor is an important officer of the State Government and is appointed by the State under the

- A Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the
- B investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the
- C investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking
- D extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the
- E accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with this request or application and report, but his report, as envisaged under clause (bb), must disclose
- F on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention
- G of the accused beyond the said period" as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of
- H the public prosecutor. The report of the public prosecutor,

therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor.

12. The court further went on to say that even if the application for extension of time was either rooted through the public prosecutor or supported by him would not make the said application a report of the public prosecutor.

13. Mr. Bhattacharjee has, however, pointed out that the applications for extension filed by the public prosecutor Section 36A (4) of the Act did satisfy the aforesaid conditions and merely because an independent report had not been tendered would not change the nature of the application. We reproduce herein the application dated 2nd August, 2007 for extension of time in extenso:

1. That, the aforesaid person was arrested on 12.02.2007 in connection with illegal distribution of psychotropic substances externally through the internet.

2. That he was produced before your honour on 12.02.2007 and thereafter he was remanded to judicial custody in Dum Dum Correctional Home.

3. That the investigation of the case is still on.

4. That a connected/related case against the associates of the present accused person is being investigated by the Drug Enforcement Administration (DEA), USA and the investigation report/collected documents are highly relevant/essential in proving the case. In this regard necessary steps, sending letters to that competent authority, has already been taken.

5. That, the Servers, Laptop, CDs etc. as seized in

A connection with this case, which has already been reported
before Your Honour earlier, were also been sent to the
Central Forensic Science Laboratory (CFSL) for
deciphering the data on 20.2.07 and several reminders
have been sent for obtaining the reports, but till date same
B could not be received. It is pertinent to mention that a letter
from the end of CFSL has been received by NCB, wherein
they informed that in a short time it is not possible to send
the report.

C 6. That, considering the exigencies of the report of CFSL
in proving the case against the accused person the
prosecution has to pray for further extension of time.

D 7. That, as per the provision of Section 36A Clause (4)
proviso the prosecution is submitting this petition for
extension of time for filing. Complaint after completing the
investigation accepting the report of the prosecution kept
in the case file submitted herewith showing that the
detention of the aforesaid accused is further necessary.

E In the abovementioned circumstances, it is hereby
prayed before your Honour that,

F A further period of 6 months may kindly be given for
the completion of investigation and filing of complaint. And
the accused person may be remanded in judicial custody
for further period.

And for this act of kindness, the petitioner as is duty
bound shall ever pray.

G 14. A bare perusal of this application shows that it has
been filed by the investigating officer of respondent No.1 and
does not indicate even remotely any application of mind on the
part of the public prosecutor. It further does not indicate the
progress of the investigation, nor the *compelling* reasons which
required an extension of custody beyond 180 days. This
H application was allowed by the Special Judge on 2nd August,

2007 i.e. on the day on which it was filed which also reveals that no notice had been issued to the accused and he was not even present in Court on that day. A

15. The second application dated 30th January, 2008 is even more incomprehensible. We reproduce the same hereinbelow: B

IN THE COURT OF LD.JUDGE-SPECIAL COURT NDPS
ACT KOLKATA AT BARASAT NORTH 24 PGS
CASE NO.N-23/2007

Union of India C

Versus

Sanjay KediaAccused Person

The humble petition on behalf of the prosecution. D

MOST RESPECTFULLY STATES:

1. That today is the date fixed for submission of the complaint.

2. That as the prosecution is not in a position to submit the complaint today hence prays for further time for the same. E

Under the above circumstances it is prayed that a short date may kindly allowed for the same for ends of justice F

AND

For this act of kindness shall ever pray your petitioner as is duty shall ever pray." G

A bare perusal of this unsigned application would reveal that it does not even remotely satisfy the tests laid down in Vishnu Thakur's case. The Special Judge allowed this H

A application as well on the day it was filed by a cryptic order and without notice to the accused in the following terms:

B “Accd. Sanjay Kedia is produced from J/C. Accd. Filed a vakalatnama. Prosecutor files Hazira. Prosecution also files a petition praying for time. Considered prayer for time is allowed to 13.2.2008 for production of the accd & report from I.O.”

C 16. We are, therefore, of the opinion that the extensions granted to the investigating department under the proviso to Section 36A (4) did not satisfy the conditions laid down therein and both the extensions, therefore, being contrary to law, must be struck down accordingly.

D 17. As would appear from what has been held above we must now deal with the order of the Special Judge dated 13th February, 2008 whereby the application for bail filed by the appellatant under the default clause had been dismissed. The special Judge observed that as the Supreme Court had rejected the prayer for bail on 4th February, 2008 and that the period of investigation had been extended on two occasions and that the complaint had been filed before the last extended date had expired and having regard to the facts of the case in as much that the allegations were serious, the appellatant was not entitled to bail. The High Court while noticing the decision in *Hitendra Vishnu Thakur's case* (supra) has deviated from its observation and side stepped the very categorical directions given by this Court, on wholly irrelevant considerations. We reproduce certain observations of the High Court judgment to support our opinion :

G The petition dated 02/08/2007 seeking to extend the period of investigation for a further period of six months was presented by the Intelligence Officer of the opposite party No.1. However, the same was not presented by the learned Public Prosecutor himself but the order passed by H the learned Trial Court would show the same was

proceeded in the presence of the learned Public A
Prosecutor.

However, "Specific reasons" and the "progress of B
investigation" has been set out in the petition dated, 02/
08/2007 wherein it was shown that the offence against the
petitioned and his associates are being investigated even
in the United States of America and several electronic
equipment, which have been seized, were sent to the
Central Forensic Science Laboratory for deciphering and
the Report is yet to be received. Further time was sought C
for and the learned Trial Court applied its judicial mind on
the basis of a subjective satisfaction quoting the substance
of the prayer and allowed the time. As such, other portion
of the provisio of Subsection (4) of Section 36A of the said
Act with regard to the progress of investigation and the D
specific reasons for detention of the petitioner beyond the
period of one hundred eighty days, in our humble view,
have been complied with.

Now, if we see the phrase "on the report of the Public
Prosecutor" *vis-à-vis* the petition dated 02/08/2007 sent E
by the Intelligence Officer and submitted through the Public
Prosecutor and was moved in his presence- we must
make a purposive construction of the word "report of the
Public Prosecutor" and give it a wider and meaningful
implication without doing violence to the Statue. F

Proviso to sub-section (4) of Section 36A has to be
construed in relation to the subject matter covered by the
said Section. The general Rule in construing an enactment
which contains a provisio is to construe them together G
without making either of them redundant or otiose.

In other words, the language of a provisio, even if
general, should be normally construed in relation to the
subject-matter covered by the Section to which the provisio
is so appended. H

A Once we have seen the efficacy of the order passed on 02/08/2007 which cannot be sullied on the reasons seen by us earlier-we find the undisputed position remains that the period of further detention of the present petitioner stands extended till 02/02/2008.

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C Now, comes the legality of the order passed on 30/01/2008 passed by the learned Trial Court. Of course, the said order was preceded by a petition filed by the Public Prosecutor himself outlining the fact since the Prosecution is not in a position to file the complaint some short time may be allowed. Acting on the basis of the same the learned Trial Court extended the period till 13/02/2008.

D A put up petition was preferred on behalf of the petitioner for being released on bail on 04/02/2008 but in the meanwhile on 07/02/2008 the petition of complaint was filed on behalf of the Opposite Party No.1.

E From a plain reading of the sequence of events it can be easily deciphered that the first phase of extension was up to 02/02/2008 which was subsequently, extended by the order dated 30/01/2008 till 13/02/2008. It is within the said period of extension i.e. on 07/02/2008 Petition of Complaint has been filed.

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G In the light of our wholesome assessment of the entire situation, we would be of the view that the position as projected by Shri Basu turns out to be more academic than realistic. It has to be 'Just Justice'. Justice in the sense of Law and the Constitution and not to the individual mindset of the Court. The said Act and its ramification has to be understood in a wider context.

H 18. With great respect, these findings do no justice to the

observations of this court in Vishnu Thakur's case as the very A
specific observations therein have been noticed and ignored
by the Division Bench.

19. In the light of what has been held above, Mr. Lalit's B
second submission as to the expiry of the maximum period of
detention of one year based on *Uday Mohan Lal Acharya's*
case (supra), need not detain us more particularly, as the facts
are disputed by Mr. Bhattcharjee. We are, therefore, not
required to go into this aspect of the matter.

20. We accordingly allow this appeal, set aside the order C
of Special Judge dated 13th February 2008 and High Court
dated 5th September, 2008 and direct that the appellant be
released on bail.

R.P. Appeals allowed. D