

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri

Present:

The Hon'ble Justice Joymalya Bagchi

The Hon'ble Justice Suvra Ghosh

The Hon'ble Justice Krishna Rao

C. R. M. 146 of 2021
(CRAN 1 of 2021)

[Subhas Yadav vs. The State of West Bengal]

W I T H

C. R. M. 174 of 2021

[Rama Kishan @ Krishna Bishnoy & Anr. vs. The State of West Bengal]

W I T H

C. R. M. 214 of 2021

[Ripan Sarkar vs. The State of West Bengal]

W I T H

C. R. M. 257 of 2021

[Sushanta Roy vs. The State of West Bengal]

W I T H

C. R. M. 437 of 2021
(CRAN 1 of 2021)

[Amjad Khan & Anr. vs. The State of West Bengal]

W I T H

C. R. M. 478 of 2021
(CRAN 1 of 2021)

[Rakesh Shaw vs. The State of West Bengal]

W I T H

**C. R. M. 479 of 2021
(CRAN 1 of 2021)**

[Sohonlal & Anr. vs. The State of West Bengal]

W I T H

**C. R. M. 497 of 2021
(CRAN 1 of 2021)
(CRAN 2 of 2022)**

**Ramesh Manju Bishnoi @ Ramesh Manju Bishnoy @ Ramesh Kumar
Bishnoi**

vs.

The State of West Bengal

W I T H

**C. R. M. 535 of 2021
(CRAN 1 of 2021)**

[Probin Barman & Anr. vs. The State of West Bengal]

W I T H

C. R. M. 536 of 2021

[Ajit Thapa vs. The State of West Bengal]

W I T H

C. R. M. 748 of 2021

[Ranjan Roy & Anr. vs. The State of West Bengal]

W I T H

C. R. M. 879 of 2021

[Rajpal Singh vs. The State of West Bengal]

W I T H

C. R. M. 981 of 2021

[Ramesh Kumar & Anr. vs. The State of West Bengal]

W I T H

C. R. R. 1419 of 2021**[Sakiul Sk. @ Md. Sakiul Sk. vs. The State of West Bengal]**

- For the petitioners :** Mr. Sekhar Kumar Basu, Sr. Adv.
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Mr. Sayan Mukherjee, Adv.
Mr. H S Poddar, Adv.
... in CRM 146/2021
- Ms. Suman Sehanabis (Mondal), Adv.
Ms. Atulya Sinha, Adv.
... in CRM 214/2021
- Mr. Jaydeep Kanta Bhowmick, Adv.
... in CRM 257/2021
- Mr. Uday Sankar Chattopadhyay, Adv.
Mr. Santanu Maji, Adv.
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- Mr. Sekhar Kumar Basu, Sr. Adv.
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For the State : Mr. Saswata Gopal Mukherjee, Ld. P.P.
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For the NCB : Mr. Sudipto Kumar Majumder, Ld. A.S.G.
Mr. Ajoy Kumar Singhanian, Adv.

Heard on : 11.05.2022, 19.07.2022, 23.08.2022, 01.09.2022
21.09.2022, 16.11.2022, 14.12.2022

Judgment on : 17.01.2023

Joymalya Bagchi:-

Terms of reference:-

1. The reference was made on the following issue:-

“Whether an accused upon expiry of period of detention pending investigation as prescribed under Section 36A(4) of the NDPS Act is to be released automatically on statutory bail without a prayer made by him availing such right and expressing his willingness to furnish bail?”

2. During hearing the parties proposed additional issues as follows:-

1. *Whether retrospective extension of the period of investigation by the learned Special Court is permissible on a juxtaposed reading of section 36A(4) of the NDPS Act vis-à-vis Article 21 of the Constitution of India?*

2. *Whether at the time of passing of the order extending the period of investigation the learned Special Court would apply the parameters of observing the “progress of investigation” and “the specific reasons of detention” prior to the passing of such order?*

3. *Whether in the interregnum period between the conclusion of the period of investigation, and an order retrospectively extending the period of investigation the petitioner would be liable to be released on statutory bail, especially on a harmonious interpretation of section 36A(4) of the NDPS Act and section 167 of the Cr.P.C.?*

4. *Whether the mere filing of an application for extension in the absence of an order extending the period of investigation would render the application for statutory bail filed by the petitioner to be infructuous?*

Arguments at the Bar:-

3. Learned Counsels appearing for the petitioners argued the right to be released on statutory bail is a facet of right to liberty enshrined under Article 21 of the Constitution of India. Such right cannot be whittled down except through procedure established by law. Section 36A(4) of the Narcotic Drugs and Psychiatric Substances Act (hereinafter referred to as the Act) alters the general law under section 167(2) of the Code of Criminal Procedure and provides in certain offences under the Act including offences involving commercial quantity an accused shall be entitled to be released on statutory bail if investigation is not completed within 180 days. Proviso to the said section empowers the Court to extend the said period up to one year on the report of a public prosecutor indicating the progress of investigation and specific reasons for detention of the accused beyond 180 days. The aforesaid statutory scheme makes it imperative that report of the public prosecutor must be filed before expiry of 180 days failing which the accused would automatically be entitled to statutory bail. In other words, report filed by the prosecutor after expiry of 180 days cannot empower the Special Court to retrospectively extend the period of detention under the proviso to section 36A(4) of the Act. A belated report of the public prosecutor seeking extension cannot take away such right. Relying on ***Rakesh Kumar Paul vs. State of***

Assam¹ it was further argued the special court has a duty to inform the accused of his right to be released on statutory bail. Failure to apprise the accused of such right would automatically entitle him to statutory bail. Learned Counsels also argued extending the period of remand under the proviso to section 36A(4) of the Act is not a mechanical exercise. Report of the Public Prosecutor must indicate that the investigating agency was not indolent and there is appreciable progress in investigation and ought to spell out 'specific reasons' justifying detention pending further investigation. Special court must express satisfaction on the basis of the report of the Public Prosecutor on the twin requirements before extending detention beyond 180 days.

4. Learned Public Prosecutor and Assistant Solicitor General for Union of India opposed such interpretation. Relying on **M. Ravindran v. Directorate of Revenue Intelligence**² they argued right to statutory bail does not crystallise till it is 'availed of'. If the application for extension is filed prior to the accused availing his right to statutory bail but after expiry of 180 days an order on such application extending the period of detention cannot be said to have retrospective effect. This is because the right to statutory bail has not crystallised on the date of filling of the application. It was also contended mere failure of the special court to apprise the accused of his right to statutory bail by itself would not entitle him to such relief. There are myriad reasons why

¹ (2017) 15 SCC 67

² (2021) 2 SCC 485

investigation cannot be concluded within 180 days .It may not be advisable to lay down any hard and fast proposition of law guiding the discretion of the Special Court in extending the period of detention. This has to be decided on case to case basis.

Discussion and reasonings:-

5. In the light of the aforesaid submissions, the referred issue and additional issues are taken up for consideration and answered as follows:-

(i) **Is an accused automatically entitled to statutory bail on expiry of 180 days if prayer for extension is not made before the expiry of the said period?:-**

6. The Constitution Bench in ***Sanjay Dutt vs. State through C.B.I., Bombay (II)***³ while interpreting the right to statutory bail under section 20(4)(bb) of Terrorist and Disruptive Activities (Prevention) Act held as follows:-

“48. ... 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.”

7. The observation in ***Sanjay Dutt*** (supra) was quoted with approval and explained in ***M. Ravindran*** (supra). The bench after considering a catena of decisions clarified the law as under:-

“25.1. Once the accused files an application for bail under the proviso to Section 167(2) he is deemed to have “availed of” or enforced his right to be released on default bail, accruing after expiry of the stipulated time-limit for investigation. Thus, if the accused applies for bail under Section 167(2) CrPC read with Section 36-A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the court must release him on bail forthwith without any unnecessary delay after getting necessary information from the Public Prosecutor, as

³ (1994) 5 SCC 410

mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigating agency.

25.2. The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher court.

25.3. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

25.4. Notwithstanding the order of default bail passed by the court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the court, his continued detention in custody is valid.”

8. A plain reading of the aforesaid enumerated principles particularly paragraph 25.1 would show mere expiry of 180 days and/or failure of the prosecuting agency to seek extension of the period of detention prior to the expiry of the said period does not crystallize the right to statutory bail. It remains an inchoate right which crystallizes when the accused avails of his right by making an application under section 167(2) Cr.P.C. read with section 36A(4) of the NDPS Act upon expiry of 180 days or any extended period, as the case may be. Thus, the right to statutory bail crystallizes only when an accused

has availed of his right by applying for statutory bail and has offered to furnish the bail.

9. In **Rakesh Kumar Paul** (supra) the Apex Court held that an application for statutory bail even made orally must be treated as valid and considered on merits. It held as follows:-

“40. ... it is not as if the petitioner did not make any application for default bail – such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for “default bail” or an oral application for “default bail” is of no consequence. The court concerned must deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge-sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.”

10. In **Bikramjit Singh vs. State of Punjab**⁴ the Apex Court reiterated this view and clarified ‘*whether the accused makes a written application for “default bail” or an oral application for “default bail” is of no consequence*’.

11. The crux of the aforesaid ratios is that right to statutory bail is said to have been ‘availed of’ once an accused has applied for statutory bail and offered to furnish bail. It is immaterial whether such application is in writing or made orally before the Court. But if an accused fails to apply for statutory bail his right does not crystallize and the Court is empowered to remand him to custody under section 167(2) Cr.P.C. read with section 36A(4) of NDPS Act beyond 180 days till he avails of such right. Jurisdiction of the Court to do so arises from the failure of the accused to avail his right to statutory bail and is

⁴ (2020) 10 SCC 616

not dependant on the filing of a report by the prosecutor seeking extension of period of detention.

(ii) Does an order extending detention on a report filed after 180 days have retrospective operation:-

12. Once the report of the public prosecutor is filed seeking extension of the period of detention under the proviso to section 36A(4) of NDPS Act prior to the accused having availed his right to statutory bail, the Court is vested with the jurisdiction to extend the period of detention for such period as it may deem fit and proper but not beyond one year in the whole.

13. In such cases the period of remand of an accused comprises of three distinct stages. First is the remand of the accused pending investigation upto 180 days under the principle clause of section 36A(4) of the Act. Second is the intervening stage i.e. between expiry of 180 days and the date when the accused avails his right to statutory bail. Third is the continued detention of the accused pursuant to an order passed by the Special Court under the proviso to section 36A(4) of the Act. The sum of all the periods cannot exceed one year in the whole. The expression '*retrospective*' is defined as "*Looking backward; contemplating what is past; having reference to a state of things existing before the Act in question.*"⁵ Source of power of the Special Court to remand the accused during intervening period is a distinct one. It is derived from section 167(2) Cr.P.C. read with section 36A(4) of the Act owing to the failure of the accused to avail of his right to statutory bail and is not traceable to the report

⁵ Henry Campbell Black, "Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, Blacks Law Dictionary 6th Edition (1990), 1317

of the prosecutor. From this perspective an order extending period of detention on a report filed by the prosecutor beyond 180 days but prior to the accused availing his right to statutory bail operates from the date of filing of the application and cannot be said to have retrospective operation as contended on behalf of the petitioners.

(iii) Power of Special Court to remand an accused pending consideration of the report of the Public Prosecutor:-

14. Any subsequent prayer for statutory bail once the report of the public prosecutor has been filed can be considered only after the prayer of the prosecutor is disposed of. In ***Rambeer Shokeen vs. State (NCT OF DELHI)***⁶ the Apex Court held as follows:-

“As held by the Constitution Bench of this Court, the consideration of application for grant of statutory bail in a situation, as in the present case, was dependent on rejection of prayer of the Additional Public Prosecutor for extension of time. When such prayer is made, it is the duty of the court to consider the report/application for extension of period for filing of the charge-sheet in the first instance; only if it was to be rejected could the prayer for grant of statutory bail be taken forward. In no case, the hearing of statutory bail application precede the consideration of prayer for extension of the period for filing of the charge-sheet made by the Additional Public Prosecutor.”

15. It is true in ***Rambeer Shokeen*** (supra) the report of public prosecutor was filed prior to expiry of 90 days and the right to statutory bail had not crystallized on such day. But the situation would not be different if the report seeking extension had been filed after expiry of the statutory period but before the accused has availed his right to statutory bail. In such cases, filing of a report by prosecutor to extend the period of detention would extinguish the

⁶ (2018) 4 SCC 405

right to statutory bail till the prayer of the prosecutor is turned down. In this regard one may preferably refer to paragraph 25.3 of *M. Ravindran* (supra).

16. As per para 25.3 of *M. Ravindran* (supra), when a report of the prosecutor seeking extension of detention is filed it extinguishes the right of the accused to statutory bail till the prayer of the prosecutor is dismissed. This casts an onerous duty on the Court to dispose of the prayer of the prosecutor at the earliest. Any undue delay would adversely affect the right of an accused to statutory bail if the prayer of the prosecutor is unmerited and ultimately dismissed. The Court must be conscious of this fact and ought not indulge a scheming prosecutor for seeking unnecessary and flimsy adjournments to protract detention and dilate proceedings. But one cannot also lose sight of the fact that there are numerous unavoidable circumstances beyond the control of the Court which causes delay, e.g., illegal cessation of work or even prayers for accommodation at the behest of accused or his counsel. As the right of the accused to seek statutory bail remains suspended till the prayer of the prosecutor is dismissed, the power of the Court to remand the accused under section 167(2) Cr.P.C. read with section 36A(4) of the NDPS Act subsists till the prayer of the prosecutor is disposed of. When the application is dismissed or an extension erroneously granted by the Special Court is set aside by a superior Court the right to statutory bail stands revived in favour of the accused.

(iv) Impact of failure of Special Court to inform the accused of his right:-

17. The other argument advanced on behalf of the petitioners is that the Special Court is under an obligation to inform an accused of his right to

statutory bail. Any infraction of such duty would disable the accused from availing his right to statutory bail. Accordingly, failure of the Court to inform an accused of such right would entitle him to statutory bail.

18. The petitioners appear to have been inspired by the observations of the Apex Court in **Rakesh Kumar Paul** (supra):-

“44. ... we are of the clear opinion that adapting this principle, it would equally be the duty and responsibility of a court on coming to know that the accused person before it is entitled to “default bail”, to at least apprise him or her of the indefeasible right. A contrary view would diminish the respect for personal liberty, on which so much emphasis has been laid by this Court as is evidenced by the decisions mentioned above, and also adverted to in Nirala Yadav.”

19. A three Judge Bench of the Apex Court in **M. Ravindran** (supra) clarified the aforesaid observation as follows:-

“18.10. We agree with the view expressed in Rakesh Kumar Paul that as a cautionary measure, the counsel for the accused as well as the Magistrate ought to inform the accused of the availability of the indefeasible right under Section 167(2) once it accrues to him, without any delay. This is especially where the accused is from an underprivileged section of society and is unlikely to have access to information about his legal rights. Such knowledge sharing by Magistrates will thwart any dilatory tactics by the prosecution and also ensure that the obligations spelled out under Article 21 of the Constitution and the Statement of Objects and Reasons of the CrPC are upheld.”

Personal liberty is the heart and soul of bail adjudication. More so, when the accused invokes his right to statutory bail. In this background, the Apex Court insisted on the duty of the Special Court, as a cautionary measure, to inform the accused of his right to statutory bail. In none of the cited authorities, however, the Apex Court has laid down any axiomatic proposition of law that failure of the Court to inform an accused of his right would automatically

entitle him to statutory bail. Failure of the Court to inform an accused of a valuable right may not always vitiate the proceeding. For example, a Magistrate has a duty to inform an unrepresented accused produced before him of his right to counsel through free legal aid. Failure to do so at the pre-trial/remand stage, though attracting disciplinary proceeding, would not vitiate the proceeding. One may profitably refer to the observations of the Supreme Court in **Mohd. Ajmal Amir Kasab vs. State of Maharashtra**⁷:-

“454. As we see Navjot Sandhu, it is difficult to sustain Mr Ramachandran's submission made on that basis. To say that the safeguards built into Section 32 of POTA have their source in Articles 20(3), 21 and 22(1) is one thing, but to say that the right to be represented by a lawyer and the right against self-incrimination would remain incomplete and unsatisfied unless those rights are read out to the accused and further to contend that the omission to read out those rights to the accused would result in vitiating the trial and the conviction of the accused in that trial is something entirely different. As we shall see presently, the obligation to provide legal aid to the accused as soon as he is brought before the Magistrate is very much part of our criminal law procedure, but for reasons very different from the Miranda rule, aimed at protecting the accused against self-incrimination. And to say that any failure to provide legal aid to the accused at the beginning, or before his confession is recorded under Section 164 CrPC, would inevitably render the trial illegal is stretching the point to unacceptable extremes.”

20. Right to avail statutory bail is a conscious decision of an accused in consultation with his counsel. Failure of the Court to inform the accused of such right cannot by itself lead to the irresistible conclusion that such breach had prevented the accused from availing such right. Reference to **Union Public Service Commission vs. S. Papaiah And Others**⁸ is inapposite. In the cited case, the Apex Court was dealing with the mandatory duty of the Magistrate to issue

⁷ (2012) 9 SCC 1

⁸ (1997) 7 SCC 614

notice upon the de-facto complainant as per ***Bhagwant Singh vs. Commissioner of Police And Another***⁹ prior to accepting a final report. Unlike ***Bhagwant Singh*** (supra), in ***M. Ravindran*** (supra) the Apex Court described the duty of the Court as a 'cautionary measure' and not a mandatory fiat. Hence, I am unable to accept that failure of the Court to inform an accused of his right to statutory bail would automatically entitle him to statutory bail even when he has not availed of such right.

(v) Conditions precedent for extension of period of detention:-

21. Power of the Court to extend the period of detention under proviso to section 36A(4) of the Act is based on the report of a Public Prosecutor indicating the progress of investigation and the specific reasons for detention of the accused beyond 180 days. Conditions precedent for extending the period of detention are as follows:-

- (i) Report must be of the public prosecutor;
- (ii) Report must record the progress of investigation and indicate specific reasons for extending the period of detention beyond 180 days.

22. An application by the investigating agency cannot be treated as a substitute for a report by the public prosecutor. A public prosecutor is an independent prosecuting officer of the State and not a part of the investigating agency. He is an independent statutory authority and a report filed by him endorsing the stance of the investigating agency with regard to the twin

⁹ (1985) 2 SCC 537

requirements, namely, progress of investigation and specific reasons for extension of period of detention is a *sine qua non* for invoking the proviso to section 36A(4) of the Act. Application of mind of the public prosecutor to the progress of investigation and his satisfaction that special reasons exist to seek extension of the period of detention is the crux of the matter. The Public Prosecutor must not act as a post office or a mere mouth piece of the investigating agency. He must independently apply his mind to request of the investigating agency and be satisfied with the progress and existence of special reasons for extension of detention beyond 180 days for completion of investigation. Substance and not the form of the application is important. In ***State of Maharashtra vs. Surendra Pundlik Gadling and Others***¹⁰ the Apex Court highlighted the issue holding as follows:-

“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 Kumar Kedia case [Sanjay Kumar Kedia v. Narcotics Control Bureau, (2009) 17 SCC 631].”

23. In ***Sanjay Kumar Kedia vs. Intelligence Officer, Narcotics Control Bureau and Another***¹¹ the Apex Court held there must be compelling reasons for seeking extension of the period of detention of an accused in the event investigation is not complete. What would constitute specific or compelling

¹⁰ (2019) 5 SCC 178

¹¹ (2009) 17 SCC 631

reasons for extension of the period of detention is a subjective one based on the facts of a particular case. However, the satisfaction of the Court must be based on the materials produced by the prosecutor in support of his report with regard to the progress of investigation and the justification for further detention of the accused for completion of investigation. For example, if the prosecution case involves mere possession of narcotics by a carrier and the investigation is not complete due to failure to obtain report from the chemical examiner with regard to contents of the contraband, the same without anything more may not justify specific reasons for further detention for the following reasons.

24. Firstly, in the aforesaid scenario delay in conclusion of investigation is not attributable to the intricacies of the case but due to inadequate infrastructural facilities resulting in delay in examination of samples. Noticing such infrastructural deficiencies the Apex Court way back in 2013¹² had issued directives to the State and Central Governments to increase the number of central and state forensic laboratories. Notwithstanding such direction progress in the matter is hardly appreciable and one may take judicial notice that in most cases failure to complete investigation within 180 days of detention is primarily due to non-availability of chemical examiner's report. Failure to obtain the report due to systemic reasons indicates indifferent progress in investigation for which the accused ought not suffer. Right to speedy investigation is a facet of the fundamental right to speedy trial. Poor infrastructural facilities resulting in inordinate delay in analysis of samples

¹² Thana Singh vs. Central Bureau of Narcotics, (2013) 2 SCC 590

infracts the basic sovereign duty of the State to maintain adequate infrastructure for efficient investigation of crimes. This lapse resulting in delay in completion of investigation cannot in the absence of any other aggravating circumstance justify extension of detention beyond 180 days. Moreover, steps to obtain the analysis report do not require continued detention of an accused. In other word, there is no reasonable justification for further detention of an accused to facilitate the steps required to complete investigation, namely, obtaining chemical examiner's report.

25. But a different picture would emerge if the justification for further detention is not hinged solely for the purpose of obtaining of chemical examiner's report but is relatable to other aggravating factors, e.g., criminal antecedents of the accused, apprehension of commission of similar offences while on bail, seriousness of the crime demonstrating the involvement of an organized crime syndicate or inter-state/transborder trafficking, abscondence of co-accused whose apprehension may be jeopardized upon the release of the undertrial or the like.

(vi) Presence of accused during consideration of the report of the Public Prosecutor:-

26. Issue whether the accused must be served with a written notice and copy of the application for extension of period of detention is no longer res integra. In **Sanjay Dutt** (supra) the Apex Court clarified that written notice of

the prayer for extension of period of detention to the accused is not necessary.

The Court held as follows:-

“53.

(1) *** **

(2)(a) Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the CrPC and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to Clause (bb) of Sub-section (4) of Section 20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in *Hitendra Vishnu Thakur*. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.”

27. This proposition was reiterated in ***Jigar alias Jimmy Pravinchandra Adatiya vs. State of Gujarat***¹³ wherein the Apex Court held an accused ought to be produced physically or through video linkage at the time when the application for extension is considered and must be informed about such consideration. He is also entitled to raise objection, if any, to such prayer.

28. The Apex Court held as follows:-

“35. As noted earlier, the only modification made by the larger Bench in the case of *Sanjay Dutt* to the decision in the case of *Hitendra Vishnu Thakur* is about the mode of service of notice of the application for extension. In so many words, in paragraph 53(2)(a) of the Judgment, this Court in the case of *Sanjay Dutt* held that it is mandatory to produce the accused at the time when the Court considers the application for extension and that the accused must be informed that the question of extension of the period of investigation is being considered. The accused may not be entitled to get a copy of the report as a matter of right as it may contain details of the investigation carried out. But, if we accept the submission of the respondents that the accused has no say in the matter, the requirement of giving notice by producing the accused will become an empty and meaningless formality. Moreover, it

¹³ 2022 SCC OnLine SC 1290

will be against the mandate of clause (b) of the proviso to sub-section (2) of section 167 of CrPC. It cannot be accepted that the accused is not entitled to raise any objection to the application for extension. The scope of the objections may be limited. The accused can always point out to the Court that the prayer has to be made by the Public Prosecutor and not by the investigating agency. Secondly, the accused can always point out the twin requirements of the report in terms of proviso added by sub-section (2) of Section 20 of the 2015 Act to sub-section (2) of Section 167 of CrPC. The accused can always point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension cannot be granted.”

29. In view of the aforesaid ratios, it can be safely concluded though a written notice and copy of the report of the public prosecutor may not be supplied to the accused, the latter is required to be produced physically or through video linkage when the prayer for extension is considered. He must be made aware of such consideration and would be entitled to raise objection, if any, with regard to compliance of the mandatory requirements of law.

Conclusion:-

30. In light of the aforesaid discussion, the issues are answered as follows:-

1. *Right of an accused to statutory bail upon expiry of the period of detention prescribed under section 36A(4) of NDPS Act is an inchoate one till he avails of his right by seeking statutory bail either by way of an application or even orally. Hence, he cannot be released automatically on statutory bail on the mere expiry of 180 days even if the prosecutor has failed to submit report seeking extension of detention in terms of the proviso to section 36A(4) of the Act before expiry of the said period;*

2. Order extending the period of detention under proviso to section 36A(4) of NDPS Act on a report of the Public Prosecutor submitted after expiry of 180 days but prior to the accused availing of his right does not envisage retrospective operation but the total period of detention under the aforesaid provision cannot exceed one year in the whole;

3. As per Para 25.3 of **M. Ravindran** (supra) the right to statutory bail stands extinguished once the report of the Public Prosecutor seeking extension is filed. Hence, remand of the accused till the prayer of the prosecutor is disposed of is traceable to section 167(2) Cr.P.C. read with section 36A(4) of the NDPS Act. In the event, the application for extension is dismissed or an order extending detention is set aside by a superior court right to statutory bail revives in favour of the accused;

4. Upon expiry of 180 days of detention, Special Court as a cautionary measure ought to inform the accused (particularly if he is from an underprivileged section of society and is unrepresented by a counsel) of his right to statutory bail. However, failure to intimate the accused of his right by itself would not entitle him to statutory bail unless he avails of such relief;

5. Prayer for extension of period of detention must be on the basis of a report of Public Prosecutor which must record progress of

investigation and spell out specific reasons to justify further detention beyond 180 days pending investigation;

6. *Special Court on the basis of the report of Public Prosecutor and materials in support of such plea must be satisfied of the twin requirements, i.e., (a) there is appreciable progress in the investigation and (b) there are specific/compelling reasons to justify further detention pending investigation. Each case has to be decided on its own merits. For example, failure to complete investigation solely on the score of non-submission of FSL report of the samples drawn from the contraband is an institutional shortcoming. This by itself may not justify further detention pending completion of investigation. But if the aforesaid fact situation is coupled with compelling circumstances like complexities in investigation in an organized crime racket or inter-state/ trans-border trafficking, criminal antecedents of the accused giving rise to possibility of recidivism, abscondence of co-accused, etc., constituting 'specific reasons' justifying further detention, the Court may be inclined to extend the period of detention and deny liberty;*

7. *Prayer for extension of period of detention must be decided at the earliest without undue delay preferably within 7 days from making such application. Reasons for adjournment must be specifically stated;*

8. *No written notice or copy of report of Public Prosecutor requires to be served upon the accused or his counsel but the accused or his counsel must be present personally or through video linkage at the time of consideration of the application. Accused and/or his counsel must be aware of such consideration and may raise objection, if any, with regard to compliance of mandatory requirements of law.*

31. The reference is, accordingly, answered.

32. The bail applications and other proceedings may be decided by appropriate benches according to the facts of each case and in light of the aforesaid declaration of law.

(Joymalya Bagchi, J.)

(Suvra Ghosh, J.)

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(Krishna Rao, J.)