HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4148 OF 2018

Shri Surendra Pundlik Gadling & Ors. … Petitioners

Vs.

The State of Maharashtra … Respondent

Mr.R. Sathyanarayanan with Arif Siddiqui, Susan Abraham, Jagdish Meshram I/b Barun Kumar for the Petitioners

Mr.A.A. Kumbhakoni, Advocate General, with Mr.Sardul Singh and Mr.Deepak Thakare, Public Prosecutor and Ms.Rutuja Ambekar, APP, for the Respondent – State

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: OCTOBER 24, 2018

ORAL JUDGMENT:

1. This criminal writ petition is directed against the order dated 2.9.2018 passed by the learned Special Judge and Additional Sessions Judge, Pune, in C.R. No.4 of 2018 wherein the learned Additional Sessions Judge, Pune, has granted an extension of 90 days for further investigation as per the provision of Section 43-D of the Unlawful Activities (Prevention) Act, 1967.

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2. The issue before this Court is, while passing the said impugned order, whether the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the period of 90 days, as contemplated under the proviso to section 43-D of the Unlawful Activities (Prevention) Act, 1967, (for short, “the Act”) was available to the learned Special Judge to grant extension beyond 90 days?

3. The petitioners are the accused facing prosecution under sections 153A, 505(1)(B), 117, 120B r/w section 34 of the Indian Penal Code and under sections 13, 16, 17, 18, 18B, 20, 38, 39 and 40 of the Unlawful Activities (Prevention) Act, 1967. Most of the accused are arrested in the month of June, 2018 on different dates and at present, they are in judicial custody. None of them is on bail. As per section 167(2)(a)(i) and (ii) of Code of Criminal Procedure, the investigation of the offence is to be completed within 90 days if the investigation relates to the offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. The offences committed by the petitioners/accused are falling in this category of punishment and,

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therefore, the period of investigation is fixed of 90 days. However, if the offences are committed under the UAP Act, then, a special provision under section 43-D of the Act for extension of the period of investigation by a further 90 days is available under the Act. In the present case, admittedly, 90 days are over and, therefore, extension of further 90 days is required for investigation. Hence, the application was made by the prosecution before the learned Special Judge and was allowed.

4. The learned Counsel for the petitioners/accused has submitted that a report seeking extension of time should be filed by the Public Prosecutor and the Court after taking into account the said report, may extend the period by a further 90 days i.e., upto 180 days. In the present case, the application was moved by the police officer and no report was submitted by the Public Prosecutor. Thus, there is no compliance of section 43-D of the Act.

5. In support of his submissions, he relied on the judgment of the Supreme Court in the case of **Hitendra Vishnu Thakur & others vs. State of Maharashtra & Ors.**[1] and also on the ratio

1 (1994) 4 SCC 602

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laid down by a learned Single Judge of this Court in the case of **Pahadiya Tulshiram Champala & Ors. vs. State of Maharashtra[2].**

6. Mr.Kumbhakoni, the learned Advocate General, appearing for the State, has vehemently opposed the application and tried to assail the submissions of the learned Counsel for the petitioners/accused. He has argued that the clauses and the terms used in the proviso to section 43-D of the Act are to be understood properly while interpreting the statute. The satisfaction of the Court is the core of the proviso while granting extension and not the report or the application of the Public Prosecutor. The Court has to take into account the progress of the investigation and the reasons for detention of the accused beyond the period of 90 days are to be taken into account by the Judge while extending the period upto 180 days. The Judge has to consider the reasons given as to why it was not possible for the police to complete the investigation within the stipulated period of 90 days. The learned Advocate General has submitted that the Court should not deviate from the core part of the proviso that it is the discretionary power of the Judge and if the Judge is satisfied, then, the period can be

2 MANU/MH/2212/2017

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extended. He argued that this special provision is introduced as the object of the Act is to control unlawful terrorist activities, which damage the stability of the State. While interpreting the section, the doctrine of Purposive Interpretation, which is pre-dominant today, should be applied. He relied on the judgment in the case of **Shailesh Dhairyawan vs. Mohan Balkrishna Lulla**[3] and submitted that the golden rule of interpretation of literal interpretation may not serve the purpose and it may lead to absurdity.

7. The learned Advocate General has submitted that when this application was made by the prosecution for extension of time, the petitioners/accused kept mum and did not raise any objection. Accused No.1 claims to be an experienced criminal lawyer and, therefore, it was expected that the petitioner No.1 would raise the objection by pointing out illegality in the report submitted by the Public Prosecutor. In the order, the Judge has mentioned that all the accused were present, “however, they submitted that they are not willing to submit anything”. He argued that these accused had inchoate right at the time of filing of the application. However, as they did not object, their right to take objection and the ground to

3 (2016) 3 SCC 619

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challenge the said order before the Court is now lost and this objection at this stage is not maintainable. He submitted that thus, the trial Court is justified in extending the period of investigation from 90 to 180 days. In support of his submissions, he relied on the judgment in **Rambeer Shokeen vs. State (NCT of Delhi)**[4].

8. The learned Advocate General has submitted that the accused are prosecuted for very serious offence that they have provoked terrorism and responsible for communal tension in the State of Maharashtra. Due to their unlawful activities, violence occurred at Bhima-Koregaon and they have connections with Communist Part of India (Mao), the banned organization. He has relied on the report submitted by the Investigating Officer dated 30 August 2018, which is marked at exhibit 29 by the Special Court and the said report was submitted through Smt.Ujwala S. Pawar, the District Government Pleader. He pointed out that besides this report (exh. 29) of the Investigating Officer Dr.Shivaji Panditrao Pawar, Assistant Commissioner of Police; Exhibit 30 is an application filed by the learned Public Prosecutor giving all the details of the progress of investigation giving reasons for extension

4 (2018) 4 SCC 405

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of time for further investigation. This application is signed by the District Government Pleader. He also submitted that exhibit 31 is the affidavit of the Investigating Officer Dr Shivaji Pawar, Assistant Commissioner of Police at Swargate Division, Pune city. This affidavit is signed by him and the District Government Pleader has identified him as the affiant.

9. The learned Advocate General has submitted that all these three documents are very clear that the report filed by the Investigating Officer and the affidavit filed by the Investigating Officer are two different documents and exh. 30 is the application filed by the learned Public Prosecutor. The said application may not be in the form of report, however, the Court has to consider the substance, the purpose behind it and the said application is to be treated as a report of the Public Prosecutor. He has submitted that in view of exhibit 30, the requirement of section 43-D and the proviso are undoubtedly complied with.

10. He has argued that the judgment of the learned Single Judge of this Court in the case of **Pahadiya Tulshiram Champala (supra),** is distinguishable as in the said case, rubber stamp was put by the Public Prosecutor and in the present case, below exhibit

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30, no rubber stamp was put by the Public Prosecutor, Pune. Thus, he submitted that the order of the trial Court is justified. The learned Advocate General has relied on the judgment of the Supreme Court in the case of **Atif Nasir Mulla vs. State of Maharashtra**[5] on the power of the Special Court to grant extension of statutory period of 90 days. The learned Advocate General has submitted that the State is ready to file a formal affidavit of the Public Prosecutor in the trial Court.

11. Heard submissions. The affidavit of the Public Prosecutor is not filed till now though matter was adjourned earlier. Let me advert to the law laid down in the cases relied by the learned Advocate General and their applicability to the present case.

12. In the case of **Rambeer Shokeen (supra),** the Supreme Court has dealt with sections 167 and 173 of Code of Criminal Procedure. In that case, the prosecution had filed an application for extension of time for filing chargesheet under Maharashtra Control of Organised Crime Act (MCOC Act) and that too, prior to expiry of 90 days. The accused also filed application for bail under section 167(2) of Code of Criminal Procedure and under Section

5 (2005) 7 SCC 29

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21(2)(b) of MCOC Act. Both the applications were pending and the accused were remanded to judicial custody. The remand continued and 90 days expired. Subsequently, a supplementary chargesheet was filed and thereafter, the trial court rejected the application for statutory bail. The High Court upheld the order of the Special Court and Supreme Court also maintained the order of the High Court. The Supreme Court in that case found the prayer for extension of time in the report submitted by the Additional Public Prosecutor specifying tangible reasons, to be genuine and appropriate. The Supreme Court held that the right to grant of statutory bail would have enured to the accused only after rejection of the request of extension of time prayed by the Additional Public Prosecutor. In the said case, there is no dispute that the report for extension of time was submitted by the Additional Public Prosecutor.

13. In the said judgement, the Supreme Court also held that it has to be borne in mind that it is not a matter of form but one of substance. At the end of the said judgement, the Supreme Court while considering statutory bail has further held as under:

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> "26. It is thus clear that no right had accrued to the appellant before filing of the charge-sheet; at best, it was an inchoate right until 8-3-2017. Resultantly, the question of granting statutory bail after filing of charge-sheet against the appellant and more so during the pendency of report/application for extension of time to file charge-sheet was impermissible. In other words, the application for grant of statutory bail filed by the appellant on 2-3-2017, even if pending, could have been taken forward only if the prayer for extension of period was to be formally and expressly rejected by the Court."

However, in the present case, whether the report / application submitted to the trial Court is by the Public Prosecutor or not is the issue.

14. In the case of **Atif Nasir Mulla (supra),** the offence was under the Prevention of Terrorism Act, 2002 and the application was filed before the Special Court for extension of time u/s 49(2)(d) of the POTA Act, which is the provision similar to section 43-D of the Unlawful Activities (Prevention) Act, in which the Supreme Court has held that the High Court has committed no error in dismissing the appeal preferred by the appellants challenging the extension of further 90 days granted by the Special Court u/s 49(2)(b) of POTA Act. In this case, the application was filed by the Public Prosecutor.

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15. The relevant portion of Section 43-D of the Unlawful Activities (Prevention) Act, 1967 reads as under:

> “43D Modified application of certain provisions of the Code. —
>
> (1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and “cognizable case” as defined in that clause shall be construed accordingly.
>
> (2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—
>
> (a) the references to “fifteen days”, “ninety days” and “sixty days”, wherever they occur, shall be construed as references to “thirty days”, “ninety days” and “ninety days” respectively; and
>
> (b) after the proviso, the following provisos shall be inserted, namely:—
>
> “Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with 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 ninety days, extend the said period up to one hundred and eighty days:
>
> Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody

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of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.”.

(3) ….

(a) ...

(i) ...

(ii) ...

(b) ...

(4) ...

(5) ...

(6) ...

(7) ...

16. Section 167 of the Code of Criminal Procedure is a laudable provision, which limits the period of investigation and thus, vindicates the liberty of an individual when a person is detained behind the bars. Incomplete investigation beyond 90 days cannot be a ground for denying bail to the accused. If the accused is on bail, then, the investigating agency may go on investigating the case for some more period than ninety days and file the report of investigation u/s 173 of the Code of Criminal Procedure. However, when the accused is behind bars, then, the investigation should be complete within 60 days or 90 days, as per the sentence for which the accused is prosecuted. Sub-clauses (i) and (ii) of Section

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167(2)(a) are expressly clear about the period of investigation of 60 days or 90 days within which the police are required to complete the investigation when the accused is arrested and is not granted bail. Under Chapter XXXIII, provisions of bail and bonds are available. Section 167 states that when a person is released on bail, in default of completion of investigation and filing of chargesheet/police report, then, it shall be deemed that the person is so released under the provisions of Chapter XXXIII for the purpose of that Chapter.

17. Certain offences are of very serious and grave nature and, therefore, the special Acts like Prevention of Terrorism Act, 2002, Terrorist and Disruptive Activities (Prevention) Act, 1987, Maharashtra Control of Organised Crime Act, 1999, Unlawful Activities (Prevention) Act, 1967, etc. are enacted by the Legislature. It is very difficult to unearth the roots and cut the branches of such activities and offences within the stipulated period of 90 days and the police genuinely require more time for investigation and, therefore, the provision of statutory bail u/s 167 of the Code of Criminal Procedure should not be a compelling factor for the investigating machinery to hurriedly submit the report

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of a half-done investigation. On taking into account the practical difficulty of the investigating agency, the Legislature has introduced specific sections in such special enactments wherein regular period of investigation of 90 days can be extended further upto 180 days. The provision under section 43-D of Unlawful Activities (Prevention) Act, 1967, is in *pari materia* with section 20(4BB) of Terrorist and Disruptive Activities (Prevention) Act, 1987, section 49 of the Prevention of Terrorism Act, 2002, Section 21(2) of the Maharashtra Control of Organised Crime Act, 1999.

18. The submissions of the learned Advocate General that while interpreting section 43-D, the Court should not deviate from the core object of the provisions of the said section that the satisfaction of the Court for extending the period is most important, cannot be disputed. However, the submissions of the learned Advocate General that the satisfaction of the Court is the goal of the proviso to section 43-D and the medium to achieve is subordinate or not material, cannot be accepted. The position of law is contrary to these submissions. The law states that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. This is an old good law laid down

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in the case of **Nazir Ahmad vs. King-Emperor**[6] and it was reiterated in many cases thereafter. For example, in the case of **Chandra Kishore Jha vs. Mahavir Prasad & Ors.**[7]**.** Hence, for the satisfaction of the conscience, the Judge needs able assistance of the Public Prosecutor, who is expected to file his/her report. The method, medium or ways to reach a goal equally matters in the administration of justice. Extension of time for more than 90 days is a very serious decision curtailing the statutory right of the accused, which is granted by the Legislature u/s 167(2) of the Code of Criminal Procedure. Therefore, the terms and clauses as pointed out by the learned Advocate General in the proviso are to be scrutinized.

19. The section states that if it is not possible to complete the investigation within the period of 90 days, then, the Public Prosecutor to submit a report to the Court. In the said report, as per the proviso, the Public Prosecutor should indicate the progress of the investigation and the specific reasons for detention of the accused beyond the said period of 90 days are to be mentioned. Thereafter, the Court is required to consider the progress so also

6 AIR 1936 P.C. 253 (1)
7 (1999) 8 SCC 266

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the reasons for detention and if its conscience is satisfied, then, the Court may extend the said period and that is upto 180 days. It is to be noted that it is not binding on the Court to extend the period upto 180 days. It is a discretion of the Court to accept the report of the Public Prosecutor or to reject the said report. The discretion necessary to be used judiciously and not arbitrarily. Thus, the Court's power to extend the period of investigation vests in this enabling section.

20. On the background of this factual report and the application, i.e., exhibits 29, 30 and 31, it is to be noted that in the proviso to section 43-D, the Legislature has specified that the report of the Public Prosecutor is a medium for the Court to satisfy its conscience. The Legislature did not mention a report or application of the Investigating Officer. Thus, the provision demands the Public Prosecutor to prepare a report with proper application of mind. In a number of judicial pronouncements, it is made amply clear that the Public Prosecutor is not a mouthpiece of the investigating machinery but he or she is an officer of the Court. The learned Advocate General has rightly submitted that the Public Prosecutor has a difficult task of wearing two hats i.e., to represent the

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Investigating Officer and also to assist the Court. However, to assist the Court, being an officer of the Court, is the first and foremost duty of the Public Prosecutor. Rather, the Court is very much dependent on the Public Prosecutor where the special powers are to be used under these provisions.

21. In the present case, exhibit 29 is undoubtedly a report of 30.8.2018 submitted by Dr.Shivaji Pawar, the Assistant Commissioner of Police, Swargate Division, Pune, below which the designation of District Government Pleader is typed and also mentioned that it was presented through the District Government Pleader. Exhibit 31 is the affidavit of Dr.Shivaji Pawar and the District Government Pleader has identified him. Exhibits 29 and 31 are not disputed. Exhibit 30 is the disputed document, where the controversy is whether the report or application submitted by the Public Prosecutor or it is an application submitted by the Assistant Commissioner of Police. The argument of the learned Advocate General that in view of the cases referred to and the ratio laid down in the case of **Rambeer Shokeen (supra),** substance is material and not the form and although the nomenclature is used as an application, it can be considered as a

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report, is though convincing, the key issue in the present matter as to who has submitted this report or application is not covered under the said case. Exhibit 30 is an application through Assistant Commissioner of Police, Swargate Division, Pune City. He is the applicant. The application is under section 43-D of the Act for extension of the period by further 90 days for investigation and filing chargesheet in the said crime. In the body of the application or report, it is mentioned that the Investigating Officer has arrested the accused. In many places, routinely it is addressed by the applicant by his or her post that he holds and not by the first person. This application is signed by the Assistant Commissioner of Police and learned District Government Pleader has also signed below. In para 10, it is specifically mentioned as under:

> "10) According to the provisions of Section 43(D) of UAPA Act, 1967, if the investigation pertaining to the said Act is not completed within the period of 90 days, then, after filing the **application/report by the investigating officer,** the said period of 90 days can be extended upto the period of 180 days. .... "
>
> (Emphasis added).

Thus, in the said paragraph, the Public Prosecutor has made it clear that this application is filed by the Investigating Officer and not by her. Moreover, the impugned order of the learned Special Judge in para 1 opens as under:

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सत्यमेव जयते

> "1. **This application is filed by the Investigating Officer in Crime No.04/2018** of Vishrambag Police Station for grant of extension of 90 days after 03/09/2018 for further investigation and filing of charge sheet as per the provisions of section 43-D of the Unalwful Activities (Prevention) Act, 1967."
>
> (emphasis added)

Further, in the impugned order, the learned Special Judge has mentioned in para 3 of the order that –

> "Investigating Officer and the learned DGP have submitted their arguments".

In para 4, he again mentioned that –

> "Investigating Officer and learned DGP have submitted…."

Thus, it appears that the Investigating Officer has argued the matter alongwith the Public Prosecutor. The Investigating Officer is the in-charge of the investigation. However, the reigns of the prosecution are necessarily in the hands of the Public Prosecutor. In the present case, not only the application was submitted by the Investigating Officer but he also acted as a Prosecutor by arguing the case alongwith the Public Prosecutor.

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22. There is no bar to make certain query through the learned Public Prosecutor to the investigating officer. On certain occasions, the Court directly calls upon the Investigating Officer to answer a particular query. However, the arguments are to be advanced by the Public Prosecutor, who represents the prosecution.

23. This shows that the Investigating Officer has navigated the application for extension of period by further 90 days, which is not contemplated under the proviso to section 43-D of the Act. It is to be remembered that the Investigating Officer is always interested in the success or the conviction in the case. However, it is the duty of the Public Prosecutor to assist the Court in the process of administration of justice by upholding the law. I rely on the judgment in the case **Hitendra Vishnu Thakur vs. State of Maharashtra (supra),** wherein it is held thus :

> 23. ….. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some

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more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the 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 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. …….”

24. In the said case of **Hitendra Vishnu Thakur (supra)**, the Court dealt with section 20(4) of the TADA Act and section 167(2) of the Code of Criminal Procedure. Section 20(4) of the TADA and section 43-D of the Act are in *pari materia*. It is further held in the case of **Hitendra Vishnu Thakur (supra)** as under:

“23. … 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 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 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.** …. ”

(emphasis added)

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25. In the result, the Writ Petition is partly allowed. Rule made absolute in terms of prayer clause (a) only.

26. At this stage, the learned Advocate General submits on instructions, that the State wants to test the legality of this order before the hon'ble Supreme Court and hence, prays for stay of this order by two weeks. The learned Counsel appearing for the petitioners opposes this oral prayer. However, in view of the submissions of the learned Advocate General, this order is stayed till 1st November, 2018 to enable the State to challenge this order.

(MRIDULA BHATKAR, J.)

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