

This is an application for bail under section 439 of Cr.P.C. in connection with K. Nuagaon P.S. Case No.30 of 2020 corresponding to C.T. Case No.25 of 2020 pending in the Court of learned Special Judge -cum- Addl. Sessions Judge, Balliguda for alleged commission of offences under sections 20(b)(ii)(C), 25, 27-A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act').

The prayer for bail of the petitioner has been rejected by the learned Special Judge -cum- Addl. Sessions Judge, Balliguda by order dated 17.06.2020.

The prosecution case, in short, is that on 09.06.2020 at about 8.00 p.m. as per direction of I.I.C., K. Nuagaon P.S., the informant Prakash Kumar Pradhan, S.I. of Police, K. Nuagaon police station along with his staff had been to perform their night patrolling duty and while performing their duty at Purun Nuagaon area, at about 8.10 p.m. the informant got information from D.S.P. I/C Balliguda police station Sri Manoj Kumar Pujhari that a Mahindra Bolero Maxx Pik-Up vehicle bearing Registration No. WB 57-B-9682 crossed Balliguda Naka post in a high speed in suspicious manner. The informant and his staff proceeded immediately towards Daringbadi and on the way at Sirtiguda bazaar, due to rash and negligent driving of the driver of the said

Bolero vehicle, it slipped near a under construction bridge and could not proceed ahead. S.I. Sri Pradhan could notice four persons who were sitting inside the Bolero started running to evade arrest by the police. However, they could manage to catch hold of two persons while other two persons fled away from the spot. On interrogation, the apprehended persons disclosed their identity so also identity of two absconding accused persons and confessed their guilt that they were transporting ganja towards Kolkata for selling purpose. They also disclosed that they procured ganja from one Sunil Digal of village Sindrigaon. The informant sent constable C/77 Sibaram Mallick to arrange two independent witnesses and a weighman from the locality and the informant also commanded the driver HG/498 Babula Pradhan to bring his laptop, printer, generator, brass seal, packing and sealing materials with requisition for deputation of a gazetted police officer to the spot as the spot was highly naxal affected area. On being asked in Hindi language, the accused persons agreed to be searched in presence of gazetted officer. Accordingly, the accused persons and other independent witnesses were searched personally. The S.D.P.O., Balliguda recovered cash of Rs.2560/- one Motorola mobile phone from accused Choton Sk. He also recovered one DL, one Xerox copy of

RC book of Bolero vehicle bearing No. WB 57-B-9682 stands recorded in the name of owner Jahanara Bibi Sekh, one insurance certificate of that vehicle, one Vivo mobile phone from accused Jayanal Ansari and seized those articles and prepared seizure list at the spot in presence of witnesses. The informant searched the vehicle in presence of S.D.P.O. and independent witnesses and found twenty six polythene packets wrapped with cello tape kept in a concealed manner under ten potato bags in the Dala of the vehicle. The informant opened all the twenty six bags and kept it on a polythene on the ground and homogenously mixed and prepared eleven numbers of new packets (ten packets containing 12 kgs 200 grams each and another one packet containing 10 kgs 800 grams), in total 132 kgs. 800 grams and without bags, it was 131 kgs. 700 grams. The ganja was weighed and seized and brought to the police station along with accused persons Choton Sk and Jayanal Ansari. The informant presented a written report at the police station and the I.I.C., K. Nuagaon P.S. registered the case and directed S.I. P. Nayak to take up investigation of the case. In course of investigation, the I.O. arrested the accused persons Choton Sk and Jayanal Ansari on the same day and forwarded them to Court on 11.06.2020. The petitioner Naresh Digal was

arrested on 16.06.2020 and forwarded to Court on the same day.

There is no dispute that the ganja seized in the case comes under 'commercial quantity' as defined under section 2(viia) of the N.D.P.S. Act. In view of sub-section (4) of section 36-A of the N.D.P.S. Act, for offences involving commercial quantity, the references in sub-section (2) of section 167 of Cr.P.C. to 'ninety days' shall be construed as reference to 'one hundred and eighty days', in other words, if the investigation of the case is not completed within one hundred and eighty days of the date of first remand of an accused to custody, he would ordinarily be entitled to default bail in view of the proviso to sub-section (2) of section 167 of Cr.P.C. but the proviso to sub-section (4) of section 36-A of the N.D.P.S. Act states that if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days. Therefore, if the Special Court extends the period of completion of investigation exercising the power as conferred under sub-section (4) of

section 36-A of the N.D.P.S. Act then the accused would not be entitled to default bail under section 167(2) of Cr.P.C. on the ground of non-submission of final form within one hundred and eighty days of the date of his first remand to custody inasmuch as it cannot be said there is any default on the part of the investigating officer in not filing final form within the said period as time for completion of investigation has been extended.

In the case in hand, the petitioner was forwarded to the Court of learned Special Judge, Balliguda on 16.06.2020 and one hundred and eighty days period as per sub-section (4) of section 36-A comes to end on 13.12.2020. It appears that on 04.12.2020, a prayer was made by the investigating officer before the learned trial Court by filing a petition through the Special Public Prosecutor to extend the period of completion of investigation for ninety days more. Copy of the petition was served on the learned defence counsel on the very day i.e. on 04.12.2020 and on the same day, order was passed by the learned Special Judge in allowing the petition filed by the learned Special Public Prosecutor and the investigating officer was directed to complete the investigation and submit charge sheet in a further period of ninety days. The operative portion of the

order dated 04.12.2020 passed by the learned Special Judge is extracted herein below:

“.....The proviso to sub-section (4) of section 36-A of the N.D.P.S. Act makes it clear that, if it is not possible to complete the investigation within the period of 180 days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of investigation and the specific reasons for detention of the accused beyond the period of 180 days. The provision of sub-section (4) of section 36-A of the N.D.P.S. Act has been enacted for the purpose of declaring a law relating to the narcotic drugs and to make stringent provision for the regulation of operations relating to narcotic drugs and thus N.D.P.S. Act being a Special Act, it overrides the general provision of s.167(2) of Cr.P.C. **[Rasheek v. State of Karnataka 2007 Cri.L.J. 2316 (Kant.)]**

In view of the said provision, the petition filed by the learned Special P.P. is allowed. The I.O. is directed to complete the investigation and to submit the charge sheet further in a period of 90 days. Put up on the date fixed awaiting Final Form. Send an extract of this order to the I.O...”

Mr. Das, learned counsel for the petitioner contended that since copy of such extension petition was served on the

learned defence counsel on 04.12.2020 and extension order was also passed on the very same day, the accused did not get a fair opportunity to have his say and to oppose the extension sought for by the prosecution and in all fairness of things, the learned Special Judge should have given some reasonable time to the learned defence counsel to obtain instruction from the petitioner who was in jail and file his objection, if any, to such extension petition and only thereafter on hearing the learned counsel for both the sides, the Court could have passed any order either allowing or rejecting the prayer for extension in accordance with law. It is further contended that the approach of the learned Special Judge in disposing of the petition for extension hurriedly on the very day of filing without giving opportunity to the accused to file his objection, has resulted in causing miscarriage of justice and therefore, the extension order is not sustainable in the eye of law and on that ground alone, the petitioner is entitled to be released on bail. He further contended that the application filed by the petitioner under section 167(2) of Cr.P.C. to enlarge him on default bail was rejected without application of mind and therefore, in view of period of detention in judicial custody, the bail application of the petitioner should be favourably considered.

Mr. Parida, learned counsel for the State, on the other hand, produced the case diary and submitted that since the copy of the extension application was served on the learned defence counsel, it was his duty to seek for time to file objection and since there is nothing in the order dated 04.12.2020 that the defence counsel sought for any time to file his objection, it presupposes that the defence counsel or the accused, had no objection to such extension and therefore, it cannot be said that there is any infirmity in the order dated 04.12.2020 passed by the learned Special Judge in extending the completion of investigation for a further period of ninety days in view of the power conferred under section 36-A(4) of N.D.P.S. Act.

In the case of **Lambodar Bag -Vrs.- State of Odisha reported in (2018)71 Orissa Criminal Reports 31**, a question came up for consideration as to whether extension for completing the investigation beyond the prescribed period of one hundred and eighty days can be granted under section 36-A(4) of the N.D.P.S. Act on the report of the Public Prosecutor without any notice to the accused to have his say regarding the prayer for grant of extension. While answering the said question, this Court relying upon the decision of the Hon'ble Supreme Court in the case of **Hitendra Vishnu Thakur -Vrs.- State of**

Maharashtra reported in A.I.R. 1994 Supreme Court 2623

held that even though sub-section (4) of section 36-A of the N.D.P.S. Act does not specifically provide for issuance of notice to the accused on the report of the Public Prosecutor before granting extension, but it must be read into the provision both in the interest of the accused and the prosecution as well as for doing complete justice between the parties and since there is no prohibition to the issuance of such a notice to the accused, no extension shall be granted by the Special Court without such notice. Moreover, the report has to be filed by the Public Prosecutor in advance and not on the last day, so that on being noticed, the accused gets fair opportunity to have his say and oppose the extension sought for by the prosecution.

An order for release on bail under the proviso (a) of section 167(2) of the Cr.P.C. is an order on default on the part of the prosecution to file charge sheet within the prescribed period. It is a legislative command and not a judicial discretion of the Court. An indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in completing the investigation within the period prescribed. If an accused entitled to be released on bail under the proviso (a) makes an application before the Magistrate, there

is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not and whether a challan has been filed or not. The merits of the case are not to be gone into while releasing the accused on bail under proviso (a) to section 167(2) Cr.P.C.

In the case in hand, the period of completion of investigation as per sub-section (4) of section 36-A of the N.D.P.S. Act from the first date of remand of the petitioner to custody was one hundred eighty days which was expiring on 13.12.2020 and the said period of investigation could have been extended as per proviso to the section in the manner it is provided which must be after complying principle of natural justice and after providing fair opportunity to the petitioner to have his say and oppose the extension sought for by the prosecution.

Therefore, when a petition was filed by the investigating officer in advance on 04.12.2020 (which was not the date fixed in the case earlier) through the Special Public Prosecutor to extend the period of completion of investigation for a further period of ninety days and copy of the petition was also served on the learned defence counsel on 04.12.2020, since nine

days more period was still there for completion of one hundred eighty days, in all fairness of things, the case should have been posted to some other date by the learned Special Judge to consider the petition on merit by giving opportunity to the learned defence counsel to obtain instruction from the petitioner, who was in jail custody and to file his objection, if any, to such petition. If no objection would have been filed from the side of the petitioner, then the Court after hearing both the sides could have passed the order and similarly, if any objection would have been filed from the side of the petitioner, the Court could have passed the order considering the objection in accordance with law after giving opportunity of hearing to both the sides. In this case, when the order was passed on the very day the extension petition was served on the defence counsel and in the order, there is nothing to show that the defence counsel was aware that the petition would be considered on that day itself and there is also nothing that the defence counsel did not want to file any objection after taking instruction from the petitioner and there is also nothing that the defence counsel was present at the time of hearing of the petition and when it was the duty on the part of the Court to grant some reasonable time to the defence counsel to obtain instruction from the petitioner to file objection, if any,

the same having not being done in this case, it cannot be said that fair opportunity was provided to the petitioner to have his say and oppose the extension sought for by the prosecution. Mere serving a copy of the extension petition by the prosecution on the defence counsel and that to on a date which was not earlier fixed, is not sufficient to assume that fair opportunity was provided to the petitioner.

In that view of the matter, I am constrained to hold that the order of extension to complete the investigation granted by the learned Special Judge as per order dated 04.12.2020, is not in accordance with law and therefore, the petitioner is entitled to be released on bail on that ground itself. Accordingly, the prayer for bail is allowed.

Let the petitioner Naresh Digal be released on bail in the aforesaid case on furnishing a bail bond of Rs.2,00,000/- (rupees two lakhs) with two local solvent sureties each for the like amount to the satisfaction of the learned Court in seisin over the matter with further conditions as the learned Court may deem just and proper including the condition that he shall appear before the learned trial Court on each date to which the case would be posted for trial.

Violation of any of the conditions shall entail cancellation of bail.

The BLAPL is accordingly allowed.

Urgent certified copy of the order be granted on proper application.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
Dated 27th January 2021/PKSahoo