

---

*J.S. Mehndiratta*

*Before Satish Kumar Mittal & Inderjit Singh, JJ.*

**KAMAL CHAUHAN—Appellant**

*versus*

**NATIONAL INVESTIGATION AGENCY—Respondents**

**CRA No. 554-DB of 2012**

July 3, 2012

*National Investigation Agency Act, 2008 - S. 21 - Unlawful Activities (Prevention) Act, 1967 - Ss. 16, 18, 43-C & 43-D (2)(b) - Indian Penal Code, 1860 - Ss. 302, 307, 124A, 438, 440 - Railway Act - Ss. 150, 151 & 152 - Explosive Substances Act, 1908 - Ss. 3, 4 & 6 - Prevention of Damage to Public Property Act, 1984 - S. 3/4 - Code of Criminal Procedure, 1973 - S. 167 - (Samjhauta Express Blast Case) - Appeal against the order whereby the period for completion of investigation was extended to 180 days from 90 days - Challenge on the ground that since the Accused was neither issued*

*any notice of the application nor was he/his counsel present at the time of passing of the impugned order, thus the principle of natural justice has not been complied with. Secondly, the time period could not have been extended as report of the public prosecutor had not been placed before the court - Held mandatory requirement of issuing notice to the accused was not followed - Before extending the time to complete the investigation, no opportunity was granted*

*Held*, that neither the application nor the impugned order indicates that the Public Prosecutor moved the said application after proper application of his mind and after he was satisfied about the progress on the investigation. Though the provision of Section 43-D (2) (b) of the UA (P) Act has not come for consideration before any court, but undisputedly, these provisions are para materia to clause (bb) of subsection (4) of Section 20 of the TADA, which has been considered by the Hon'ble Supreme Court in the aforesaid two judgments. [Hitendra Vishnu Thakur v. State of Maharashtra; 1994 SCC (Criminal) 1087 and Sanjay Dutt v. State through CBI, Bombay (II); (1994) 5 SCC 410] Therefore, interpretation given in these two judgments would be squarely applicable to the provision of Section 43-D (2) (b) of the UA (P) Act.

(Para 8)

*Further held*, that in the present case, the mandatory requirement of issuing notice to the accused was not followed. Even on 9.5.2012, when the application was moved by the investigating agency seeking extension of time for completing investigation and allowed, the accused was not present. Before extending the time to complete the investigation, no opportunity was granted to the accused to oppose the said prayer. Thus, the principle of natural justice was violated. The impugned order has caused serious prejudice to the accused, because his indefeasible right to seek an order of his release on bail was being defeated by extending the time. The other requirements of moving the application through Public Prosecutor and filing the report of the Public Prosecutor, as indicated in the aforesaid judgments, have also not been complied with.

(Para 9)

Appeal allowed.

Venect Sharma, Advocate, *for the appellant.*

Sukhdeep S. Sandhu, Advocate, *for the respondent.*

**SATISH KUMAR MITTAL , J.**

(1) Accused Kamal Chauhan has filed this appeal under Section 21 of the National Investigation Agency Act, 2008 (hereinafter referred to as 'the Act') challenging the order dated 9.5.2012 passed by the NIA, Special Court, Panchkula, whereby the application moved by the respondent for extending the period of completing investigation from 90 days to 180 days was allowed.

(2) Accused Kamal Chauhan was arrested on 12.2.2012 in NIA Case No. 9 of 2010, which was registered under Sections 16, 18 of the Unlawful Activities (Prevention) Act, 1967 [hereinafter referred to as 'the UA (P) Act'], 302, 307, 124A, 438, 440 of the Indian Penal Code, 150, 151, 152 of the Railway Act, 3, 4, 6 of the Explosive Substances Act, 1908 and 3/4 of the Prevention of Damage to Public Property Act, 1984, pertaining to the Samjhauta Express Train blast, in which 68 persons died and 12 other persons were injured. During investigation, after initial police remand, accused Kamal Chauhan was sent to judicial custody and the investigation period of 90 days as provided under Section 167 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') read with proviso to Section 43-D (2) (b) of the UA (P) Act was going to expire on 11.5.2012. On 9.5.2012, an application, seeking extension of the period of completing investigation and filing supplementary challan against the accused from 90 days to 180 days, was moved by the National Investigation Agency through Inspector R.S. Jambwal. In the application, it was stated that investigation of the case is at the crucial stage and is spread over the different states to trace out the origin of the explosive used. It was further stated that travelling records of the accused persons from Madhya Pradesh to New Delhi, records pertaining to stay at New Delhi, details of communication used during the pre/post bomb explosion, bank records of the accused person were required to be verified. It was also stated that the other close associates of the accused were evading their arrest and if the accused gets free under the default clause, the other co-accused will not be apprehended. The NIA, Special Court, allowed the said application on 9.5.2012, while observing as under :-

“Keeping in view the fact that investigation is under progress and investigation is spread over to many parts of the country and the investigating agency has to scrutinise the voluminous

record of Railway which is five years old as per prosecution, the application is allowed and time is extended to 180 days for filing challan under section 167 Cr.P.C read with section 43-D (2) (b) of UA (P) Act.”

It is pertinent to mention here that at the time of allowing the aforesaid application, neither the accused was present in the court nor the notice of the said application was issued to him. The aforesaid order was passed without providing an opportunity of hearing to the accused.

(3) Accused Kamal Chauhan has challenged the aforesaid order on two grounds. Firstly, that before granting extension of the period to complete investigation, the accused must be issued notice, so that he may be able to oppose such prayer on all legitimate and legal grounds, available to him. In the present case, neither the notice of the application was issued to the accused or his counsel, nor the accused was present at the time of passing of the impugned order. Thus, the principle of natural justice has not been complied with in this case. Therefore, the impugned order is illegal and liable to be set aside. Secondly, learned counsel argued that before extending the time to complete investigation, report of the Public Prosecutor was not placed before the court and without examining such report, the time has been extended by the trial court. It has been further argued that the application seeking extension of the time to complete investigation could be filed by the Public Prosecutor after applying his independent mind to the request of the investigating agency, but the investigating agency itself has no right to file an application seeking extension of time to complete the investigation. In the present case, without filing the report of the Public Prosecutor, straight way an application was filed by the investigating agency, which was illegally allowed without application of mind, without scrutinising the progress of the investigation and without furnishing the reasons for granting extension of time to complete the investigation. In support of his submissions, learned counsel for the appellant relies upon *Hitendra Vishnu Thakur versus State of Maharashtra (1)* and *Sanjay Dutt versus State through C.B.I., Bombay (II) (2)*.

---

(1) 1994 SCC (Cr.) 1087

(2) (1994) 5 SCC 410

(4) We have heard learned counsel for the parties on the aforesaid two issues and also gone through the impugned order as well as the application filed by the investigating agency through Inspector R.S. Jambwal, seeking extension of the period to complete investigation.

(5) Section 43-C of the UA (P) Act makes the provisions of the Code applicable to the investigation insofar as they are not inconsistent with the provisions of the UA (P) Act. Sub-section (2) of Section 43-D of the UA (P) Act makes Section 167 of the Code applicable in relation to a case involving an offence punishable under the UA (P) Act subject to the modification that in sub-section (2), the reference 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 satisfied with the report of the Public Prosecutor. After the proviso to clause (b), the following proviso was inserted :

“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.”

Thus, as per the aforesaid proviso, if it is not possible for the investigating agency to complete the investigation within ninety days, on the application, the court may, after being 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.

(6) The aforesaid proviso is exactly similar to proviso (bb), which was inserted after clause (b) of sub-section (4) of Section 20 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as ‘the TADA’). Proviso (bb) came for consideration before the Hon’ble Supreme Court in *Hitendra Vishnu Thakur’s case (supra)*. In that case, it was held that if the investigation is not completed within the period provided under Section 167 (2) of the Code read with Section 20 (4) (b) of the TADA, then on account of default of the investigating agency in completing the investigation within the maximum period prescribed or

extended, as the case may be, an indefeasible right accrues in favour of the accused to seek an order of his release on bail. When the charge sheet is not filed within the prescribed or the extended time, the accused would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 of the TADA read with Section 167 of the Code. Keeping in view the said right of the accused, it was held in that case that when the Public Prosecutor submitted the report to the court for grant of extension of time under clause (bb), then the court is required to issue notice to the accused before granting extension to the prosecution, so that the accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. It was held as under :-

“It is true that neither clause (b) nor (bb) of sub-section 4 of Section 20 of 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 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 a 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.....

x

x

x

An application for grant of bail under Section 20 (4) has to be decided on its own merits for the default of the prosecuting agency to file the charge-sheet within the prescribed or the extended period for completion of the investigation uninfluenced by the merits or the gravity of the case. The Court has no power to remand an accused to custody beyond the period prescribed by clause (b) of Section 20 (4) or extended under clause (bb) of the said section, as the case may be, if the challan is not filed

only on the ground that the accusation against the accused is of a serious nature or the offence is very grave. These grounds are irrelevant for considering the grant of bail under Section 20 (4) of TADA.”

Regarding the procedure for obtaining such extension, it was further observed that a plain reading of clause (bb) of sub-section 4 of Section 20 of TADA point out that the legislature has provided for seeking extension of time for completion of investigation on a report of the Public Prosecutor. The legislature did not purposely leave it to an Investigating Officer to make an application for seeking extension of time from the court. But when the investigation is not completed within the stipulated time and where it becomes necessary to seek more time for completion of investigation, the investigating agency must submit itself to the scrutiny of the Public Prosecutor in the first instance and satisfy him about the progress on the investigation and furnish reasons for seeking further custody of an accused. It was held that the Public Prosecutor is an important officer of the State Government, but he is not 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. He will not act merely as a post office or a forwarding agency. The Public Prosecutor has a duty to examine the reasons given by the investigating agency for seeking extension of time. He may disagree with the investigating agency and may refuse to submit report to the court to seek extension of time. It was further observed as under :-

“Thus for seeking 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 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 his request or application and report, but his report, as envisaged under clause (bb), must disclose 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 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 consequences 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. Where either no report as is envisaged by clause (bb) is filed or the report filed by the Public Prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court "shall" release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the Public Prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the justification, from the report of the Public Prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes indefeasible and cannot be defeated by reasons other than those contemplated by sub-section (4) of Section 20, as discussed in the earlier part of this judgment. We are unable to agree with Mr. Madhava Reddy or the Additional Solicitor General Mr. Tusli, that even if the Public Prosecutor 'presents' the request of the Investigating



Officer to the court, or 'forwards' the request of the Investigating Officer to the court, it should be construed to be the report of the Public Prosecutor. There is no scope for such a construction, when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without adding or substitution of any expression in it. We have already dealt with the importance of the report of the Public Prosecutor and emphasised that he is neither a 'post office' of the investigating agency nor its 'forwarding agency' but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub-section (4) of Section 20. Since, the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the Section and in no other manner. A Designated Court which over-looks and ignores the requirements of a valid report fails in the performance of one of its essential duties and renders its order under clause (bb) vulnerable. Whether the Public Prosecutor label his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the fact of it, that he has applied his mind and is satisfied with the progress of the investigation and genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (supra). Even the mere reproduction of the application or request of the Investigating Officer by the Public Prosecutor in his report, without demonstration of the application of mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the accused default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court. Moreover, no extension can be granted to keep an accused in custody beyond

the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension.”

The Hon’ble Supreme Court in *Sanjay Dutt’s case (supra)* again considered the scope of clause (bb) of Section 20 (4) of the TADA. The requirement of issuing notice to the accused before granting extension of time to complete the investigation was slightly modified and it was observed as under :-

“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 Code of Criminal Procedure 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.”

(7) Learned counsel for the respondent neither controverted the aforesaid legal position nor cited any contrary judgment.

(8) It is conceded position that on 9.5.2012, when the time to complete investigation was extended by the NIA, Special Court, neither the accused was present nor any notice on the application filed by the investigating agency, seeking extension of time, was issued to him or his counsel. It is also apparent from the impugned order that the application for extension of time was moved through Inspector R.S. Jambwal, which was also signed by the Public Prosecutor. But neither the application nor the impugned order indicates that the Public Prosecutor moved the said application after proper application of his mind and after he was satisfied about the progress on the investigation. Though the provision of Section 43- D (2) (b) of the UA (P) Act has not come for consideration before

any court, but undisputedly, these provisions are para materia to clause (bb) of subsection (4) of Section 20 of the TADA, which has been considered by the Hon'ble Supreme Court in the aforesaid two judgments. Therefore, interpretation given in these two judgments would be squarely applicable to the provision of Section 43-D (2) (b) of the UA (P) Act.

(9) In the present case, the mandatory requirement of issuing notice to the accused was not followed. Even on 9.5.2012, when the application was moved by the investigating agency seeking extension of time for completing investigation and allowed, the accused was not present. Therefore, there was no implied notice to him, as interpreted in *Sanjay Dutt's case* (supra). Before extending the time to complete the investigation, no opportunity was granted to the accused to oppose the said prayer. Thus, the principle of natural justice was violated. The impugned order has caused serious prejudice to the accused, because his indefeasible right to seek an order of his release on bail was being defeated by extending the time. The other requirements of moving the application through Public Prosecutor and filing the report of the Public Prosecutor, as indicated in the aforesaid judgments, have also not been complied with.

(10) In view of the above, we are of the opinion that the impugned order passed by NIA, Special Court, Panchkula, cannot be sustained, as the same was passed without any notice to the accused or providing an opportunity of hearing to him. Consequently, the order dated 9.5.2012 passed by NIA, Special Court, Panchkula, is hereby set aside and the matter is remanded to the said court with a direction to consider and decide the prayer of the prosecution for extension of time to complete investigation, after issuing notice to accused Kamal Chauhan and providing an opportunity of hearing to him, by passing a speaking order within ten days, without being influenced by its earlier order. Keeping in view the facts and circumstances of the present case and in the interest of justice, we extend the period of completing investigation for ten days, i.e. upto the fresh decision of the application.

(11) Registry is directed to immediately send a copy of this order to NIA, Special Court, Panchkula.

(12) Accordingly, the appeal is disposed of.