

GAHC010000072023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./5/2023

FARHAD ALI @ FARHAD ALI AHMED
S/O MUSLIM UDDIN @ MUSLIM UDDIN AHMED
PERMANENT RESIDENT OF KATAZHAR
P.S. GABARDHANA, DIST. BAKSA, ASSAM
TEMPORARY RESIDENT OF AL AMIN NAGAR, WARD NO. 9, P.O. AND P.S.
BARPETA ROAD, DIST. BARPETA, ASSAM, PIN-781315.

VERSUS

THE STATE OF ASSAM
TO BE REP. BY THE PP, ASSAM.

Advocate for the Petitioner : MR S BORTHAKUR

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT

Date : 06-01-2023

Heard Mr. S. Borthakur, learned counsel for the petitioner. Also heard Mr. M. Phukan, learned Public Prosecutor, Assam appearing for the State respondent.

2. In this petition, under Section 482 of the Code of Criminal Procedure, the petitioner, namely, Farhad Ali @ Farhad Ali Ahmed, has challenged the correctness or otherwise of the order dated 22.12.2022, passed by the learned Chief Judicial Magistrate, Kamrup (M)

at Guwahati, in Special Operation Unit (SOU) P.S. Case No.02/2022, under sections 120(B)/124(A)/153A /353 of the IPC, with added Section 18 of the UA(P) Act.

3. It is to be mentioned here that, vide the impugned order dated 22.12.2022, the learned CJM, Kamrup (M) at Guwahati allowed the prayer of the I.O., namely, Smti. Aseema Kalita, DSP, for extending the period of investigation to 180 days, as per provision specified in Section 43-D (2)(b) of the UA(P) Act, so as to enable her to complete the investigation.

4. In order to decide the controversy at hand, with greater precision, it would be beneficial to briefly refer to the facts of the case leading to passing of the impugned order dated 22.12.2022.

“On 21.09.2022, Smti. Pallabi Majumdar, APS, Addl. S.P., Special Branch, Assam at Kahilipara, Guwahati an FIR lodged, with the Officer-in-Charge, Special Operation Unit (SOU) P.S., Assam, Kahilipara, to the effect that it has been found from the inputs received from reliable sources that Popular Front of India, (PFI) with its State office in Guwahati, is making all round effort to formant communal stride throughout the State of Assam and the members trying to whip communal passion and sentiments of the religious minority community by criticizing the policy of the Government, with communal overtone including Citizenship Amendment Act (CAA), National Registration Certificate (NRC), D-Voters, new State Education Policy, Cattle Protection Act, extention of AFSPA, TET Examination, Agnipath Scheme, Eviction of encroachers from the Govt. land and termed these actions of the Government as direct attacks upon the Muslim Community and they also used to obstruct the Government servants in performing their duty by using force in Goalpara, in Bhalukdubi Old Science Academy Hall, Goalpara on 08.09.2018, violating the prohibitory order under Section 144 of the Cr.P.C. and on 17.02.2022, during celebration of the Foundation Day, the Baksa District unit of the PFI raised inflammatory slogans by violating the prohibitory order under Section 144 Cr.P.C. and to divide the society on religious line and obstructing the Government in executing its policies, they use cyber space to provoke the people for defying the Government and the PFI expressed solidarity with their National Executive in the campaign “Save The Republic Programme” on 26.01.2022 to 15.08.2022 and they provoked people against the Government and tried to

formant and spread mistrust among public against the Government and they are also misleading the people by taking up the issues, which occurred outside the State and mis-campaigning through social media tools like twitter, e-postering, organizing webinars through ZOOM or Google Meet and the same includes highlighting of arrest made in UP, Bihar, Delhi and challenging the Karnataka High Court verdict on Hijab issue, Bilkis Bano Issue, Court verdict on the Gyanvapi Mosque, criticizing the Supreme Court verdict on the Ram Janambhoomi-Babri Masjid Issue, abrogation of Article 370 of the Constitution of India and they also organizing protest on such issued in communally sensitive areas, like Badarpur, Karimganj, Barpeta, Baksa, Kamrup (R), Goalpara and Kamrup (M) District, etc. and also trying to spread communal feelings in Muslim dominated pockets of Barpeta, Goalpara and Badarpur, by whipping their sentiments on the issue of communal violence, Ram Navami and Hanuman Jayanti, that took place in Rajasthan and (1) Abu Sama Ahmed, (2) Robiyool Hussain, (3) Nazrul Islam Bhuyan, (4) Aminul Hoque, (5) Hafiz Rafiqool Islam, (6) Abdul Razzak, (7) Farhad Ali Ahmed, (8) Faizur Rahman, (9) Bazlul Karim, (10) Khalilur Rahman, (11) Mufti Rahman Ullah, (12) Dr. Minarul Sheikh and (13) some others are actively involved in the above noted conspiracy of propagating anti-establishment propaganda with communal overtone, with a view to polarizing the society on religious line and they pose a serious threat to the internal security of India.”

5. Upon the aforesaid FIR, the Officer-in-Charge, SOU P.S., has registered a case, being SOU P.S. Case No.02/2022, under sections 120(B)/124(A)/153A/353 of the IPC, with added Section 18 of the UA(P) Act and thereafter, arrested some accused, including the present petitioner on **22.09.2022**, and forwarded them to the jail hajoot. Thereafter, on 22.12.2022, the I.O. made a prayer before the learned CJM, Kamrup (M) at Guwahati for extension of the period of investigation up to 180 days, on the ground that during the course of investigation, collection of the Call Details Record (CDR) of the accused persons, date extraction report of accused namely, Abu Sama Ahmed from the FSL, Kahilipara and the seizure of incriminating documents established their involvement into the case and the date extraction report of other exhibits from FSL, Kahilipara are yet to be collected and there remains to collect some more evidence and therefore, it is contended to extend the period of investigation up to 180 days, as per provision specified in Section 43-D (2)(b) of

the UA(P) Act.

6. Mr. S. Borthakur, learned counsel appearing for the petitioner submits that some of the dates are very much relevant here in this case. Mr. Borthakur submits that the FIR was registered on 21.09.2022, and the petitioner and other co-accused were arrested on 22.09.2022, and forwarded them to the jail hajoot and the statutory period of detention i.e. 90 days were over on 21.12.2022. Mr. Borthakur, further submits that thereafter, on 22.12.2022, the petitioner along with other co-accused have filed a petition for granting them default bail and then, on the same day, the I.O. has made a prayer, vide Annexure-H for extension of the period of investigation up to 180 days. And thereafter, vide the impugned order, dated 22.12.2022, the learned Court below has allowed the prayer of the I.O. and dismissed the bail petition, filed by the petitioner and other co-accused.

7. Mr. Borthakur submits that the impugned order dated 22.12.2022, suffered from manifest illegalities on the following four counts: -

Firstly, Mr. Borthakur submits that the learned CJM, Kamrup (M) at Guwahati has no jurisdiction to extend the period of investigation from 90 days to 180 days. According to him, the power of such extension is vested with the Special Judge, under the UA(P) Act only. In support of his submission, Mr. Borthakur, has referred one case law i.e. **Sadique and others vs. State of Madhya Pradesh**, reported in **(2022) 6 SCC 339**.

Secondly, Mr. Borthakur submits that while the learned CJM, Kamrup (M) at Guwahati has extended the period of investigation, the learned Court below has neither heard the learned Public Prosecutor nor procured a report from the learned Public Prosecutor, which according to Mr. Borthakur is mandatory in view of the law laid down by the Hon'ble Supreme Court in the case of **Hitendra Vishnu Thakur and others vs. State of Maharashtra and others**, reported in **(1994) 4 SCC 602**.

Thirdly, Mr. Borthakur submits that while extending the period of investigation, the learned CJM, Kamrup (M) at Guwahati never issued notice to the accused persons nor heard them and they were never produced before him at the relevant time, which according to Mr. Borthakur is mandatory in view of the law laid down by

Hon'ble Supreme Court in the case of **Jigar @ Jimmy Pravinchandra Adatiya vs. State of Gujarat**, reported in **2022 SCC Online SC 1290**.

Fourthly, Mr. Borthakur submits that the period of 90 days was over on 21.12.2022, as the accused was arrested on 22.09.2022 and the I.O. has filed the application for extension of investigation on 91 days and the same is contrary to the provision of Section 167 of the CrPC. In support of his submission, Mr. Borthakur has referred the case law of **Bikramjit Singh vs. State of Punjab**, reported in **(2020) 10 SCC 616**.

8. Under the above facts and circumstances Mr. Borthakur, submits that the impugned order, so passed by the learned Court below, failed to withstand the test of correctness and therefore, it is contended to set aside the same by allowing the petition.

9. On the other hand Mr. M. Phukan, learned Public Prosecutor, Assam has vehemently opposed the petition and submits that, the offences are serious in nature and the investigation is still going on and the I.O. has rightly made the prayer for extension of the period of investigation and the learned Court below also rightly granted the same. However, Mr. Phukan fairly submits that while making the prayer before the learned CJM, Kamrup (M) at Guwahati, the I.O. has never routed the petition through the Public Prosecutor and the Public Prosecutor was never been heard by the learned Court below.

10. Having heard the submission of learned Advocates of both sides, I have carefully gone through petition and the documents placed on record. Also, I have carefully gone through the case laws, referred by Mr. S. Borthakur, learned counsel for the petitioner.

11. It is to be noted here that the State respondent has not filed any objection/affidavit in opposition to the present petition.

12. Before directing a discussion into the points raised by the learned Advocates of both the parties, it would be appropriate to re-produce the impugned order dated 22.12.2022, passed by the learned CJM, Kamrup (M) at Guwahati, in SOU P.S. Case No.02/2022, so as to understand the dispute more appropriately:

“Case record put up today in view of the prayer filed by the I.O. one Smti. Aseema Kalita, DSP, whereby she has prayed that the period for completion of the

investigation may be extended up to 180 days as per provision u/s 43(D)(2)(b) of UA(P) Act.

It has been further stated that from the course of investigation, certain incriminating documents have been seized and they have also sent the electronic devices and other documents for examination by the expert as FSL, Kahilipara. It is also stated in the prayer that custodial interrogation is still continuing at Central Jail, Guwahati as allowed by this Court earlier.

I have perused the record and considering the nature of the allegations and as Section 18 of the UA[P] Act was added vide order dated 18.10.2022, the prayer is allowed.

Later on, also seen the bail petition vide No. 5124/22 and 5125/22 filed on behalf of the accused Bazlul Karim, Md. Minarul Sheikh, Robiul Hussain, Abu Sharma Ahmed, Nazrul Islam Bhuyan, Rafiqul Islam, Aminul Hoque, Khalliuur Rahman and Rahmatullah respectively.

Heard both sides on the petitions.

Considering the serious nature of the allegations and the fact that the investigation is still continuing, both the bail prayers are rejected.

A copy of the order is to be given to the I.O.

The IO of the instant case has further produced one Seizure list vide MR No. 22/2022 in connection with the Seizure list with a prayer to peruse the same. Further, it is also prayed to permit to send these exhibits to FSL for obtaining FSL report.

I have perused the seizure list along with the seized documents.

For a proper investigation, the prayer to have the documents examined by FSL Expert is allowed.

The seized documents be returned back to the I.O. with a direction to keep a photocopy of the same in the case record”.

13. A bare perusal of the order, reproduced here-in-above, reveals that the learned Court below, while extending the period of investigation, has neither issued notice to the petitioner and other co-accused nor procured a report from the learned Public Prosecutor. The learned Public Prosecutor, Assam has fairly admitted the same. In the Case of **Jigar**

@ **Jimmy Pravinchandra Adatiya (Supra)**, Hon'ble Supreme Court, in paragraph No. 34, has held as under:

“**Clause (b) of subsection (2) of [Section 167](#) of CrPC lays down that no Magistrate shall authorise the detention of the accused in the custody of the police unless the accused is produced before him in person. It also provides that judicial custody can be extended on the production of the accused either in person or through the medium of electronic video linkage. Thus, the requirement of the law is that while extending the remand to judicial custody, the presence of the accused has to be procured either physically or virtually. This is the mandatory requirement of law. This requirement is *sine qua non* for the exercise of the power to extend the judicial custody remand. The reason is that the accused has a right to oppose the prayer for the extension of the remand. When the Special Court exercises the power of granting extension under the proviso to subsection (2) of [Section 20](#) of the 2015 Act, it will necessarily lead to the extension of the judicial custody beyond the period of 90 days up to 180 days. Therefore, even in terms of the requirement of clause (b) of subsection (2) of [Section 167](#) of CrPC, it is mandatory to procure the presence of the accused before the Special Court when a prayer of the prosecution for the extension of time to complete investigation is considered. In fact, the Constitution Bench of this Court in the first part of paragraph 53(2)(a) in its decision in the case of Sanjay Dutta to holds so. The requirement of the report under proviso added to subsection (2) of [Section 20](#) of the 2015 Act to clause (b) of subsection (2) of [Section 167](#) of CrPC is twofold. Firstly, the report of the Public Prosecutor, the progress of the investigation should be set out and secondly, the report must disclose specific reasons for continuing the detention of the accused beyond the said period of 90 days. Therefore, the extension of time is not an empty formality. The Public Prosecutor has to apply his mind before he submits a report/an application for extension. The prosecution has to make out a case in terms of both the aforesaid requirements and the Court must apply its mind to the contents of the report before accepting the prayer for grant of extension.”**

14. In the case of **Sanjay Kumar Kedia vs. Intelligence Officer, NCB and Another**, reported in **(2009) 17 SCC 631**, Hon'ble Supreme Court has held that the condition on which the prayer for extension is to be considered are:-

- (i) a report of a public prosecutor;
- (ii) which indicates the progress of the investigation,
- (iii) specifies compelling reasons for seeking the detention of the accused beyond 180 days; and
- (iv) after notice to the accused.

15. In the aforementioned case, no notice was given to the accused and he was not produced in the Court on the said date, and therefore, Hon'ble Supreme Court has held that the extension, so granted to the Investigating Officer, under provision of section 36 A [4] of the NDPS Act, did not satisfy the condition and accordingly, held that order extending the time was contrary to the law and accordingly, struck down the same.

16. Thus, it appears that production of the accused before the Court, granting extension and the report of the Public Prosecutor is not an empty formality and it is the requirement of the law, and it is a *sine qua non* for the exercise of the power to extend the judicial custody/remand and the period of investigation. It appears that the learned court below, while extending the period of investigation, has never procured a report from the learned P.P. to show his application of mind and the petition, for extension of the period of investigation, was never routed through the learned Public Prosecutor. It was filed directly before the learned court below.

17. Further, it appears that while extending the time for investigation, vide order dated 26.07.2022, the learned court below has not issued any notice to the accused persons nor they were produced before the court and no opportunity was afforded to them to raise any objection. Thus, there is sufficient force in the submission of Borthakur, the learned counsel for the petitioner. And Mr. M. Phukan, the learned P.P., Assam also fairly admitted the same that the petitioner was not produced before the learned court below at the time of hearing on the petition.

18. Further, it appears that the prayer for extension of period of investigation (Annexure-H) is made before the learned CJM, Kamrup (M) at Guwahati. And admittedly, the said Court is not the Special Court, designated under the UA(P) Act. A three Judges Bench of Hon'ble Supreme Court, in the case of **Sadique and others (Supra)**, has held that, so far as the

extension of time to complete the investigation is concerned, the Magistrate would not be competent to consider the request and the only competent authority to consider such request would be the Court as specified in the proviso in Section 43-D(2)(b) of the UA(P) Act. Further, the Hon'ble Supreme Court, in the aforementioned case, has held that, in view of the law laid down by this Court, we accept the plea raised by the appellants and hold them entitled to the relief of default bail as prayed for. Mr. Borthakur, the learned counsel for the petitioner has rightly pointed this out at the time of hearing and I find sufficient force in his submission. It is to be mentioned here that in the case of **Bikramjit Singh (Supra)**, Hon'ble Supreme Court has held that:

“26. Before the NIA Act was enacted, offences under the UAPA were of two kinds those with a maximum imprisonment of over 7 years, and those with a maximum imprisonment of 7 years and under. Under the Code, as applicable to offences against other laws, offences having a maximum sentence of 7 years and under are triable by the Magistrate's courts, whereas offences having a maximum sentence of above 7 years are triable by Courts of Session. This scheme has been completely done away with by the NIA Act, 2008 as all Scheduled Offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated court by notification issued by either the Central Government or the State Government, the fallback is upon the Court of Session alone. Thus, under the aforesaid scheme what becomes clear is that so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D(2)(b) is non-existent, “the Court” being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself. The impugned judgment in arriving at the contrary conclusion is incorrect as it has missed Section 22(2) read with Section 13 of the NIA Act. Also, the impugned judgment has missed Section 16(1) of the NIA Act which states that a Special Court may take cognizance of any offence without the accused being committed to it for trial, inter alia, upon a police report of such facts.”

19. Also it appears that the petitioner was arrested on 22.09.2022, and as such, the period of 90 days, was completed on 21.12.2022. But, on the said date, no prayer for extension was

made by the I.O. before the competent Authority. Rather the petition was filed on 22.12.2022, on which date, the petitioner and other co-accused have made the prayer for default bail before the learned Court below.

20. In the case of **Hitendra Vishnu Thakur and others (Supra)**, Hon'ble Supreme Court, in paragraph No. 21, has held that:-

“Thus, we find that once the period for filing the charge-sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with [Section 167](#) of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with [Section 167](#) of the Code, the court must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail.

21. As admittedly, the petition for extension of the period of investigation was filed on 91 days. The right of the accused to get released him on bail accrued on 21.12.2022. On that day, there was no prayer of the I.O. for extension of period of investigation. And as such, after expiry of the period of 90 days, on 21.12.2022, extending the period of investigation on 22.12.2022, when the petitioner and other co-accused have filed the prayer for default bail on 21.12.2022, the impugned order cannot be said to have withstand the test of legality, propriety and correctness.

22. In the result, I find sufficient merit in this petition and accordingly, the same stands allowed. The impugned order, dated 22.12.2022, passed by the learned CJM, Kamrup (M) at Guwahati, in SOU P.S. Case No.02/2022, extending the period of investigation beyond 90 days suffers from manifest illegality and impropriety and accordingly, the same is set aside and quashed.

23. Before parting with the record, this court is constrained to record its displeasure in the casual approach of extending the period of investigation by the learned court below in a serious case like the present one. Such casual approach, in extension of the period of investigation, is also being experienced by this court in the cases under NDPS Act, resulting release of the accused on bail. Perhaps, this has happened due to lack of sensitization of the Presiding Officers. Therefore, this court deemed it appropriate to direct the Registrar (Judicial), to examine the necessity of sensitizing the learned Presiding Judges, in this regard and to bring the same to the notice of the appropriate authority.

24. In terms of above this petition stands disposed of. The parties have to bear their own costs.

JUDGE

Comparing Assistant