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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06..09..2022

PRONOUNCED ON: 28..09..2022

CORAM

THE HONOURABLE MR. JUSTICE **P.N.PRAKASH**

AND

THE HONOURABLE MR. JUSTICE **RMT.TEEKAA RAMAN**

Crl.A.Nos.393 & 479 of 2022

Crl.A.No.393 of 2022:

1.T.Keeniston Fernando
2. K.Baskaran .. Appellants/Accused 2&3

Vs.

1.State By: The Deputy Superintendent of Police,
Q Branch CID, Chennai City
(Cr.No.1 of 2021) .. 1st Respondent/Complainant

2. Union of India rep by: The Deputy Superintendent of Police,
National Investigation Agency,
Chennai (R.C.No.2/2022/NIA/DLI)
.. 2nd Respondent/Investigation Agency

Crl.A.No.479 of 2022:

K.Baskaran .. Appellant/Accused

Vs.

Union of India, rep by:
The Deputy Superintendent of Police,
National Investigation Agency, Chennai.
(R.C.No.2/2022/NIA/DLI) .. Respondent/Complainant

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Prayer in Crl.A.No.393 of 2022: Criminal Appeal filed under Section 21 of NIA Act, to call for the records in Crl.M.P.No.98 of 2022 dated 3.1.2022 on the file of the Principal Sessions Court, Kanchipuram District, Chengalpattu in Cr.No.1 of 2021 on the file of the respondent No.1 (now the records are available before the Special Court for NIA Cases in Cr.No.R.C.No.2/2022/NIA/DLI) and set aside the same and grant bail to the appellants.

Prayer in Crl.A.No.479 of 2022: Criminal Appeal filed under Section 21 of NIA Act, to call for the records in Crl.M.P.No.142 of 2022 dated 19.04.2022 in R.C.02/2022/NIA/DLI on the file of the Special Court for NIA Cases, at Poonamallee, Chennai and set-aside the same and grant bail to the appellant.

For Appellant(s) (in both cases)	: Mr.Radhakrishnan for Mr.P.Pugalenthi
For Respondent(s) (in both cases)	: Mr.R.Karthikeyan, Special Public Prosecutor (NIA)

COMMON ORDER

RMT.TEEKAA RAMAN, J.

Crl.A.No.393 of 2022 is filed by A2 and A3 challenging the extension of remand period from 90 days to 180 days on the petition filed by the respondent police. Elongation of period from 90 days to 180 days in Crl.M.P.No.98 of 2022 dated 03.01.2022 and consequently seeks grant of bail.

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2. Crl.A.No.479 of 2022 is filed by A3 alone for grant of bail by challenging the order passed by the Special Court, NIA in Crl.M.P.No.142 of 2022 dated 19.04.2022. Since the contentions raised in both the cases are common. Common arguments heard.

3. The facts distilled from the final report in Spl.S.C.No.01 of 2022 on the file of the Special Judge, Special Court for Trial of NIA Cases at Poonamallee, Chennai are as under:-

The deceased Hamida A Lalljee (for short **"Hamida"**) was having a Savings Bank Account in Indian Overseas Bank, Mumbai Fort Branch, in which, around Rs.40,00,00,000/- [Rupees Forty Crores only] was available. It appears that the said SB Account was not frequently operated. This came to the notice of the The Liberation Tigers of Tamil Eelam (for short **"LTTE"**), a proscribed Terrorist Organization under the Unlawful Assembly (Prevention) Act, 1967 (for short **"UAP Act"**) and that they decided to stealthily siphon off the said money for their organization. One Umakanthan @ Idhayan @ Charles @ Iniyan, a key LTTE operative stationed in Europe was closely monitoring the said savings bank account. On his directions, a Srilankan Tamil lady Letchumanan Mary Franciska (A1) [for short **"Mary"**] came to India and managed to obtain documents like Aadhaar, Pan and Indian Passport in her name. One Kenniston Fernando (A2), K.Baskaran (A3), C. Johnson Samuel (A4), G. Dharmendran (A5) and E.Mohan (A6) also joined the bandwagon at various stages of operations in

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order to knock-off the money. They started to create fake Power of Attorney as if the deceased Hamida had given it in favour of A1, armed with which, they attempted to withdraw the amount from the said account of the deceased Hamida. However, before they could execute their dubious plan, misfortune fell on them when A1-Mary was intercepted at Chennai Airport on 01.10.2021 with an Indian Passport and, thereafter, she was handed over to the 'Q' Branch CID of the State Police which conducted preliminary enquiries and registered a case in Crime No.01 of 2021 for the offence under Section 12(1)(b), 12(1-A)(a) of the Passport Act, 1967 r/w 420, 465, 468, 471 IPC r/w 14(a) of Foreigners (Amendment) Act, 2004 and arrested Mary (A1) and produced before the Judicial Magistrate-I, Alandur, Chennai, who remanded her in judicial custody. Subsequently, 'Q' Branch CID altered the case in Crime No.01 of 2021 and added Section 18, 39 and 40 of the UAP Act, 1967 and filed an alteration report. Since the provisions of UAP Act were added to the FIR, the case records were transferred from the Court of the Judicial Magistrate to the Court of Principal District and Session, Chengalpattu, which is the designated court for trial under the UAP Act cases. Pursuant to the transfer of the case, the accused were produced before the Court of Session, Chengalpattu, for remand from time to time.

4. The ninety days remand envisaged by S.167 of Cr.P.C. was to expire on 31.12.2021. Anticipating that it would not be possible to

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complete the investigation before the date, the Special Public Prosecutor filed a report under the first proviso to Section 43D (2) of UAP Act for the extension of the remand period. The Sessions Judge examined the report and, by order dated 03.01.2022, accepted the report of the Special Public Prosecutor and extended the remand to a further period of 90 days from 31.12.2021.

5. Thereafter, considering the gravity of case, the Government of India, by order dated 17.01.2022, entrusted the investigation of the case to the National Investigation Agency (for short "the NIA") which registered the case as RC-02/2022/NIA/DLI on 18.01.2022 u/s 120-B, 465, 467, 468, 471, 472 & 474 of IPC, Sections 10, 13, 38 & 39 of the UAP Act, 1967 , Sections 12(1)(b) & 12(1A) (a) of the Passport Act, 1967 and Section 14(a) of Foreigners (Amendment) Act, 2004 and the FIR was submitted before the Special Court for NIA cases on 19.01.2022. The NIA effected the arrest of the other accused, other than those who were already arrested by Q Branch CID, Chennai, in this case. Since the Special Court for Exclusive Trial of Bomb Blast Cases at Poonamallee, Chennai, has been designated as the Special Court for NIA cases, records from the Principal District and Sessions Court, Chengalpattu, were transferred to the Special Court for Exclusive Trial of Bomb Blast Cases at Poonamallee, Chennai, on 16.02.2022. The NIA completed the investigation and filed a final report on 29.03.2022 for the offences u/s 120-B, 465, 467, 468, 471, 472 &

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474 of IPC, Sections 10, 13, 38 & 39 of the UAP Act, 1967 , Sections 12(1)(b) & 12(1A) (a) of the Passport Act, 1967 and Section 14 (a) of Foreigners (Amendment) Act, 2004 against 6 accused, which has been taken on file in Spl. S.C.No.01 of 2022. Challenging the order dated 03.01.2022 passed by the Principal District and Sessions Judge, Chengalpattu, on the report of the Special Public Prosecutor, Kenniston Fernando (A2) and K.Baskaran (A3) have filed the present Appeal in Crl.A.No.393 of 2022.

6. On 29.03.2022, K.Baskaran (A3) filed an application in Crl.M.P.No.142 of 2022 for default bail under Section 167(2) on the ground that the extension of time period for completing the investigation that was ordered by the Principal District and Sessions Judge, Chengalpet on 03.01.2022 was illegal. The trial Court heard both sides and by a detailed order dated 19.04.2022 has dismissed Crl.M.P.No.142 of 2022, aggrieved by which, Baskaran (A3) has filed Crl.A.No.479 of 2022.

7. The NIA has filed detailed counter statements in response to the grounds raised in the two Memorandum of Appeals.

8. Heard Mr.M.Radhakrishnan, learned counsel on behalf of Mr.G.Pugalenthi, counsel on record for the appellants (A2 & A3) and Mr.R.Karthikeyan, the learned Special Public Prosecutor for NIA Cases/UOI.

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9. Mr.M.Radhakrishnan submitted that the order dated 03.01.2022 was passed without hearing the accused as mandated by the Supreme Court in **Hitendra Vishnu Thakur v. State of Maharashtra [(1994) 4 SCC 602)]**, which has been affirmed subsequently by the Supreme Court in **Sanjay Kumar Kedia @ Sanjai Kedia v. Intelligence Officer, Narcotics Control Bureau [(2009) 17 SCC 631]**. He heavily placed reliance at paras 13 and 14 of **Sanjay Kumar Kedia's case** [cited supra] which read as follows:-

> "**13.** The question to be noticed at this stage is as to whether the two applications for extension that had been filed by the Public Prosecutor seeking an extension beyond 180 days met the necessary conditions. We find that the matter need not detain us as it is no longer res integra and is completely covered by the judgment of this Court in *Hitendra Vishnu case* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] . In this case, the Bench was dealing with the proviso inserted as clause (*bb*) in sub-section (4) of Section 20 of TADA, which is in pari materia with the proviso to sub-section (4) of Section 36-A of the Act. This Court accepted the argument of the accused that an extension beyond 180 days could be granted but laid a rider that it could be so after certain conditions were satisfied.
>
> **14.** It was observed: (*Hitendra Vishnu case* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] , SCC p. 628, para 21)
>
> > "*21.* … It is true that neither clause (*b*) nor clause (*bb*) of sub-section (4) of Section 20 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 in the interest of the accused and the prosecution as

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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 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." "

10. Since it was alleged that the accused were not put on notice, we called for a report from the Principal District and Sessions Judge, Chengalpattu, in this regard, and we also received a detailed report dated 26.07.2022 along with the relevant records.

11. On a perusal of the relevant records, it could be seen that the report under first proviso to Section 43D (2) of UAP Act has been filed by Mr.R.Thirumurugan, B.A.B.L., District Public Prosecutor, Chengalpattu, who was the Special Public Prosecutor for the Q-Branch CID, Chennai, on 21.12.2021 itself. Therefore, the contention of the learned counsel for the petitioner that Special Public Prosecutor had not filed any report in terms

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of proviso to Section 43-D (2) is factually incorrect.

12. The learned counsel for the petitioner contended that a copy of the report should have been served on the accused and they must have been heard.

13. We are unable to countenance the aforesaid submission because, the law does not require so. The question as to whether the accused would be entitled to a copy of remand extension application or a copy of application for police custody of the investigating agency came up for consideration before the Full Bench of this Court in **Selvanathan alias Raghavan v. State by Inspector of Police [1988 L.W. (Crl.) 503]** wherein it was held that the accused will not be entitled to a copy of the requisition for remand. It may be apposite to extract para 48 in **Selvanathan's case** [cited supra]:

> "In fact, this problem arises only on account of the investigating officer sending a 'remand report' which is not contemplated under law. Therefore, we hold that the judicial remand should be applied by the concerned police officials in strict compliance with the provisions of Sec.167 of the Code and O.593(1) of the Madras Police Standing Orders. In such a case, the accused would not be entitled to a copy of the requisition for remand in view of the embargo placed by Sec.172(3) of the Code. If any other record besides the remand report is forwarded to the Magistrate under any name, a copy of the same will have to be furnished to the accused once an order is passed on

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the basis of such document other than the requisition for remand, as per the provisions of Sec.363(5) of the Code on payment of charges. So far as the requisition for remand is concerned, we hold that the accused is not entitled to a copy of the same. "

14. When a requestion for remand under Section 167 of Cr.P.C. with a report is filed by the Special Public Prosecutor under the proviso to sub-section (2) of Section 43D of UAP Act for extending the period of remand, materials have to be placed before the court to show progress of the investigation and reasons for the remand / extension of remand. For this, several material particulars and trajectory of the investigation would be disclosed including the names of some suspects whom the investigation agency would have to nab. If the copies of these documents are furnished to the accused, then, it would be easy for those who are in the radar to just escape from the clutches of law. No doubt, in **Hitendra Vishnu Thakur's case** [cited supra], the Supreme Court had stated that the accused would be heard but, subsequently, this view has been reviewed by a Constitution Bench of the Supreme Court in **Sanjay Dutt v. State [(1994) 5 SCC 410].** (In fact, it was contended before the Constitution Bench that on account of the observations made in **Hitendra Vishnu Thakur's case** [cited supra] accused facing trial started claiming bail on the ground that there was an infraction of Section 20(4)(bb) of the TADA Act which is *in pari materia* with the proviso to Section 43D of UAP Act. It may be relevant to extract para 47 of **Sanjay Dutt's case** [cited supra]:

"**47.** Learned Additional Solicitor General, in reply,

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agreed entirely with the above submission of Shri Sibal and submitted that the principle enunciated by the Division Bench in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] must be so read. However, the grievance of the learned Additional Solicitor General is that the direction for grant of bail by the Division Bench in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] , on the facts of that case, is not in consonance with such reading of that decision and indicates that the indefeasible right of the accused to be released on bail on expiry of the time allowed for completing the investigation survives and is enforceable even after the challan has been filed, without reference to the merits of the case or the material produced in the court with the challan. He further submitted that it should be clarified that the direction to grant bail under this provision on this ground alone in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] after the challan had been filed was incorrect. Such a clarification, he urged, is necessary because the decision in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] is being construed by the Designated Courts to mean that the right of the accused to be released on bail in such a situation is indefeasible in the sense that it survives and remains enforceable, without reference to the facts of the case, even after the challan has been filed and the court has no jurisdiction to deny the bail to the accused at any time if there has been a default in completing the investigation within the time allowed. Bail is being claimed by every accused under the TADA Act for this reason alone in all such cases. This is the occasion for seeking a fresh decision of

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this question by a larger Bench. ....."

15. The answers of the Supreme Court to the two questions, viz., (1) Whether notice to the accused means, 'hearing' the accused; and (2) Whether the indefeasible right to default bail is extinguished after the charge sheet is filed, have been answered in no uncertain terms in para 53(2)(a) and (b) of the judgement in Sanjay Dutt's case cited supra which read as under:-

> "**53.** As a result of the above discussion, our answers to the three questions of law referred for our decision are as under:
>
> (2)(a) Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the 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.
>
> (2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the

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> accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to-the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing on the challan, notwithstanding the default in filing it within the time allowed, as governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage."

16. Coming to the case at hand, we find from the report of the Principal District and Sessions Judge, Chengalpattu, that a copy of the order dated 03.01.2022 has been served on all the accused, vide letter in D.No.290/2022. Therefore, the Principal District and Sessions Judge, Chengalpattu, has substantially complied with the directions of the Supreme Court in para 53 (2)(a) and (b) of **Sanjay Dutt's case** [cited supra].

17. Now, the next question is, even on a demurrer, if there has been an infraction of the proviso to Section 43D(2) of the UAP Act or infraction of the mandate laid down in para 53(2)(a) and (b) of **Sanjay Dutt's case** cited supra, would the indefeasible right continue to survive? This has also been answered by the Supreme Court in para 53(2)(b) of **Sanjay Dutt's case,** cited supra which has already been extracted above.

18. In the present case, the order under challenge is dated

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03.01.2022. The NIA completed the investigation and filed a final report on 29.03.2022. On 29.03.2022, the accused filed an applicable seeking default bail. The present appeal challenging the order dated 03.01.2022 has been filed only on 04.04.2022. Therefore, after the filing of the final report on 29.03.2022, the indefeasible right for default bail [even assuming for a moment, that it had accrued to the accused, though on facts, we have held it had not accrued] stood extinguished.

19. Coming to the judgment of the Supreme Court in Sanjay Kumar Kedia (*supra*), we find that the said judgment is under NDPS Act and not under the UAP Act. Though the relevant provisions under both the acts are *in pari materia*, yet, the observations of the Supreme Court in Sanjay Kumar Kedia (*supra*) cannot be mechanically applied to the present case arising under the UAP Act, in the light of the following observations of a Constitution Bench of the Supreme Court in **The State of Punjab v. The Okara Grain Buyers Syndicate Ltd., Okara and another [AIR 1964 SC 669]**:

> "We are clearly of the view that this argument does not deserve to be accepted. In the first place, we are concerned solely with the interpretation of the Act of 1951 and unless there was an ambiguity it would be impermissible to refer to any previous legislation for construing the words in it. The examination we have made of the Act read in conjunction with the purposes it seeks to achieve which are manifest in its various provisions have led us unmistakably to the conclusion which we have expressed earlier. In the circumstances, there is no scope for invoking this external aid to the construction of the expressions used in the Act. Secondly, the scope of the two enactments viz. the Act of 1948 and that of 1951 are widely different, and the latter has a definitely more extended scope and is designed to secure substantive advantages to

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displaced persons which were wholly foreign to the earlier law which was but of very limited scope. Therefore even if the language used in the two enactments were identical which is not even the case here the same conclusion would not necessarily follow having regard to the differing scopes of the two pieces of legislation. It could not therefore be said that the two Acts are *in pari materia* so as to attract the Rule relied on." (emphasis supplied)

20. That apart, in Sanjay Kumar Kedia (*supra*), the Supreme Court has relied upon the passages in Hitendra Vishnu Thakur (*supra*) which have been substantially diluted by the Supreme Court in Sanjay Dutt (*supra*). The law laid down by the Constitution Bench in Sanjay Dutt (*supra*) was not brought to the notice of the Supreme Court in Sanjay Kumar Kedia (*supra*). Therefore, we are obligated to follow the law laid down by the Constitution Bench in Sanjay Dutt (*supra*) when the same has been brought to our notice.

In the result, these criminal appeals are dismissed as being devoid of merits.

(P.N.P.,J.) (TKR,J.)
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To

1. The Deputy Superintendent of Police,
   Q Branch CID, Chennai City.

2. The Deputy Superintendent of Police,
   National Investigation Agency,
   Chennai.

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3. The Principal Sessions Court,
   Kanchipuram District, Chengalpattu.

4. The Special Court for NIA Cases, at Poonamallee,
   Chennai

5. The Public Prosecutor,
   Madras High Court, Chennai – 600 104.

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P.N.PRAKASH, J.

and

RMT.TEEKAA RAMAN, J.

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Judgment in
Crl.A.Nos.393 & 479 of 2022

28..09..2022

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