

**Court No. - 11**

**Case :-** APPLICATION U/S 482 No. - 8678 of 2023

**Applicant :-** Sanjeev Kumar Ojha

**Opposite Party :-** State Of U.P. Thru. Prin. Secy. Home Lko.

**Counsel for Applicant :-** Mohammad Alishah Faruqi, Ali Hasan, Mohd. Suhail

**Counsel for Opposite Party :-** G.A.

**Hon'ble Saurabh Lavania, J.**

Heard learned counsel appearing for the applicant, learned AGA appearing for the State of U.P. and perused the record.

By means of the present applicant under Section 482 Cr.P.C., the applicant has assailed the order dated 17.08.2023 passed by Additional Chief Judicial Magistrate-V, Room No. 29, Lucknow in Case Crime No. 196 of 2023, under Sections- 323, 308, 498-A, 506 IPC, Police Station- Ashiyana, District- Lucknow.

The impugned order dated 17.08.2023 was passed by the Additional Chief Judicial Magistrate-V, Room No. 29, Lucknow (in short "trial Court") on an application preferred by the applicant under Section 167(2) of Code of Criminal Procedure (in short "Cr.P.C."). By the order, the trial Court rejected the application preferred by the applicant under Section 167(2) Cr.P.C.

The submission of applicant's counsel while assailing the order impugned dated 17.08.2023 is to the effect that an FIR was lodged against the applicant on 31.05.2023 and thereafter, he was arrested by the police on 02.06.2023. The applicant thereafter was produced before the concerned Magistrate on 02.06.2023 and on the same date, an application seeking bail was preferred, which was rejected on the same day i.e. 02.06.2023. After rejection of the bail by the trial Court vide order dated 02.06.2023, an application seeking bail was preferred by the applicant before the Sessions Court on 03.06.2023. The Sessions Court granted interim bail to the applicant on 12.06.2023 and this bail application was subsequently rejected by the Sessions Court on 28.06.2023. After rejection of bail by the Sessions Court on 28.06.2023, an application under Section 167(2) Cr.P.C. was preferred on 17.08.2023 and on the same date, the charge-sheet was submitted by the prosecution before the trial Court. The trial

Court rejected the said application after observing that the applicant was not in continuous judicial custody, as such, the applicant is not entitled to be released on bail in terms of the provisions contained under Section 167 Cr.P.C. particularly Sub-section (2) of Section 167 Cr.P.C.

He submitted that broken period is required to be taken note of while considering the application under Section 167(2) Cr.P.C. and if in the same light, two periods i.e. period w.e.f. 02.06.2023 to 12.06.2023 and period w.e.f. 28.06.2023 to 17.08.2023 is considered then it would come to 62 days, as such, the applicant was entitled to be released on default bail in terms of Section 167(2) Cr.P.C.

With regard to broken period, learned counsel appearing for the applicant has placed reliance on the observations made by the Hon'ble Apex Court in the judgment passed in the case of **Gautam Navlakha v. NIA, (2022) 13 SCC 542**. The relevant paras of the same, as indicated by the applicant's counsel, on reproduction read as under:-

*"83. Let us take another example. After ordering remand, initially for a period of 15 days of which 10 days is by way of police custody and 5 days by way of judicial custody, the Magistrate enlarges an accused on bail. The High Court interferes with the order granting bail on the basis that the bail ought not to have been granted. Resultantly, the person who on the basis of the order of bail, has come out of jail custody, is put back into the judicial custody or jail custody. The order is one passed by the High Court. The order granting custody by the High Court cannot be treated as one which is not anchored in Section 167CrPC. Therefore, we would think that though the power is vested with the Magistrate to order remand by way of appropriate jurisdiction exercised by the superior courts, (it would, in fact, include the Court of Session acting under Section 439) the power under Section 167 could also be exercised by courts which are superior to the Magistrate.*

*84. Therefore, while ordinarily, the Magistrate is the original court which would exercise power to remand under Section 167, the exercise of power by the superior courts which would result in custody being ordered ordinarily (police or judicial custody) by the superior courts which includes the High Court, would indeed be the custody for the purpose of calculating the period within which the charge-sheet must be filed, failing which the accused acquires the statutory right to default bail. We have also noticed the observations of this Court in State of U.P. v. Abdul Samad [State of U.P. v. Abdul Samad, 1962 SCC OnLine SC 40 : AIR 1962 SC 1506] . In such circumstances*

broken periods of custody can be counted whether custody is suffered by the order of the Magistrate or superior courts, if investigation remains incomplete after the custody, whether continuous or broken periods pieced together reaches the requisite period; default bail becomes the right of the detained person."

He further submitted that word "continuous" is not indicated in Section 167 Cr.P.C. Section 167(2) Cr.P.C. does not say that the accused shall be in continuous custody and in that eventuality only, the accused would be entitled to benefit provided under Section 167(2) Cr.P.C. In this background of the case, the applicant is entitled to be released on default bail.

As regards maintainability of instant application under Section 482 Cr.P.C. during pendency of regular bail application under Section 439 Cr.P.C., applicant's counsel has placed reliance on the judgment passed by the High Court of Madras in the case of **Gnanasekaran Thiagaraj vs. State, Rep. by the Deputy Superintendent of Police** reported in **2023 SCC OnLine Mad 5427**, relevant para 19 of which, on reproduction reads as under:-

*"19. The next question is that whether there is a complete bar for this Court to exercise its jurisdiction under Section 482 of Cr. P.C., against the order passed by the Court below dismissing the application under Section 167(2) of Cr. P.C. It is too well settled that there is no total bar on the exercise of inherent power where abuse of process of the Court or other extraordinary situation arises for the Court to exercise such a jurisdiction. The so-called limitation in the exercise of jurisdiction under Section 482 of Cr. P.C., is more in the nature of self restraint and nothing more. It will be useful to take note of the judgment of the Apex Court in this regard in case of Raj Kapoor v. State, (1980) 1 SCC 43 and Prabhu Chawla v. State of Rajasthan, (2016) 16 SCC 30. The availability of an alternative remedy of Criminal Revision under Section 397 Cr. P.C., by itself cannot be a ground to dismiss a petition under Section 482 of Cr. P.C. The Apex Court in Prabhu Chawla's case has held that if the jurisdiction under Section 482 of Cr. P.C., is exercised only for petty interlocutory orders and all the orders can only be challenged by filing a revision under Section 397 Cr. P.C., it will have an unwarranted and undesirable result."*

Learned AGA opposed the present application, however, he could not dispute the arguments advanced by the applicant's counsel on the issue that broken period should be counted for the purposes of extending benefit provided under Section

167(2) Cr.P.C.

Considered the submissions advanced by the learned counsel for the parties and perused the record.

Regarding maintainability of application under Section 482 Cr.P.C., it is settled proposition of law that this Court despite having remedy available in Cr.P.C. to the concerned, can exercise the jurisdiction under Section 482 Cr.P.C, if facts so warrant.

From the aforesaid undisputed facts of the case, it is apparent that for 12 days, the applicant was in custody i.e. w.e.f. 02.06.2023 to 12.06.2023 and a perusal of the order dated 28.06.2023 rejecting the bail application of the applicant indicates that the applicant was taken into custody on 28.06.2023 and from this date i.e. 28.06.2023 till 17.08.2023, when the application seeking benefit of Section 167(2) Cr.P.C. was preferred as also the charge-sheet was filed, the period of custody would come to 51 days.

Thus, the charge-sheet was filed after expiry of statutory period i.e. 60 days provided under proviso (a)(ii) to Sub-section (2) of Section 167 Cr.P.C.

It is also apparent from the impugned order dated 28.06.2023 that the trial Court while rejecting the application failed to take note of aforesaid period and it rejected the application preferred by the applicant under Section 167(2) Cr.P.C. after observing that the applicant was not in continuous judicial custody. In this regard, the observations made by the Hon'ble Apex Court are required to be referred, as per which broken period is to be taken note of while considering the application under Section 167(2) Cr.P.C.

In view of aforesaid, this Court finds that the trial Court committed error in not granting benefit to the applicant as provided under Section 167(2) Cr.P.C. Accordingly, the order dated 17.08.2023 is liable to be set-aside. It is accordingly set-aside. The applicant is hereby released on bail on following terms:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on

each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. may be issued and the applicant fail to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

The instant application under Section 482 Cr.P.C. is hereby ***allowed*** in above terms.

**Order Date :- 20.11.2023**

Arun/-