

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 1863 OF 2016

Chetan Dashrath Gade. ... Applicant.

Versus

The State of Maharashtra. ... Respondent.

Mr. V.B. Shivarkar, advocate for Applicant.

Mr. Rajan Salvi, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : NOVEMBER 25, 2016

P.C.:

1 Heard the learned Counsel for the applicant and the learned
APP for State.

2 The applicant herein is seeking enlargement on bail in C.R. No.
99 of 2015 registered at Vani Police Station, Nashik for offence

punishable under Section 302, 498A read with Section 34 of the Indian Penal Code.

3 The learned Counsel at the outset has submitted that the present application need not be considered on merits. The facts of the case in nutshell are as follows :

4 The applicant was arrested on 24/8/2015. On 5/12/2015 the applicant filed an application before the Judicial Magistrate First Class, Dindori contending therein that it is almost 103 days since his arrest and that the charge-sheet has not been filed. It is alleged that he has been falsely implicated. The letter was received by the learned Magistrate on 11/12/2015, who called for say and passed an order as follows :

“Read the application and say filed therewith. Perused A.S. Report. Upon perusal, it appears that in this matter, charge-sheet has been filed after expiration of 90 days. Hence, the accused is entitled to default bail. Hence, the accused be

released on personal bond of Rs. 35,000/- each and subject to condition that they will not tamper with evidence.”

5 The application was filed by the accused applicant under section 167(2) of the Code of Criminal Procedure, 1973. The case was committed on 14/12/2015 and on 15/12/2015, the applicant had filed application requesting the Magistrate to accept surety.

6 Upon perusal of record, it appears that on 19/11/2015, the investigating officer had filed report for seeking time to file charge-sheet. The said application was allowed and only thereafter, the applicant had sought bail under section 167(2) of the Code of Criminal Procedure, 1973 that too after the charge-sheet was filed.

7 It is pertinent to note that the application filed by the accused is dated 5/12/2015 and the charge-sheet was actually filed on 2/12/2015. Needless to say that the application seeking relief under section 167(2) of the Code of Criminal Procedure, 1973 was filed 3 days after filing of the charge-sheet. In fact, the Assistant

Superintendent of Court of J.M.F.C. had brought to the notice of the Court that the charge-sheet is filed. It appears that the learned Magistrate was of the opinion that the charge-sheet is filed after 90 days and therefore, had enlarged the applicant on bail. The applicant in his application dated 5/12/2015 had not shown his readiness to furnish bail and the application was on sympathetic ground. It is further pertinent to note that the applicant had shown his willingness to furnish surety in pursuant to the order dated 11/12/2015 only after the case was committed.

8 The application seeking permission to furnish surety was rejected by Judicial Magistrate vide order dated 17/12/2015 and the same is under challenge on various grounds such as -

(i) That the charge-sheet was filed after expiry of 90 days and hence, statutory right of being enlarged on bail had accrued upon the accused.

(ii) The order dated 11/12/2015 did not indicate that the bail was to be furnished within a particular period.

(iii) Once bail is granted, there is no limitation for furnishing surety bonds.

(iv) That the subsequent Magistrate had no authority to reject the application seeking permission to furnish surety as it would amount to review of the order passed by the predecessor Magistrate on 11/12/2015.

9 The first submission needs to be considered in view of the Judgment of the Apex Court in the case of **Uday Acharya v/s. State of Maharashtra 2001 All M.R. 713**, wherein the Hon'ble Apex Court observed thus :

“On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, **if he is prepared to and furnishes the bail, as directed by the Magistrate.**”

“If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section 2 of Section 167, the continued custody of the accused even beyond the specified period in paragraph(a) will not be unauthorised, and therefore, if during that period the investigation is completed the charge-sheet is filed then upon the so-called infeasible right of the accused would stand extinguished.”

10 It is admitted position that the application seeking enlargement on bail was filed after filing of the charge-sheet. There was a report to that effect and at that very moment, the right stands extinguished.

11 According to the Learned Counsel for the applicant, duty is cast upon the Court to inform the accused of his infeasible right to be enlarged on bail in the eventuality that the charge-sheet is not filed within the prescribed limit. The learned Counsel for the applicant has placed reliance upon the Judgment of the Apex Court in the case of **Rajnikant Jivanlal Patel v/s. Intelligence Officer, NCB, New**

Delhi reported in (1989) 3 SCC 532. The Hon'ble Apex Court has observed thus :

“The right to bail under the provision is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. At that stage, merits of the case are not to be examined. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.”

12 In **Uday Acharya (cited supra)**, 3 Judges Bench of the Hon'ble Apex Court considered the meaning of expression “if already not availed of” used by the Hon'ble Apex Court in the case of **Sanjay Datta v/s. State through C.B.I. Bombay reported in 1994(5) SCC 410**, and held that **if an application for bail is filed** before the charge-sheet is filed, the accused could be said to have availed of his right under section 167(2) of the Code of Criminal Procedure, 1973.

13 In the case of **Sadhvi Pragya Thakur v/s. State of Maharashtra reported in 2012 BCR (Cri.) 752 : 2 JT 2011 (12) SC 56**, the Hon'ble Apex Court has held that-

“The right under [Section 167\(2\)](#) of Cr.P.C. to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet. In other words, even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge sheet is filed, the said right to be released on bail would be lost. After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits.”

14 In the present case, the application seeking enlargement on bail was filed on 5/12/2015, whereas the charge-sheet was filed on 2/12/2015 and it was registered as R.C.C. No. 138 of 2015. Needless to say that the application itself ought not to have been granted at that stage, as the report of the Assistant Superintendent of the Court also clearly indicated that the charge-sheet has been filed. The

Magistrate had lost sight of the fact that the right would not accrue upon the applicant after filing of the charge-sheet, as recorded in the order that the charge-sheet is filed and yet proceeded to release the applicant on bail under section 167(2) of the Code of Criminal Procedure, 1973. The case was registered as R.C.C. No. 138/15 and the application seeking enlargement on bail could have only been decided on merits. Hence, the first submission holds no good ground.

15 The second and third submission that no time limit is prescribed for furnishing bail, once an order granting bail is passed, the applicant would be at liberty to avail of it at any stage is not only unwarranted but cannot be countenanced by any statutory provisions. The order itself was not in accordance with law and therefore, there was no question of availing of the right subsequently.

16 Section 167(2)(a)(ii) reads as-

“sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released

on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;”

17 The very expression “if he is prepared to and does furnish bail” indicates two things that in the application seeking relief under section 167(2) of the Code Criminal Procedure, 1973, the applicant shall explicitly state that he is willing to furnish bail and he actually does furnish bail. In the present case, upon perusal of the application, it is clear that the said expression is missing. First and foremost, the application was not maintainable and could not have been granted since the charge-sheet was filed on 2/12/2015 and 3 days thereafter, the application was filed. The order granting bail would be void ab initio and could not have been acted upon.

18 Moreover, the Hon'ble Constitution Bench in the case of **Uday Acharya (cited supra)** has held that if the accused is unable to

furnish bail as directed by the Magistrate, then further detention will not be unauthorised.

19 The fourth submission of the Counsel that the subsequent Magistrate had no authority to reject the application seeking permission to furnish surety is squarely covered by the observation of the Hon'ble Apex Court in the case of **Uday Acharya (cited supra)**. This Court is of the opinion that an error in law needs to be corrected whenever noticed and cannot be perpetuated for whatever reason. In fact, the prosecution ought to have challenged the said order but has failed to do so. Moreover, the order granting bail itself was unwarranted and passed without application of mind, there was no question of the subsequent Magistrate acting upon the same. Perpetuity in error does not validate the error. An erroneous order cannot be allowed to continue or set a precedent. It would only be perpetuity in error. Hence, the said submission cannot be taken into consideration.

20 It is in these circumstances that an application seeking enlargement on bail under section 167(2) of the Code of Criminal Procedure, 1973 deserves to be rejected.

21 Hence, the application being sans merits stands rejected and disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)