

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.2216 of 2017

Arising Out of PS.Case No. -161 Year- 2017 Thana -Fatuha District- PATNA

=====

Vishwanath Yadav, Son of Janak Rai, Resident of Village Murajpur, Police Station
Fathua, District Patna.

.... Petitioner/s

Versus

1. The State of Bihar through Director General of Police Bihar, Patna.
2. The Inspector General of Police Patna Division, Patna.
3. The Deputy Inspector General of Police Patna Division, Patna.
4. The Senior Superintendent of Police, Patna.
5. The Superintendent of Police Rural Patna.
6. The Divisional Police Officer, Fatuha, Patna.
7. The Officer in charge Fatuha, Police Station Patna.
8. The Investigating Officer of Fatuha Police Station in Fatuha P.S. Case No.-
161/2017, Patna.

.... Respondent/s

=====

Appearance :

For the Petitioner/s : Mr. Rajeev Ranjan Sinha, Adv.
For the Respondent/s : Mr. Ajay Kumar Sharma, AC to AG.
For the informant : Mr. Prem Kumar, Adv.

=====

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

CAV JUDGMENT

Date: 04-04-2018

The present writ application has been preferred for
setting aside the order dated 06.10.2017 passed by the learned Judicial
Magistrate-1st Class, Patna City (Patna) in connection with Fatuha
P.S. Case No.161 of 2017 in G.R.No. 1615 of 2017 registered under
Section 304(B) of the Indian Penal Code in which the petitioner,



being the husband of the deceased, is one of the accused lying in judicial custody. By the impugned order, the learned Magistrate has rejected the application preferred by the petitioner under Section 167(2) of the Code of Criminal Procedure seeking his release in terms of the said provision.

2. From the narration of the facts appearing from the records it appears that in connection with Fatuha P.S. Case No.161 of 2017, the petitioner was arrested by police on 07.07.2017, he was produced before the learned Magistrate on the same day when he was taken to judicial custody and was remanded to jail. Since the investigating officer failed to file a charge-sheet within a period of 90 days from the date the petitioner was taken in the judicial custody, the petitioner moved an application on 06.10.2017 at 10.30 am for grant of bail in accordance with the provisions of Section 167(2) Cr.P.C. It is the case of the petitioner that bail application was moved after service of a copy on the learned APP, who was representing the State, both the parties were heard by the learned Magistrate and an order was passed directing the office clerk to submit a report as to whether or not a charge-sheet has been submitted in the case.

3. Learned Magistrate directed the office clerk to place the record. Thereafter, at 2.30 PM on 06.10.2017 itself, office clerk submitted a report that till 11.30 AM the charge-sheet was not



submitted, but thereafter another report was submitted stating that the charge-sheet has been filed in this case at 12.30 PM. Learned Magistrate thereafter rejected the application under Section 167(2) Cr.P.C. by simply stating in one line that in view of the report submitted by the office, the application under Section 167(2) Cr.P.C. is not maintainable. The application preferred by the petitioner has been rejected holding it not maintainable, but without giving reasons thereof. It is this order dated 06.10.2017 passed by the learned Judicial Magistrate-1st Class, Patna City in Fatuha P.S. Case No.161/17 which is under challenge in the present writ application.

4. Learned counsel representing the petitioner has vehemently submitted before this Court that till 5.10.2017 when no charge-sheet was filed by the investigating officer, the statutory period prescribed under law expired and a right accrued to the petitioner to avail the benefit of statutory bail as envisaged under sub-section (2) of Section 167 Cr.P.C. Learned counsel submits that on 06.10.2017 i.e. on 91st day the petitioner availed his right by filing an appropriate application in terms of Section 167(2) Cr.P.C., it is his contention that at the time of filing of application by this petitioner no charge-sheet was filed in the court and, therefore, the petitioner had availed of his remedy well before filing of the charge-sheet. He submits that filing of this charge-sheet subsequently at 12.30 PM



would not disentitle the petitioner for the reliefs prayed in his application. He has relied upon various judgments of the Hon'ble Supreme Court such as **Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors. (1194) 4 SCC 602; Sanjay Dutt Vs. State through C.B.L, Bombay (1994) 5 SCC 410; Uday Mohanlal Acharya Vs. State of Maharashtra (2001) 5 SCC 453; Syed Md. Ahmad Kazmi Vs. State (Govt. of NCT of Delhi) & Ors. (2012) 12 SCC 1 and Union of India Vs. Nirala Yadav (2014) 9 SCC 457.**

5. Learned counsel has placed before this Court the judgment dated 15.09.2015 passed by a learned coordinate Bench of this Court in **Criminal Writ Jurisdiction Case No.835 of 2015** reported in **2016 (1) PLJR 321**. It is his submission that the learned coordinate Bench of this Court had occasion to decide a similar issue which had fallen for consideration before His Lordship. It is submitted that the expression 'if already not availed of' used by the Hon'ble Supreme Court in **Sanjay Dutt's case** (supra) has been explained by the Constitution Bench of the Hon'ble Supreme Court to mean that the accused if filed an application and is prepared to offer bail, on being directed, then it has to be held that the accused has 'availed of' his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail and the accused has not furnished the same.



6. Learned counsel for the petitioner submits that the learned court below has not at all considered the relevant provisions of the Cr.P.C. as well as the judgment of the Hon'ble Supreme Court as also the judgment of this Court and has rejected the application preferred by the petitioner by holding it not maintainable. According to him, the order dated 06.10.2017 cannot be said to have been passed by applying judicious mind.

7. On the other hand, learned counsel representing the State has supported the impugned judgment and submits that once the charge-sheet has been filed by the investigating officer well before passing of the order by the learned Magistrate on the application under Section 167(2) Cr.P.C., the application preferred by the petitioner will be rendered infructuous and in such circumstance it would not be correct to say that the petitioner has acquired indefeasible right to obtain bail. Learned counsel has relied upon a judgment of the Hon'ble Supreme Court in the case of **Pragyna Singh Thakur Vs. State** reported in (2011) 10 SCC 445. Reference has been specifically made to paragraphs 54, 55 and 56 of the judgment of the Hon'ble Apex Court in **Pragyna Singh Thakur** (supra).

8. Having heard learned counsel for the petitioner and learned counsel representing the State as also upon perusal of the



(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; (ii) 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 released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I—*For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.*

Explanation II—*If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.*

Provided further that in case of a woman under the eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution.”

9. On perusal of the judgment of the learned coordinate Bench of this Court referred to hereinabove, I find that the learned coordinate Bench has discussed in detail the various judgments of the Hon'ble Apex Court including the judgment rendered in the case of **Pragyna Singh Thakur** (supra). In paragraph 28, the learned coordinate Bench has taken note of the relevant part of the judgments of the Hon'ble Supreme Court, the same is being quoted hereunder for a ready reference:-

*“28. The opinion expressed in paragraphs 54 and 58 in **Pragyna Singh Thakur** (Supra) was considered by the Supreme Court in **Union of India Vs. Nirala Yadav** (Supra). After taking into*



*consideration almost all the previous judgments on the point of Section 167(2) Cr.P.C., the Supreme Court concluded and held that the principle laid down in paragraphs 54 and 58 of **Pragyna Singh Thakur** case (Supra) does not state the correct principle of law and it runs counter to the principles stated in **Uday Mohanlal Acharya** case (Supra), which has been followed in **Union of India Vs. Hassan Ali Khan**, [(2011) 10 SCC 235] and **Syed Mohd, Kazmi** case (Supra). The relevant paragraphs of **Union of India Vs. Nirala Yadav** case in this regard would be paragraphs 44 to 46, which are being reproduced herein below :-*

*“44. At this juncture, it is absolutely essential to delve into what were the precise principles stated in **Uday Mohanlal Acharya** case and how the two-Judge Bench has understood the same in **Pragyna Singh Thakur**. We have already reproduced the paragraphs in extenso from **Uday Mohanlal Acharya** case and the relevant paragraphs from **Pragyna Singh Thakur**. **Pragyna Singh Thakur** has drawn support from **Rustam** case to buttress the principle it has laid down though in **Uday Mohanlal Acharya** case the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in paragraph 56 which have been reproduced hereinabove, as referred to paragraph 13 and the conclusions of **Uday Mohanlal Acharya** case. We have already quoted from paragraph 13 and the conclusions.*

*45. The opinion expressed in paras 54 and 58 in **Pragyna Singh Thakur** which we have emphasised, as it seems to us, runs counter to the principles stated in **Uday Mohanlal Acharya** which has been followed in **Hassan Ali Khan** and **Sayed Mohd. Ahmad Kazmi**. The decision in **Sayed Mohd. Ahmad Kazmi** case has been rendered by a three-Judge Bench. We may hasten to state, though in **Pragyna Singh Thakur** case the learned Judges have referred to **Uday Mohanlal Acharya** case but have stated the principle that even if an application for bail is filed on the ground that the 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 enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in Mustaq Ahmed Mohammed Isak case. We are disposed to think so, as the two-Judge Bench has used the words “before consideration of the same and before being released on bail”, the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

46. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya case. The learned Judge dissented with the majority as far as interpretation of the expression “if not already availed of” by stating so: (SCC p.481, paras 29-30)

“29. My learned brother has referred to the expression “if not already availed of” referred to in the judgment in Sanjay Dutt case for arriving at Conclusion 6. According to me, the expression ‘availed of’ does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression ‘availed of’ does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right,



howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised.”

On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in Pragyna Singh Thakur case has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three-Judge Bench in Sayed Mohd. Ahmad Kazmi case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi case which is based on three-Judge Bench decision in Uday Mohanlal Acharya case, we are obliged to conclude and hold that the principle laid down in Paras 54 and 58 of Pragyna Singh Thakur case (which has been emphasised by us: see paras 42 and 43 above) does not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be good law. Our view finds support from the decision in Union of India v. Arviva Industries India Ltd.”

10. In paragraph 30, the learned coordinate Bench of this Court has taken a final view which is as under:-

*“30. From perusal of the conclusions arrived at by the Supreme Court in **Uday Mohanlal Acharya** case (Supra) it would be clear that if the accused files an application for enforcement of his indefeasible right on account of default on the part of the investigating agency in completion of investigation within the specified period, the court must dispose of it forthwith. If the accused is unable to furnish the bail as directed by the Magistrate, his detention would not be unauthorized and even if during that period investigation is complete and charge sheet is filed, the so called indefeasible right cannot be frustrated.”*

11. I have discussed in detail the legal position as



appearing from the judicial pronouncements on the subject. Presently for the purpose of holding that the view taken by the learned Magistrate that an application under Section 167(2) Cr.P.C. was not maintainable is not a correct view, the application filed by the petitioner was very much maintainable because it was filed on 91st day when the investigating officer failed to file charge-sheet by 90th day from the date of judicial custody. The petitioner was taken in judicial custody on 7th July, if the said 7th July is excluded, 90th day would be falling on 5th October, 2017 and by this date the charge-sheet was not filed, therefore, the petitioner acquired a right to file an application under Section 167(2) Cr.P.C. which was accordingly filed. Rejection of the application holding it not maintainable without discussing the law on the subject in the light of the judicial pronouncements is, therefore, liable to be set aside.

12. The impugned order is, therefore, set aside, the learned Judicial Magistrate-1st Class, Patna City is hereby directed to consider the application under Section 167(2) Cr.P.C. in the light of the legal provision and the judicial pronouncements on the subject and take a final view on the application after giving an opportunity of hearing to all concerned. The learned Magistrate shall pass a reasoned order after hearing all the parties within a period of fifteen days from the date of receipt/production of a copy of this order.



13. The writ application is allowed to the extent indicated hereinabove.

(Rajeev Ranjan Prasad, J)

Arvind/-

AFR/NAFR	NAFR
CAV DATE	16.03.2018
Uploading Date	04.04.2018
Transmission Date	04.04.2018

