GAHC010130772020

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

Case No. : Bail Appln./1934/2020

GAGAN PEGU AND 3 ORS.
S/O SRI HIRAKANTA PEGU, R/O VILL-NAMONI DODABARI, P.S.-DHAKUAKHANA, DIST-LAKHIMPUR

2: RAMJI @ LAKHESWAR PEGU @ MONUJ PEGU

3: RATUL SAIKIA

4: ABHIJIT DOLEY @ ATUL DOLE

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR F KHAN

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE HITESH KUMAR SARMA

ORDER

01-12-2020

This is an application made under **Section 439 Cr.P.C.**, seeking bail by the accused-petitioners, namely, **1. Sri Gagan Pegu, 2. Sri Ramji @ Lakheswar Pegu @ Monuj Pegu, 3. Sri Ratul Saikia** and **4. Sri Abhijit Doley @ Atul Doley,** in connection with **Jengraimukh Police Station Case No. 15/2020**, (corresponding to GR Case No. 34/2020), registered **under Section 397 of the IPC**.

I have perused the petition including the copy of the FIR and the documents annexed therewith.

Heard Mr. F. Khan, learned counsel appearing for the accused-petitioners and Mr. N.J. Dutta, learned Additional Public Prosecutor, appearing for the State.

It has been submitted by the learned counsel for the petitioners that the accused-petitioner No. 1 was arrested on 14-02-2020, the accused-petitioner No. 2 on 17-02-2020, the accused-petitioner No. 3 on 26-02-2020 and the accused-petitioner No. 4 was arrested on 04-03-2020 and the charge-sheet was laid on 16-05-2020.

The charge-sheet was laid after 60 days of arrest of the accused-petitioners is a fact apparent on the face of the record. The learned counsel for the petitioner has submitted that since investigation is completed and charge-sheet was laid beyond the statutory period prescribed for completion of investigation in a case of the present nature, the petitioners deserve to be granted the privilege of default bail.

The learned Additional Public Prosecutor, Mr. Dutta, has submitted that the petitioner ought to have filed an application for bail on the ground of default even before charge-sheet was laid while the statutory period was over. It has been submitted by the learned Additional Public Prosecutor that application for bail was filed after the charge-sheet was laid which was rejected by the learned Court below on the ground of submission of charge-sheet.

In view of the above facts as well as arguments advanced by the learned counsel for the petitioner as well as the learned Additional Public Prosecutor, this Court needs to examine as to whether the petitioner is entitled to the grant of bail after the charge-sheet is laid after the statutory period was over although no application was pending at that time.

The learned counsel for the petitioner has referred to the authority in **Bikramjit Singh vs State of Punjab (2020 SCC Online SC 824)** particularly, paragraph 30 thereof, which is reproduced below:

> "***30.*** *The second vexed question which arises on the facts of this case is the question of grant of default bail. It has already been seen that once the maximum period for investigation of an offence is over, under the first proviso (a) to Section 167(2), the accused shall be released on bail, this being an indefeasible right granted by the Code. The extent of this indefeasible right has been the subject matter of a number of judgments. A beginning may be made with the judgment in Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602, which spoke of "default bail" under the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA") read with Section 167 of the Code as follows:*

*"**19.** Section 20(4) of TADA makes Section 167 of CrPC applicable in relation to case involving an offence punishable under TADA, subject to the modifications specified therein… while clause (b) provided that reference in sub-section (2) of Section 167 to '15 days', '90 days' and '60 days' wherever they occur shall be construed as reference to '60 days', 'one year' and 'one year' respectively. This section was amended in 1993 by the Amendment Act 43 of 1993 with effect from 22-5-1993 and the period of 'one year' and 'one year' in clause (b) was reduced to '180 days' and '180 days' respectively, by modification of sub-section (2) of Section 167. After clause (b) of sub-section (4) of Section 20 of TADA, another clause (bb) was inserted which reads:*

"(bb) in sub-section (2), after the proviso, the following proviso shall be inserted, namely:—

'Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period up to one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and'"

20. …Sub-section (2) of Section 167 of the Code lays down that the Magistrate to whom the accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that section. The proviso to subsection (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure… Section 167 read with Section 20(4) of TADA, thus, strictly speaking is not a provision for "grant of bail" but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-sheet, if necessary, in the court. The proviso to Section 167(2) of the Code read with Section 20(4)(b) of TADA, therefore, creates an indefeasible right in an accused person on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section 167(2) of the Code read with Section 20(4) of TADA is generally termed as an "order-on-default" as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (b) of subsection (4) of Section 20 read with the proviso to subsection (2) of Section 167 of CrPC an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 CrPC. An obligation, in such a case, is cast upon the court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section 20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. (Hussainara Khatoon case [Hussainara Khatoon v. Home Secy., State of Bihar, (1980) 1 SCC 98 : 1980 SCC (Cri) 40 : AIR 1979 SC 1369]). This legal position has been very ably stated in Aslam Babalal Desai v. State of

Maharashtra [(1992) 4 SCC 272 : 1992 SCC (Cri) 870 : AIR 1993 SC 1] where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in Rajnikant Jivanlal Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi [(1989) 3 SCC 532 : 1989 SCC (Cri) 612 : AIR 1990 SC 71] wherein it was held that : (SCC p. 288, para 9)

> *"The right to bail under Section 167(2) proviso (a) thereto 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. But at that stage, merits of the case are not to be examined. Not at all. 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."*

21. 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. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating/prosecuting agency and once such an application is made, the court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's 'default'… No other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the 'default' of the prosecution."

From the observation made in the above paragraph and the law laid down therein, it appears that if the investigation is not completed within the statutory period and charge-sheet is not laid, the accused acquires an indefeasible right to get bail. That apart, the petitioner was not informed by the learned Court below of their right to be released on bail.

That being so, applying the ratio of this judgment, this Court is of the view that in the instant case, charge-sheet was laid after the statutory period prescribed for completion of investigation, the petitioners are entitled to the grant of bail on the ground of default even if

no application was moved by the petitioners on the expiry of the statutory period prescribed for completion of investigation before submission of charge-sheet.

So far the submission made by the learned Additional Public Prosecutor Mr. Dutta, that petition ought to have been pending on the expiry of the statutory period and before laying of the charge-sheet, this Court is of the view that the decision rendered by the Hon'ble Supreme Court, indicated above, does not subscribe to such a view and the view adopted by the Hon'ble Supreme Court is that if investigation is not completed/charge-sheet is not laid within the statutory period prescribed then the indefeasible right accrued to the accused.

In that view of the matter the petitioners are entitled to the grant of bail.

Accordingly, the accused-petitioners, named above, shall be released on bail in connection with the case aforementioned on furnishing bail bond of **Rs.20,000/- each** with **a suitable surety** each of the like amount, to the satisfaction of learned Sub-Divisional Judicial Magistrate, Majuli.

The direction for bail is further subject to the conditions that the accused-petitioners:

(a) shall not leave the territorial jurisdiction of learned Sub-Divisional Judicial Magistrate, Majuli, without prior written permission from him;

(b) shall not hamper with the investigation, or tamper with the evidence of the case;

(c) shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

In terms of the above, this bail application stands disposed of.

JUDGE

Comparing Assistant