

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.713 of 2022

(In the matter of an application under Section 482 of the Code of Criminal Procedure)

Muna Sahoo@Sahu and Another ***Petitioners***

-versus-

State of Orissa ***Opposite Party***

Advocate(s) appeared in this case:-

For Petitioners : Mr. J. Panda, Advocate

For Opposite Party : Ms. Samapika Mishra,
Additional Standing Counsel

CORAM: JUSTICE B.P. ROUTRAY

JUDGMENT
27th April, 2022

B.P. Routray, J.

1. The Petitioners, who are the accused for commission of offence under Section 21(c) of the N.D.P.S. Act, have prayed for releasing them on default bail in terms of Section 36-A(4) of the N.D.P.S. Act read with Section 167(2) of the Cr.P.C.

2. The case of the Petitioners is that, on the allegation of transporting and possessing 1kg 159grams of Brown Sugar (heroin), they were arrested and taken to custody on 08.08.2021 in connection

with Lalbag P.S. Case No.206 dated 08.08.2021 for commission of offence under Section 21(c) of the N.D.P.S. Act. Pending investigation, they were remanded to custody on 09.08.2021 by order of the learned Sessions Judge-cum-Special Judge, Cuttack in G.R. (Special) Case No.22 of 2021 and since then the Petitioners are inside custody.

3. On 03.02.2022, the accused persons were produced before the learned Sessions Judge-cum-Special Judge from the jail custody through virtual mode and the case was posted to be put up on 17.02.2022. The investigation continued and 180 days completed on 04.02.2022. On 12.02.2022, chargesheet was filed by the prosecution and on 14.02.2022, cognizance was taken by the learned Sessions Judge-cum-Special Judge against the Petitioners and four other accused persons for the offences stated above. Later on the same date, an application was filed by the counsel on behalf of the accused persons U/s.167(2) of the Cr.P.C praying for grant of bail on the ground that since the charge-sheet had not been filed within a period of 180 days from the date of initial remand, the accused persons should be released on bail. However, the learned Sessions Judge-cum-Special Judge rejected the application by order dated 14.02.2022 on the ground that such application was made after chargesheet had been filed and

cognizance has been taken in the case. It was further held that since the accused have not made such application before filing of the chargesheet, the right having accrued in their favour extinguished upon filing of the charge-sheet.

4. The Petitioners contend before this Court that remanding them into custody on 12.02.2022 and again rejecting their application for bail by order dated 14.02.2022 is against the principles of law enumerated in Section 167(2) of the Cr.P.C and such an interpretation of the learned Sessions Judge-cum-Special Judge with regard to the extinguishment of right of default bail upon filing of the charge-sheet without informing the Petitioners of their right as such, is not permissible. The learned counsel for the Petitioners by relying on a decision of this Court in the case of *Lambodar Bag vs. State of Orissa, (2018) 71 OCR-31* contends that rejection of bail for non-completion of investigation within 180 days from the date of custody is illegal and liable to be set aside. It is thus prayed that the Petitioners should be released on default bail as a matter of right guaranteed under the provisions contained in Section 167(2) of the Cr.P.C. read with Section 36-A(4) of the N.D.P.S. Act.

5. It is the settled law that right guaranteed under Section 167(2), Cr.P.C. to the accused is indefeasible. This Court, in the case of *Lambodar Bag* (supra) after taking into consideration the principles decided in the case of *Hitendra Vishnu Thakur vs. State of Maharashtra, AIR 1994 SC 2623* and various other decisions, have answered on five points relating to release of an accused in terms of Section 36-A(4) of the N.D.P.S. Act read with Section 167 (2) of the Cr.P.C. The answer is in affirmative in favour of the accused for his enlargement on bail for non-completion of investigation within the prescribed period of 180 days on different contingencies relating to extension of such period.

6. In the said decision this Court has further held that, before granting extension of time to the prosecution, the obligation casts upon the Court to inform the accused of his right for release on bail.

7. Applying those principles as decided by this Court in the case of *Lambodar bag* to the present facts of the case as narrated in the preceding paragraphs, it is felt that in the present case, the indefeasible right of the Petitioners for their release on default bail has been violated. It is evinced from the order of remand dated 12th February, 2022 and the rejection of default bail by order dated 14th February,

2022 that the accused-Petitioners have never been informed of their right of default bail accrued due to non-filing of investigation report upon completion of 180 days, and even before extension of remand.

8. It is also held in the case of *Labmodar Bag* (supra) that, even if the accused has not applied for his release on default bail, still his entitlement for bail on account of non submission of prosecution report would not be affected. The relevant observations of this Court are reproduced below:

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Keeping in view that ratio laid down in the aforesaid decisions and coming to the case in hand, I am of the humble view that even though the Petitioners have not applied for bail during the default period when prosecution report was not filed even after extended period for completion of investigation as was granted by the learned trial judge but since the learned trial judge has not informed the Petitioners of their right being released on bail on account of non-submission of prosecution report, no fault can be found with the Petitioners for not making such application for bail during the default period. Had the learned trial judge informed the Petitioners of their right and the Petitioners on being so informed, failed to file an application for release on bail on account of the default by the investigating agency in the completion of investigation within the extended period, after the prosecution report is filed, they would have lost their valuable right. In the factual scenario, the Petitioners cannot be stated to have voluntarily given up their indefeasible right for default bail.

8. Even though the Petitioners have not applied for bail before the learned trial judge on the ground of not being noticed to have their say on the invalid petition filed by the Addl. Public Prosecutor on 22.07.2017 but on some other grounds, they are not debarred from taking such ground before this Court. As held in case of Rakesh Kumar Paul, in the matter of personal liberty,

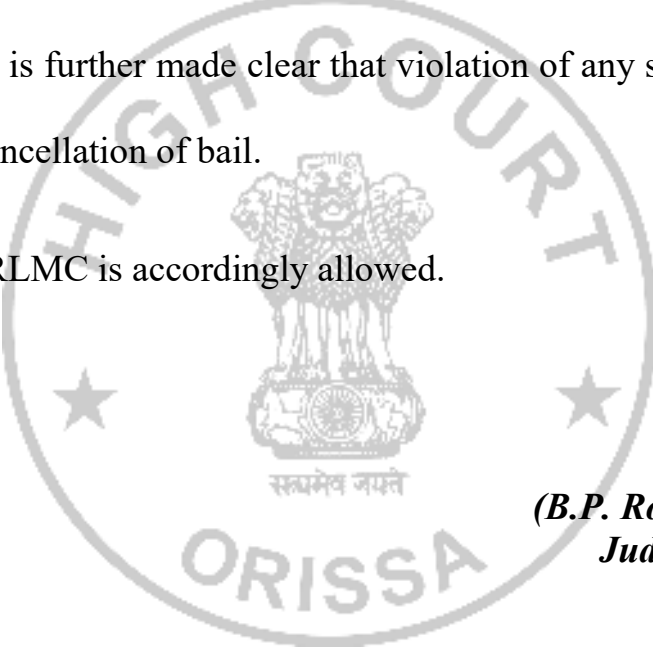
the Court should not be too technical and must lean in favour of personal liberty. An application for bail in the High Court is not an application for review of the order of the court below. Grounds not taken in the court below can be taken in the bail petition in the higher Court and even non-taking of grounds in the bail petition will not deprive the counsel for the accused in raising such grounds during hearing of the bail application. Even if a ground for grant of bail is not taken in the bail petition and not argued by the counsel for the accused, the court is not deprived of releasing the accused on bail on such ground if it is legally sustainable. Strict rules of pleadings are not applicable in bail petition.”

9. As it reveals from the impugned orders and copy of the lower court record that admittedly the charge-sheet was filed on 12.02.2022 and cognizance was taken on 14.02.2022. However, the statutory period of 180 days had ended prior to such date, that is, on 04.02.2022. As a result, prior to the extension of remand on 12.02.2022, right to be released on default bail had accrued in favour of the Petitioners. The right of default bail accrued in favour of the Petitioners will not extinguish unless they are informed of their such right. Thus it cannot be said that such right had extinguished upon subsequent filing of the chargesheet, when the accused-Petitioners were not informed of such right accrued in their favour.

10. Thus, in consideration of all the facts, the order dated 12.02.2022 granting extension of remand and order dated 14.02.2022 rejecting the application for bail of the learned Sessions Judge-cum-Special Judge, Cuttack to the extent of rejecting the prayer of bail

under Section 167(2) of the Cr.P.C. is set aside. Resultantly, it is directed to release the Petitioners on bail in the aforesaid case on furnishing bail bond of Rs.1,00,000/- (Rupees One Lakh) with two sureties each for the like amount to the satisfaction of the court in seisin over the matter with further condition that the Petitioners shall attend the trial court on each date fixed. Further, the court below is at liberty to fix any other condition in addition to the above as it deems fit and proper. It is further made clear that violation of any such condition shall entail cancellation of bail.

11. The CRLMC is accordingly allowed.

The seal of the Orissa High Court is a circular emblem. It features the State Emblem of India at the top center, which is a four-lion capital of an abacus. Below the emblem is the motto 'सत्यमेव जयते' in Devanagari script. The words 'HIGH COURT' are written in a semi-circle at the top, and 'ORISSA' is written in a semi-circle at the bottom. Two five-pointed stars are positioned on either side of the central emblem.

(B.P. Routray)
Judge

M.K Panda/Sr. Steno