

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.1058 of 2022

Saraswati Haldar & another *Petitioners*
-versus-
State of Odisha *Opposite Party*

CORAM: JUSTICE S.PUJAHARI

ORDER
07.07.2022

Order No.

04.

- 1.This matter is taken up through Hybrid mode.
- 2.Heard learned counsel for the Petitioners and learned counsel for the State.
- 3.This application under Section 482 of Cr.P.C. has been filed by the Petitioners with a prayer to quash the order dated 6.8.2021 passed by the learned Sessions Judge-cum-Special Judge, Malkangiri in T.R. Case No.162 of 2019 arising out of Malkangiri P.R. No.40 of 2019-20.
4. The case of the Petitioners is that they were given the benefit of Section 167(2) Cr.P.C. However, before filing of the bail bond as the final form in this case had been filed against the Petitioners, the Petitioners are in custody as their subsequent prayer for bail has been rejected. Therefore, counsel for the Petitioners submits that the Petitioners may be extended the benefit of Section 167(2)

Cr.P.C. notwithstanding the final form filed. Challenging the same, the Petitioners have come to this Court.

5. Considering the facts and the submissions made, this Court finds no illegality or infirmity in the impugned order. Accordingly, the CRLMC stands dismissed.

6. However, it is open to the Petitioners to invoke their right accrued in their favour pursuant to the earlier order by filing a bail bond. If such a bail bond is filed, the court in seisin over the matter taking note of the law laid down by the apex Court in the case of **Union of India through Central Bureau of Investigation vrs. Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav** reported in (2014) 9 SCC 457 wherein it has been held as follows :

“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’s 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 has based on three-Judge Bench decision in Uday Mohanlal Acharya case, we are obliged to conclude and hold the principle laid down in paras 54 and 58 of Pragyna Singh Thakur case (which has been underlined 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 a good law. Our view finds support from the decision in Union of India v. Arviva Industries India Ltd.”

shall consider the same, notwithstanding the fact that the Petitioners have filed a fresh petition under Section 167 (2) Cr.P.C. as the provision of waiver is not applicable to a criminal case.

7. With the aforesaid order, this CRLMC stands disposed of.

8. Urgent certified copy of this order be granted on proper application.

(S. Pujahari)
Judge

PKS