

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.1747 of 2022

Chout @ Chandrasing Patil. ***Petitioner***

-versus-

State of Odisha. ***Opposite Party***

CORAM: JUSTICE S.PUJAHARI

ORDER
21.07.2022

Order No.

- 02.
- 1.** This matter is taken up through Hybrid mode.
 - 2.** This is an application filed under Section 482 of Cr.P.C. seeking for quashment of the order dated 31.01.2022 passed by the learned Addl. Sessions Judge-cum-Special Judge, Koraput in T.R. No.26 of 2018 refusing the prayer made by the petitioner to allow him to be released on default bail in view of Section 167(2) of Cr.P.C. read with Section 36A(4) of the N.D.P.S. Act.
 - 3.** Heard the learned counsel for the petitioner and the learned counsel for the State.

4. As it appears, the petitioner being indicted in a case under Sections 20(b)(ii)(C), 25 and 29 of the NDPS Act is languishing in custody. On 02.02.2019 a petition was filed by the learned Special P.P. and the I.O. for extension of time for completion of the investigation. However, the same was rejected by the Court below and since charge-sheet was not filed within the time stipulated, the accused persons including the present petitioner in custody, were intimated of their right to be released on bail due to non-submission of charge-sheet within the statutory period, but the Court did not fix the terms and conditions for their release on default bail. Thereafter, on 05.02.2019 charge-sheet was filed by the Investigating Officer keeping the investigation open. On 06.02.2019 a petition under Section 167(2) of Cr.P.C. was filed on behalf of the co-accused – Prakash Raghunath Choudhury and the same was rejected by the Court below on the ground that charge-sheet had already been filed by then.

However, the present petitioner at that point of time neither came forward to avail of his right pursuant to the intimation given by the Court below nor filed any petition seeking for default bail. He filed the application for bail purportedly under Section 167(2) Cr.P.C. belatedly on 31.01.2022, i.e., after the final / supplementary charge-sheet was filed by the Investigating Officer as dealt with by the Court below in the order dated 27.07.2020. The said petition of the petitioner having been rejected by the impugned order, he has approached this Court.

5. While rejecting the application of the petitioner the learned Special Court vide the impugned order placed reliance on the decision of the Apex Court in the case of ***M. Rabindran vs. The Intelligence Officer, Directorate of Revenue Intelligence***, reported in (2021) 81 OCR (SC) 548. He further took note of the order dated 06.02.2019 under which the application for default bail filed by a co-accused had been rejected, and the delay of three years on the part of the present petitioner in making application for

default bail. The impugned order, however, does not specify that the charge-sheet that had been filed on 05.02.2019 was termed by the Investigating Officer as “preliminary charge-sheet” and the final or supplementary charge-sheet was filed on record only on 27.07.2020. Further, vide the impugned order, the learned Special Judge observed that although vide the order dated 04.02.2019 the petitioner and another co-accused were intimated about their right to be released on bail for the default on the part of the Investigating Officer to submit charge-sheet within the stipulated period of 180 days, neither the petitioner nor the co-accused – Prakash Raghunath Choudhury came forward to avail of the said right at that point of time. To reiterate, after the charge-sheet (preliminary charge-sheet) was filed, the co-accused – Prakash Raghunath Choudhury moved an application under Section 167(2) of Cr.P.C. on 06.02.2019, and the same was rejected citing the reason that charge-sheet by then had already been submitted, and the right of default bail was no more available to him.

6. The learned Special Court vide the impugned order has referred to the decision of the Apex Court in the case of **M. Rabindran** (supra) and the said authority has also been relied on by the petitioner before this Court. In no ambiguous terms, the Apex Court have held in the said case that where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, additional complaint, or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. In the present case, admittedly, the final charge-sheet was received from the Investigating Officer on 27.07.2020, and the charge-sheet upon which the order of cognizance was taken by the Court below on 05.02.2019 was termed / treated as a preliminary charge-sheet by the Investigating Officer himself. This Court in CRLMC No.1 of 2010 (Sk. Raju @ Raju & others vrs. State of Orissa), held as follows:-

“16. The concept of “preliminary charge-sheet” is alien to the Code of Criminal Procedure although in

view of Section 173(8) of the Code, supplementary charge-sheet can be filed by the Investigating Agency in the aftermath of submission of the Final Form / charge-sheet. Notwithstanding the term so used, it is always upto the Court receiving such charge-sheet, to find out at the stage of taking cognizance, as to whether or not the so-called preliminary charge-sheet qualifies to be a Final Form under Section 173(2) of the Code, to be acted upon in view of Section 190 of the Code. Xxxxxx”

7. In the case of ***Bikramjit Singh vrs. The State of Punjab***, reported in (2020) 10 SCC 616 the Apex Court referring to the case of ***Rakesh Kumar Paul vrs. State of Assam***, reported in (2017) 15 SCC 67, held as follows:-

“27. In a fairly recent judgment reported as *Rakesh Kumar Paul v. State of Assam* (2017) 15 SCC 67, a Three-Judge Bench of this Court referred to the earlier decisions of this Court and went one step further. It was held by the majority judgment of Madan B. Lokur, J. and Deepak Gupta, J. that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted. This was stated in Lokur, J.’s judgment as follows:

“37. This Court had occasion to review the entire case law on the subject in *Union of India v. Nirala Yadav* [*Union of India v. Nirala Yadav*, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212] . In

that decision, reference was made to Uday Mohanlal Acharya v. State of Maharashtra [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows: (Nirala Yadav case [Union of India v. Nirala Yadav, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212] , SCC p. 472, para 24) “13. (3) 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.’ (Uday Mohanlal case [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] , SCC p. 473, para 13)”

38. This Court also dealt with the decision rendered in Sanjay Dutt [Sanjay Dutt v. State, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] and noted that the principle laid down by the Constitution Bench is to the effect that if the charge-sheet is not filed and the right for “default bail” has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge-sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to Mohd. Iqbal Madar Sheikh v. State of Maharashtra [Mohd. Iqbal

Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722 : 1996 SCC (Cri) 202] wherein it was observed that some courts keep the application for “default bail” pending for some days so that in the meantime a charge-sheet is submitted. While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for “default bail” during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court.

Procedure for obtaining default bail

40. In the present case, it was also argued by the learned counsel for the State that the petitioner did not apply for “default bail” on or after 4-1-2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge-sheet. Strictly speaking, this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court — he made no specific application for grant of “default bail”. However, the application for regular bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge-sheet having expired and that perhaps no charge-sheet had in fact been filed. In any event, this issue was argued by the learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail — such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written

application for “default bail” or an oral application for “default bail” is of no consequence. The court concerned must deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge- sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.”

8. In the aforesaid decision, it was also held that the accused-petitioner filed yet another application for default bail subsequent to return of his earlier petition for similar relief, would not mean the later application that had been wrongly decided. The right to default bail is not mere a statutory right under the first proviso to Section 167(2) of Cr.P.C., but is a part of the procedure established by law under Article 21 of the Constitution of India, which is therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) of Cr.P.C. are fulfilled.

9. Without disputing the legal propositions as above, the learned counsel for the State, however, submits that in the present case, the petitioner

having not availed of his statutory right of default bail before submission of the charge-sheet, the impugned order cannot be found fault with, inasmuch as the right of default bail stood extinguished after charge-sheet was filed by the Investigating Officer.

10. In the case of **Rakesh Kumar Paul** (supra), the Apex Court held as follows:-

“44. Strong words indeed. That being so we are of the clear opinion that adapting this principle, it would equally be the duty and responsibility of a court on coming to know that the accused person before it is entitled to ‘default bail’, to at least apprise him or her of the indefeasible right. A contrary view would diminish the respect for personal liberty, on which so much emphasis has been laid by this Court as is evidenced by the decisions mentioned above, and also adverted to in *Nirala Yadav*.

Application of the law to the petitioner

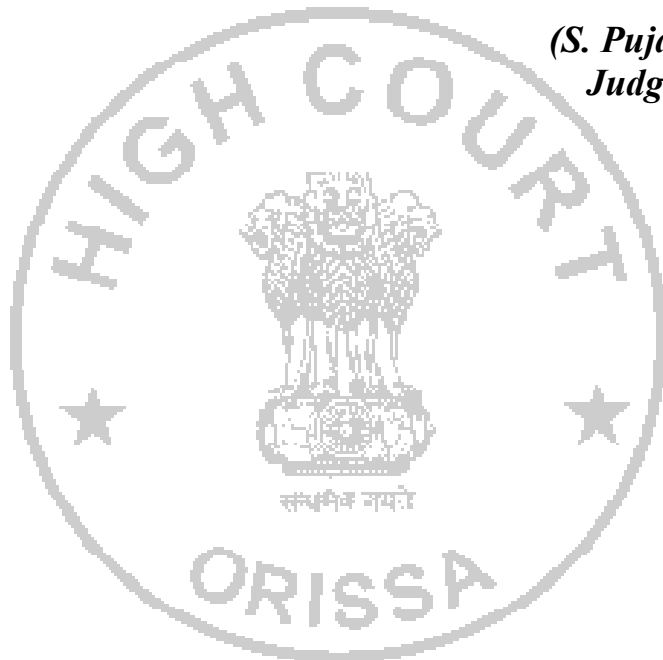
45. On 11th January, 2017 when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of ‘default bail’ since the statutory period of 60 days for filing a charge sheet had expired, no charge sheet or challan had been filed against him (it was filed only on 24 th January, 2017) and the petitioner had orally applied for ‘default bail’. Under (2012) 9 SCC 1 these circumstances, the only course open to the High Court on 11 th January, 2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him ‘default bail’ on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.”

11. The principles on default bail under Section 167(2) of Cr.P.C. have thus been settled. There is nothing on record to show that either before submission of the first charge-sheet (preliminary charge-sheet) or even before submission of the final charge-sheet (supplementary charge-sheet), there was any move from the side of the petitioner seeking for default bail. There is also nothing to show that he expressed his willingness or preparedness to go on bail by making any prayer orally or through petition before the learned Special Judge, pursuant to the observation made by the learned Special Judge vide his order dated 04.04.2019 affirming the entitlement of the petitioner to avail default bail. The learned counsel appearing for the petitioner though placed reliance on a decision of the Apex Court in the case of **M. Rabindran** (supra), but could not convince this Court as to how the same can render any assistance to the case of the petitioner for default bail, inasmuch as, admittedly, the petitioner failed to apply for default bail when the right accrued to him and before

submission of charge-sheet against him. Hence, this Court finds no reason to interfere with the impugned order.

12. Accordingly, this CRLMC filed challenging the impugned order being devoid of merit stands dismissed.

DA/MRS



(S. Pujahari)
Judge