

IN THE HIGH COURT OF ORISSA AT CUTTACK

AFR

CRLMC No.2033 of 2022

Sk. Eimat @ Bidhia

....

Petitioner

Mr. Chandan Samantaray, Advocate

-Versus-

State of Odisha

....

Opposite Party

Mr. S.S. Mohapatra, ASC

CRLMC No.2428 of 2022

Sk. Mammot @ Sk. Mohammad
Hosen @ Husen

....

Petitioner

Mr. Chandan Samantaray, Advocate

-Versus-

State of Odisha

....

Opposite Party

Mr. S.S. Mohapatra, ASC

CORAM:
JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT:12.10.2022

1. Since a common question of law is involved, both the cases have been clubbed and taken up together for disposal.

2. CRLMC No.2033 of 2022: The petitioner herein was arrested in connection with an incident dated 10th September, 2021 towards recovery and seizure of 264 grams of contraband substance suspected to be Brown sugar which corresponds to Special Case No.235 of 2021 pending in the file of learned Special Judge, Balasore and was remanded to judicial custody and later chargesheeted, whereupon, the court took cognizance of an

CRLMC Nos.2033 & 2428 of 2022

offence under the NDPS Act. The petitioner thereafter moved an application for bail under Section 167(2) Cr.P.C. on the ground that the preliminary chargesheet though filed but is incomplete, since it is not accompanied with a Chemical Examination Report and hence, he entitled to default bail. However, the learned Special Judge, Balasore rejected the plea of the petitioner by impugned order dated 15th July, 2021.

3. CRLMC No.2428 of 2022: In the instant case, the petitioner was alleged to be involved in possession of 325 grams of Brown sugar which was recovered from him and for that, he was forwarded in connection with Special Case No.34 of 2022 pending before the court of learned Special Judge, Balasore. Like the other case, the petitioner applied for default bail under Section 167(2) Cr.P.C. but the same was rejected.

4. The petitioners pleaded for release on a common ground that though the chargesheets have been submitted but without Chemical Examination Reports, hence, are incomplete and therefore, both are entitled to default bail.

5. The learned counsel for the petitioners contends that when there were no complete chargesheets, on expiry of the stipulated period of detention, the petitioners should have been granted bail in terms of Section 167(2) Cr.P.C. however the learned Special Judge, Balasore declined it on the ground that cognizance has already been taken of the offence, a decision which is legally not tenable and therefore, deserve to be interfered with. While contending so, Mr. Samantaray, the learned counsel for the petitioners cited the following decisions, such as, **Ravinder Vrs. State of Haryana:** MANU/PH/3829/2014; **Sunil Vasantrao Phulbande and Others Vrs. State of Maharastra:** MANU/MH/0356/2002; **Tarlok and Others Vrs. State of Haryana:** MANU/PH/0275/2019; and **Achpal @**

Ramswaroop and Others Vrs. State of Rajasthan: MANU/SC/1035/2018. The contention of Mr. Samantaray is made to suggest that the investigation cannot be said to be complete as the preliminary chargesheets were filed though within the stipulated period but not in conformity with Section 173(5) Cr.P.C. and therefore, the petitioners are entitled to default bail which is inevitable being an indefeasible right statutorily mandated.

6. Mr. Mohapatra, learned ASC on the other hand submits that the learned Special Judge, Balasore rightly declined to release the petitioners for having already taken cognizance of the offence on the basis of the materials submitted along with the preliminary chargesheets and therefore, the impugned orders cannot be found fault with and hence, not to be disturbed.

7. It is not denied by the State that at the time of taking cognizance of the offence, there was any Chemical Examination Reports submitted with the preliminary chargesheets. Admittedly, the preliminary chargesheets were filed, whereafter, cognizance of the offence was taken against the petitioners, who thereafter moved the learned court below for release in terms of Section 167(2) Cr.P.C. but were denied. So the seminal question is, whether, in such a situation, the preliminary chargesheets are to be held as incomplete so as to enable the petitioners to claim default bail? Mr. Samantaray would contend that in view of the decisions (supra), the chargesheets could not be treated as complete despite being filed within the statutory period and therefore, the petitioners were bound to be released on bail on its expiry.

8. Let us browse the decisions which have been placed reliance on by Mr. Samantaray. To begin with, in **Ravinder** (supra), the chargesheet was filed without Chemical Examiner's Report and in that case, not only cognizance of the offence was taken but also

charge against the accused was framed and under such circumstances, while calling for a report from the trial court and adjourning the case to a future date, released the accused on bail. In **Sunil Vasantrao Phulbande and Others** (supra), the Nagpur Bench of Bombay High Court, however, allowed release of the accused in terms of Section 167(2) Cr.P.C. by holding that the chargesheet was not complete without the Chemical Examination Report for not being a report in conformity with Section 173(5) Cr.P.C. In **Tarlok and Others** (supra), the Punjab & Haryana High Court held that since the chargesheet is not accompanied with FSL report, the accused is entitled to be released on bail which was though with a reference to Section 167(2) Cr.P.C. The Apex Court in **Achpal @Ramswaroop and Others** (supra), in the peculiar facts and circumstances of the case, held and observed that since there was no chargesheet before the court when the default bail was applied in the sense that though it had been filed earlier but returned due to non-compliance of the High Court's direction which could not have been treated as extension of investigation, the accused is therefore entitled for a relief under Section 167(2) Cr.P.C. however towards the end approved the view expressed in **Rakesh Kumar Paul Vrs. State of Assam** reported in (2017) 15 SCC 67 to the effect that even after such release, there is no bar or prohibition as such to arrest or re-arrest the accused on cogent grounds.

9. In **Ravinder** (supra), the accused was released on bail pending final decision as to how the trial court could frame charge when there was no Chemical Examiner's Report. But, it not an authority to say that a chargesheet is no chargesheet in the eye of law without such scientific report and hence, assuming that there is no report in terms of Section 173(5) Cr.P.C. being on record, default bail is to be allowed. However, such a view appears to have been

expressed in **Sunil Vasantrao Phulbande and Others** (supra) and in that case, the accused was released on default bail. The decision in **Tarlok and Others** (supra) is again not an authority to hold the view that the accused shall be eligible for bail in terms of Section 167(2) Cr.P.C. since the report under Section 173 Cr.P.C. is no chargesheet in the eye of law. In **Achpal @Ramswaroop and Others** (supra), the Apex Court, as mentioned before, held absence of a chargesheet with the court when the accused applied for default bail, in the peculiar facts, should not have been disallowed.

10. In the instant case, in fact, preliminary chargesheets have been filed before expiry of 180 days keeping the investigation open as per Section 173(8) Cr.P.C. The question before the Court is whether the petitioners are entitled to default bail despite preliminary chargesheets have been filed? The decision of **Achpal @Ramswaroop and Others** (supra) is inapplicable to the case at hand since there was no chargesheet so to say before court by the time default bail was asked for and hence, it was held that the accused would be eligible for release in terms of Section 167(2) Cr.P.C. As held earlier, decisions in **Ravinder** and **Tarlok and Others** (supra) do not lay down the law that despite a chargesheet is filed, it would not be treated to be a report under Section 173 Cr.P.C. and therefore, the accused shall be entitled to default bail. However, the Court with due respect is in disagreement with the view expressed in **Sunil Vasantrao Phulbande and Others** (supra) for the fact that once a chargesheet is filed, on completion of investigation, notwithstanding absence of a document like the Chemical Examination Report which may at times be very crucial and assumes importance especially in cases involving contraband substance, it shall have to be treated as a report received under Section 173 Cr.P.C. Once a chargesheet so submitted and received and not refused, the court shall have to consider the bail of the

accused as per Section 309(2) Cr.P.C. and there the accused cannot plead for default bail. In fact, on default bail, it is well settled that if the chargesheet is not submitted within the stipulated period and the accused applies for it, as has been held in the Constitution Bench judgment of the Apex Court in **Uday Mohanlal Acharya Vrs. State of Maharastra** reported in (2001) 5SCC 453, such an invaluable and indefeasible right is not lost even after receipt of report under Section 173 Cr.P.C. unless he after having availed of the right under Section 167(2) Cr.P.C. could not be able to furnish the bail bond, where, in such situation, the right which had accrued shall stand extinguished.

11. So far as the present case is concerned, the investigation stood completed with respect to the petitioners though the investigation is kept open since some other accused persons involved are yet to be apprehended and as such, preliminary chargesheets have been filed. The preliminary chargesheets are final for the purpose of investigation vis-à-vis the petitioners. Admittedly, no permission was sought for in terms of Section 36A(4) of NDPS Act seeking extension of the period for the investigation not able to be concluded within the stipulated period. So to say, no such application was moved for extending the period, rather, the preliminary chargesheets were filed on completion of investigation. Hence, for all intent and purpose, there was completion of investigation with the filling of preliminary chargesheets which were received as reports under Section 173 Cr.P.C. As a necessary, corollary, the petitioners did not have any scope for availing such a right of default bail in terms of Section 167(2) Cr.P.C. So the option which was left for the petitioners was to apply for regular bail with a pleading that the chargesheets since are not accompanied with the Chemical Examination Reports, no offence under the N.D.P.S. Act could possibly be made out. Interestingly, the preliminary

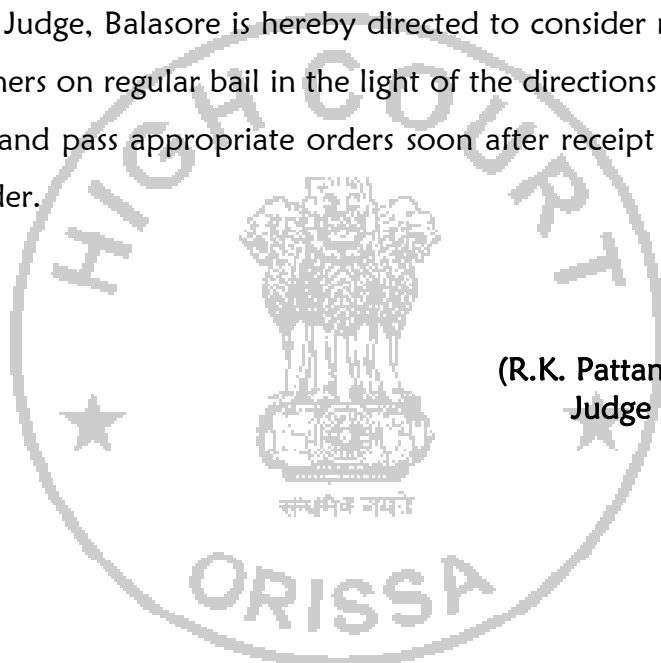
chargesheets were received and the learned court below took cognizance of the offence without the Chemical Examination Reports. It cannot be gainsaid that a Chemical Examination Report is a document of strong relevance as it renders immense assistance to a court in forming a definite opinion when offence is with respect to any contraband substance. Having reached thus far, the Court reaches at a logical conclusion that the petitioners would not be eligible to demand bail in terms of Section 167(2) Cr.P.C. for having the preliminary chargesheets filed which are final as against them and the remedy which is left open is to plead for regular bail for having no conclusive proof of recovery of contraband substance, such as, Brown sugar in absence of Chemical Examination Reports to substantiate it.

12. If the court below did not have the Chemical Examination Reports, a claim which has remained unchallenged, it is not easily comprehended as to how for an offence under N.D.P.S. Act, cognizance was taken. Whether other materials submitted along with the preliminary chargesheets were sufficient for the court below to form an opinion that the contraband substance to be Brown sugar? Anyways, in the given situation, the petitioners could have claimed bail on such ground. It is not known, if in the meantime, the Chemical Examination Reports have been received by the court below. In aforesaid backdrop, the Court is of the opinion that the case of the petitioners for regular bail should be examined and it shall be by the learned court below considering the Chemical Examination Reports, if it is available and in case, the same could not be found, to release both of them on bail subject to such conditions unless it is fully convinced that the contraband substance is nothing but Brown sugar. But while taking a decision in that regard, the significance of the Chemical Examination Report and its absence should not be lost sight of which in fact play a

dominant role and a deciding factor in reaching at a conclusion as to the nature of the contraband substance. However, in the event the Chemical Examination Reports are received later to the release of the petitioners with a positive result that the seized substance is Brown sugar, the learned court below shall have the jurisdiction to ensure cancellation of bail but in accordance with law.

13. It is ordered accordingly.

14. In the result, the petitions filed under Section 482 Cr.P.C. at the behest of the petitioners stand dismissed. However, the learned Special Judge, Balasore is hereby directed to consider release of the petitioners on regular bail in the light of the directions issued herein above and pass appropriate orders soon after receipt of a copy of this order.



(R.K. Pattanaik)
Judge

TUDU