IN THE HIGH COURT OF ORISSA AT CUTTACK

BLAPL Nos. 12345 and 12628 of 2023

Applications for bail under Section 439 of Code of Criminal Procedure, 1973.

BLAPL No. 12345 of 2023

Rintu Tarei & Another .... **Petitioners**

-*Vs.*-

State of Odisha .... **Opp. Party**

BLAPL No. 12628 of 2023

AFR

S.K. Hussain & Others .... **Petitioners**

-*Vs.*-

State of Odisha .... **Opp. Party**

Advocate(s) appeared in these cases:-

For Petitioners : M/s. D.P. Dhal, Sr. Advocate
Mr. B.S. Das Parida, S. Mohapatra,
K. Mohanty, A. Ray, S.S. Lenka,
K.K. Sethy and A. Pradhan,
G.P. Behera, B. Behera &
G. Padhi, Advocates

Vs.

For Opp. Party : Mr. S.K. Mishra,
(Additional Standing Counsel)
[in **BLAPL No. 12345 of 2023**]

For Petitioners : M/s. D.P. Dhal, Sr. Advocate
Mr. B.S. Das Parida, S. Mohapatra,

K. Mohanty, A. Ray, S.S. Lenka,
A. Pradhan, K. Sethi, G. Behera,
B. Behera & G. Padhi, Advocates

Vs.

For Opp. Party : Mr. S. K. Mishra,
(Additional Standing Counsel)
[in **BLAPL No. 12628 of 2023]**

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
16th April, 2024

SASHIKANTA MISHRA, J.

"*To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law enforcement machinery on the other is a perennial problem of statecraft*"- observed Justice V.R. Krishna lyer quoting Lewis Mayers in his celebrated judgment in the case of ***Nandini Satpathy vs. P.L. Dani***,[1] This Court, in the present cases is called upon to embark upon a path similar, for the cries of the accused persons for protection of their sanctimonious right of liberty is pitted against the

[1] AIR 1978 SC 1025

demand of the investigating agency to curb the same, ostensibly for investigation of what according to it, is a heinous crime. Underlying the legal battle however is the more cherished objective of the court to uphold the majesty of the rule of law under the Constitutional jurisprudence.

This in essence, is the task cut out before this Court in these cases.

Both these applications relate to the same case and have been filed by the petitioners seeking bail therein. As such both were heard together and are being disposed of by this common judgment.

2. The petitioners in these bail applications are in custody since 27.05.2023 in connection with Sahadevkhunta P.S. Case No. 366 dated 12.11.2022 corresponding to Special Case No. 294 of 2022 pending in the Court of learned Special Judge, Balasore for the alleged commission of offences under Sections 21(C)/29 of NDPS Act.

3. The prosecution case is that on 12.11.2022, upon receiving reliable information regarding transportation of

contraband brown sugar, the police personnel of Sahadevkhunta Police Station rushed to the spot, which is at Kantabania bridge, and apprehended two persons, namely, Sk. Sahabul@Sunil and Jada Soren. On search, 270 grams of brown sugar was recovered from their possession. Both of them were arrested and forwarded to the Court of Special Judge. Upon completion of investigation, charge sheet was submitted on 11.05.2023 but on an application filed by the arrested accused for default bail under Section 167(2) of Cr.P.C read with Section 36-A (4) of the NDPS Act, learned Special Judge by order dated 11.05.2023, directed their release as he found that the charge sheet had not been submitted within 180 days as stipulated. Charge sheet was submitted on 11.05.2023, purportedly keeping the investigation open as per Section 173(8) of Cr.P.C.. On 27.05.2023, the petitioners in the present bail applications were arrested on the basis of evidence collected during further investigation. The bail applications having been rejected by the learned Special Judge, they have approached this Court seeking bail.

4. Heard Mr. D.P. Dhal, learned Senior Counsel with Mr. Ansuman Ray, learned counsel for the petitioners and Mr. S.K.Mishra, learned Additional Standing Counsel for the State.

5. Mr. Dhal opens his arguments by submitting that the petitioners were in custody in connection with another case being Sahadevkhunta Case No. 352 of 2022 since 27.10.2022. Alleging that they had not been produced before the learned Special Judge after their arrest within the stipulated 24 hours, the petitioners moved applications for bail before the Special Judge, which being rejected, they approached this Court in CRLMC No.3703 of 2022. By Judgment passed on 17.05.2023, this Court held that the mandatory requirement of Section 57 of Cr.P.C. (read with Article 22 of the Constitution) had been violated and therefore, directed the petitioners to be released. Accordingly, the petitioners were released on 27.05.2023 but were again arrested in connection with the present case (Sahadevkhunta P.S. Case No. 366 of 2022) immediately upon their release from jail. In fact, they were

supposedly arrested from outside the jail gates. Mr. Dhal forcefully argued that this by itself shows that the Investigating Agency was hell bent upon taking the petitioners to custody somehow and therefore, falsely entangled them in the present case even though their names do not find place either in the FIR or the charge sheet submitted in the present case. Mr. Dhal further argues that even otherwise, the Investigating Officer is not authorized to seek extension of time to complete investigation. He has relied upon several judgments in this regard. On merits, Mr. Dhal has argued that there is not a whisper about the petitioners' involvement either in the FIR or in the charge sheet but their alleged involvement is sought to be established through the statements of two witnesses, namely, Debabrata Mishra and Rabindra Behera. According to Mr. Dhal, it is apparent that the said witnesses are stock witnesses of the Investigating Agency and have been utilized only for the purpose of taking the petitioners into custody again. Even accepting their statements for a moment, a prima facie case is not revealed against the petitioners. Moreover, there is nothing in their

statements to show the involvement of the petitioners with the alleged occurrence.

6. Mr. S.K. Mishra, learned State Counsel, on the other hand, argues that the proposition of law cited by learned Senior Counsel that the Investigating Officer is not authorized to seek extension of time for the investigation is not applicable to the present case because the Investigating Officer did not seek extension of time to complete investigation as provided under Section 36-A (4) of the NDPS Act, but filed charge-sheet keeping the investigation open as per the provision under Section 173 (8) of Cr.P.C. After submission of charge sheet, Mr. Mishra further argues, the right of the Investigating Agency to collect relevant information, materials and evidence cannot be taken away. Mr. Mishra also argues that there is nothing on record to show that the case was built up against the petitioners falsely to take them into custody only because they were released in the earlier case as per orders passed by this Court in CRLMC No.3703 of 2023. On merits, Mr. Mishra would argue that both the witnesses have clearly

stated about supply of brown sugar by the petitioners to the co-accused persons, which they had seen themselves.

7. Perusal of the order sheet of the case before learned Special Judge reveals that charge sheet in Sahadevkhunta P.S. Case No. 366 of 2022 was submitted on 11.05.2023 on which date the co-accused persons, namely, Sk. Sahabul@Sunil and Jada Soren were released on default bail as learned Special Judge found that charge sheet had been submitted after expiry of 180 days. In the charge sheet, the Investigating Officer had mentioned about keeping the investigation open under Section 173(8) of Cr.P.C. The order sheet does not reveal any specific petition being filed by the I.O. seeking permission to keep the investigation open under Section 173(8). Be that as it may, learned Special Judge stated in his order dated 11.05.2023 that the prayer of the Investigating Officer for extension of time will be considered after serving the copy to the other side. No further order appears to have been passed in this regard by learned Special Judge. On 09.06.2023, in course of hearing of the bail applications

filed by the petitioners an argument was made that the Court not having accorded permission to the I.O. to continue the investigation after expiry of 180 days, he had no jurisdiction to do so nor to arrest the petitioners on the basis of the statements of some witnesses recorded by him during such further investigation. In paragraph -6 of order dated 09.06.2023, the Special Judge also noted that no written permission was accorded to the I.O. for further investigation of the case. Having held so learned Special Judge referred to two judgments of the Apex Court, i.e., ***Rama Chouduary v. State of Bihar***[2] and ***K. Chandrasekhar v. State of Kerala and Others***[3], wherein it was held that carrying on further investigation even after filing of the charge sheet is a statutory right of the police and that the law does not require taking prior permission from the Magistrate. Accordingly, the contentions advanced on behalf of the petitioners were rejected.

The arguments made by learned Senior Counsel need to be considered in the above factual background. Learned

[2] 2009 6 SCC 346
[3] 1985 5 SCC 223

Senior Counsel has relied upon the judgments of the Supreme Court in the case of ***Hitendra Vishnu Thakur & Others v. State of Maharashtra***[4], ***Sanjay Kumar Kedia v. Intelligence Officer, Narcotics Control Bureau and Another***[5], and ***Muhammed Ajmal v. State of Kerala***,[6].

8. Learned State Counsel has also relied upon the judgment of this Court in the case of ***Rajendar Kakodiya & Another v. State of Orissa***,[7] ***Lambodar Bag v. State of Orissa***,[8] and ***Naresh Diggal v. State of Orissa***,[9] as also of the Gauhati High Court in the case of ***Jayanandan Prasad & Another v. State of Assam***[10].

It has been argued by learned Senior Counsel that the provision under Section 36-A (4) does not authorize the Investigating Officer but only the Public Prosecutor to seek extension of time for completion of investigation. For

[4] 1994 AIR 2623
[5] (2009) 17 SCC 631
[6] 2022 SCC OnLine Ker 6374
[7] (2022) 1 CLT (Cri) (Supp) 127
[8] (2018) 71 OCR 31
[9] (2021) 81 OCR 694
[10] (2012) 3 Guwahati Law Reports 397

immediate reference Section 36-A (4) is quoted herein below.:-

> *"(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":*
>
> *Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may 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."*

A plain reading of the provision makes it evident that power is conferred on the Special Court to extend the period of completion of investigation on the report of the Public Prosecutor in the manner stated therein. The decisions cited by Mr. Dhal have all emphasized the statutory mandate that it is the Public Prosecutor alone who can pray for extension of time to complete investigation and not the Investigating Officer. The case at hand however, stands on an entirely different footing inasmuch as charge sheet has already been submitted and the I.O. has sought to take recourse to Section 173 (8) of

Cr.P.C. to keep the investigation open. Obviously, the provision under Section 36-A (4) would have no application once charge sheet is submitted. It has been argued that N.D.P.S. Act being a Special statute and there have being no provision in it akin to Section 173 (8) of Cr.P.C., the I.O. could not have kept investigation open after submitting the charge sheet. In this regard, Section 5 of the Cr.P.C. has been referred to by learned Senior Counsel, which reads as follows:-

> "***5. Saving****.—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."*

On such basis, it is argued that the provision under Section 173(8) cannot be applied to a case under N.D.P.S. Act.

This Court is however unable to accept the argument as above since it finds that Section 36-C of the NDPS Act takes care of such contingency, which reads as follows:-

> *"36-C. Application of Code to proceedings before a Special Court.-Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor."*

Thus, on a conjoint reading of Section 5 of Cr.P.C. and Section 36-C of N.D.P.S. Act, it is evident that there being no specific provision in the NDPS Act debarring the I.O. from investigating further after submission of charge sheet, the provision under Section 173(8) would apply in full force. To the above extent therefore, the reasoning adopted by learned Special Judge as mentioned above cannot be faulted with.

9. Mr. Dhal, learned Senior Counsel then argued that the petitioners were released from custody in the earlier case on the basis of judgment passed by this Court in CRLMC No.3703 of 2022 as it was proved that they had been forwarded to the Court beyond 24 hours. Since this was an embarrassment for the Investigating Agency, it has tried to cover up the same by arresting the petitioners

again immediately upon their release from jail in the said case by building up a false case against them.

10. Learned State Counsel has tried to counter such contentions by submitting that the Investigating Agency cannot be attributed with such malafides.

11. There seems to be no dispute with regard to the factual position that the petitioners were arrested on 27.05.2023, i.e., on the day on which they were released from jail in connection with the previous case (Sahadevkhunta P.S. Case No. 352 of 2022). It is also stated that they were arrested just as they had stepped out of the jail gate. Now simply because they were arrested on the same day and in front of the jail gate cannot, ipso facto, lead to the conclusion that the Investigating Agency was actuated with a malafide intent to somehow take them into custody, in view of the order passed by this Court directing their release in the previous case. It is urged by learned State Counsel that nothing has been placed before this Court to persuade it to arrive at such a conclusion and that the possibility that the arrest in the present case, upon

their release from custody in the previous case was a mere coincidence, cannot be entirely ruled out.

12. This Court finds that according to the prosecution, the involvement of the petitioners in the present case came to light from the statements of two witnesses, Debabrata Mishra and Rabindra Behera recorded on 24.05.2023 by the I.O. in course of further investigation. If such was the case, what stopped the I.O. from seeking order for remand of the petitioners from the Special Court shortly after recording of the statements of the two witnesses as by then they were already in custody in connection with the previous case ? . The I.O. instead allowed two days to pass and swung into action only when the petitioners were directed to be released on 27.05.2023 by order of this Court. This inaction for two days is inexplicable and being tell-tale, lends considerable support to the argument of learned Senior Counsel that the I.O. was actuated with the desire to somehow detain the petitioners in custody so as to nullify the order of this Court passed in respect of the previous case. At this juncture, this Court would observe

that no matter how serious the allegations may be against a person, adherence to the legal principles cannot be given a go-bye. The need to respect the Rule of law by all stakeholders in the criminal justice system cannot be over-emphasized. The petitioners may or may not be guilty of the accusations but their fundamental rights guaranteed under the Constitution cannot be whittled down, trammeled or done away with under any circumstances.

13. Coming to the merits of the case, it is seen that the FIR lodged by one Mukunda Murari Patra on 12.11.2022 relates to a specific occurrence that took place on that day at about 2.20 P.M. The co-accused persons, Sk. Sahabul@Sunil and Jada Soren were apprehended and on their personal search brown sugar weighing 273 grams was found. There is absolutely no mention regarding the involvement of the petitioners. In the charge sheet submitted on 11.05.2023 also, there is no mention whatsoever of any role having been played by the petitioners in the alleged occurrence. The I.O. is said to have examined one Debabrata Mishra and Rabindra Behera on 24.05.2023 and on such basis arrested the

petitioners on 27.05.2023. This Court has already held that there was nothing wrong in the procedure so adopted by the I.O. to further investigate the case after submission of charge sheet but then it needs to be seen as to what the witnesses have stated. Both of them have stated parrot-like that on 12.11.2022, they had seen the apprehension of the co-accused persons, Sk. Sahabul@Sunil and Jada Soren in presence of the witnesses and of the recovery of brown sugar from their possession. They again say that they were aware of the fact that the petitioners were selling brown sugar to the co-accused persons. Further, somewhere around 15th Septembers, 2022, they had seen all five of them selling a big brown packet to the co-accused persons, which they had seen to contain brown sugar. They further say that as the petitioners were antisocials, they could not say anything before the police at the relevant time and only after knowing that they were taken to custody, they mustered courage to speak about the occurrence.

14. Read objectively, the statements of the two witnesses, prima facie, appear to be too far-fetched and vague to be

believed. Firstly, there is no reason as to why the I.O. did not cite them as witnesses in the charge sheet, if they were present near the spot at the time of apprehension close enough to know that the packet found from the co-accused persons contained brown sugar. Secondly, if the petitioners and the co-accused persons according to them are anti-socials then how could they muster courage to stand so close to them during the alleged sale of brown sugar so as to know that it was brown sugar. Thirdly, they have stated nothing otherwise to link the petitioners with the alleged occurrence, save and except for vaguely stating that they had seen them selling brown sugar to the co-accused persons around 15th September, 2022. The date of occurrence, it must be kept in mind is 12.11.2022. So essentially, the witnesses are referring to the alleged sale of brown sugar by the petitioners that happened at least two months prior to the occurrence. All these incongruities create reasonable doubt in the mind of the Court as regards the veracity of their versions. If the statements of these two witnesses are discarded, prosecution is left with no other material/evidence to link the petitioners with the

alleged occurrence. It is needless to mention that in order to justify arrest of a person a prima facie nexus between him and the alleged occurrence must be shown to exist. From what has been discussed hereinbefore, this Court is of the considered view that such a proximate nexus does not exist in the present case so as to justify the detention of the petitioners in custody. In other words, this Court does not find a prima facie case against the petitioners justifying their arrest on 27.05.2023. As such, they are entitled to be set at liberty.

15. For the foregoing reasons therefore, the bail applications are allowed. Let the petitioners be released on bail on such terms and conditions as the court below may deem fit and proper to impose including the following conditions-

i. They shall appear before the IIC of Sahadevkhunta Police Station on every Sunday at 10.00 A.M. for a period of six months and such fact shall be certified by the I.O. to the Special Court once in every fortnight.

ii. They shall personally appear before the court below on each date of posting of the case and no representation through counsel shall be allowed under any circumstances.

iii. They shall not commit similar or any other offence.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 16th April, 2024/ B.C. Tudu, Sr.Steno

Signature Not Verified
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