

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.37 of 2022

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

Kartik Nag **Petitioner**

Versus

State of Odisha **Opposite Party**

Advocate(s) appeared in this case:-

For Petitioner : Mr.J.K.Panda, Advocate

For Opposite Party : Mr.S.N.Nanda,
Additional Government Advocate

CORAM : JUSTICE B.P. ROUTRAY

JUDGMENT

20th April, 2022

B.P. Routray, J.

1. The Petitioner, who is one of the accused for commission of offence under Section 20(b)(ii)(C) of the N.D.P.S.Act, has prayed for releasing him 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 Petitioner is that, on the allegation of transporting and possessing 73Kg 800Grams of contraband

ganja, he was arrested and taken to custody on 07.07.2020 in connection with Kalimela P.S.Case No.86 dated 07.07.2020 for commission of offences under Section 20(b)(ii)(C) of the N.D.P.S. Act. Pending investigation, he was remanded to custody on 08.07.2020 by order of the learned Sessions Judge-cum-Special Judge, Malkangiri in T.R.Case No.66 of 2020 and since then the Petitioner is inside custody. The investigation continued and 180 days completed on 03.01.2021. On 04.01.2021, a petition was filed by prosecution praying for extension of a further period of 180 days for completion of investigation and submission of chargesheet. On the same day, learned Sessions Judge-cum- Special Judge, Malkangiri granted extension of 60 days to the prosecution for completion of investigation without giving any opportunity of hearing to the accused-Petitioner. Again on 01.03.2021, the prosecution filed another petition praying for further extension of 60 days to file chargesheet. The defence counsel objected to such prayer. However, the learned Sessions Judge-cum-Special Judge granted extension of 15 days to the prosecution to file the chargesheet. On 15.03.2021, chargesheet was filed by the prosecution against the Petitioner and three other accused persons for the offences stated above and the cognizance has been taken for the offences on the same day by the learned Sessions Judge- cum-Special Judge.

3. The Petitioner contends before this Court that remanding

him in custody on 04.01.2021 & again on 01.03.2021 is against the principles of law enumerated in Section 167(2) of the Cr.P.C. The learned counsel for the Petitioner by relying on a decision of this Court reported in (2018) 71 OCR-31, **Lambodar Bag Vrs. State of Orissa**, contends that before granting extension of time for completion of investigation beyond 180 days without granting any opportunity of hearing to the Petitioner and even without intimating him of his right for release on bail upon completion of 180 days is gross violation of law and thus, the orders dated 04.01.2021 & 01.03.2021 of the learned Sessions Judge-cum-Special Judge and subsequent remand of the Petitioner into custody is illegal and liable to be set aside. It is thus prayed that the Petitioner 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.

4. It is the settled law that right guaranteed under Section 167(2) 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 Vrs. State of Maharashtra**, reported in A.I.R. 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. It is observed inter alia by this Court at para-8 as follows:

“In the case in hand, when the petition was filed by the learned Addl. Special Public Prosecutor on 22.07.2017 for extending the period of investigation, no notice was issued to the petitioners on such petition to have their say in the matter. Even the filing of the petition was not brought to the notice of the counsels representing the petitioners. Since while considering such a petition, principles of natural justice was not followed and the petitioners were not given opportunity to oppose the extension on any legitimate and legal grounds available to them and even the trial Judge has not brought filing of such a petition to the notice of the counsels representing the petitioners, in view of the ratio laid down in case of **Hitendra Vishnu Thakur** (supra), I am of the view that the learned Trial Judge has committed illegality in granting extension for a further period of sixty days for completing investigation as per order dated 22.07.2017 which is against fair play in action and in my humble opinion, it has caused serious prejudice to the petitioners. Even though Sub-section (4) of Section 36-A of the N.D.P.S. Act does not specifically provide for issuance of notice to the accused on the report of the Public Prosecutor before granting extension but it must be read into the provision both in the interest of the accused and the prosecution as well as for doing complete justice between the parties and since there is no prohibition to the issuance of such a notice to the accused, no extension shall be granted by the Special Court without such notice. Moreover, report has to be filed by the Public Prosecutor in advance and not on the last day, so that on being noticed, the accused gets fair opportunity to have his say and oppose the extension sought for by the prosecution.”

5. 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.

6. 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 Petitioner for his release on default bail has been violated. It is evinced from the orders dated 04.01.2021 & 01.03.2021 that the accused-Petitioner has not been given any opportunity of hearing to lead his legitimate objections nor he has been informed his right of default bail before granting extension of 60 days and 15 days respectively to the prosecution.

7. It is also held in the case of *Lambodar 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 infeasible 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.”

8. Thus, in consideration of all the facts, the orders dated 04.01.2021 & 01.03.2021 of the learned Sessions Judge-cum-Special Judge, Malkangiri to the extent granting extension of remand to the prosecution for completion of investigation is set aside. Resultantly, it is directed to release the Petitioner on bail in the aforesaid case on furnishing bail bond of Rs.1,00,000/-(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 Petitioner shall attend the

learned 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.

9. The CRLMC is accordingly allowed.

(B.P. Routray)
Judge



//C.R.Biswal, Secy.//