

Court No. - 5

AFR
Reserved

Case :- BAIL No. - 5384 of 2020

Applicant :- Abhishek Srivastava

Opposite Party :- State of U.P.

Counsel for Applicant :- Pranjali Krishna, Pooja Mishra, Shivam Pandey

Counsel for Opposite Party :- G.A.

Alongwith:

Case :- BAIL No. - 5756 of 2020

Applicant :- Sanjeev Yadav

Opposite Party :- State of U.P.

Counsel for Applicant :- Sushil Kumar Singh

Counsel for Opposite Party :- G.A.

Hon'ble Attai Rahman Masoodi, J.

Heard Sri Pranjali Krishna, learned counsel for the applicant in Bail No. 5384 of 2020, Sri Sushil Kumar Singh, learned counsel for the applicant in Bail No. 5756 of 2020 and learned AGA for the State. Perused the record.

These two bail applications involve an identical question of law. In both the applications, the right of personal liberty embodied under Article 21 of the Constitution of India is pressed on the ground of default on the part of the prosecution to file the charge sheet within the statutory period as provided under Section 167(2) of Code of Criminal Procedure (Cr.P.C.).

Learned counsel for the applicants would contend that personal liberty of a citizen is fundamental and the same cannot be curtailed without following due procedure prescribed under law.

In the case of Abhishek Srivastava i.e. in Bail Application No. 5384 of 2020, the accused after arrest by the police was taken in judicial custody with the passing of remand order on 16.1.2020 whereafter the judicial custody continued from time to time and lastly the remand was extended on 11/12.3.2020 for a period of fourteen days i.e. upto 25.3.2020. Before the said date, nationwide lock-down was imposed and the functioning of the Courts stood obstructed rather completely closed except for the urgent work regulated as per the directives issued by Hon'ble the Chief Justice from time to time.

Due to closure of courts from 24.3.2020, the first/fresh remand cases were done and no remand orders could be passed from 25.3.2020 to 26.6.2020. This position was brought to the notice of this Court by the District Judge, Lucknow on 29.9.2020 pursuant to an order passed by this Court on 18.9.2020 which reads as under:

"This matter was heard at considerable length.

Having heard the learned counsel for the parties, it is desirable that a report may be called for from the District Judge, Lucknow clarifying the position of remand in case crime no. 368 of 2018 from 11/12.3.2020 to 16.6.2020.

The District Judge, Lucknow is expected to forward a clear report within ten days for the reason that the matter pertains to the freedom of life and personal liberty of the accused applicant.

List for further hearing on 30.9.2020."

The effect of lock-down was equally harsh on the litigants or detenues in jail who could not assert their rights of personal liberty through the process of law. The period of 90 days in Bail Application No. 5756 of 2020 expired on 14.4.2020 and in absence of any remand order since 25.3.2020, the applicant (Abhishek Srivastava) continued in jail till the filing

of charge sheet on 1.5.2020 and thereafter until the rejection of default bail on 18.6.2020. The personal liberty of the accused applicant oscillated without any attention either by prosecution or the guardian of justice i.e. courts. The duty on the part of the State to set the applicant free by apprising the court was given a complete go by to legitimize the default. Non performance of the judicial duty also owes its failure to the nationwide lock-down due to Pandemic Covid-19.

The magistrate notwithstanding the filing of charge sheet beyond the period of limitation, has nevertheless rejected the bail application treating the right of default bail to have extinguished on filing of the charge sheet and this position is evident from the order passed by the magistrate on 18.6.2020.

In the connected matter i.e. Bail Application No. 5384 of 2020, the initial remand order was passed on 31.1.2020 and the period of limitation for filing of charge sheet lapsed on 29.4.2020 whereafter the police report was filed on 5.5.2020. The order sheet merely endorsed 'remand' on several dates and lastly on 29.4.2020. The default bail application was filed in the month of June which was rejected on 20.6.2020. In the counter affidavit filed by the State, a plea has been taken that the police report was ready on 29.4.2020 but the same could not be filed before the deadline i.e. 29.4.2020 due to the closure of court on account of lock-down.

The argument put forth by learned counsel for the applicants in both the cases is that the indefeasible right of default bail could not be denied to them by the State once the limitation for filing the police report ran out, therefore, irrespective of

the fact whether the prayer for release was made or not, the duty had shifted upon the magistrate who ought to have streamlined and secured the personal liberty of the applicants in accordance with the mandate of Article 21 of the Constitution of India on suitable conditions as were necessary in the criminal administration of justice. It is also submitted that the personal liberty of the applicants could not be weighed any less than those cases where accused persons on executing personal bonds were enlarged on bail pursuant to the general directions issued by the apex court in suo motu case. Moreover, even the imposition of lock-down on account of which the courts were closed, cannot be allowed to legitimize the judicial custody in contravention of Article 21 of the Constitution of India read with the procedure prescribed in Section 167(2) Cr.P.C.

To buttress the submission put forth by learned counsel for the applicants, they have placed reliance upon a catena of judgements taken note of hereinafter.

Per contra, learned AGA who has appeared on behalf of the State has submitted that the right claimed by the applicants though guaranteed under Article 21 of the Constitution of India, can be curtailed by following due procedure of law and drawing support from the judgment rendered by the apex court in the case of ***Sanjay Dutt v. State through CBI, Bombay*** reported in ***(1994) 5 SCC 410***, it is argued that upon filing of the police report before the court concerned, the right of default bail stands eclipsed and thus, the order passed by the trial court is wholly tenable in the eye of law and does not suffer from any illegality.

It is also submitted that the magistrate in the present case, had no occasion to offer the accused any suitable conditions for being set free on bail during the lock-down period when the court was closed, therefore, there is no lapse on the part of the magistrate to grant default bail particularly when the police report in one of the present cases was ready on the deadline i.e. 29.4.2020 but could not be filed in the court due to closure.

The larger question that arises for consideration before this Court is as to the sanctity of the right of personal liberty and whether such a right guaranteed under Article 21 of the Constitution of India would stand eclipsed under the lock-down directives issued by the Government or any directives issued by the High Court applicable on holidays contrary to the mandate embodied under Section 167(2) Cr.P.C.

Before coming to the merits of the case, it would be apt to refer to the report of District Judge, Lucknow which was called for in Bail Application No. 5384 of 2020 so as to clarify the position of remand in relation to one of the applicants and the same is extracted below:

"..... In this regard, I called report from learned Special Chief Judicial Magistrate, Lucknow who has submitted report dated 24.09.2020 apprising the first remand of accused Abhishek Srivastava was granted on 16.01.2020 and thereafter same was extended on 29.01.2020, 12.02.2020, 26.02.2020 fixing 11.03.2020 but under Administrative Order of the District Judge, 11.03.2020 was declared holiday hence, the accused persons whose remands were due on 11.03.2020 were brought before the learned Magistrate on 12.03.2020 and on said date i.e. 12.03.2020, said accused was remanded up to 25.03.2020 and that is why on the last remand, date 11/12.03.2020 was written.

From 25.03.2020 onwards, there was complete lock-down throughout India consequently, Courts remained closed and due to above, no remand order could be passed till 16.06.2020. Meanwhile, on 01.05.2020,

police submitted chargesheet before the Remand Magistrate.

It is worth to mention that Hon'ble High Court issued notice dated 25.03.2020 communicating the order of his lordship Hon'ble the Chief justice of High Court of Judicature at Allahabad informing that all the Courts subordinate to the Hon'ble High Court, Commercial Courts, Motor Accidental Claims Tribunals and Land Acquisition Rehabilitation and Resettlement Authorities across the State of Uttar Pradesh shall remain closed till further orders and remand and bails of accused persons shall be done as per holiday practice.

The said notice dated 25.03.2020 was followed by letter of Hon'ble Court bearing No. PS(RG)/52/2020: Allahabad dated May 02, 2020 referring notice dated 25.03.2020 apprising that Hon'ble Court has reiterated its previous Order dated 25.03.2020.

It is further submitted that as per holiday practice only first/fresh remand use to be done and that is why further remand of accused person Abhishek Srivastava could not carried out till 16.06.2020....."

The District Judge in his report has submitted that the last remand order was passed on 11/12.3.2020 and there was no remand from 25.3.2020 to 16.6.2020 due to closure of the courts pursuant to complete lock-down order of the government. It is secondly mentioned that the charge sheet was filed on 1.5.2020 before the remand magistrate. It is thirdly mentioned that the courts were closed till further orders, therefore, remand and bails of accused persons were directed to be done as per holiday practice. It is lastly mentioned that as per holiday practice only first/fresh remand used to be done.

In view of the report extracted above, it is desirable to understand the holiday practice for dealing with the remand and bail matters. A direction was issued by the High Court, Allahabad on 25.3.2020 and the same is extracted below:

"As resolved by the Administrative Committee (telephonically), in supersession of all administrative notifications, circular etc., issued earlier, the Court work in the Allahabad High Court shall remain

suspended with immediate effect till further orders. However, imminently emergent and urgent cases would be heard by the designated Division Bench/single Judge with prior approval of the Chief Justice. For Lucknow Bench, necessary approval for hearing of urgent cases shall be obtained from Hon'ble Senior Judge, Lucknow.

*All the courts subordinate to the High Court to the High Court of Judicature at Allahabad and all commercial courts, Motor Accident Claims Tribunal and Land Acquisition Rehabilitation and Resettlement Authorities across the State of U.P. shall also remain closed till further orders. **The remands and bails of arrested person shall be done as per holiday practice.**"*

The procedure on holidays is further gathered from Rule-186 of the General Rules (Criminal), 1977 as well as from a circular of the High Court, Allahabad i.e. C.L. No. 102/VIIb-47 dated 5th August, 1975 and the same are reproduced below:

"186. Work on holiday.

On a holiday a criminal court may dispose of such work of urgent nature like granting of bail or remand or do such other work that may with propriety be done out of court and it will not be proper to refuse to do any act or make any order urgently required merely on the ground of the day being a gazetted holiday."

"Circular No. 102/VIIb-47 dated 5th August, 1975

"I am directed to say that the Judicial Magistrates who are detained on duty for granting bails and remands and for the disposal of other urgent matters during holiday or on Sundays may kindly be asked to do this work in court at a fixed time duly notified and intimated to all concerned, including the Public Prosecutor. This will not only ensure the presence of the Public Prosecutor at the time of the orders are passed but will also facilitate the work of Judicial Magistrates concerned."

What is surprising is that the whole procedure seems to have been misinterpreted and misunderstood by the District-Session Judges/magistrates in the matter of remand and bail. The directive issued by the High Court on 25.3.2020 as reproduced above was clear enough, yet the Session Judges/

magistrates do not appear to have proceeded as per the mandate of Rule-186 or the earlier circular issued on 5.8.1975 whereby the procedure applicable on holidays was succinctly defined. The District Judges were under a bounden duty to assign the remand duty to the courts of magistrate/Session Judge during the lock-down period and irrespective of the fact that the courts were closed, the remand matters were bound to be taken up and wherever the indefeasible right of personal liberty accrued to an accused incarcerated in jail, he ought to have been offered default bail in the manner prescribed under Section 167(2) of the Cr.P.C.

Personal liberty of a person is an indefeasible right and this is what the apex court has opined in the case of *Sanjay Dutt* (supra) in paragraph 48 of the judgement. The rider which the apex court read was that the accused must avail the right before it stood eclipsed by filing of the police report. As per the apex court judgement, once the charge sheet was filed, Section 167 Cr.P.C. would become inapplicable and the accused who failed to avail the right would stand deprived of claiming the benefit of default.

The apex court yet in another decision reported in (2001) 5 SCC 453 (*Uday Mohanlal Acharya v. State of Maharashtra*), further propounded that once the application was filed by the accused in jail for the grant of default bail, mere filing of the police report would not frustrate the right and the ground of default would remain available for release. This judgement, however, reiterated the requirement of filing an application consequent upon the accrual of indefeasible right before the charge sheet was filed. The apex court in the case

reported in **(2017) 15 SCC 67 (Rakesh Kumar Paul v. State of Assam)** dealing with the earlier decisions has further enlarged the scope of default bail in paragraph 40 as under:

"40. In the present case, it was also argued by learned counsel for the State (1996) 1 SCC 722 that the petitioner did not apply for 'default bail' on or after 4th January, 2017 till 24th January, 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 11th January, 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 11th January, 2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by 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 concerned court 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."

The position of law is reiterated by the apex court in the case of **M. Ravindran v. Intelligence Officer, Directorate of Revenue, 2020 SCC OnLine SC 867**. The apex court in **S. Kasi v. State through the Inspector of Police, 2020 SCC OnLine SC 529**, taking note of the lock-down situation during Pandemic Covid-19 has made certain observations in paragraphs 25 and 26 which may profitably be extracted as under:

"25. We, thus, are of the clear opinion that the learned Single Judge in the impugned judgment erred in holding that the lockdown announced by the Government of India is akin to the proclamation of Emergency. The view of the learned Single Judge that the restrictions, which have been imposed during period of lockdown by the Government of India should not give right to an accused to pray for grant of default bail

even though charge sheet has not been filed within the time prescribed under Section 167(2) of the Code of Criminal Procedure, is clearly erroneous and not in accordance with law.

26. We, thus, are of the view that neither this Court in its order dated 23.03.2020 can be held to have eclipsed the time prescribed under Section 167(2) of Cr.P.C. nor the restrictions which have been imposed during the lockdown announced by the Government shall operate as any restriction on the rights of an accused as protected by Section 167(2) regarding his indefeasible right to get a default bail on non-submission of charge sheet within the time prescribed. The learned Single Judge committed serious error in reading such restriction in the order of this Court dated 23.03.2020."

This Court may also take note of a judgement rendered by the Delhi High Court in the case of **Subhash Bahadur @ Upender vs The State (NCT Of Delhi)** decided on 6 November, 2020 where the position of law has elaborately been considered and it is observed that the duty of the courts to offer default bail does not stand mitigated even when a regular bail application is under consideration.

In the light of decisions noted above, it is clear that the right of personal liberty is an indefeasible right which for the purposes of its enforcement remained unaffected during the lock-down period and the courts of law on account of closure pursuant to the directives issued by the Government or the High Court were nevertheless duty bound to deal with the remand matters as per the provisions of General Rules (Criminal), 1977 or circulars regulating holiday practice.

This Court is constrained to observe that non performance of duty owing to holidays is firstly a serious dereliction of duty on the part of the Session Judges/magistrates and secondly the remand matters could not be ignored selectively by attaching preference or priority to fresh/first remand cases in derogation of the procedure applicable on holidays. The

report forwarded by the District Judge, Lucknow, extracted above, is alarming and the selective role which the courts have played from 25.3.2020 to 16.6.2020 deserves to be condemned.

There is a famous saying that injustice anywhere is a threat to justice everywhere. It is for this reason that the civil liberty movement worldwide changed the very ethos of the concept of justice to secure the right of personal liberty. The saying seeks to liberate the personal liberty of a citizen clamped in isolation and pain. It appeals and awakens the justice delivery system for the cause of freedom of life and personal liberty. A mass disaster or Pandemic may severely obstruct our life and governing systems in many ways but the doors of the courts of law must remain open for the protection of Article 21 of the Constitution of India.

In order to serve the civil rights of the citizens, the Indian Parliament enacted two important legislations in the year 1981 and 1987 viz. Essential Services Maintenance Act, 1981 and Legal Services Authority Act, 1987. This Court may note that these legislations were made in the pursuit of objects embodied under Article 39 and 39A of the Constitution of India. The policy of the State having trammelled into law is binding upon the State and must offer adequate safeguards. Section 12(e) and 13(1) of the Legal Services Authority Act being relevant are reproduced below:

"12. Criteria for giving legal services.—Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is—

- (a)
- (b)
- (c)
- (d)

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster;”

"Section 13. Entitlement to Legal Services

(1) Persons who satisfy all or any of the criteria specified in Section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima-facie case to prosecute or to defend."

It is unfortunate to note that the legal services which the law contemplates as an essential service for victims was rendered inadequately by the State as well as by the legal services authorities during the Pandemic Covid-19. In absence of the services of legal practitioners, the State was under a bounden duty to activate legal aid authorities to deal with the situation and the benefit of default bail accruing anywhere ought to have been effectively taken up before the courts. The protection of rights within the ambit of Article 21 of the Constitution of India fully fell within the scope of Section 12(e) of the Act, therefore, no discrimination could be practiced between the accused persons entitled to be released on default bail as compared to the other accused persons released on personal bonds keeping in view the general directions of the apex court coupled with the satisfaction of the State. It is immaterial whether such persons during the lock-down period had applied for help under Section 13(2) of the Legal Services Authority Act or not.

It is also true that the default bail may at times become a futile plea when an accused is involved in more than one or a series of offences, yet he may claim the benefit of default in one case but the actual release for his involvement in some other offence may not bring, such a person, the benefit of setting him free.

The above situation is also experienced invariably besides the fact of delayed justice. This Court has no hesitation to put on record that the right under Article 21 of the Constitution of India is an enjoyable right for which the plea of default bail unfettered by procedure must yield immediate release. The procedural law has left a grey area which deserves to be dealt with in appropriate cases. However, the question framed in the present case for the reasons recorded above, obliges the courts to guard the rights embodied under Article 21 of the Constitution of India in all circumstances.

Now coming to the two cases at hand, there is a clear dereliction of duty in Bail Application No. 5384 of 2020 (Abhishek Srivastava v. State of U.P.) and the position is amply evident from the report of the District Judge extracted above, hence a case for default bail is made out. The court of magistrate is accordingly directed to release the applicant **Abhishek Srivastava involved in Crime No. 0368 of 2018, under Section 420, 467, 468 and 471 IPC, Police Station Aliganj, Lucknow**, on furnishing bail bonds to the satisfaction of the court and it shall be open to the prosecution to act in accordance with law, provided the filing of charge warrants the accused applicant to be detained in judicial custody. The magistrate shall also satisfy himself that the plea of default bail was enforceable prior to the date of filing the charge sheet and being available is enforceable on the date of release which in the present case seems doubtless.

In the other Bail Application No. 5756 of 2020 (Sanjeev Yadav v. State), the prosecution has adopted a peculiar stand to justify the default. It is stated that the closure of court prevented them to file the charge sheet before the deadline

i.e. 29.4.2020. The prosecution has taken a bald plea without showing any steps having been taken to file the charge sheet by approaching the court or through online service. The plea advanced is misleading and cannot be accepted particularly when the date of filing itself is shown during the lock-down period i.e. 5.5.2020. Moreover, as per the periodic guidelines during Pandemic, the courts were open for filing the reports under Section 173 Cr.P.C. The position emerging as a result of failure to sanction prosecution, in absence whereof cognizance cannot be taken, has been clarified in the case reported in **(2013) 3 SCC 77 (Suresh Kumar Bhikamchand Jain v. State of Maharashtra and another)**, wherein failure to file the charge sheet has been laid down as the rule for default bail.

It is well settled that investigation is complete with the filing of charge sheet, therefore, the limitation embodied under Section 167(2) must be seen on the date of filing of the charge sheet in the court and any other date suggesting completion of investigation is irrelevant and does not satisfy the requirement of law. The right of default bail which undoubtedly accrued to the applicant became enforceable on 29.4.2020. This right was very much alive when the charge sheet was filed in the court on 5.5.2020 and survived thereafter. The applicant Sanjeev Yadav is thus entitled to be enlarged on bail at par with the case of Abhishek Srivastava.

Let the applicant **Sanjeev Yadav** involved in **Case Crime No. 78 of 2020**, under **Section 406, 409, 419, 420, 467, 468, 471 IPC, Section 67 Information Technology Act and Section 7/13(1)(c) Prevention of Corruption Act, Police Station Gola, District Lakhimpur Kheri**, be enlarged on bail on the same conditions

and satisfaction of the court concerned as provided in the case of Abhishek Srivastava.

Since the mass disaster of Pandemic Covid-19 covered the meaning of Section 2(d) of the Disaster Management Act, 2005 is not over, therefore, it is desirable to issue notice to the National Legal Service Authority as well as the State Legal Services Authority through their Member Secretaries who may apprise the Court as to how the applicants or like victims of mass disaster were or are being helped during Pandemic Covid-19. The Member Secretary, U.P. State Legal Services Authority shall appear before this Court in person on the next date of listing with all relevant details from the respective districts. Before any further order is passed on the dereliction of duty on the part of respective magistrates/Session Judges, the Senior Registrar of this Court, in the light of report forwarded to this Court on 29.9.2020 by the District Judge, Lucknow, is hereby directed to obtain the relevant details of magistrates/Session Judges from district Lucknow/Hardoi who have failed to pass remand orders from 25.3.2020 to 16.6.2020. The Senior Registrar of this Court shall also remain present in the Court when the case is listed next.

List on 10.12.2020.

Order Date :- Nov. 25, 2020

Fahim/-