

(2011) 04 P&H CK 0311

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Miscellaneous No. M-10219 of 2011 (O and M)

Som Nath and Another

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: April 28, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 167, 167(2), 209
- Penal Code, 1860 (IPC) - Section 120B, 304, 305, 307, 313

Citation: (2011) 3 RCR(Criminal) 515

Hon'ble Judges: Alok Singh, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Alok Singh, J.

Notice of motion.

2. On being asked, Mr. K.D. Sachdeva, learned Additional Advocate General, Punjab, accepts notice on behalf of the Respondent-State.

3. With the consent of learned Counsel, appearing on behalf of the parties, present petition is being taken up for final decision.

4. Present petition is moved seeking regular bail in case FIR No. 9 dated 15.01.2011, under Sections 420, 467, 468, 471, 120-B IPC, registered at Police Station Basti Jodhewal, Ludhiana, District Ludhiana.

5. Jasvinder Kaur wife of Gurmail Singh has lodged present FIR against the present accused/Petitioner and others stating therein that accused by playing fraud and by showing fictitious and forged agreement to sell received Rs. 16 lakhs from the complainant towards consideration to sell a plot in question which did not belong to them. Petitioners are in judicial custody w.e.f. 28.01.2010. Bail application was moved before the Additional Sessions Judge, Ludhiana, on 07.02.2011, which was

dismissed by the learned Additional Sessions Judge on 16.02.2011. Thereafter, present application seeking regular bail was moved before this Court on 05.04.2011, which was listed before this Court on 07.04.2011. During the pendency of present bail application, challan was submitted by the police before the Magistrate on 28.04.2011.

6. Mr. R.P. Dhir, learned Counsel for the Petitioner has vehemently argued that since no challan was submitted by the police within 60 days as provided u/s 167(2) of the Code of Criminal Procedure from the date of custody of the Petitioners, therefore, Petitioners are entitled to be enlarged on bail in view of the dictum of the Hon"ble Apex Court in the case of [Uday Mohanlal Acharya Vs. State of Maharashtra](#), . He has further argued that although challan has been submitted on 11.04.2011 during the pendency of the present bail application before this Court, however, it will not make the Petitioner disentitle for bail on the ground of non-filing of challan within the stipulated period.

7. Mr. K.D. Sachdeva, learned Additional Advocate General, Punjab, has vehemently argued that since offence u/s 467 I.P.C. is punishable upto 10 years and imprisonment of life, therefore, statutory period prescribed u/s 167(2) of the Code would be 90 days not 60 days. He has further argued that to seek the bail for non-filing of the challan within the statutory period, Petitioner should approach the Magistrate first instead of seeking bail from this Court.

8. Proviso of Section 167 of the Code of Criminal Procedure reads as under:

Provided that-

(a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

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9. There is no doubt that if offence is punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, challan is to be submitted by the

prosecuting agency within 90 days, however, if offence is not punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, then challan is to be submitted within 60 days from the date of the custody.

10. Section 467 of the Indian Penal Code reads as under:

467. Forgery of valuable security, will, etc- Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

11. Undisputedly, u/s 467 of the Indian Penal Code, Court can award sentence for the period less than ten years. Section 467 IPC does not provide that minimum sentence would be not less than ten years.

12. In the opinion of this Court, under Clause (i) of proviso of Section 167(2) of the Code, if minimum punishment for an offence is not less than 10 years then only period of 90 days for filing the challan would be applicable, if offence is punishable for any term upto ten years then period of 60 days would be applicable to submit the challan. I find support from the judgment of the learned Single Judge of Allahabad High Court in the case of Sohan Lal v. State reported in 1991 ACR 383 as well as, judgment of Division Bench of this Court in the case of Om Parkash Gabbar v. State of Punjab, reported in 1997(1) R.C.R. 193. This Court in the case of Om Parkash Gabbar (Supra) in paragraph Nos. 4 and 5 has observed as under:

4. This provision came up for consideration before the Allahabad High Court in Sohan Lai's case (supra). After a discussion of its implications, the learned Judge observed as under:

Section 167(2)(a) of the Code of Criminal Procedure lays down that the Magistrate may authorize the detention of the accused person, otherwise than in police custody, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so. But total period of detention shall not exceed ninety days where the investigation relates to an offence punishable with death/imprisonment for life or imprisonment for a term of not less than ten years. If the investigation relates to any other offence, the total period of detention shall not exceeds sixty days. The words "imprisonment for a term of not less than ten years" mean that the maximum punishment shall be ten years. The term not less than ten years" is not to be confused with the terms upto ten years". In a case where the maximum punishment is upto ten years, the period of detention, which is permissible u/s 167(2) Code of Criminal Procedure is only sixty days.

To our mind, the paragraph above wholly sums up the clear intent of the provisions of Section 167(2) of the Code.

5. Mr. Randhawa, the learned State counsel has, however, relied upon the decision in Tejinder Singh Desanj's case (supra). It is true that the decision is in favour of the State counsel, but we find that the learned Judge did not delve deep into the matter and after reproducing the words of the Section, straightaway came to his conclusions. We are of the opinion that the two different situations and in the offences wherein the "sentence up to ten years" imprisonment is provided, the challan has to be filed within sixty days and in cases where the sentence provided is not less than ten years (by way of illustration Sections 304, 305, 307, 313 IPC etc.) the challan has to be filed within ninety days. We accordingly answer the reference as under:

The words "imprisonment for a term of not less than 10 years" occurring in Section 167(2)(a)(i) of the Code mean that the minimum punishment provided should be ten years.

For the reasons recorded above, we are of the opinion that the judgment of the learned Single Judge in Tejinder Singh Desanj's case (supra) does not lay down correct law and the same is over ruled. We, accordingly, accept the interpretation given by the Allahabad High Court in Sohan Lal's case (supra).

13. Now, second question comes, if challan is filed during the pendency of bail application, can accused be enlarged on bail as per Section 167(2) of the Code for nonfiling of the challan within the statutory period. Hon'ble Apex Court in the case of Uday Mohanlal Acharya (Supra) has held as under:

...On the aforesaid premises, we would record our conclusions as follows:

1. Under Sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorize detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.
2. Under the proviso to the aforesaid Sub-section (2) of Section 167, the Magistrate may authorize detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.
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.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/Court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to Sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorized, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of" used by this Court in Sanjay Dutt case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to Sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression "availed of" if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to Sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with the law laid down by this Court in the case of Mohd. Iqbal v. State of Maharashtra.

14. In view of the above dictum of the Hon"ble Apex Court, question stands answered. If challan is not filed within statutory period and is filed during the pendency of the bail application then rights accrued to the Petitioner u/s 167(2) of the Code shall not stand curtailed.

15. Now, questions comes as to whether, this Court should direct the accused to move before Magistrate for seeking bail for non-filing of the challan within statutory period or this Court can enlarge the Petitioner on bail u/s 167(2) of the Code straightaway for not filing of the challan within the statutory period?

16. In the humble opinion of this Court, it would be futile exercise to ask the accused to approach the Magistrate first if argument is advanced that even during the pendency of the bail application before this Court, statutory period provided u/s 167(2) of the Code for filing the challan has expired. This Court can take note of the law and can consider the bail application itself without asking the accused to approach the Magistrate first. In the opinion of this Court, hypertechnical view should not be adopted to refuse the relief if accused is otherwise legally entitled for.

17. In the present case, accused were sent into judicial custody on 28.01.2011. Present bail application was filed before this Court on 05.04.2011. Challan was not submitted within 60 days from 28.01.2011 and was submitted during the pendency of present bail application.

18. In view of the above, Petitioners are entitled to be enlarged on bail for non-filing of the challan within the statutory period of 60 days.

19. Present petition is allowed. Let, Petitioners be enlarged on bail on furnishing their personal bonds and two sureties to the satisfaction of the learned Chief Judicial Magistrate, Ludhiana.