

(2003) 09 GAU CK 0009**Gauhati High Court****Case No:** Bail Application No. 2896 of 2002

Hridayanada Sharma

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: Sept. 17, 2003**Acts Referred:**

- Copyright Act, 1957 - Section 68A

Citation: (2004) 1 GLR 421 : (2003) 3 GLT 440**Hon'ble Judges:** P.P. Naolekar, C.J; Ranjan Gogoi, J**Bench:** Division Bench**Advocate:** B.K. Mahajan, A.K. Pradhan and A. Choudhary, for the Appellant; Z. Kamar, PP. Assam, for the Respondent**Judgement**

Ranjan Gogoi, J.

There being a conflict of opinion between two learned Single Judges of this Court on the question as to whether an offence, punishable with imprisonment for a term which may extend to 3 years, is bailable or non-bailable offence, the aforesaid question which has also arisen in the present case, has been referred to a Larger Bench and that is how the matter is before us.

2. Section 68A of the Copyright Act, 1957 provides that an offence u/s 52A of the said Act is punishable with imprisonment which may extend to 3 years as well as fine also. Under Part-II contained in Schedule-I of the Code of Criminal Procedure, an offence under any special law, punishable with imprisonment for less than 3 years or with fine only, is bailable. The learned Single Judge hearing the present bail application took the view that as for an offence u/s 68A of the Copyright Act, the punishment may be 3 years, it has to be understood that the said offence is non-bailable. The aforesaid view was taken by the learned Single Judge in another case, i.e., in the case of *Jitendra Prasad Singh v. State of Assam*, reported in 2002 (3) GLT 241. However, another Single Bench has taken a contrary view in the case of

Tapan Biswas v. State of Assam, reported in 2001 (3) GLT 13 holding the offence u/s 7(1)(a) of the Cinematograph Act of 1952, which is also punishable with imprisonment for a term, which may extend to 3 years or with fine to be bailable. As the aforesaid conflicting views emanate from a different understanding of the ratio of the law laid down by the Apex Court in the case of [Rajeev Chaudhary Vs. State \(N.C.T.\) of Delhi](#), the answer to the question raised, therefore, would lie in trying to ascertain what is the correct ratio laid down in the above noted decision of the Apex Court.

3. The question that arose in Rajib Chaudhary's case (supra) before the Apex Court is whether a person accused of an offence u/s 386 IPC could be detained in custody for the period specified under Clause (i) of proviso (a) to Section 167(2) Cr.P.C. without the charge-sheet being submitted. For a better understanding of the question involved, the provisions of Section 167(2) proviso (a)(i) and (ii) and Section 386 of the Indian Penal Code may be usefully extracted herein below :

"167(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole ; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

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 ;"

"386. Extortion by putting a person in fear of death or grievous hurt. Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

4. The learned trial Court in Rajib Chaudhary's case (supra) took the view that as detention of a person up to 90 days under Clause (i) of Proviso (a) of Section 167(2) is

permissible where the investigation relates to an offence punishable with death or imprisonment for life or imprisonment for a term of not less than 10 years, it is Clause (ii) which prescribes a period of 60 days that would apply in view of the fact that the punishment prescribed u/s 386 IPC is for a term which may extend to 10 years. As charge-sheet had not been filed and period of 60 days was over, the accused was held to be entitled to bail. The view taken by the learned Magistrate was disapproved by the revisional Court where after the matter was taken before the Delhi High Court and the Delhi High Court, on an elaborate consideration of the provisions of Section 167 Cr.P.C. and the earlier decisions rendered by the Court, upheld the order of the revisional Court holding that for an offence u/s 386 IPC the maximum period of detention without submission of charge-sheet could be 90 days as contemplated by Clause (i) of Proviso a to Section 167(2) Cr.P.C. The reasoning of the High Court of Delhi for the conclusion reached as contained in paragraph 4 of the judgment may be usefully extracted herein below :

"The expression "imprisonment for a term of not less than ten years" used in Clause (i) of proviso (a) to Sub-section (2) of Section 167 includes imprisonment for a term of ten years as well as imprisonment for a term of more than ten years, In other words, Clause (i) of proviso (a) to Sub-section (2) of Section 167 will be applicable where the investigation relates to an offence punishable with imprisonment for a term often years or more. The crucial test is whether the offence is one for which the punishment of imprisonment for a term of ten years or more can be awarded. It is immaterial that the Court may have also the discretion to award the punishment of imprisonment for a term of less than ten years. In the case of a particular offence, even though the Court may have discretion to award punishment of imprisonment for a term of less than 10 years, the above mentioned Clause (i) will apply if the accused can be punished with imprisonment for a term often years. Where the offence is punishable with imprisonment for a term which may extend to ten years the Court has the discretion to sentence the accused to undergo imprisonment for a term often years or for a term of less than ten years. Hence the abovementioned Clause (i) will be applicable where the investigation relates to an offence punishable with imprisonment for a term which may extend to ten years". It should be borne in mind that the expression used by the Legislature in Clause (i) of proviso (a) to Section 167(2) is not "imprisonment for a minimum term often years". If the Legislature intended to restrict the application of the said Clause (i) to offences punishable with imprisonment for a minimum term of ten years, the Legislature could have used the expression "offence punishable with death, imprisonment for life or imprisonment for a minimum term of ten years". Significantly the legislature did not use such an expression."

5. The Apex Court, on being moved by the accused against the aforesaid judgment of the Delhi High Court, upheld the view taken by the High Court. A reading of the judgment of the Apex Court would clearly go to show that the view taken is that u/s 386 IPC the punishment provided is imprisonment for a term which may extend to

10 years, which means that imprisonment can be for a clear period of 10 years or even less. As the imprisonment prescribed can be up to a maximum period of 10 years, the Apex Court held that the punishment prescribed cannot be said to be not less than 10 years. The Apex Court having upheld the view of the Delhi High Court by dismissing the appeal filed by the accused there can be no two opinions that the view taken by the Apex Court is that the punishment u/s 386 IPC, i.e., for a term, which may extend to 10 years would be covered by the expression "imprisonment for a term not less than 10 years" as prescribed in Clause (i) of proviso (a) to Section 167(2) Cr.P.C. Following the ratio of the Apex Court judgment in Rajeeb Chaudhary's case (supra) what would logically follow is that the punishment prescribed u/s 68A of the Copyright Act being for imprisonment which may extend to period of 3 years, the punishment prescribed cannot be said to be less than 3 years as required under Part II of Schedule I of the Code of Criminal Procedure to make the offence bailable. Consequently, we answer the question raised, holding that the offence u/s 68A of the Copyright Act is a non-bailable offence.