

(2023) 02 OHC CK 0003

In the Orissa High Court

Case No : Bail Application Nos. 7941, 7985, 11197 Of 2022

Satendra Kumar

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 01-02-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 167, 167(2), 173, 173(2), 173(2)(i), 173(3), 173(4), 173(5), 173(6), 173(8), 190(b), 344
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 20(b)(ii)(C), 27A, 29, 36A(4)

Citation : (2023) 02 OHC CK 0003

Hon'ble Judges : V. Narasingh, J

Bench : Single Bench

Advocate : S.D. Das, M.M. Swain, B.P. Pradhan, K.K. Gaya

Final Decision : Disposed Of

Judgement

V. Narasingh, J.

1. Since all the three BLAPLs arise out of the same P.S. Case (Chandrapur P.S. Case No.17 of 2020) (T.R. No.05/2022 on the file of learned Additional Sessions Judge-cum-Special Judge, Gunupur), they were heard together on the consent of the parties and are being disposed of by this common judgment.

2. Heard Mr. S.D. Das, learned senior counsel for the Petitioner and Mr. K.K. Gaya, learned Addl. Standing Counsel.

3. The petitioner (Satendra Kumar) is an accused in connection with T.R. No.05 of 2020, pending in the file of the learned Additional Sessions Judge-cum-Special Judge, Gunupur, for alleged commission of offences under Sections 20(b)(ii)(C)/27-A/29 of the N.D.P.S. Act.

4. Being aggrieved by the rejection of his application for bail U/s.439 Cr.P.C. by the learned Additional Sessions Judge-cum-Special Judge, Gunupur, by order dated 22.07.2022 in the aforementioned case, the present BLAPL has been filed.

5. The undisputed facts are that the petitioner along with his two other co-accused namely, Raju Mehetwa @ Mahato (BLAPL No.7985 of 2022) and Anil Kumar Pandit (BLAPL No.11197 of 2022) were taken into custody on 27.05.2020 for alleged commission of offences under Sections 20(b)(ii)(C)/27-A/29 of the N.D.P.S. Act, 1985 for carrying contraband (Ganja) to the tune of 245Kgs.

6. On 22.11.2020, the Investigating officer submitted the charge-sheet, styling the same as "preliminary charge-sheet" on the 179 th day, keeping the investigation open under Section 173(8) of the Code of Criminal Procedure, 1973 (Code).

7. The order passed by the learned Special Judge on 22.11.2020 is culled out hereunder:-

T.R.-5/2020

"The case record is put up today as the I.O. of this case is submitted the Preliminary Charge Sheet no.29, Dtd. 22.11.2020 u/S 20(b)(ii)(C) of N.D.P.S. Act against the accused persons namely 1. Anil Kumar Pandit, S/O- Late Jagadish Pandit of Village- Near Pratapnagar Sabeli, P.S- Nandangari, Madoli-93, North-East Delhi, 2. Satendra Kumar, S/O- Sriram Pritsa of Village- Srirampur, P.S- Bella, Dist-Sitamani (Bihar) and 3. Raju Mehetwa, S/O-Sukan Mehetwa of Village- Kharrabisampur, P.S-Behla, Dist- Korihari (Bihar) and has kept the investigation open as per 173(8) of Cr.P.C for arrest of the other two accused persons namely Duli Bihar and Abhiram Bihar. He also submitted sixteen sheets of Case Diary, eleven sheets of statement u/S. 161 Cr.P.C, two sheets of Spot Map, four sheets of Seizure list, two sheets of Zimanama and other connecting documents (in total 60 sheets). Tag the same in the case record.

Perused the preliminary charge sheet & other connecting papers and found that there is a prima facie material against the accused persons namely. 1. Anil Kumar Pandit, 2. Satendra Kumar and 3. Raju Mehetwa for commission of offence u/S 20(b)(ii)(C) of the N.D.P.S. Act. Hence, cognizance of the offence u/S 20(b)(ii)(C) of the N.D.P.S. Act is taken against the above named accused persons.

Put up on date fixed for submission of Final Charge sheet and further order."

8. On 11.08.2021, the Investigating Officer submitted the "final charge-sheet" and the order passed is quoted hereunder:-

T.R.05/2020

"The record is put up today as the I.O. of this case is submitted Final Charge Sheet vide C.S.19 dated 31.07.2021 for the offence u/S- 20(b)(ii)(C)/27-A/29 of the N.D.P.S. Act, against accused person namely

1. Anil Kumar Pandit, aged about- 43 years, S/o-Late Jagadish Pandit of Village- Near Pratap nagar Sabeli, PS: Nandangiri, Madoli-93, North east Delhi,

2. Satendra Kumar, aged about 27 years S/O-Sriram Krishna vill: Srirampur, Ps-Bella, Dist-Saltamani (Bihar), 3. Raju Mehetwa, aged about 19 years S/O: Sukan Mahetwa, Vill: Kharrabisampur, PS: Behla, Dist- Korihari (Bihar) 4. Duli Bibara aged about 56 years, S/O: Late Mani Bibara of Vill Gerengaguda PS: Chandrapur Dist: Rayagada 5. Abhiram Bibara, aged about 31 years, S/O: Duli Bibara, Vill: Gerengaguda, PS: Chandrapur, Dist: Rayagada showing accused person namely Abhiram Bibara as absconder. He also submitted Two (02) sheets of Case Diary along with final charge sheet (in total 12 sheets).

Perused the charge sheet along with the case record. It transpires from the case record that on the preliminary charge sheet No.29, Dated 22.11.2020 filed on date 22.11.2020 U/S 20(b)(ii)(C) N.D.P.S. Act, against accused persons namely Anil Kumar Pandit, 02. Satendra Kumar, 3. Raju Mehetwa. The cognizance of offence U/s 20(b)(ii)(C) N.D.P.S. Act has already been taken on that very day. Now the I.O has submitted the final Charge Sheet against above said three accused persons and two others namely Duli Bibara and Abhiram Bibara, showing Abhiram Bibara as absconder. There is prima facie material against all the above named accused persons for the offence punishable U/S 20(b)(ii)(C) N.D.P.S. Act. As the cognizance of the offence U/S 20(b)(ii)(C) N.D.P.S. Act has already taken, it need not require to take cognizance again. Put up on the date fixed."

9. It is the submission of the learned senior counsel Mr. Das for the petitioner that there is no concept of filing of the "preliminary charge-sheet". Since the final charge-sheet was filed on the 440th day, and admittedly, there being no extension of the period in terms of Section 36-A(4) proviso of the N.D.P.S. Act, each day of the custody of the petitioner is illegal and keeping in view his indefeasible right under proviso to 167(2) of the Code, he is to be released on "default bail".

10. At the outset, it is submitted by the learned State counsel that before the learned Court in seisin infringement of such indefeasible right on non filing of the charge sheet/final form within the stipulated period, in the face of non extension of the time limit in terms of Section 36-A(4), detention being illegal was never urged. Hence, learned State counsel submitted that on the said count alone, the BLAPL is liable to be rejected.

11. In view of the authoritative pronouncements of the apex Court relating to the indefeasible right of an accused, this Court notwithstanding that such a ground is being canvassed for the first time in this BLAPL, proceeds to consider the same on its own merits.

12. Learned senior counsel Mr. Das for the petitioner has relied upon the following judgments to fortify his submissions.

(i) Sanjay Kumar Kedia @ Sanjay Kedia Vs. Narcotics Control Bureau and Another - (2009) 17 SCC 631

(ii) M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence -

(2021) 2 SCC 485

(iii) Sk. Raju @ Raju & Others Vs. State of Odisha (CRLMC No.1 of 2020 disposed of on 01.07.2020) (OHC)

12(A). Learned counsel Mr. M.M. Swain appearing in BLAPL No.7985 of 2022 and learned counsel Mr. B.P. Pradhan appearing in BLAPL No.11197 of 2022 adopted the submission of the learned senior counsel.

13. It is the submission of the learned counsel for the State that once charge-sheet has been filed in the case at hand on 179th day i.e. within the stipulated period of 180 days in terms of Section 36-A(4) of the NDPS Act, there is no scope to urge violation of indefeasible right in terms of proviso to Section 167(2) of the Code.

14. Learned counsel for the State further submitted that content of the final report is significant and merely because the same has been referred to and styled as preliminary charge sheet, it does not lose its legal import and it ought to be considered as the final report in terms of Section 173(2) of the Code and more so when cognizance has been taken on the basis of the same as in the instant case. He also relied on the provisions of Orissa Police Manual and the judgment of the apex Court in the case of S. Kasi Vs. State reported in (2021) 12 SCC 1.

15. It is the submission of the learned counsel for the State that once "charge sheet" has been filed in whatever form, the right of the accused to get default bail does not merit consideration. Hence, it is stated that indefeasible right though undoubtedly gets precedence over the right of the State to carry on investigation, is curtailed on submission of charge-sheet. It is his submission that if the law laid down in this context in its proper prospective in the case of S. Kasi (Supra) is applied contextually in the case at hand it has to be unerringly held that there has been no violation of right of the petitioner much less indefeasible right to be released on "compulsive bail".

16. The dispute in the case at hand falls within a narrow compass i.e. as to whether preliminary charge-sheet filed on 22.11.2020 can be treated as an intimation to the learned Court in seisin on completion of investigation and in the instant case under the N.D.P.S. Act within 180 days in terms of Section 36-A(4).

17. Preliminary charge-sheet has been referred to in Rule 172- (f) of the Odisha Police Rules under Chapter-IX thereof dealing with "Investigation" is quoted hereunder for convenience of ready reference:-

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"(f) Preliminary Charge Sheet :- If after a limit of 15 days provided by Section 167, Cr.P.C., a further remand of the accused is considered necessary to obtain further evidence the Investigating Officer shall submit a report styled as Preliminary Charge Sheet and not in the form of charge sheet to the Magistrate

in order to enable him to grant remand under Section 344, Cr.P.C. This preliminary charge sheet shall state facts of the case and show briefly the evidence so far collected.

It must be shown-

(i) that sufficient evidence has been obtained to raise suspicion that the accused may have committed an offence.

(ii) that it appears likely that further evidence may be obtained by a remand."

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18. The word "charge sheet" has not been defined in the Code. Section 173 of the Code refers to report of police officer on completion of investigation.

Section 173(2)(i) of the Code states that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report in the form prescribed by the State Government stating the details as enumerated therein. Such form has been prescribed by the State Government (Vol-II of Police Manual Form No.32)

Section 173(8) of the Code clothes the Investigating Agency with the Additional power to continue the investigation and forward a "further report or reports" in the form prescribed and also stipulates that the provision of Section 173(2) to (6) of the Code shall apply to such report or reports, as they apply in relation to a report forwarded under Section 173(2) of the Code.

19. Rule 174(a) of PMR deals with charge sheets. It states that when the case is found to be true and prima facie case is made out, a charge sheet shall be submitted in PM form No.32 to the Court competent to take cognizance as soon as possible after the arrest and by the quickest means and reference has been made regarding the briefest particulars to be noted in terms of Section 173 and 190(b) of the Code.

20. The reference to preliminary charge sheet under Rule 172(f) has thus to be understood in the context of Rule 173(a) dealing with completion of investigation and Rule 174 of the Orissa Police Manual referring to charge sheet.

21. In the case at hand, it can be seen that the police officer forwarded to the Court competent to take cognizance report in the prescribed form. It has to be borne in mind that on the basis of such report cognizance has been taken and more particularly in the order dated 11.08.2021, the learned Court has specifically stated that as cognizance of the offences under Section 20(b)(ii)(C) of NDPS Act has already been taken, it is not required to take cognizance again. Hence, it is clear that even cognizance of the offence has been taken within the time limit of 180 days as stipulated under Section 36-A(4) of the Special Act, 1985. Hence, this Court does not find any force in the submission of the learned Counsel for the petitioner that the report of the police officer on completion of

investigation under Section 173 of the Code read with Section 36-A(4) proviso was not submitted.

21(A). As such report was admittedly submitted on the 179th day, as rightly stated by the learned counsel for the State, there was no necessity for the prosecution to seek extension of time for completion of investigation as envisaged under proviso to Section 36-A(4) of NDPS Act, 1985.

22. Hence, it is not necessary to further elaborate regarding the indefeasible right of the accused in terms of proviso to 167(2) of the Code on non conclusion of investigation within the time stipulated.

23. The submission of the learned senior counsel for the petitioner in the factual matrix of the case at hand referring to M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence reported in (2021) 2 SCC 485 is not on sound foundation and is on account of fallacious appreciation regarding the applicability of M. Ravindran (Supra) in the case at hand.

24. Inasmuch as in M. Ravindran (Supra), the points to be decided was stated as under at Page-499.

"10.1.(a) whether the indefeasible right accruing to the appellant under Section 167(2) CrPC gets extinguished by subsequent filing of an additional complaint by the investigating agency.

10.2.(b) Whether the Court should take into consideration the time of filing of the application for bail, based on default of the investigating agency or the time of disposal of the application for bail while answering."

25. As already discussed, this Court did not find force in the submission that the report styled as "Preliminary Charge Sheet" submitted on the 179th day, on the basis of which cognizance was taken, cannot be stated to be a report under Section 173(2) of Cr.P.C.

26. It is nobody's case that the subsequent report by the Investigating Agency in terms of its power conferred under Section 173(8) of the Code amounts to "subsequent filing of an additional complaint" by the Investigating Agency. Hence, both the points

(i) The question of learned Court in seisin taking into consideration the time of filing of the application for bail on account of default of Investigating Agency, not submitting the report under Section 173(2) of the Cr.P.C within the time prescribed by the special statute (NDPS Act), in the case at hand within 180 days in the first place and

(ii) The time of disposal of such application for bail on account of subsequent filing of additional complain does not arise in the case at hand. In as much as admittedly even no application was moved before the learned Court in seisin for release on default bail.

27. Thus reliance on the judgment of the apex court in the case of M. Ravindran (Supra) is bereft of its context. The judgment reported in Sanjay Kumar Kedia (Supra) is clearly distinguished on facts and as such has no application in the case at hand. It was held in the said case that extension granted therein under proviso to Section 36-A(4) of NDPS Act did not satisfy the condition laid down and "also did not remotely satisfy the test laid down in Hitendra Vishnu Thakur Vs. State of Maharashtra – (1994) 4 SCC 602". Therefore, orders of Court below in the said case were set aside and direction was passed to release the accused on default bail.

28. Such mechanical reliance on precedents militates against the law laid down by the apex Court in the matter of interpretation of judgments (Ref:- Haryana Financial Corporation V. Jagdamba Oil Mills reported in (2002) 3 SCC 496) and by this Court in the case of Sk. Jumman @ Badruddin Vs. State of Odisha - BLAPL No.7354 of 2022 disposed of on 05.01.2023.

29. In fact in one of the judgments relied upon by the learned senior counsel for the petitioner (Sk. Raju @ Raju & Others Vs. State of Odisha (CRLMC No.1 of 2020 disposed of on 01.07.2020), this Court examined the issue of the right of an accused to be released on default bail for non submission of charge sheet within the period stipulated under the NDPS Act

30. After referring in detail to the schematic arrangement of the Cr.P.C. and taking note that reference to preliminary charge sheet is a misnomer, this Court held thus

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"Notwithstanding the term so used, it is always upto the Court receiving such charge-sheet, to find out at the stage of taking cognizance, as to whether or not the so-called preliminary charge-sheet qualifies to be a Final Form under Section 173(a) of the Code, to be acted upon in view of Section 190 of the Code."

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31. The report submitted by the police officer under Section 173(2) of the Code in the case at hand though styled as a preliminary charge sheet, in the considered view of this Court, conforms to the test laid down by this Court to be acted upon and in fact cognizance was taken on the basis of such preliminary charge sheet, as already noted.

32. Hence, the assertion of the learned senior counsel for the petitioner that the final charge sheet submitted on 11.08.2021 i.e. on the 440th day from the period of custody is to be construed as the charge sheet under Section 173(2) of the Code cannot stand to reason. And as report under Section 173(2) of the Code was submitted within the stipulated period of 180 days, there was no necessity to seek extension in terms of the proviso to Section 36-A(4).

33. As such, this Court finds sufficient force in the submission of the learned

counsel for the State Mr. Gaya that in the factual backdrop of the case at hand that there is no infringement of indefeasible right of the petitioner in the case at hand so as to warrant his release on "default bail".

34. Hence, on a conspectus of materials on record and on application of the law governing the field, as discussed, this Court does not find any merit in the bail applications and the same accordingly stand rejected.

35. The BLAPLs accordingly disposed of. No costs.

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