

(2022) 11 DEL CK 0057

In the Delhi High Court

Case No : Bail Application No. 2208 Of 2022

Sher Singh @ Raj Bohara

APPELLANT

Vs

State (Nct Of Delhi)

RESPONDENT

Date of Decision : 14-11-2022

Acts Referred:

Official Secrets Act, 1983 — Section 3, 4, 5

Indian Penal Code, 1860 — Section 120B

Code Of Criminal Procedure, 1973 — Section 167, 167(2), 167(2)(a)(ii), 173, 439

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 20(4)(bb), 20(8)

Citation : (2022) 11 DEL CK 0057

Hon'ble Judges : Anu Malhotra, J

Bench : Single Bench

Advocate : Venamra Mahaseth, Bhaskar Tripathi, Abhishek Singh, Shoaib Haider

Final Decision : Dismissed

Judgement

Anu Malhotra, J

1. The applicant vide the present application seeks the grant of bail in relation to FIR No. 230/2020 Police Station Special Cell registered under Section 3,4 &5 of the Official Secrets Act, 1983 & Section 120B of the Indian Penal Code, 1860, submitting inter alia to the effect that he has been falsely implicated in the instant case and that he is uneducated, illiterate, is a citizen of Nepal and has been residing in India for a substantial period and had come to India to find a suitable job to cater to the needs of his family which is totally dependent on him.

2. The applicant submits that he worked as a Taxi Driver in the Delhi NCR for his livelihood and found an opportunity to join a company at Mahipalpur named MZ Mall Private Limited for the position of an office peon-cum-driver at a monthly salary of Rs.10,000/- and his role in the said company was limited to strict and specific instructions of the Management of the company comprising of Mr. Zhang Zheng @ Suraj and Ms. Zhang Lixia @Usha. Inter alia, the applicant submits that his role was to clean the office, drive a vehicle and to work as per the

directions of the Director of the Company Mr. Zhang Zheng @ Suraj and that the applicant used to deliver/pick any packages as per the specific directions of the management.

3. The applicant further submits that he was not aware of the business of the company and his role was limited and to his understanding the company was involved in the pharmaceutical Sector.

4. Inter alia, the applicant submits that towards the end of January, 2020 Mr. Zhang Zheng @ Suraj and Ms. Zhang Lixia @Usha departed to China for a short visit on personal reasons and after their departure all the flights from and to China were suspended during the Covid-19 situation and they could not return back to India, and handled the business of the company from China through internet and calls and in the meantime, India also declared a nationwide strict lockdown from 24th of March 2020 suspending all the movements in the entire country.

5. The applicant submits that he has been behind bars since 19.9.2020 in relation to the FIR No. 230/2020 Police Station Special Cell registered under Sections 3, 4 & 5 of the Official Secrets Act and further Section 120B of the Indian Penal Code, 1860 was added alleging that the applicant was the part of the alleged conspiracy though the applicant was not named in the FIR and was arrested on the lead provided by Rajeev Sharma, Accused No.1, during interrogation. Inter alia the applicant submits that he was in police custody for a period of 9 days and thereafter sent to Judicial custody from 27.9.2020 and that the final report under Section 173 of the Cr.P.C., 1973, was filed on 28.11.2020 with a delay of 10 days.

6. Inter alia, the applicant submits that the other co-accused availed of the default bail under Section 167(2) of the Cr.P.C., 1973, and that the main accused was released vide order dated 4.12.2020 of the Co-ordinate Bench of this Court in Crl. Rev. Petition No. 363/2020 and the other co-accused Qing Shi was granted bail by the Co-ordinate Bench of this Court vide order dated 28.7.2021 in Crl.Rev.P. No. 82/2021. Inter alia the applicant submits that in the absence of legal aid he could not avail of the default bail before filing of the charge sheet as he could not afford to hire any advocate for his defence.

7. The applicant has further submitted that the Directorate of Enforcement recorded an ECIR at the instance of the present matter being a predicate offence and arrested the main accused Rajeev Sharma who was out on bail on 1.7.2021 and arrested the co-accused Qing Shi from the Central Jail No.-06, Tihar Prisons in connection with the ECIR/05/STF/2021 but the Enforcement Directorate did not choose to arrest the applicant and filed the final complaint/chargesheet.

8. The applicant further submits that the accused persons arrested by the Enforcement Directorate under the PMLA, 2002 on the same facts of this matter have already been released on regular bail on merits in ECIR/05/STF/2021 in as much as the main accused Rajeev Sharma was enlarged on regular bail vide

order dated 7.1.2022 in Bail Appln. No. 3156/2021 and the co-accused Ms. Qing Shi was released on regular bail by the Special Court PMLA, Patiala House Courts, New Delhi vide order dated 18.1.2022.

9. Vide the status report submitted on 24.8.2022 by the State it has been submitted that a secret input from the Intelligence Agency was received that Mr. Rajeev Sharma, the co-accused had links with a Foreign Intelligence Officer and had been receiving funds from his handler through illegal means & Western Union money transfers platforms for conveying sensitive information (having a bearing on National Security & Foreign relations) through electronic means to his handler based abroad and an FIR 230/2020 Police Station Special Cell, dated 13.9.2020 under Sections 3, 4 & 5 of the Official Secrets Act 1983 was registered and during investigation the accused Rajeev Sharma S/o Late Sh. Rattan Lal Sharma, the co-accused, aged 61 years was arrested on 14.9.2020 and during the search of the house of the co-accused Rajeev Sharma several articles including some sensitive/ confidential documents related to the Indian Defence Department were recovered at the instance of the accused Rajeev Sharma and during further investigation it was revealed that the accused Rajeev Sharma was indulging in procurement of secret/ confidential/ sensitive documents/material information conveying the same to his handlers (Chinese Intelligence Officers) based in China and in lieu of the same he was receiving remuneration through illegal means i.e. hawala transactions/funds through shell companies being operated through the Chinese persons in India.

10. Inter alia, it was submitted through the status report that during further investigation it was revealed that the accused Rajeev Sharma was in contact with Chinese Intelligence Officers through emails and social media platform i.e. Telegram etc. and the accused Rajeev Sharma was conveying the information to these Chinese Intelligence Officers and was receiving the illegal funds through illegal means/shell companies being operated in Mahipalpur, Delhi, by the Chinese people on the direction of the Chinese Intelligence Officers.

11. It was further submitted through the status report that during the course of the further investigation the co-accused Qing Shi @ Queen Shi D/o Shi Chaoqun, a Chinese National and Sher Singh, the applicant herein, a Nepalese citizen were arrested on 19.9.2020 and during investigation it was revealed that MZ Mall Private Limited and MZ Pharmacy Private Limited were being operated at L-382B, First Floor, Mahipalpur Extn., New Delhi and Mr. Jhang Cheng @ Suraj, a Chinese national was the Director of these companies and Sher Singh, the applicant herein, was a co-director of one of these companies and Ms. Qing Shi and Sher Singh were operating these companies on behalf of Mr. Jhang Cheng and his wife/partner Ms. Zhang Lixia as both of them were present in China. Inter alia through the status report it was averred that the accused Rajeev Sharma was being funded through these shell companies on the directions of Chinese Intelligence Officers as remuneration for the information provided to them by him and the remuneration to the accused Rajiv Sharma has also been confirmed

by the pseudo witnesses during the investigation in their statements u/s 161 and 164 of the Cr.P.C., 1973.

12. Inter alia, the State submits that a report from the Defence Department of India was sought regarding the sensitive/confidential documents recovered from the house of accused Rajeev Sharma whereby a reply was received as "Yes" and that the documents are classified as "CONFIDENTIAL" vide Para 9 of Classification & Handling of Classified Documents (CHCD)-2001 as issued vide Military Intelligence - 11 letter Number. A/38020/MI-11 dated July 2001, and the person i.e., the accused Rajeev Sharma had unauthorized possession of the said documents. Inter alia it was submitted through the status report that it was also mentioned by the DGMI that any unauthorized disclosure of content of these documents could be expected to cause damage to National Security or could be prejudicial to the National Interests or would embarrass the Government in its functioning and the contents contained in the documents are directly or indirectly connected with security matters of the country.

13. The State submits that the accused Rajeev Sharma granted bail by the Co-ordinate Bench of this Court on 4.12.2020 under Section 167(2) of the Cr.P.C., 1973 and the co-accused Qing Shi was also granted bail by the Co-ordinate Bench of this Court under Section 167(2) of the Cr.P.C., 1973 on 28.7.2021.

14. Undoubtedly, the applicant in the instant case was arrested on the same date as the co-accused Qing Shi both having been taken into police custody on 19.9.2020 and put into judicial custody on 27.9.2020. The co-accused Qing Shi in terms of order dated 28.7.2021 of the Co-ordinate Bench of this Court CrI.Rev. Petition No. 82/2021 has been allowed to be released on default bail. The other main accused in the instant case Rajeev Sharma vide order dated 4.12.2020 also in CrI.Rev. Petition No. 363/2020 had been allowed to be released on default bail in terms of Section 167(2) of the Cr.P.C., 1973.

15. As has been submitted by the applicant that he did not seek redressal in terms of Section 167(2) of the Cr.P.C., 1973, in terms of Section 167(2) of the Cr.P.C., 1973, the provision for grant of default bail becomes applicable only if the accused person falls within the parameters of Section 167(2)(a)(ii) falls within the category of a person 'who is prepared to and does furnish bail.'

16. In the instant case, admittedly, the applicant had not chosen to seek the grant of default bail through provisions of Section 167(2) of the Cr.P.C., 1973 and it is rightly held vide order dated 20.5.2022 of the Court of the Additional Sessions Judge-05, New Delhi declining the prayer made by the applicant seeking the grant of bail observing to the effect that there is no parity between the applicant and the co-accused Rajeev Sharma and Qing Shi granted default bail under Section 167(2) of the Cr.P.C., 1973.

17. This is so in as much as vide a verdict of the Hon'ble Supreme Court in Rakesh Kumar Paul V. State of Assam, (2017) 15 SCC 67 a verdict dated 16.8.2017 in SLP(Crl.) 2009/2017 with SLP (Crl.) No. 2176/2017, the question in

para 98.2(ii) thereof which reads to the effect:

" 98. The three main questions that arise in these appeals for our consideration are as under:

98.1 (i)

98.2 (ii) Whether the appellant is entitled to default bail under Section 167(2) of the Code though he has not made any application (oral or written) under Section 167(2) of the code before the Magistrate (or Special Judge), but has instead argued orally without pleadings in a pending regular bail application filed under Section 439 of the Code before the High Court?

98.3 (iii)?"

It has been expressly laid down vide paragraph 108 to 113 of the said verdict to the effect:

"108. The second issue which requires to be addressed is whether the Appellant is entitled to statutory bail Under Section 167(2) of the Code though he has not made any application Under Section 167(2) of the Code before the Magistrate(or Special Judge) prior to the filing of the charge sheet. The record of the case reveals that the Appellant was arrested on 4.11.2016 and produced before the Magistrate on 5.11.2016 and he was remanded to custody for the first time. The period of sixty days for filing charge sheet expired on 04.01.2017. The charge sheet came to be filed on 24.1.2017. Initially the Appellant had applied for regular bail before the Sessions Court which came to be rejected on 20.12.2016. Thereafter he moved bail application No. 23/2017 for bail Under Section 439 of the Code before the High Court of Guwahati. This bail application was disposed on 11.01.2017 which was after sixty days of arrest, but prior to filing of charge sheet. A perusal of this bail application shows that this bail application was moved Under Section 439 of the Code for regular bail on merits and not as a bail claiming the statutory right Under Section 167 of the Code. In none of the grounds taken in the bail application, the Appellant has pleaded for default bail as a result of non filing of the charge sheet. All the grounds urged are on merits. The prayer is also for regular bail. It appears that, prior to the time of hearing, the counsel for the Appellant has realised that the Accused was entitled for default bail Under Section 167(2) and has taken the plea in the oral arguments in the High Court that since sixty days for filing charge sheet has expired, he is entitled to bail as matter of right Under Section 167(2) of the Code. The question thus arises, whether such application on merits can be equated to be an application seeking enforcement of statutory right Under Section 167(2) of the Code and whether such practice of taking such oral arguments directly before the High Court in a pending regular bail application without having taken such grounds in the application or having approached the Magistrate(or Special Court) should be entertained.

109. The legal position regarding bail Under Section 167(2) of the Code was

cemented by a Constitution Bench of this Court which has inter alia held in the case of Sanjay Dutt v. State through C.B.I., Bombay that: ...

"53.(2) (b)The "indefeasible right" of the Accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur v. State of Maharashtra, is a right which enures to, and is enforceable by the Accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the Accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the Accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage..."

110. In Uday Mohanlal Acharya v. State of Maharashtra three Judge Bench of this Court had the occasion to determine when an Accused can be said to have availed of his indefeasible right for being released on bail under the proviso to Section 167(2) of the Code of Criminal Procedure, if a challan is not filed within the period stipulated thereunder. The Court held in a majority of 2:1 that the indefeasible right is said to be availed at the time when an application is made for enforcement of the right Under Section 167(2) of the Code and the Accused offers to abide by the terms and conditions of bail. While holding so, the court, in para 11, interpreted the decision in Dr. Bipin Shantilal Panchal v. State of Gujarat, a three Judge Bench decision of this Court, as under:

"11. In this case (Dr. Bipin Shantilal Panchal), the Accused had not made application for enforcement of his right accruing under proviso to Section 167(2) of the Code. But raised the contention only in the Supreme Court. This Court, therefore, formulated the question thus-Whether the Accused who was entitled to be released on bail under proviso to Sub-section (2) of Section 167 of the Code, not having made an application when such right had accrued, can exercise that right at a later stage of the proceeding, and answered in the negative."

111. The requirement for making the application for seeking enforcement of the right Under Section 167(2) has been recognised in several cases. In the case of Mohamed Iqbal Madar Sheikh v. State of Maharashtra, this Court rejected the claim for statutory bail under Section 167(2) of the Code on the ground that no application was made on that ground. In para 11 of the judgment the Court held as under:

" 11. So far the facts of the present case are concerned, the Appellant Nos. 1 to 6 were taken into custody on 16.1.1993. The chargesheet was submitted on

30.8.1993; obviously beyond the statutory period Under Section 20(4)(b). There is nothing on record to show that provisions of Section 20(4)(bb) were applied in respect of Appellants. They had become entitled to be released on bail under proviso (a) to Section 167(2) of the Code read with Section 20(4)(b) of the TADA. But it is an admitted position that no application for bail on the said ground was made on behalf of the Appellants. Unless applications had been made on behalf of the Appellants, there was no question of their being released on ground of default in completion of the investigation within the statutory period. It is now settled that this right cannot be exercised after the charge-sheet has been submitted and cognizance has been taken, because in that event the remand of the Accused concerned including one who is alleged to have committed an offence under TADA, is not Under Section 167(2) but under other provisions of the Code."

112. In *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Others*, it was held in para 30 that:

"In conclusion, we may (even at the cost of repetition) say that an Accused person seeking bail under Section 20(4) has to make an application to the court for grant of bail on grounds of the 'default' of the prosecution and the court shall release the Accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail Under Section 20(4) of TADA and both the provisions operate in separate and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under Clause(bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without notice to an Accused to have his say regarding the prayer for grant of extension under Clause(bb). In this view of the matter, it is immaterial whether the application for bail on ground of 'default' Under Section 20(4) is filed first or the report as envisaged by Clause(bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail."

113. The law laid down as above shows that the requirement of an application claiming the statutory right Under Section 167(2) of the Code is a prerequisite for the grant of bail on default. In my opinion, such application has to be made before the Magistrate for enforcement of the statutory right. In the cases under the Prevention of Corruption Act or other Acts where Special Courts are constituted by excluding the jurisdiction of the Magistrate, it has to be made before such Special Court. In the present case, for the reasons discussed, since the Appellant never sought default bail before the court concerned, as such not entitled to the same." (emphasis supplied),

having thus been held categorically vide paragraph 113 adverted to herein above that since the applicant therein had not sought the default bail before the Court concerned, as such he was not entitled to the same.

18. In the instant case, admittedly, the applicant did not seek the grant of default bail though it was stated that it was not sought because the applicant was not adequately, legally represented. It is essential to observe that vide observations in para 11 in the verdict titled Kavita @ Laxmi V. State of NCT of Delhi; Bail Appln. No. 3062/2021, a verdict dated 15.9.2021 it was observed by this Court as under:

“11. In the instant case too, there is nothing on the record to indicate that the applicant had sought grant of any default bail. It is however the submission raised on behalf of the applicant by learned counsel for the applicant that the applicant was not legally represented and it was the bounden duty of the Court to ensure that there was a compliance of the provisions of Section 167(2) of the Cr.P.C., 1973 as had been made even on the date 2.6.2017 in relation to the application of the co-accused named Satbir. In relation to this aspect, it is essential to observe that vide a verdict dated 14.3.2018 of this Court in Bail Appln. No. 2238/2017 titled Arvind Kumar Saxena V. State, there are observations in para 21 of the said verdict whereby it has inter alia been observed to the effect that the Registrar General of this Court was requested to explore the possibility of creation of a database and software for the District Courts of Delhi for updation of the date in relation to the pending remand applications during the course of investigation pending before the Trial Courts with the dates of arrest and dates by when the requisite charge-sheet is to be filed in terms of Section 167(2) of the Code of Criminal Procedure, 1973 and the date when the said charge-sheet has been filed which would assist the learned Trial Courts in preservation of the rights of personal liberties of the accused appearing before them by informing the accused on coming to know that an accused person before them is entitled to the indefeasible right of default bail and may thus exercise the same if he / she is willing to furnish bail.”,

19. Apparently, in the instant case as observed herein above, the applicant is not entitled to the grant of default bail in as much as the prayer seeking the grant of default bail or bail even in terms of Section 439 of the Cr.P.C., 1973 had not been made by the applicant prior to the impugned order declining bail.

CONCLUSION

20. Taking into account, thus the allegations levelled against the applicant of his being involved allegedly as a co-director of one of the Chinese companies through whom the information falling within the ambit of secret/confidential/sensitive documents material information was being conveyed by the co-accused Rajeev Sharma to Chinese Intelligence Officers allegedly and that there was a conveyance of documents classified as “Confidential” being conveyed by the company of which the petitioner/applicant herein was one of the co-directors for which funding was received by the co-accused Rajeev Sharma through the Shell company of which the applicant herein was allegedly a co-director, in view of the gravity of the offence affecting the national security of the country, there is no ground for grant of bail and the bail application is declined.

21. It is, however, expected by this Court that the observations of this Court in Arvind Kumar Saxena V. State; a verdict dated 14.3.2018 in Bail Appln. No. 2238/2017 referred to herein above vide paragraph 18 are expeditiously explored to be implemented by the Registrar General of this Court.