

INDRAJIT MAHANTY, J.

CRLMC. NO. 2067 OF 2010 (Decided on 25.01.2011)

PRATIMA NAYAK

..... Petitioner.

. Vrs.

STATE OF ORISSA

.....Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.167 (2) (a) (i).

For Petitioner - M/s. H.N.Mohapatra, A.Samantaray.

For Opp.Party - Mr. K.K.Mishra

Additional Govt. Advocate.

I. MAHANTY, J. The petitioner herein Pratima Nayak seeks to challenge the order dated 28.5.2010 passed by the learned JMFC, Nimapara in G.R. Case No.55 of 2010 by which the learned Magistrate, after granting bail to the petitioner under Section 167(2)(a)(i) of the Cr.P.C., later on refused to accept the bail bond and affidavit of the surety after taking note of the fact that, on the same day charge sheet was submitted against the accused-petitioner at 5.00 P.M., prior to furnishing of the bail bond.

2. The petitioner is an accused in Ramchandi P.S. Case No. 4 of 2010 for commission of offences under Sections 302,309 and 364, I.P.C. corresponding to G.R. Case No. 55 of 2010.

3. Mr. Mohapatra, learned counsel for the petitioner submitted that since the prosecution had failed to submit the charge sheet in the case, in spite of lapse of 123 days since remand of the accused, an application was filed seeking bail under Section 167(2)(a)(i) of the Cr. P.C. and by order dated 28.5.2010, the said application seeking bail came to be allowed and direction was given for release of the petitioner on bail on furnishing bail bond of Rs.30,000/- with one solvent surety for the like amount. But by a later order, on the same day i.e. 28.5.2010, the learned JMFC noted that the bail bond had not been filed and direction was issued to put up the record on the date fixed. But on the self-same day i.e. 28.5.2010 the order sheet reveals that at 5.00 P.M. the case record was put up before the learned Magistrate in his residential office, on receipt of charge sheet bearing No. 10 dated 22.5.2010 against the accused for commission of the offences under Sections 302, 309 and 364 I.P.C. and after the charge sheet was submitted on the same day i.e. on 28.5.2010, advocate for the petitioner filed the bail bond and affidavit of the surety, but the same was not accepted on the ground that the charge sheet had been filed in the meanwhile by the prosecution, the bail application of the accused-petitioner had become infructuous accordingly and the bail bond was not accepted.

4. Mr. Mohapatra further placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Uday Mohanlal Acharya vrs. State of Maharashtra**, reported in

2001(II) OLR (SC) 290 and in particular conclusion No.4 in paragraph 13, which is quoted hereunder:-

“Conclusion No. 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.”

Relying upon the aforesaid conclusion No.4, learned counsel for the petitioner strenuously urged that since prosecution had not filed charge sheet within the mandatory period of 120 days in the case against the accused-petitioner involving an offence under Section 302 of the I.P.C., an indefeasible right had accrued in favour of the accused-petitioner on account of default on the part of the investigating agency in completing the investigation within the statutory period and further order of bail had also been passed in favour of the accused-petitioner, requiring the petitioner only to furnish bail bond in question. He further submitted that in order to deprive the accused-petitioner of her “indefeasible right” the prosecution submitted charge sheet on the same day i.e. on 28.5.2010 before the trial court, but filing of the charge sheet after an order of bail has been granted could not be a ground to deny the release of the petitioner on bail and the learned Magistrate ought to have accepted the bail bond and affidavit of the surety as submitted by the accused-petitioner through her counsel on the self-same day.

5. Mr.Mohapatra further placed reliance on the judgment of the Hon’ble Supreme Court in the case of **Gorel Venkat Ratnam @ G.V.Ratnam vrs. State of Orissa**, reported in (2009) 44 OCR 721 and submitted that since the petitioner had been directed to furnish bail bond of Rs. 30,000/- with one solvent surety for the like amount and in fact had furnished such bail bond, rejection of the bail bond on a technical ground that the condition of the bail had not been written in the bail bond and refusal to accept the same should not have been done.

6. Mr. K.K.Mishra, learned Additional Government Advocate for the State on the other hand also placed reliance on the judgment of the Hon’ble Supreme Court in the case of Udaya Mohanlal Acharya (supra) in particular on conclusion No.-5 in Paragraph-13 of the said judgment, which is quoted below:

“Conclusion No. 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.”

Mr. Mishra, learned Additional Government Advocate submitted that in view of Explanation 1 an the Proviso to Sub-section 2 of Section 167, since the accused continued to be in custody, even beyond the specified period (120 days) the said custody could not be deemed to be unauthorized and therefore, if during the said period the investigation was completed and charge sheet was filed, then the so called "indefeasible right of the accused" would stand "extinguished".

6.1 Mr. Mishra further submitted that in the fact of the present case although on 28.5.2010 the bail application of the accused-petitioner had been allowed, the necessary bail bond had not been submitted by the accused and at 5.00P.M. on the said date the investigating agency submitted the charge sheet. He accordingly submits that once charge sheet is submitted prior to the bail bond being furnished by an accused, the so called indefeasible right of the accused would stand extinguished and hence learned Magistrate was correct in refusing to accept the bail bond, since the same was furnished after filing of the charge sheet and holding that the bail petition had become infructuous.

6.2 In so far as the judgment in the case of Gorel Venkat Ratnam (supra) is concerned, learned Additional Government Advocate for the State submitted that, the facts of the said case are clearly distinguishable from the facts of the case at hand. In the aforementioned case the accused-petitioner had furnished the bail bond and affidavit of the surety prior to the submission of charge sheet, but the same had been rejected on a technical ground, which was held to be illegal as observed by the Hon'ble High Court. But in the present case, from the certified copy of the entire order sheet appended as Annexure-1 to the present application, it would be clear that, the charge sheet in the present case had been submitted by the investigating agency prior to accused furnishing the bail bond and therefore, the said case being clearly distinguishable from the facts of the case at hand has no application to the present case.

7. Mr. Mohapatra, learned counsel for the petitioner on the other hand placed further reliance on para-32 in the case of Uday Mohanlal Acharya' (supra) in which Hon'ble Justice B.N.Agrawal noted his dissenting view from the majority view held in the facts of the said case that the right of the accused to be enlarged on bail under the Proviso to Section 167(2) of the Code "cannot be said to have been availed".

7.1 While placing reliance on the aforesaid paragraph of the dissenting view expressed therein, Mr. Mohapatra, learned counsel for the petitioner submitted that in the case at hand since the accused-petitioner had already "availed of" of her "indefeasible right" under Proviso to Section 167 (2) of the Code, such right could not be frustrated or defeated by the mere factum of filing of the charge sheet after an order of bail was passed and prior to acceptance of the bail bond/surety being furnished.

8. In the light of facts as well as contentions advanced by the learned counsel for both parties as noted herein above, the short point that arises for consideration in the present case is, whether the claim of the accused-petitioner of an "indefeasible right" under Section 167(2) of the Code, could be said to have been extinguished or not in the facts of the present case?

9. In view of the judgment rendered by the Hon'ble Supreme Court in the case of Udaya Mohanlal Acharya(supra), this issue is no longer res integra and the conclusions arrived at by the majority view in the aforesaid case contained in para-13 thereof is fully binding.

10. While the petitioner placed reliance on conclusion No.4, the State has placed reliance on conclusion No.5. In my earnest view conclusion No.5 is squarely applicable to the facts of the present case. On a perusal of the impugned order, it is clear that on 28.5.2010 the learned Magistrate had in fact granted bail to the accused petitioner under Section 167(2)(a)(i) of the Cr.P.C. on the condition of furnishing bail bond of Rs. 30,000/- with one solvent surety for the like amount. The order sheet further reveals that till the learned Magistrate rose from his dais on the said date and left for his residence, bail bond had not been furnished. Further the order indicates that at 5.00 P.M. of the same day, i.e., 28.5.2010 the prosecution submitted charge sheet under Section 302,309 and 364 I.P.C. and by a later order on the same date i.e. 28.5.2010 the learned Magistrate noted, "at this juncture advocate Sri B.K.Mohapatra files bail bond and affidavit of the surety for the accused". This clearly shows that the bail bond that was furnished on behalf of the petitioner was furnished after the charge sheet was submitted by the prosecution. Therefore, in terms of conclusion No.5 in the case of Udaya Mohanlal Acharya (supra) the "indefeasible right" claimed by the accused stood "extinguished".

11. So far as Gorel Venkat Ratnam's case is concerned, the said case is clearly distinguishable on facts, inasmuch as, in the said case while the order passed therein under Section 167(2) proviso granting bail to the petitioner had been passed on 7.1.2009 and bail bond was also furnished on behalf of the accused, on a technical defect that the bail bond was incomplete and therefore refused to accept the same and directed that the matter be put up with the case record with the rectified bail bond. Thereafter, on the same day at 4.30 P.M. the charge sheet was received by the learned court below. This act on the part of the learned Magistrate in the aforesaid case was held by the High Court as a technical ground, but on factual basis in the aforesaid case the Court had granted bail to the accused-petitioner therein and accused-petitioner had also furnished the bail bond as well as surety prior to the charge sheet being filed.

12. In the present case, the facts are clearly distinguishable and the bail bond was furnished only after the charge sheet was submitted by the prosecution and therefore, the "indefeasible right" claimed by the accused petitioner stood "extinguished" in view of the judgment of the Hon'ble Supreme Court, in the case of Udaya Mohanlal Acharya (supra) and in particular conclusion No.5 as contained in para-13 of the said judgment.

13. In view of the foresaid conclusion, this Court is left with no other alternative but to reject the present application and affirm the order passed by the learned Magistrate.

Application dismissed.