

GAHC040000082023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : BA 1/2023

1:Nalo Mibang
S/o Late Tagon Mibang ,
R/o Mangnang Sille Village, PO/PS Sille Oyan, East Siang District, Arunachal Pradesh.

VERSUS

1:THE STATE OF AP
Represented by the Special Public Prosecutor, Arunachal Pradesh.

Advocate for the Petitioner : Jungam Jini
Advocate for the Respondent : Ojing Pada

Linked Case : IA(Crl) 6/2023

1:Nalo Mibang
S/o Late Tagon Mibang
R/o Mangnang Sille Village
PO/PS Sille Oyan
East Siang District
Arunachal Pradesh.

VERSUS

1:the Central Bureau of Investigation
Represented by the Standing Counsel CBI

Advocate for the Petitioner : Binter Picha
Advocate for the Respondent : Marto Kato

**BEFORE
HONBLE MR. JUSTICE NANI TAGIA**

ORDER

Date : 31.01.2023

Heard Mr. Jumgam Jini, learned counsel for the petitioner.

Also heard Mr. Marto Kato, learned standing counsel, Central Bureau of Investigation(CBI), appearing on behalf of the sole respondent.

This is a bail application under Section 439 of the Code of Criminal Procedure, 1973, for enlarging the accused Smti. Opet Mibang, who has been under custody since 30.10.2022, on bail, in connection with SIC(Vig.) Police Station Case No. 12/2022 registered u/ss. 120(B)/406/409/420 of the Indian Penal Code *read with* Section 13(2) of the Prevention of Corruption Act, 1988.

The respondent Central Bureau of Investigation(CBI), has filed an objection, dated 25.01.2023, to the bail application opposing the prayer made by the petitioner for grant of bail to the accused, named-above.

The applicant, in the meanwhile, has filed an interlocutory application being IA(crl.)06(AP)2023, dated 30.01.2023, stating that the SIC(Vig.) Police Station Case No. 12/2022 registered u/ss. 120(B)/406/409/420 of the Indian Penal Code *read with* Section 13(2) of the Prevention of Corruption Act, 1988, has now been re-numbered as CBI Case No. RC0172023A0001, on the case being transferred for investigation by the Central Bureau of Investigation (CBI).

The applicant, by filing the interlocutory application being IA(crl.)06(AP)2023, dated 30.01.2023, makes a further prayer for grant of default bail to the accused Smt. Opet Mibang in terms of provision under Section 167(2) of the Code of Criminal Procedure, 1973, contending that since she was arrested on 30.10.2022, in connection with SIC(Vig.) Police Station Case No. 12/2022 registered u/ss. 120(B)/406/409/420 IPC *read with* Section 13(2) of the Prevention of Corruption Act, 1988, re-numbered as CBI Case No. RC0172023A0001 and the statutory period prescribed for completion of the investigation and filing of the charge-sheet being 90(ninety) days and the period of 90 days having expired on 28.01.2023; she is, therefore, entitled to be released on bail as a matter of right on the failure of the investigating agency to file the charge-sheet within the stipulated time.

Mr. Kato, learned standing counsel, Central Bureau of Investigation(CBI), has not disputed the contention raised by the accused that the charge-sheet in the instant case, has not yet been filed.

Section 167(2) of the Code of Criminal Procedure, 1973, reads as under:

“167. Procedure when investigation cannot be completed in twenty four hours.

(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, authorise 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 authorise 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 authorise 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;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;].

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution.

(2A) Notwithstanding anything contained in sub-section(1) or sub- section(2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section(2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the Officer-in-Charge of the Police Station or the Police Officer making the investigation, as the case may be."

Interpreting Section 167(2)(a) of the Code of Criminal Procedure, 1973; the Hon'ble Apex Court in **Aslam Babalal Desai v. State of Maharashtra**, reported in **AIR 1993 SC 1**, has held in paragraph No. 14, as under:

“14. We sum up as under:

The provisions of the Code, in particular Ss. 57 and 167, manifest the legislative anxiety that once a person's liberty has been interfered with by the police arresting him without a Court's order or a warrant, the investigation must be carried out with utmost urgency and completed within the maximum period allowed by the proviso (a) to S.167(2) of the Code. It must be realized that the said proviso was introduced in the Code by way of enlargement of time for which the arrested accused could be kept in custody. Therefore, the prosecuting agency must realize that if it fails to show a sense of urgency in the investigation of the case and omits or defaults to file a charge-sheet within the time prescribed, the accused would be entitled to be released on bail and the order passed to that effect under S. 167(2) would be an order under S. 437(1) or (2) or under Section 439 of the Code of Criminal Procedure, 1973(1) of the Code.....”

Similarly, the Hon'ble Apex Court in ***Rajnikant Jivanlal & anr. v. Intelligence Officer, Narcotic Control Bureau, New Delhi***, reported in **(1989) 3 SCC 532**, has held in paragraph No. 13, as follows:

“13. An order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's direction. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.”

What is discernible from the decisions rendered by the Hon'ble Apex Court in the aforesaid cases is that the proviso to sub-Section (2) of Section 167 of the Code of Criminal Procedure, 1973, fixes the outer limit within which the investigation must be completed and if the same is not completed within the period prescribed; the accused has a right to be released on bail if he is prepared to and does furnish bail.

Thus, in terms of the law laid down by the Hon'ble Apex Court in ***Aslam Babalal Desai***(supra) and ***Rajnikant Jivanlal & anr.*** (supra), in the event; the charge-sheet is not filed within the period stipulated, under Section 167(2) proviso (a) of the Code of Criminal Procedure, 1973; after the investigation is completed; the right to bail under Section 167(2)(a) thereto, is absolute, and it is no longer the Court's discretion.

Release of the accused on default bail u/s. 167 of the Code of Criminal Procedure, 1973, however, is not on merit, but on the failure of the investigating agency in completing the investigation and filing the charge-sheet within the stipulated time prescribed therein.

In the instant case, one of the Sections under which the case has been registered being 409 IPC, which prescribes the punishment for 10 years and more which may extend to life; proviso (a)(i) of Section 167(2) of the Code of Criminal Procedure, 1973; would be attracted which provides for completion of the investigation and filing of the charge-sheet within a period of 90 days.

There is no dispute that the accused was arrested on 30.10.2022 and the period of 90 days from 30.10.2022 has expired on 28.01.2023.

Since the accused has been in detention for more than 90 days and it is an admitted position, as submitted by Mr. Kato, learned standing counsel, Central Bureau of Investigation(CBI), that the charge-sheet is yet to be filed in the instant case; the accused would entitled to be released on default bail under Section 167(2)(a) of the Code of Criminal Procedure, 1973, in connection with in connection with SIC(Vig.) Police Station Case No. 12/2022 registered u/ss. 120(B)/406/409/420 IPC *read with* Section 13(2) of the Prevention of Corruption Act, 1988, re-numbered as CBI Case No. RC0172023A0001.

Accordingly, the bail application along with the connected interlocutory application are allowed in terms of Section 167(2)(a) of the Code of Criminal Procedure, 1973, and the accused Smt. Opet Mibang shall be released on bail on furnishing a bail bond of Rs. 20,000/- with 2(two) sureties of like amount to the satisfaction of the learned Special Judge, Yupia, subject to the following terms and

conditions, that :

- (1). She shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him for disclosing such facts to the Court or to any police officer; and
- (2). She shall fully cooperate with the investigation of the case.

The instant bail application and the interlocutory application stands disposed of, in terms above.

JUDGE

Comparing Assistant