

Sanjay Bhatia Vs. State

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Court : Delhi

Decided On : Mar-26-2014

Judge : V.P.Vaish

Appellant : Sanjay Bhatia

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.M.C. No.623/2014
Date of decision:

26. h March, 2014 SANJAY BHATIA Petitioner Through Mr. Vijay Aggarwal & Mr. Mudit Jain, Advocates. versus STATE Respondent Through Mr. Yogesh Verma, APP for the State CORAM: HON'BLE MR. JUSTICE VED PRAKASH VAISH VED PRAKASH VAISH, J.

(ORAL) 1. By way of the present petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as `Cr.P.C.), the petitioner challenges the impugned order dated 1.2.2014 passed by learned Metropolitan Magistrate (West), Tis Hazari Courts, Delhi whereby the application under Section 167(2) of Cr.P.C. filed by the petitioner was dismissed.

2. On 23.10.2013, the complainant Prem Sagar Sachdeva lodged a complaint on the basis of which FIR No.385/2013 under Sections 406/420 & 120B IPC was registered at P.S. Kirti Nagar, Delhi. On 29.11.2013, the petitioner Sanjay Bhatia

was arrested. The petitioner was produced before the concerned Metropolitan Magistrate, Delhi and he was remanded to judicial custody . The petitioner moved an application for bail before the learned Metropolitan Magistrate, Delhi which was dismissed. The petitioner moved an application for bail before learned District & Sessions Judge, Delhi which was dismissed as withdrawn on 18.12.2013. The petitioner filed another application for bail before the District & Sessions Judge (West) Delhi. Vide the order dated 15.1.2014, the petitioner was admitted to bail subject to deposit of FDR for a sum of Rs.1.34 crores within a period of two weeks and on furnishing bail bond in the sum of Rupees two lakhs with one surety in the like amount before CMM (West). The petitioner preferred CrI.M.C. No.523/2014 before this Court which was disposed of vide order dated 31.1.2014.

3. An application for being released on bail on default under the proviso (a) (ii) to Section 167 (2) of the Cr.P.C. was filed on behalf of the petitioner on 31.1.2014. The charge sheet was also filed on the same day i.e. 31.1.2014.

4. Counsel for the petitioner submitted that the application for bail was filed on 31.1.2014 at about 1.00 p.m., the charge sheet was filed at a later time on the same day, and therefore, petitioner is entitled to be released on bail under Section 167(2) of the Cr.P.C.

5. Relying upon the judgment in Uday Mohanlal Acharya vs. State of Maharashtra (2001) 5 SCC453 Om Parkash vs. State (NCT of Delhi) 2005 (121) DLT686Rajkumar Aggarwal vs. Director General Central Excise ILR (2008) (11) DRJ745and Gousemohiddin Maradansab Masanakatti vs. State of Karnataka, 2004 (4) Criminal Reported Judgments 622 (Karnataka), counsel for the petitioner submitted that mere filing of the charge sheet during pendency of an application for bail does not extinguish or defeat the accrued right of the accused.

6. The primary question which arises in this case is whether the accused is entitled for bail on default under the provisions of proviso (a)(ii) Section 167(2) of Cr.P.C. when charge sheet is filed on the same day when the accused applied for the said bail.

7. The Cr.P.C. deals with investigation of offence by the police in Chapter XII. Section 167 of the Cr.P.C. reads as under:

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, 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.

8. From a perusal of the aforesaid provisions of Section 167(2) Cr.P.C. it is manifestly clear that the jurisdiction of the Magistrate to detain the accused in judicial custody arises only when the accused is produced before him. The Magistrate has the power to detain the accused for a period of sixty days or ninety days, as the case may be, and beyond the prescribed period, the Magistrate has

no power to extend detention unless challan is filed. The power to authorise detention by the Magistrate extinguishes on 60th or 90th day, as the case may be, and the law provides that on the expiry of such period he shall pass an order of his release on bail on accused furnishing the bail bond. The power of the Magistrate to authorise detention again starts when challan is filed and cognizance of the offence is taken by the Magistrate. Thus, after expiry of the period of 60 days or 90 days, the Magistrate does not have to wait for filing of application for bail but has to pass an order for bail and ask the accused to furnish bail bond so that he can be set at liberty. However, if before the accused furnishes the bail bond, the investigating agency files the challan, the Magistrate per se has to take cognizance of the offence and take cognizance of the facts and circumstances under which the offence was allegedly committed by the accused. At that time, the investigating agency can very well press that since the bail bond of the accused has not been furnished, he be not released on bail under Section 167(2) Cr.P.C. and the accused can be kept in custody and his bail application be decided on merits. While the accused has a right to be released on bail after sixty days or ninety days, as the case may be, the State also has a right to detain the accused on filing of challan and the accused is entitled to bail only on merits.

9. It is settled principle of law that when application for bail on default is filed, the merits of the case are not to be gone into. This is quite evident from the observations in *Union of India vs. Thamisharasi* (1995) 4 SCC190 10. The question whether the accused is entitled to bail on default has been the subject matter of judicial scrutiny before the Honble Supreme Court of India in various cases. The Constitution Bench of the Apex Court in *Sanjay Dutt vs. State through CBI, (Bombay)*, (1994) 5 SCC410 on the strength of three Constitution Bench cases, in *Narayana Singh Nathawan vs. State of Punjab* AIR 1952 SC106 *Ram Naryana Singh vs. State of Delhi* AIR 1953 SC277 and *A.K. Gopalan vs. Government of India*, AIR 1966 SC816 has held as under:

"8. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4) (bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only

prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. 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. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See *Naranjan Singh Nathawan v. State of Punjab*, *Ram Naryana Singh v. State of Delhi* and *A.K. Gopal v. Government of India*.)

11. Considering the law laid down in *Sanjay Dutts* case (supra), the Honble Supreme Court in *State of M.P. vs. Rustam* 1995 (Supp.) 3 SCC 221 observed that the right to compulsive bail under Section 167(2) of Cr.P.C. does not survive after filing of the challan. The Court must examine the availability of the right to compulsive bail on the date it considered the question of bail and not barely on the date of presentation of the petition for bail.

12. A similar view was taken by the three judge bench of the Supreme Court of India in Bipin Shantilal Panchal vs. State of Gujarat (1996) 1 SCC718(para 4), Dinesh Dalmia vs. CBI (2007) 8 SCC770(para

39) and Mustaq Ahmed Mohammed Isak vs. State of Maharashtra (2009) 7 SCC480(para 12).

13. Uday Mohanlal Acharya (supra) relied upon by counsel for the petitioner is a judgment by three judges bench of the Supreme Court and by a majority of 2:1, it was observed that Sanjay Dutts case (supra) has to be understood in the manner that the Magistrate has to dispose of such application made by the accused forthwith if the accused has been in custody without filing of charge sheet within the prescribed time limit and that accused was prepared to furnish bail bonds. In case after filing of application by the accused, the charge sheet has been filed, still the right of the accused under Section 167(2) Cr.P.C. shall continue. The Supreme Court in Uday Mohanlal Acharyas case (supra) has not overruled the judgment of Constitutional Bench in Sanjay Dutts case (supra). In the judgment given by the Constitutional Bench of Supreme Court of India in Sanjay Dutts case (supra), it is very clear that the right of being released on bail without merits is available only after statutory period as given under Section 167(2) Cr.P.C. for extending remand has expired till the charge sheet is filed by the prosecution. It is not the right of the accused which is defined in Section 167(2) Cr.P.C., it is the authority of the Magistrate to extend the remand which is defined under Section 167(2) Cr. P.C. The authority of Magistrate to extend the remand of such an accused is upto sixty days or ninety days, as the case may be, in absence of filing of the chargesheet, but once the charge sheet is filed, this authority again gets vested in the Magistrate and after filing of charge-sheet, the Magistrate can decide the application for bail only on merits.

14. Further, in Rajkumar Aggarwals case (supra) relied upon by counsel for the petitioner this was not the issue whether the accused is entitled to bail in default under Section 167(2) of Cr.P.C. if the application for bail is filed and charge-sheet is also filed on the same day.

15. However, the Supreme Court of India in *Pragyna Singh Thakur vs. State of Maharashtra* (2011) 10 SCC445 after considering the provisions of Section 167(2) of the Cr.P.C. and the case laws on the subject, it was held as under:

54. There is yet another aspect of the matter. The right under Section 167(2) of Cr.P.C. to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet. In other words, even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge sheet is filed, the said right to be released on bail would be lost. After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from Constitution Bench decision of this Court in *Sanjay Dutt vs. State* (1994) 5 SCC410 [Paras 48 and 53(2)(b)]. The reasoning is to be found in paras 33 to 49.

16. In the instant case, the charge sheet was filed on 31.1.2014 itself i.e. on the date when application for bail was moved. No bail bond was furnished by the petitioner on 31.1.2014 and the application for bail was considered by the learned Metropolitan Magistrate, Delhi on 1.2.2014 i.e. after filing of the charge sheet. Once the charge sheet had been filed, the Magistrate was not to consider the application for bail under Section 167(2) of Cr.P.C.

17. In view of the above discussion and the dictum of Constitution Bench of the Apex Court CrI.M.C. No.623/2014 in *Sanjay Dutt's case* *Pragyna Thakur's case* (supra), this Court is of the opinion that the petitioner is not entitled to bail on default.

18. In the light of aforesaid discussion, the petition is dismissed. Before parting with the papers, it may be mentioned that the charge-sheet was filed after the stipulated period, and therefore a copy of this order be sent to the concerned Joint Commissioner of Police for information and necessary action. (VED PRAKASH VAISH) JUDGE MARCH 26 2014 aj