

IN THE HIGH COURT OF ORISSA AT CUTTACK

BLAPL No. 9135 of 2021

Biru Singh ... **Petitioner**
Mr. Shyam Manohar, Advocate
- Versus -
State of Odisha ... **Opposite Party**
Mr. P.K. Maharaj, Addl. Standing Counsel

BLAPL No. 9137 of 2021

Ishab ... **Petitioner**
Mr. Shyam Manohar, Advocate
- Versus -
State of Odisha ... **Opposite Party**
Mr. P.K. Maharaj, Addl. Standing Counsel

CORAM:
JUSTICE SASHIKANTA MISHRA

ORDER
22.02.2022

Order No.
7.

1. These matters are taken up through hybrid mode.
2. Heard learned counsel for the petitioners and learned Addl. Standing Counsel for the State.
3. The petitioners are in custody since 22.08.2020 in connection with Mathili P.S. Case No.110 of 2020 corresponding to T.R. Case No.81 of 2020 pending in the Court of learned Sessions Judge-cum-Special Judge, Malkangiri for the alleged commission of offence under Sections 20(b)(ii)C of NDPS Act, 1985.
4. It is submitted at the outset by Mr. Shyam Manohar that though the applications have been filed seeking regular bail

citing several grounds yet, the petitioners also pray to be released on bail as per the provisions under Section 167(2) Cr.P.C. read with Section 36-A(4) of NDPS Act.

5. The facts of the case are that the petitioners are two out of several accused persons in the above-mentioned case before the court below, which arises out of the Mathili P.S. Case No. 110 of 2020 for the alleged commission of offence under Sections 20(b)(ii)(C)/27-A of the NDPS Act. It is alleged that on 21.08.2020 while the S.I. of police of Mathili P.S. was conducting patrolling duty, he received information about illegal transportation of contraband ganja. Subsequently, a truck was intercepted, in which four persons including the driver were occupants. Search of the vehicle revealed several bags of Ganja, in all weighing 1217 KG 700 grams, which were seized. After following the statutory formalities, the accused persons were arrested.

6. It is submitted by Mr. Manohar that the petitioners having been remanded to judicial custody for the first time on 22.08.2020, the stipulated period of 180 days expired on 17.02.2021. However, the Special Public Prosecutor filed a petition for extension of time to submit charge sheet on 25.01.2021 but without serving copy thereof on the petitioners. The said petition was heard by learned Special Judge on 27.01.2021 and was allowed by granting 30 days' extension without having the accused persons produced or after hearing them. This, according to Mr. Manohar, violates the law laid down by the Apex court in the cases of *Hitendra Vishnu Thakur Vs. State of Maharashtra*, reported in AIR 1994 SC

2623; *Rakesh Kumar Paul vs. State of Assam*, reported in (2017) 68 OCR (SC) 1: (2017) 15 SCC 67; *M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence*, reported in (2021) 81 OCR (SC) 548: (2021) 2 SCC 485; and of this Court in the case of *Naresh Digal vs. State of Odisha* reported in (2021) 81 OCR 694 and the case of a similarly situated accused in the very case namely, Rakesh Tiwari in CRLMC No. 1597 of 2021 decided on 30.11.2021.

On such ground, it is submitted that the order granting extension of time has to be treated as non-est in the eye of law and therefore, the accused persons are entitled to default bail.

7. Mr. P.K. Maharaj, learned Addl. Standing Counsel, on the other hand, has opposed the prayer for bail firstly, on the ground that after submission of charge sheet it is no longer open to the petitioner to claim default bail and secondly, the instant application for bail was filed on other grounds and hence, the prayer for default bail cannot be considered. Mr. Maharaj further contends that even otherwise, the petition for extension of time to submit charge sheet was allowed before the stipulated period and after hearing the defence counsel and therefore, no further notice was required to be given to the accused.

8. It appears that on 27.01.2021 only one of the accused persons namely, Tapas Sardar, was produced and it was observed that the other accused persons were not produced as they had been shifted to Circle Jail, Koraput. It is also mentioned that the defence counsel was present who objected to the prayer for extension. A perusal of the case record would

reveal that while Advocate Manas Swain had filed vakalatnama for the accused persons on 22.08.2020, advocate Badal Panigrahi filed vakalatnama on behalf of the accused-Tapas Sardar, for which the previous vakalatnama filed by Sri Manas Swain on behalf of Tapas Sardar was held to be ceased. Since it is not mentioned if advocate Manas Swain, who represented accused persons (petitioners) was present in the Court or not, the observation of the learned Special Judge in the order dated 27.01.2021 regarding presence of defence counsel can only imply that advocate Badal Panigrahi representing accused Tapas Sardar was present. Therefore, it must be held that accused persons (petitioners) had gone unrepresented on that date. In the above fact situation, it can reasonably be inferred that the accused persons had no notice of the petition for extension filed by the Special Public Prosecutor.

9. In the case of *Hitendra Vishnu Thakur* (supra) and followed in a series of the decisions, the Apex Court has held that when a petition is filed by the Public Prosecutor seeking extension of time to submit charge-sheet, its notice should be issued to the accused before granting such extension so that he may have an opportunity to oppose it on all legitimate and legal grounds available to him. Be it noted here that the said decision pertains to Section 20(4) of TADA Act which is in pari materia to the provision under Section 36-A(4) of the NDPS Act. This Court in the case of *Lambodar Bag v. State of Odisha*, reported in 2018 (71) OCR 31 has also held that it is mandatory to grant an opportunity of hearing to the accused before

granting extension of time to complete investigation. Relying upon the aforesaid case as also the case of *Hitendra Vishnu Thakur* (supra) and several other cases decided by the apex court and other High Courts, this Court has reiterated the said principle in the case of *Iswar Tiwari v. State of Odisha*, reported in 2020 (80) OCR 289. In summarizing the legal position as regards the provisions under Section 167(2) of Cr.P.C read with Section 36(A)(4) of the NDPS Act, this Court in *Iswar Tiwari* (supra) held that the notice must mandatorily be issued to the accused and he must be produced before the Court whenever such an application is taken up and that where any such report occurs the question of it being contested does not arise and a right accrues in favour of the accused.

10. Examined in the background of the aforementioned legal proposition it is evident that the order passed by learned Special Judge on 27.01.2021 granting extension of the time to complete investigation by thirty days without having the accused persons produced before him and without granting them an opportunity to have their say in the matter renders the same illegal and unsustainable in the eye of law. Similar view was taken by this Court in Rakesh Tiwari's (supra) case.

11. Coming to the objection raised by learned State Counsel that the petitioners not having taken the ground of default bail in the instant bail applications the same cannot be considered, this Court can do no better than to refer to the observations made in the case of *Rakesh Kumar Paul vs. State of Assam*, reported in (2017) 68 OCR (SC) 1 to the effect that in the matter of personal liberty the Court cannot and should be

too technical and must lean in favour of personal liberty and that whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned Court must deal with such an application. Relying upon the above observations of the apex Court, this Court in the case of *Lambodar Bag* (supra) also held that grounds not taken in the Court below can be taken in the bail petition in the higher Court and even not-taking of grounds in the bail petition will not deprive the counsel for the accused in raising such grounds during hearing of the bail application. It is further held that even if a ground for grant of bail is not taken in the bail petition and not argued by the counsel for the accused, the Court is not deprived of releasing the accused on bail on such ground if it is legally sustainable. Strict rules of pleading are not applicable in bail petition. The objection raised by learned State Counsel is therefore, not sustainable in the eye of law and hence, not accepted.

12. For the foregoing reasons, therefore, this Court is of the considered view that the indefeasible right of the accused must be held to have survived notwithstanding submission of chargesheet and therefore, they are entitled to be released on bail.

13. In the result, the bail applications are allowed. Let the petitioners be released on bail on such terms and conditions as the court in seisin over the matter may deem fit and proper to impose including the condition that out of two sureties each for such amount as may be determined by the trial Court, one should belong to the district of Malkangiri and further, the

petitioners shall personally appear before the trial Court on each date of posting of the case, failing which necessary orders shall be passed to take them to custody again. The petitioners shall also not leave the territorial jurisdiction of the Court without obtaining leave of the Court.

14. Issue urgent certified copy as per rules.

(Sashikanta Mishra)
Judge

A.K. Rana

