

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 20.01.2023

Pronounced on : 13.02.2023

Bail App No. 12/2023

Gopal Krishan and othersPetitioner(s)

Through: Mr. Ateet Spolia, Advocate

Vs

UT of J&KRespondent(s)

Through: Mr. Sumeet Bhatia, GA

Coram: HON'BLE MR. JUSTICE RAHUL BHARTI, JUDGE

ORDER

Heard.

01. Statutory/default bail under spell of section 167 (2) of the Code of Criminal Procedure Code, 1973 to an accused is a right elevated to a status of constitutional character. Grant of statutory/default bail is not discretion bound of a court of a magistrate or of a sessions judge. Statutory/default bail entitlement, if accruing in favour of and applied for being availed, is not to be denied by any disguise or declined under any guise. A pseudo police report under section 173 Cr.P.C, even if filed within time frame of section 167 Cr.P.C, cannot be given legal sanctity to betray the statutory/default bail right of an accused in a case. This right, upon getting accrued, is given straight away on asking of the entitled accused notwithstanding the purported gravity of the accusation of offence/s against the accused under pre-trial custody. It is, thus, neither a concession nor a charity to an accused

and as such cannot be seen as such by a magistrate or session judge so as to find some excuse to deny it getting availed by an accused.

02. After having failed to earn statutory/default bail under the aegis of section 167(2) Cr.P.C., 1973, from the Court of learned Sessions Judge, Udhampur, the petitioners have come to approach and seek from this court the very same relief of statutory/default bail riding on the premise that the failure on the part of the Investigation Authority of the Police Station Udhampur to submit a cognizable final police report/ challan under section 173 Cr. P.C. within the given period of 90 days had afforded the right to and in favour of the petitioners to ask for the release on bail which they had asked for but came to be declined by the Court of learned Sessions Judge, Udhampur.

03. On 24.08.2021, an FIR no. 322/2021 came to be registered by the Police Station Udhampur. Registration of this FIR is related to an incident of death of one Rakesh Kumar which is reported to have happened on 30.06.2021 but the information about the same was lodged on 01.07.2021 with the Police Station Udhampur which initiated inquest proceedings to enquire the nature and state of circumstances attending the death of said Rakesh Kumar. During currency of the inquest proceedings, following a direction under section 156(3) Cr. P.C., vide a magisterial order dated 16.08.2021, said FIR no. 322/2021 came to be registered by the Police Station Udhampur for alleged commission of offences under section 302/201/34 IPC.

04. Upon the basis of this FIR, the arrest of the petitioners, who are four in number, had come to take place on 27.09.2021. On 15.12.2021, that is upon 79th day of arrest of the petitioners, the Police Station Udhampur, through the SHO, came to present a purported Police Report/ Challan no. 392/2021 dated 07.12.2021 for commission of alleged offences under sections 302/202/34 Indian Penal Code, 1860, against the petitioners in relation to said FIR no. 322/2021 which upon committal by the Chief Judicial Magistrate, Udhampur came to be presented before the court of learned Sessions Judge Udhampur for its cognizance.

05. As the said Police Report/ Challan under section 173 Cr. P.C. came to be presented seemingly within 90 days period prescribed for investigation given the nature of offences involved, so the petitioners had reckoned themselves to be under trial in custody. However, when the Court of learned Sessions Judge, Udhampur came to take up the opening of case for prosecution under section 226 Cr. P.C., the learned Sessions Judge, Udhampur got confronted with a reality of the case that said Police Report/Challan no. 392/2021 dated 07.12.2021 was an empty formality done by the Police Station, Udhampur. By reference to the said Police Report/ Challan, the Court of learned Sessions Judge Udhampur found itself not in a position to take up the case even for framing of charge against the petitioners. Thus, vide an order dated 21.02.2022, the court of learned Sessions Judge Udhampur returned the very said Police Report/Challan with a direction for further investigation to be supervised and monitored by the

SSP Udhampur personally and to put up for final police report on 21.03.2022.

06. On 22.03.2022, the Investigation Officer attending the case sought extension of two weeks' time to complete the investigation which the court of learned Sessions Judge, Udhampur came to grant by 15 days' time to conclude the investigation but even this extension went without desired effect and end. It was only on 12.04.2022 that the SHO Police Station Udhampur came to submit a final police report styled as supplementary charge sheet before the court of learned Sessions Judge Udhampur. It is with respect to this charge sheet so filed that the court of learned Sessions Judge Udhampur came to put up the case for arguments on charge.

07. The situation in the context of statutory/default bail came to take place after return of the empty formality described Police Report/Challan by the court of learned Sessions Judge, Udhampur and before the presentation of so called Supplementary Police Report by the Police against the Petitioners. After passing of the order dated 21.02.2022 of return of the so called final Police Report/challan by the court of learned Sessions Judge Udhampur, the petitioners, being under continuing custody had come to file on 29.03.2022 an application for grant of default bail before the Court of learned Sessions Judge Udhampur. It took more than eight months of time loss on the part of the Court of learned Sessions Judge, Udhampur to decide and dismiss said statutory/default bail application of the petitioners in terms of its order dated 07/12/2022

08. In this order dated 07/12/2022, the court of learned Sessions Judge Udhampur ventured in stitching farfetched aspects to deny the plea of the petitioners for default bail. Para 4 of the order dated 07.12.2022 reflects the purported reasoning of the Court of learned Sessions Judge, Udhampur and same is reproduced:

“4. It is borne from the record and is evident from the application also that charge sheet was filed by the police within stipulated period of 90 days, however, while hearing the arguments on the question of charge this Court noticed some lapses on the part of the investigating agency necessitating further investigation and so it was ordered. It also needs to be pointed out that the conduct of the investigating agency has remained questionable right from the beginning, as most of recoveries were made upon the disclosures of accused, still they chose not to register a formal FIR and continued with the inquest proceedings. The reasons for that may be best known to the investigating agency but the ultimate beneficiaries of these wilful lapses are none but the accused and courts cannot shut their eyes to such blatant abuses of the powers. Therefore, it cannot be accepted that investigation was incomplete and the whole exercise was aimed at defeating the right of the accused to seek bail. The judgment relied upon by the Ld. defence counsel is also of little help since in that case it is clearly noticeable that charge sheet was not filed within the prescribed period.”

09. The court of learned Sessions Judge, Udhampur literally dealt with the case as if situation qua the petitioners was of post conviction and the petitioners were asking for suspension of sentence and bail. The court of learned Sessions Judge Udhampur indulged in evasion, on two counts, in its duty of adjudication of the default bail plea of the petitioners. First count of evasion is from the facts of the case and second is from the position of law governing the default bail. This evasion is imprinted on the very face of the

order itself as neither factual frame of the case is properly placed nor any whisper of reference to the position of law governing the default bail.

10. Firstly, the Court of learned Sessions Judge, Udhampur evaded to refer to its own observation on record that the first police report so filed against the petitioners was an empty formality. If that was the state of the purported police report/challan then that would have meant only one thing in the eyes of law which is that the presentation of said police report was a pseudo police report/challan aimed with sole objective to cover up the default on the part of the Police Station, Udhampur to complete the investigation within the time given so as to checkmate the petitioners becoming entitled to default bail. Secondly, the Sessions Judge, Udhampur skipped to know the legal position on the subject as settled by the Hon'ble Supreme Court of India as well as supplemented by this court as there is no reference to any citation which was made on behalf of the petitioners.

11. After having held the purported Police Report/Challan so filed under section 173 Cr.P.C as an empty formality and returning it , the Sessions Judge Udhampur could not and cannot be said to have taken cognizance of the offences , under section 193 Cr.P.C, acting upon the Police Report/challan so returned. In fact, by return of the very said Police Report/challan, the case stood not in the realm of the judicial enquiry/trial under Cr.P.C, 1973 but in the arena of the police investigation which lasted beyond the period laid out under section 167 (1) Cr.P.C 1973 and the custody of the petitioners as an accused had also extended beyond the said period while the investigation was to have its final form and presentation. It

is not very cherishable reading of the approach of the court of learned Sessions Judge, Udhampur that it literally acted as if a legal guide to the investigation authority and prosecution agency to do course correction of the investigation and then present a presentable case against the petitioners. A criminal court be it of a magistrate or a sessions judge, is not meant to be seen as if assisting police investigation or prosecution against an accused which seems to be the mindset adopted by the court of learned Sessions Judge Udhampur in the present case. A clear cut case of grant of default bail in favour of the petitioners was aborted by the approach of the Sessions Court, Udhampur.

12. The position of law is settled to the extent of full clarity by the Hon'ble Supreme Court of India in Achpal @ Ramswaroop & Another Vs. State of Rajasthan reported in 2019 (14) SCC 599, Rakesh Kumar Paul Vs. State of Assam reported in 217 SC 3948, Bikramjit Singh Vs. State of Punjab reported in 2020 (10) SCC 616, Fakhrey Alam Vs. State of Uttar Pradesh reported in 2021 (5) SCALE 346, Peerzada Rafiq Maqdoomi Vs. Union Territory of J&K, the Division Bench judgment of this Court in CrlA(D) no. 17 of 2022.

13. In the Division Bench judgment of this Court in the case of Peerzada Rafiq Maqdoomi Vs. Union Territory of J&K referred supra, it has been held that if on the police report laid at the first instance, cognizance and consideration of charge/discharged can be taken without waiting for further investigation and supplementary charge sheet then the plea of statutory/default/compulsive bail is untenable. In the present case before the

Court of learned Sessions Judge, Udhampur, the police report/challan presented on 15.12.2021 was found by the Court of learned Sessions Judge, Udhampur nothing but an empty formality which disabled the Court of Sessions Judge, Udhampur to act upon for any further proceedings except to return the same, as such, the right to earn default bail had set in from that very moment itself and rest of the proceedings which followed in the case were of no consequence to disturb/deny the petitioners' entitlement to avail the default bail.

14. In case of Fakhrey Alam Vs. State of Uttar Pradesh reported in 2021 (5) SCALE 346, the Hon'ble Supreme Court has elevated the default bail right under first proviso of Section 167(2) of the CrPC, 1973 as a fundamental right and not merely a statutory right. In this judgment, cognizable police report/challan is meant to be a sine qua non for keeping in check the default bail right getting activated.

15. The case of Bikramjit Singh Vs. State of Punjab 2020 (10) SCC 616 also serves the case of the petitioners as the petitioners in the present case applied for the default bail after expiry of ninety days on finding that the police report/challan which had been presented though within ninety days before the Court of learned Sessions Judge, Udhampur had not been taken cognizance on account of being an empty formality, as such, the right to earn the default bail had got activated in favour of the petitioners on their filing application on 29.03.2022 on which date the Court of learned Sessions Judge, Udhampur was not seized of any final police investigation report/challan under Section 173 Cr.P.C worth cognizable against the

petitioners and in fact time for completing the investigation was being availed and, as such, notwithstanding the fact that the Court of learned Sessions Judge, Udhampur came to decide the said application of the petitioners, post filing of so called supplementary charge sheet, still said development carried no iota of disabling effect against the petitioners' right to default bail.

16. Case of Rakesh Kumar Paul Vs. State of Assam, AIR 2017 SC 3948 serves the factual position of the present case in favour of the petitioners.

17. Para-17 of the judgment in Achpal @ Ramswaroop Vs. State of Rajasthan reported in 2019 (14) SCC 599 sums up the spirit and purpose underlying the provisions of Section 167 in its totality:

“17. The provision has a definite purpose in that; on the basis of the material relating to investigation, the Magistrate ought to be in a position to proceed with the matter. It is thus clearly indicated that the stage of investigation ought to be confined to 90 or 60 days, as the case may be, and thereafter the issue relating to the custody of the accused ought to be dealt with by the Magistrate on the basis of the investigation. Matters and issues relating to liberty and whether the person accused of a charge ought to be confined or not, must be decided by the Magistrate and not by the Police. The further custody of such person ought not to be guided by mere suspicion that he may have committed an offence or for that matter, to facilitate pending investigation.”

18. Keeping in view of the aforesaid factual and legal aspect, this Court holds that the Court of learned Sessions Judge, Udhampur fell in serious error of judgment both on facts and law in dismissing the statutory/default bail plea of the petitioners and, thus, order dated 07.12.2022

dismissing the bail application of the petitioners is held to be misconceived and wrong. The petitioners are hereby held to be entitled to grant of the statutory/default bail and for this directs the Court of learned Sessions Judge, Udhampur to grant statutory/default bail in favour of the petitioners subject to terms and conditions as may be deemed fit and appropriate to be incorporated by the Court of learned Sessions Judge, Udhampur.

19. Disposed of.

Jammu
13.02.2023
Muneesh

