



GAHC010001362023

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

Case No. : Bail Appln./36/2023

DINESH JAISWAL
S/O LATE BACHELAL JAISWAL, DIRECTOR OF M/S DINSAN GLOBAL
VENTURES PVT LTD, R/O P.S.-BASISTHA, HOUSE NO. 137, NATUN BAZAR,
BASISTHA CHARIALI, GUWAHATI-29, DIST-KAMRUP (M), ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR D J HALOI

Advocate for the Respondent : PP, ASSAM

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the petitioner	: Mr. S. Das, Advocate.
For State respondent	: Mr. M. Phukan, P.P.
Date of hearing	: 07.02.2023 and 09.02.2023.
Date of judgment	: 09.02.2023

JUDGMENT AND ORDER

(ORAL)

Heard Mr. S. Das, learned counsel for the petitioner. Also heard
Mr. M. Phukan, the learned Public Prosecutor for the State.



2. The petitioner, namely, Dinesh Jaiswal, who was arrested on 21.10.2022 in connection with Vigilance P.S. Case No. 4/2022 registered under sections 120B/420/406/409/468/471 IPC read with sections 13(1)(a)/13(2) of Prevention of Corruption Act, 1988 is seeking regular bail under section 439 IPC.

3. The learned counsel for the petitioner has submitted that the petitioner is in custody for last 111 days.

4. The only point raised by the learned counsel for the petitioner is that the charge-sheet is either incomplete and/or filed in part and therefore, notwithstanding the filing of the charge-sheet, the petitioner is entitled to default bail. In the said context, it has been submitted in para 16.63 of the charge-sheet submitted in this case on 12.01.2023, it has been mentioned as follows:-

“Investigation u/s 173(8) of Cr.P.C. is continuing for collecting more evidence against other accused persons as well as arrested accused persons found involved in this case.”

Therefore, it has been submitted that on a plain and simple reading of para 16.63 of the charge-sheet, it is clear that the investigation is continuing and therefore, incomplete.

5. It has been submitted that if any further material could be subsequently collected, nothing prevented the I.O. to take recourse to the provisions of section 173(8) CrPC and bring fresh material on record. However, as there is already a mention in the charge-sheet that the investigation is continuing, it is evident that charge-sheet has only been filed in part to frustrate the right of the petitioner to be enlarged on default bail.

6. In support of his submissions, the learned counsel for the petitioner has placed reliance on the following cases, viz., (i) *Kamlesh Chaudhary v. State of Rajasthan, 2021 SCC OnLine SC 270*, (ii) *Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67*, (iii) *Suresh Kumar Bhikamchand Jain v. State of Maharashtra & Anr., (2013) 3 SCC 77*, (iv) *Chitra Ramakrishna v. Central Bureau of Investigation (CBI) through the Investigating Officer, (2022) SCC OnLine Del 3124*, (v) *Kamlesh Chaudhary v. State of Rajasthan, 2020 (3) RLW 2507*, (vii) *Subhra Jyoti Bharali v. The Directorate of Enforcement, Crl. Rev.P. No. 488/2022, decided by the learned Single Judge of this Court on 27.10.2022.*

7. The learned Addl. P.P. has opposed the prayer for bail and in counter to the submissions made by the learned counsel for the petitioner, has placed reliance on the following cases, viz., (i) *State through Central Bureau of Investigation v. T. Gangi Reddy @ Yerra Gangi Reddy, 2023 Legal Eagle 40*, (ii) *Vinay Tyagi v. Irshad Ali @ Deepak & Ors., (2013) 5 SCC 762*, (iii) *Ranjit Kumar Borah v. Central Bureau of Investigation, B.A. No. 229/2022, decided by the learned Single Judge of this Court on 01.04.2022*, (iv) *Samedur Rahman v. The State of Assam, B.A. No. 2718/2019, decided by the learned Single Judge of this Court on 12.02.2020*, (v) *Dr. Basanta Kumar Doley v. The State of Assam, B.A. No. 176/2019, decided by the learned Single Judge of this Court on 20.03.2019.*

8. At the outset, it may be stated that there are sufficient incriminating materials in the charge-sheet against the petitioner of having connived with certain officials of the Guwahati Municipal Corporation and without implementing the requisite de-silting works of drains of Guwahati City

as per terms and conditions of the tender documents, raised bills for payment without execution of works, based on false and fabricated weigh bridge slips. As extensive description of manner in which funds of the Guwahati Municipal Corporation has been siphoned-off, only a brief description of the alleged offence committed by the petitioner has been mentioned in this order by avoiding burdening this order with voluminous materials contained in the charge-sheet against the petitioner.

9. The Final Report/Charge-sheet No. 1/2023 dated 11.1.2023 was submitted against the petitioner and 13 other co-accused on 12.01.2023. As per the order-sheet dated 12.01.2023, passed by the learned Special Judge, Assam in connection with Vigilance P.S. Case No. 4/2022, the said learned Court had considered the materials available on record, which includes sanction for prosecution, wherever required, and case diary and upon finding *prima facie* materials against all the accused persons, took cognizance of the offence under sections 120B/420/406/409/ 468/471 IPC read with sections 13(1)(a)/13(2) of Prevention of Corruption Act, 1988. Moreover, the said learned Court had also allowed the prayer made in the charge-sheet by the I.O. to allow him to continue with further investigation of the case under section 173(8) CrPC for collecting more evidence against other accused persons as well as arrested accused persons.

10. In the case of *Kamlesh Chaudhary (supra)*, the petitioner therein was arrested on 25.05.2019 and incomplete charge-sheet was filed on 22.07.2019 and cognizance of the offence was taken on the same day. The 90 days time provided for investigation expired on 24.08.2019. However, the order dated 22.07.2019, taking cognizance was set aside by the revisional Court by

order dated 16.01.2020 and had remanded the case. Thus, as 168 days had expired after the statutory period of 90 days, the petitioner therein was granted default bail, however, with a condition that petitioner can be re-arrested after charge-sheet is filed. The said part of the order, allowing the I.O. to arrest the petitioner was assailed before the Supreme Court of India, which was interfered with by the Supreme Court of India in the case of *Kamlesh Chaudhary (supra)*. Thus, on facts, the present case is distinguishable because the order dated 12.01.2023, by the learned trial Court, taking cognizance of the offence, has not been interfered with.

11. In so far as the case of *Rakesh Kumar Paul (supra)* is concerned, the learned counsel for the petitioner has not been able to show that the said judgment is the authority on the point that if there is a mention in the final report/ charge-sheet that liberty be granted to the I.O. to conduct further investigation, there is a bar to treat such a charge-sheet to be final. Therefore, in respect of the point raised by the learned counsel for the petitioner, the said case does not appear to espouse the cause of the petitioner.

12. In the context of the case of *Rakesh Kumar Paul (supra)*, it may be stated that nowhere in the charge-sheet filed in the present case in hand on 12.01.2023, the I.O. has mentioned that the charge-sheet was incomplete or in part. Therefore, merely because of the statement made in para 16.63 of the charge-sheet, it is impossible to presume that the prosecution had filed a part charge-sheet.

13. On considering the case of *Suresh Kumar Bhikamchand Jain (supra)*, the Court does not find it to be of any help to the petitioner. In the said

context, para-18 and 19 thereof are quoted below:-

“18. *None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167, Cr.P.C. is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 CrPC, it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 CrPC. The scheme of the CrPC is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) CrPC, the Magistrate is vested with authority to remand the accused to custody, both police custody and or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 CrPC. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.*

19. *Having regard to the above, we have no hesitation in holding that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, the accused was not entitled to grant of statutory bail since the charge-sheet had been filed well within the period contemplated under Section 167(2) (a)(ii) CrPC. Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings. In that view of the matter, the Special Leave Petition deserves to be and is hereby dismissed.”*

14. From para-20 and 21 of the case of *Chitra Ramakrishna (supra)*,

it appears that as no charge-sheet was filed, the petitioner filed an application under section 167(2) for default bail and the charge-sheet was filed on 21.04.2022, against the petitioner, but without obtaining sanction for prosecution and therefore, plea was taken that no cognizance can be taken on such charge-sheet. It has been held in the said case that the prosecution cannot circumvent the provision of Section 167(2) by filing incomplete or part charge-sheet. In the said context, the Court is of the considered opinion that the said proposition is not in dispute, but as cognizance of the offence having already been taken by the learned trial Court, it would not be open to this Court, in exercise of jurisdiction under section 439 CrPC, to revisit the said order dated 12.01.2023 and to opine that the charge-sheet was filed in part or was incomplete.

15. The learned counsel for the petitioner has referred to the case of *Subhra Jyoti Bharali (supra)*. In the said context, the learned Public Prosecutor has shown that the State had preferred a Special Leave Petition before the Supreme Court of India against the said order, which is registered under Diary No. 1224/2023 filed on 09.01.2023 and is tentatively to be listed on 10.02.2023.

16. It would be relevant to refer to the observations made by the Supreme Court of India in para 15, 22 and 27 to 33 of the case of *Vinay Tyagi (supra)*, which is extracted below:-

15. *A very wide power is vested in the investigating agency to conduct further investigation after it has filed the report in terms of Section 173(2). The legislature has specifically used the expression 'nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Section 173(2) has been forwarded to the Magistrate', which unambiguously indicates the*

legislative intent that even after filing of a report before the court of competent jurisdiction, the Investigating Officer can still conduct further investigation and where, upon such investigation, the officer in charge of a police station gets further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the prescribed form. In other words, the investigating agency is competent to file a supplementary report to its primary report in terms of Section 173(8). The supplementary report has to be treated by the Court in continuation of the primary report and the same provisions of law, i.e., sub-section (2) to sub-section (6) of Section 173 shall apply when the Court deals with such report.

* * *

22. 'Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a 'further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as 'supplementary report'. 'Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a 'reinvestigation', 'fresh' or 'de novo' investigation.

* * *

27. Here, we will also have to examine the kind of reports that can be filed by an investigating agency under the scheme of the Code.

27.1. Firstly, the FIR which the investigating agency is required to file before the Magistrate right at the threshold and within the time specified.

27.2. Secondly, it may file a report in furtherance to a direction issued under Section 156(3) of the Code.

27.3. Thirdly, it can also file a 'further report', as contemplated under Section 173(8).

27.4. Finally, the investigating agency is required to file a 'final report' on the basis of which the Court shall proceed further to frame the charge and put the accused to trial or discharge him as envisaged by Section 227 of the Code.

28. Next question that comes up for consideration of this Court is whether the empowered Magistrate has the jurisdiction to direct 'further investigation' or 'fresh investigation'. As far as the latter is concerned, the law declared by this Court consistently is that the learned Magistrate has no jurisdiction to direct 'fresh' or 'de novo' investigation. However, once the report is filed, the Magistrate has jurisdiction to accept the report or reject the same right at the threshold. Even after accepting the report, it has the jurisdiction to discharge the accused or frame the charge and put him to trial. But there are no provisions in the Code which empower the Magistrate to disturb the status of an accused pending investigation or when report is, filed to wipe out the report and its effects in law. Reference in this regard can be made to *K. Chandrasekhar v. State of Kerala*, (1998) 5 SCC 223; *Ramachandran v. R. Udhayakumar*, (2008) 5 SCC 413, *Nirmal Singh Kahlon v State of Punjab & Ors.*, (2009) 1 SCC 441, *Mithabhai Pashabhai Patel & Ors. v. State of Gujarat*, (2009) 6 SCC 332; and *Babubhai v. State of Gujarat*, (2010) 12 SCC 254.

29. Now, we come to the former question, i.e., whether the Magistrate has jurisdiction under Section 173(8) to direct further investigation.

30. The power of the Court to pass an order for further investigation has been a matter of judicial concern for some time now. The courts have taken somewhat divergent but not diametrically opposite views in this regard. Such views can be reconciled and harmoniously applied without violation of the rule of precedence. In the case of *State of Punjab v. Central Bureau of Investigation*, (2011) 9 SCC 182, the Court noticed the distinction that exists between 'reinvestigation' and 'further investigation'. The Court also noticed the settled principle that the courts subordinate to the High Court do not have the statutory inherent powers as the High Court does under Section 482 of the Code and therefore, must exercise their jurisdiction within the four corners of the Code.

31. Referring to the provisions of Section 173 of the Code, the Court observed that the police has the power to conduct further investigation in terms of Section 173(8) of the Code but also opined that even the Trial Court can direct further investigation in contradistinction to fresh investigation, even where the report has been filed. It will be useful to refer to the following paragraphs of the judgment wherein the Court while referring to the case of *Mithabhai Pashabhai Patel v. State of Gujarat* (*supra*) held as under:

"13. It is, however, beyond any cavil that 'further investigation' and 'reinvestigation' stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely, under Articles 226 and 32 of the Constitution of India could direct a 'State' to get an offence investigated and/or further investigated by a different agency. Direction of a reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. *Pasayat, J. in Ramachandran v. R.*

Udhayakumar, (2008) 5 SCC 413 opined as under:

7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under subsection (8), but not fresh investigation or reinvestigation.'

A distinction, therefore, exists between a reinvestigation and further investigation.

** * **

15. The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The precognizance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four corners of the Code."

32. *In the case of Minu Kumari & Anr. v. State of Bihar & Ors., (2006) 4 SCC 359, this Court explained the powers that are vested in a Magistrate upon filing of a report in terms of Section 173(2)(i) and the kind of order that the Court can pass. The Court held that when a report is filed before a Magistrate, he may either (i) accept the report and take cognizance of the offences and issue process; or (ii) may disagree with the report and drop the proceedings; or (iii) may direct further investigation under Section 156(3) and require the police to make a further report.*

33. *This judgment, thus, clearly shows that the Court of Magistrate has a clear power to direct further investigation when a report is filed under Section 173(2) and may also exercise such powers with the aid of Section 156(3) of the Code. The lurking doubt, if any, that remained in giving wider interpretation to Section 173(8) was removed and controversy put to an end by the judgment of this Court in the case of Hemant Dhasmana v. CBI, (2001) 7 SCC 536, where the Court held that although the said order does not, in specific terms, mention the power of the court to order further investigation, the power of the police to conduct further investigation envisaged therein can be triggered into motion at the instance of the court! When any such order is passed by the court, which has the jurisdiction to do so, then such order should not even be interfered with in exercise of a higher court's revisional jurisdiction. Such orders would normally be of an advantage to achieve the ends of justice. It was clarified, without ambiguity, that the magistrate, in exercise of powers under Section 173(8) of the Code can direct the CBI to further investigate the case and collect further evidence keeping in view the objections raised by the appellant to the investigation and the new report to be submitted by the Investigating Officer, would be governed by sub-Section (2) to sub-Section (6) of Section 173 of the Code. There is no occasion for the court to*

interpret Section 173(8) of the Code restrictively. After filing of the final report, the learned Magistrate can also take cognizance on the basis of the material placed on record by the investigating agency and it is permissible for him to direct further investigation. Conduct of proper and fair investigation is the hallmark of any criminal investigation.

17. Thus, from the said case of *Vinay Tyagi (supra)*, it is apparent that irrespective of the prayer made in the charge-sheet to continue with the investigation, the provision of section 173(8) CrPC duly empowers the investigating agency/police to conduct further investigation and the said provision also empowers the trial Court to direct further investigation. This Court in the case of *Ranjit Kumar Borah (supra)*, has already held as follows:-

39. *The power vested upon the investigating agency by Section 173(8) of the Cr.PC is a wide power. The said sub-section opens up with the wordings "Nothing in this section shall be deemed to preclude further investigation..." which is in the nature of a non-obstante clause giving overriding powers. Under this provision, the investigating agency shall not be precluded by anything in the section from making further investigation in respect of the report which has been submitted under sub-section (2) and on obtaining further evidence, the same should be forwarded to the Magistrate in the form of a further report or reports regarding such evidence wherein the provisions of sub-sections (2) to (6) shall apply.*

18. Coming to the present case in hand, the prosecution has not filed any supplementary charge-sheet. Moreover, in the charge-sheet filed on 12.01.2023, it is clearly indicated that the I.O. has recorded his satisfaction that *prima facie* case is established under sections 120B/420/406/409/468/471 IPC read with sections 13(1)(a)/13(2) of Prevention of Corruption Act, 1988 against the 14 accused named therein, including the petitioner. Moreover, the list of witnesses and the list of documents applicable for the charge-sheet had been attached thereto. Therefore, taking into account the material and/or evidence



collected against the petitioner, it cannot be said that the charge-sheet is not a final but a preliminary charge-sheet. Therefore, notwithstanding that there is an averment in the charge-sheet to the effect that "*Investigation u/s 173(8) of Cr.P.C. is continuing for collecting more evidence against other accused persons as well as arrested accused persons found involved in this case*", the same does not make the charge-sheet anything less than a final report as envisaged under section 173(2) CrPC.

19. Therefore, the Court has no hesitation to hold that the charge-sheet/ final-report has been filed by the I.O. within the stipulated period prescribed under section 167(2) CrPC, there is no question of default bail to the petitioner.

20. Before parting with the records, it may be mentioned that the allegation and/or accusation against the petitioner is that he has, in connivance with other co-accused, had collected payment from the Guwahati Municipal Corporation without implementing the requisite de-silting works of drains of Guwahati City as per terms and conditions of the tender documents, and that the bills for payment were raised without execution of works, based on false and fabricated weigh bridge slips. Thus, this appears to be a case of socio-economic offence, which has to be treated differently because of which the public exchequer had suffered loss of public money.

21. Accordingly, the prayer for granting default bail to the petitioner, Dinesh Jaiswal, who was arrested on 21.10.2022 in connection with Vigilance P.S. Case No. 4/2022 under sections 120B/420/406/409/468/471 IPC read with sections 13(1)(a)/13(2) of Prevention of Corruption Act, 1988 is refused at this stage.



22. This application for bail is disposed of.
23. The certified copy of the charge-sheet, which has been produced by the learned counsel for the petitioner, as well as a "final note of argument" of two pages, both filed by the learned counsel for the petitioner are retained as a part of record.

JUDGE

Comparing Assistant