

# Sapnanil Das vs The State Of Assam on 26 November, 2024

**Author: Malasri Nandi**

**Bench: Malasri Nandi**

Page No.# 1/19

GAHC010193632024

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

Case No. : Bail Appln./2818/2024

SAPNANIL DAS  
S/O LATE KUMUD CHANDRA DAS  
PRESENTLY RESIDING AT HOUSE NO. 59, BYE LANE NO. 01, WIRELESS,  
P.S.HATIGAON, GUWAHATI,  
DIST. KAMRUP (METRO), ASSAM PERMENENT RESIDENT OF VILL-  
MAHPORIA GAON, P.O. DHULIAPAR  
P.S. JAYSAGAR DIST. SIVASAGAR, ASSAM, PIN-785640

VERSUS

THE STATE OF ASSAM  
REP BY THE PP, ASSAM

Advocate for the Petitioner : MR. B K MAHAJAN, MR. D BORA,MR. N MAHAJAN,MR. P K  
DAS,MR. A CHAUDHURY

Advocate for the Respondent : PP, ASSAM, MR M HALOI, SC, CBI

BEFORE  
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

26.11.2024 Heard Mr. B. K. Mahajan, learned counsel for the petitioner. Also heard Mr. M. Haloi, learned Standing counsel, CBI.

2. By filing this petition under Section 483 of the BNSS, 2023 the accused- petitioner, namely, Sapnanil Das, has prayed for grant of bail in connection with CBI Case No. RC. 221/2024/E0014 (corresponding to Dispur PS Case No. Page No.# 2/19 934/2024) under Section 21(1)/21(2)/21(3)/22/23 of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after as BUDS Act) and Section 406/420 of the IPC added Section 409 of the IPC and Section 316(5) of BNS,

2023.

3. The brief fact of the case is that on 07/08/2024, an FIR has been lodged before the Director General of Police, Assam, stating inter alia that the petitioner, who is the owner of Trading For A Living (TFAL) introduced himself to be the No. 1 trading community in Assam and promised better financial success with an assurance to provide guaranteed profit on online trading business. Accordingly, the informant joined his online classes along with other students, invested their hard earned money through online market. But the informant suffered a huge loss amounting to Rs. 24, 00,000/- by investing his money on the online market. The petitioner not only cheated the informant but also other persons and he has been running the said fraudulent business for his wrongful gain.

4. The learned counsel for the petitioner has argued that the TFAL is a coaching and training centre of the accused/ petitioner which is a learning platform of awareness training and guidance about stock market, index, risk management etc. The petitioner started his online trading since 2021 with his demat account through Zerodha broker app which is a online trading platform available as a mobile application and which acts as a broker for individuals willing to invest/ trade in the securities market. The accused/ petitioner had always make it clear that investing in the Securities market is subject to market risk. It is further added that initially the accused/ petitioner charged fees amounting to Rs. 6999/-. Subsequently, he increased the charge for the online Page No.# 3/19 classes to Rs. 10,030/- and offline classes for Rs. 24, 780/- for each session. Moreover, the accused/ petitioner used to pay GST and other taxes incurred from running the said classes. As such no criminality can be attributed towards the accused/ petitioner.

5. Further submission of the learned counsel for the petitioner is that there has not been any complaint from any depositor within the meaning of BUDS Act that the accused/ petitioner has received or accepted any deposit for the purpose of trading so as to come within the meaning of Unregulated Scheme. Moreover, the accounts of M/s Das Brothers as well as other accounts has already been frozen by the investigating agency and the progress of investigation would make it ample and crystal clear that there is no illegality or criminality as regards deposit made in the bank accounts.

6. Learned counsel for the petitioner has raised some issues on the contention of BUDS Act and has submitted that though assuming but not admitting the allegation of receiving deposits, the same would fall u/s 4 of BUDS Act as the Indian Stock market is ultimately a regulated deposit scheme as SEBI is the regulator and the Indian stock market represents the economy of the country. As such if any offence is committed u/s 4 of BUDS Act the same is punishable u/s 22 of the BUDS Act which is a bailable offence as per section 28 of the BUDS Act.

7. According to learned counsel for the petitioner, the accused/petitioner has been languishing in judicial custody for last 83 days since his arrest on 04/09/2024. The CBI made an application before the CBI court u/s 187(2) of BNSS, 2023, on 28/10/2024 seeking permission to take 3 days CBI custody of the accused/ petitioner without mentioning addition of section 409 IPC. On the Page No.# 4/19 next date i.e., 29/10/2024 an objection petition filed on behalf of the accused/ petitioner

before the CBI court stating that the accused/ petitioner was arrested on 04/09/2024 as such the period of 40 days detention is over on 13/10/2024 and as such seeking police remand at this stage of investigation on 29/10/2024 is not in consonance with section 187(2) of BNSS, 2023.

8. It is also pointed out that the CBI on 28/10/2024 and 29/10/2024 no fresh prayer was made seeking CBI remand of the accused/petitioner while incorporating section 409 IPC which makes it crystal clear that section 409 IPC was added absolutely in a mechanical manner and with the sole intention to incorporate a graver offence so as to extend the mandatory period of detention from 60 days to 90 days.

9. The last limb of argument of the learned counsel for the petitioner is that the accused/ petitioner was arrested on 04/09/2024 for the offence u/s 316(2)/ 318(4) BNS, 2023, read with section 21/23 of BUDS Act, wherein the mandatory period of custody is 60 days. Section 406 and 420 IPC were inserted on 07/08/2024 and section 409 IPC was added on 29/10/2024 and when such sections were added in the case, the IPC has already been repealed with effect from 01/07/2024. Subsequently, the CBI had filed another petition before the CBI court for adding section 316(5) of BNS on 11/11/2024 i.e., 10 days after the accused accrued his indefeasible right to default bail on 02/11/2024. Hence, the learned counsel for the petitioner prays that the accused/ petitioner is entitled for default bail.

In support of his submission, learned counsel has placed reliance on the following case laws -

Page No.# 5/19 a. (2024) SCC Online SC 1920 (Manish Sisodia vs. Director of Enforcement) b. (2017) 2 SCC 18 (Sharat Babu Digumarti vs. Government (NCT of Delhi)

10. Per contra, learned standing counsel CBI, has objected in granting bail to the petitioner by stating that during investigation it has been revealed that there are various deposits into the accounts belonging to M/s Das Brothers and two other accounts maintained by the petitioner and his mother through various channels including cash deposits, UPI transfers and bank transactions. The petitioner has taken multiple deposits around 2. 6 crores from 26/03/2024 to 02/09/2024 into his bank accounts M/s Das Brothers as well as the bank accounts of his family members including joint accounts with him. Further, the said money was not returned to such depositors. Therefore, prima facie it appears that the petitioner caused criminal breach of trust while he was entrusted with funds by the public. While doing so, the petitioner acted as a broker/ agent unauthorizedly. Therefore, section 21(3) BUDS Act was invoked in the FIR.

11. It is further submitted that the nature of the transactions in the accounts of the accused/ petitioner have huge deposit of funds, which prima facie appears to be unregulated solicited funds. The mere absence of an explicit solicitation from the informant does not preclude criminality when unregulated funds have been involved.

12. It is also contended that during investigation, account statement of the petitioner were examined and found that huge amount from the public were Page No.# 6/19 being deposited into the bank account of the petitioner and his associates. This indicates the entrustment of money to the accused.

Therefore section 409 IPC and section 316(5) BNS were added. It is also pointed out that the investigation of the case is not solely dependent on direct deposits from the informant but rather on whether the accused misled the individuals under the guise of providing investment resulting in unauthorised solicitation and financial injury.

13. It was urged by the learned CBI counsel that the live trading classes which was being conducted by the accused/ petitioner was intentional as the participants of the said classes did not have sufficient knowledge to invest in the market by their own and therefore they followed the accused/petitioner in investing in the high risk trading. Presently, the investigation of the case is underway and the judicial custody of the accused/petitioner is essential to maintain the integrity of the investigation.

14. Learned CBI counsel has referred the case of Y.S. Jagan Mohan Reddy vs CBI reported in 2013(7) SCC 450.

15. Having heard the learned counsel for the parties and on perusal of the case diary, it is not in dispute that the accused/ petitioner is apparently involved in large scale financial scam. It is also not in dispute that the accused/ petitioner has been languishing in custody for last 83 days since his arrest on 04/09/2024. It is also an admitted fact that the CBI has filed a petition before the CBI court to add section 409 IPC and accordingly, section 409 IPC was added on 29/10/2024, prior to completion of 60 days mandatory period. As it appears that FIR has been lodged on 07/08/2024 and the case was registered under the provisions of BNS, 2023 which was introduced since 01/07/2024. But the CBI has preferred to add section 409 IPC by filing a petition before the CBI court Page No.# 7/19 which has already been repealed by that time. There is no explanation in the petition filed by the CBI before the CBI court to add the repealed provision in the instant case instead of the similar provision of BNS under section 316(5). Subsequently, another petition was filed by the CBI before the trial court to add section 316(5) of BNS and section 316(5) was added on 11/11/2024 and by that time the petitioner has completed the mandatory period of 60 days in judicial custody.

16. Keeping in view of the fact that this matter relates to bail application seeking bail on the ground of default bail, this court is not going to discuss about the alleged inherent defects like notification under Delhi Police Act or maintainability of BUDS Act etc. Hence, the point in issue to be discussed in this bail application is whether the petitioner is entitled for default bail!

17. Before going to discuss the matter in issue, it is apt to mention the provision of section 167 Cr.P.C. (corresponding to Section 187 of BNSS, 2023) which is reproduced as follows -

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

(1)Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the police officer making

the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(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 Page No.# 8/19 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, - [Substituted by Act 45 of 1978, Section 13, for paragraph (a) (w.e.f. 18-12-1978).]

(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.] [Substituted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), Section 14 (a) (i), for Cl. (b). Prior to its substitution, Cl (b) read as under.-[(b) no Magistrate shall authorise detention in any custody under this Section unless the accused is produced before him;].]

(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.

Page No.# 9/19 [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.] [Original Explanation numbered as Explanation II thereof and Explanation I inserted by Act 45 of 1978, Section 13 (w.e.f. 18-12-1978).] [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:] [Substituted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), Section 14 (a) (ii), for Explanation II. Prior to its substitution, Explanation II read as under :-

[Explanation II. - If any question arises whether an accused persons was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention].] [Provided further that in case of woman under eighteen years of is, the detention shall be authorised to be in the custody of a remand home or recognized social institution.] [Inserted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), Section 14 (b).] [(2-A) Notwithstanding anything contained in sub-section or (1) 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 Page No.# 10/19 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] [Inserted by Act 45 of 1978, Section 13 (w.e.f. 18-12-1978).], as the case may be.] (3)A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4)Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

18. On a bare look at the provision, as per section 167(2) of Cr.P.C, if a person who was arrested and remanded to judicial custody, is entitled to be released on bail if the investigation is not completed within the prescribed time period and Page No.# 11/19 the final report has not been filed.

19. In the case of Uday Mohanlal Acharaya vs. State of Maharashtra, reported in (2001) 5 SCC 453, the Hon'ble Supreme Court reiterated the legal proposition that on the expiry of the prescribed time period for investigation, an indefeasible right accrues in favour of the accused to be released on bail. Similar view was taken by the Hon'ble Supreme Court in the case of Sanjay Dutt vs. State of Maharashtra, reported in (1995) 0 Supreme (SC) 1028.

20. In the case of Sushila Agarwal vs. State(NCT of Delhi) and another, reported in (2020) 1 KHC 663, the Hon'ble Supreme Court held that the investigating officer can investigate the matter and effect recoveries on the information, if any, given by the accused even while the accused is on bail.

21. In the case of Saravanan vs. State represented by the inspector of police, reported in (2020) 6 Supreme 665, it was held that only requirement for getting default/ statutory bail u/s 167(2) Cr.PC is that accused is in jail for more than 60 or 90 days and within 60 or 90 days, investigation is not completed and no charge sheet is filed by 60 th or 90th day and accused applies for default bail and is prepared to furnish bail bond.

22. In the case of Sayantan Chatterjee vs. State of West Bengal and another, reported in (2016) SCC Online Calcutta 4573, it has been held that the magistrate is not precluded from looking into the facts and material collected whether the offence is ex-facie made out or not. In sum and substance, it was the ratio of the said order that merely producing the remand for extension of detention is not sufficient. The magistrate/ court has to look in Page No.# 12/19 the facts, circumstances and material collected and satisfy whether the section applied by the investigating officer is supported with material and makes out the same offence.

23. The police custody or judicial remand is not a bare formality. Suppose the Investigating officer brings new material constituting a new offence under a particular section during the judicial custody

of the accused before the charge sheet. In that case, the Police must bring it to the notice of the accused by submitting fresh remand papers before the Court. So the accused may have an opportunity to oppose the further extension of the judicial custody for the new offence on the basis of the material brought during his judicial custody.

24. The Division Bench of the Bombay High Court in the case of Rajkumar Bhagchand Jain Vs. Union of India and another, reported in (2019) ABR (Cri) NOC 93 (BOM), has observed thus;

"The son applied for release on bail only on this ground but that was rejected. That was rejected on the ground that during the course of investigations the prosecution invoked Sections 465, 467, 468 and Section 471 of the Indian Penal Code and Section 13(2) r/w section 13(1)

(d) of the Prevention of Corruption Act, 1988 in the same CBI case. On that basis, it was argued by the CBI that the period for filing the charge sheet is 90 days instead of 60 days. However, the statutory bail application being rejected, the petitioner made inquiries as to whether there was any remand application or any request made by the prosecution to extend the judicial custody upon invocation and addition of the provisions of the Prevention of Corruption Act, 1988. However, there is no record of any such extension."

In view of the above observations, the Bombay High Court held that the detention beyond the period of 60 days is in clear violation of Section 167(2) of Page No.# 13/19 the Code of Criminal Procedure.

25. In the case of Ritu Chhabaria vs. Union of India & Ors. reported in (2023) 4 Supreme 525, it was observed by the Hon'ble Supreme court that -

".....A bare perusal of the abovementioned statement of objects strongly indicates that Section 167(2) of the Cr.PC was enacted to ensure that the investigating agency completes the investigation within the prescribed time limit, failing which no accused could be detained if they are willing to avail bail. This position was also laid emphasis on by a three-judge bench of this Court in the case of M. Ravindran v. Directorate Of Revenue Intelligence, reported in (2021) 2 SCC 485, the relevant paragraphs of the same are being reproduced hereunder: "The suggestion made in Report No. 14 was reiterated by the Law Commission in Report No. 41 on The Code of Criminal Procedure, 1898 (Vol. I, 1969, pp. 76- 77). The Law Commission re-emphasised the need to guard against the misuse of Section 344 of the 1898 Code by filing "preliminary reports" for remanding the accused beyond the statutory period prescribed under Section 167. It was pointed out that this could lead to serious abuse wherein "the arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner". Hence the Commission recommended fixing of a maximum time-limit of 60 days for remand. It was in this backdrop that Section 167(2) was enacted within the present day CrPC, providing for time-limits on the period of remand of the accused, proportionate to the seriousness



of the offence committed, failing which the accused acquires the indefeasible right to bail."

26. Further, this legal position was again reiterated in *Satendar Kumar Antil v. CBI & Anr.* (2021) 10 SCC 773, wherein it was held that Section 167(2) of the Cr.PC is a limb of Article 21 of the Constitution of India, and as such, the investigating authority is under a constitutional duty to expedite the process of investigation within the stipulated time, failing which, the accused is entitled to be released on default bail. The relevant observations made in the said judgment are as under:-

Page No.# 14/19 "Section 167(2) was introduced in the year 1978, giving emphasis to the maximum period of time to complete the investigation. This provision has got a laudable object behind it, which is to ensure an expeditious investigation and a fair trial, and to set down a rationalised procedure that protects the interests of the indigent sections of society. This is also another limb of Article 21. Presumption of Innocence is also inbuilt in this provision. An investigating agency has to expedite the process of investigation as a suspect is languishing under incarceration. Thus, a duty is enjoined upon the agency to complete the investigation within the time prescribed and a failure would enable the release of the accused. The right enshrined is an absolute and indefeasible one, ensuring to the benefit of suspect. As a consequence of the right flowing from the said provision, courts will have to give due effect to it, and thus any detention beyond this period would certainly be illegal, being an affront to the liberty of the person concerned. Therefore, it is not only the duty of the investigating agency but also the courts to see to it that an accused gets the benefit of Section 167(2)."

27. Further, in the case of *Ashok Munilal Jain & Anr. v. Assistant Director, Directorate of Enforcement* (2018) 16 SCC 158, it was held that the right of default bail under section 167(2) Cr.PC was held to be an indefeasible right of the accused even in matters under PMLA.

28. Considering the facts of the case at hand, it is assumed that the Court has examined the material produced before it at the time of first remand and based on it, the police custody was granted, and then the accused were taken in judicial custody. However, in the absence of submitting the remand papers without knowledge of the accused, the prosecution cannot by a bare petition addressed to the Court, seek the extension of remand more than the period prescribed under Section 167 of the Cr.P.C. As discussed above, the extension of remand, particularly after adding new sections constituting the serious offence, is not a bare formality. The Court extending the detention of the accused for a period more than prescribed under the law has to pass a speaking order after Page No.# 15/19 hearing both sides, which was not done in this case. The prosecution did not produce before this Court material to believe that the accused fall under any of the seven categories mentioned in Section 409 of the Indian Penal Code that the accused are public servants, bankers etc. In view of that matter, the investigating officer cannot seek an extension of time to file a charge sheet, as the period of filing the charge sheet has to be determined from the material and papers produced before the Magistrate/Judge.

29. It is not in dispute that no remand papers were produced before the learned CBI Judge, Guwahati, for adding section 409 of the Indian Penal Code and subsequently 316(5) of BNS, 2023. In the petition addressed to the Court for adding the above sections, the Court did not pass a speaking order extending further judicial remand as required under Section 167 of the Code of Criminal Procedure (Section 187 of BNSS, 2023).

30. Section 167 of the Cr. P.C. provides that when the investigation cannot be completed within 24 hours from the arrest of the accused, the Investigating Officer, believing that the information or accusation is well-founded, shall produce the accused before the competent Court for the extension of the police custody of the accused for further investigation. Thereupon the Magistrate or the competent Court, after considering the necessity of further custody, may grant police custody. However, the Court cannot extend such Police custody exceeding 15 days in whole.

31. Reading the above section carefully, it is clear that granting Police custody after 24 hours of the arrest of the accused is not a bare formality. The Investigating Officer has to satisfy the Court that the accusation and information are well-founded. The standard practice of remand is well known that soon after producing the accused before the Court, the Court hears the accused on his Page No.# 16/19 further detention to police custody. The Court examines the papers of accusation and information and then decides whether further detention of the accused in Police custody is essential. We have an adversarial justice system. The accused has a right to know what has been alleged against him, and the Court must hear him. Sub-Section 2(a) (i) and (ii) of Section 167 of Cr.P.C. has prescribed the period of imprisonment that determines the time limit for submitting the charge sheet to the Court and the power of the Court to extend the detention of the accused. It has been provided that the Magistrate or the Court may extend judicial custody not for a total period exceeding 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 and sixty days where the investigation relates to any other offence. 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 if the charge sheet has not been filed between the said period.

32. In view of the aforesaid rival contentions, the question is whether barely addressing a petition to the Court and adding further sections for which the punishment is death/ imprisonment for life or imprisonment for a term of not less than ten years, is sufficient to believe that the period of judicial custody has been automatically extended?

33. The Bombay High Court has dealt with a similar issue in the case of Alnesh Akil Somji vs. The State of Maharashtra, reported in (2022) 3 Criminal court cases 198, in that application also, the default bail was claimed. The Special Judge rejected it on the ground that section 409 of IPC is applicable, and the prosecution had filed an application invoking section 409 of the Indian Penal Code. The Special Judge held that the period for filing the Page No.# 17/19 charge sheet was ninety days, not sixty days. In the said case, the applicants were in the Magistrate custody remand till 11.11.2021 after their arrest on 03.11.2021. The investigating officer, by remand application dated 31st December 2021 (filed on 3.1.2022) intimated to the Special Judge about adding/invoke of section 409 of the Indian Penal Code. The Special Court had passed an order "Seen, note be taken".

Considering these facts, the Bombay High Court held as follows :-

"13. There is no manner of doubt that the investigation is within the province and domain of the investigating agency. However, that does not mean that the Court, in almost all cases, would be bound by the invocation of a particular section against the accused by the prosecuting agency. This is because the label of the section or the provision invoked would not be decisive. To hold otherwise, would amount to placing the said right at the mercy of the investigating agency and would indirectly result in the Magistrate abdicating the duty to enforce the right wherever necessary. Thus, the Court would be required to look into the generality of the allegations made and the material collected. In a given case where ex facie the provision is not attracted the Court may not be bound by the same. Although there is no requirement for the investigating officer to obtain permission from the Magistrate for such addition, as held by the Calcutta High Court in Sayantan Chatterjee supra), the Magistrate is not precluded from looking into the facts and the material collected, whether the offence is ex facie made out or not. The matter depends on the facts and circumstances of each case. For instance, where the investigating officer invokes section 326 of IPC, however the medical report does not ex facie show that the victim has suffered a grievous injury, within the meaning of Section 320 of IPC OR a case where section 409 of IPC is invoked and admittedly the accused does not fall under any of the seven categories mentioned in the said section namely the accused is neither a public servant, a banker etc. I would hasten to add that where however the facts and the material collected prima facie indicate the ingredients of a particular offence the Court obviously cannot examine or appreciate the same at that stage in order to arrive at a different conclusion."

34. In view of the above, this Court is of the opinion that the ratio laid down in the above cases of Alnesh Akil Somji (supra) and Rajkumar Bhagchand Jain (supra), is squarely applicable to the case in hand. As far as other case laws are Page No.# 18/19 concerned, there is no dispute about the ratio. Once the right to claim the default bail arises, the accused is entitled to release on bail, and no subterfuge should have resorted to defeat the indefeasible right.

35. Admittedly, the charge sheet was not filed within sixty days in this case. As it appears that the accused/ petitioner was arrested on 04/09/2024 and the case was registered u/s 316(2)/ 318(4) of BNS read with section 21/23 of BUDS Act, wherein mandatory period of custody is 60 days. Section 409 IPC was added on 29/10/2024, by that time the IPC was repealed. Section 316(5) of BNS was added on 11/11/2024 and during such period, the mandatory period was over. Hence, the petitioner is entitled for default bail.

36. In the result, the bail application is allowed, the accused/ petitioner is released on bail on furnishing a bond of Rs. 1,00,000/- (Rupees One Lakh) with two suitable sureties of like amount to the satisfaction of Special Judge, CBI, Guwahati, Assam on the conditions that -

a. The petitioner shall attend the concerned investigating agency as and when required till filing of charge sheet.

b. The petitioner shall submit his passports, if any, to the trial court. c. The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the court or to any police officer or temper with the evidence of the case in any manner whatsoever.

d. The petitioner shall not commit any offence, while he is on bail. In case of violation of any of the above conditions, the CBI court shall be empowered to consider the application for cancellation of bail, if any, filed and pass orders on the same, in accordance with law.

Page No.# 19/19 e. Needless to mention, it would be well within the powers of the investigating agency to investigate the matter and if necessary, to effect recoveries on the information, if any, given by the petitioner, even while the petitioner is on bail, as laid down by the Hon'ble Supreme Court in the case of Sushila Agarwal (Supra).

37. With the above observations, the bail application is disposed of.

JUDGE Comparing Assistant