

Smt Sumi Borah vs The State Of Assam And Anr on 19 December, 2024

Author: Malasri Nandi

Bench: Malasri Nandi

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GAHC010252982024

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

Case No. : Bail Appln./3626/2024

SMT SUMI BORAH
W/O TAPAN BORAH
R/O H. NO. 21, NIRIBILI PATH, SUBWAY ANANDA PATH,
GHORAMARA, BELTOLA,
P.S. BASISTHA,
GUWAHATI, KAMRUP (M)

VERSUS

THE STATE OF ASSAM AND ANR
REP BY THE PP, ASSAM

2:THE CENTRAL BUREAU OF INVESTIGATION
REP. BY THE SPL. PP
ASSA

Advocate for the Petitioner : MR. A K BHUYAN, MR P KALITA,MR A TALUKDAR,MR A SHARMA,MR K HUSSAIN,MS. N CHOUDHURY

Advocate for the Respondent : PP, ASSAM, SPL. PP, C.B.I.

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

19.12.2024 Heard Mr. A.K Bhuyan, Learned Counsel for the petitioner and also heard Mr. M. Haloi, Learned Standing Counsel, CBI.

2. This is an application u/s 483 of Bharatiya Nagarik Suraksha Sanhita, Page No.# 2/9 2023 filed by the petitioner namely, Smti. Sumi Borah, seeking regular bail in connection with Dibrugarh PS Case no. 352/2024 u/s 61(2)/238/316(2)/316(5)/318(4) of Bharatiya Nyaya Sanhita, 2023 r/w Section 21(1)/21(2)/21(3)/23 of the Banning of Unregulated Deposit Schemes Act, 2019 (hereinafter BUDS Act), 2019 R/W Section 409/420/120(B) IPC. Subsequently, registered as CBI Case no. RC 2212024E 0017.

3. The background of the case is that one FIR has been lodged by a police personnel stating that as reported by a news channel through its Facebook page, a video surfaced showing Bishal Phukan, a businessman from Dibrugarh allegedly involved in a financial scam in violation of RBI/SEBI regulations. According to the report, accused Bishal Phukan lured individuals entering into notarized agreements, promising high returns on investments and subsequently deposited their money into his personal demat account, contrary to SEBI guidelines.

4. During the course of investigation, several associates of Percelia Pharmaceutical Pvt. Ltd. and Percelia Consultancy, where Bishal Phukan held roles as Co-founder, Director and CEO, received summons including the present petitioner who is recognized as a sister of the prime accused Bishal Phukan.

5. The learned counsel for the petitioner has argued that no offence u/s 316(2)/318(4) of BNS, 2023 r/w Section 21/23 BUDS Act is made out against the petitioner in view of the fact that no money has been received by her from the depositors or there is no allegation that she had induced someone by giving false assurance to deliver money to her and she is not even remotely connected with the allegations made in the FIR and as such, the petitioner is entitled to be released on bail.

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6. Learned Counsel for the petitioner also contended that the FIR named accused Bishal Phukan is not the biological brother of the petitioner but is only known to her whom she affectionately treats him as he is younger to her in age. Moreover, the accused petitioner never wanted a destination wedding in Rajasthan but Mr. Bishal Phukan forced to do the destination wedding and did all the expenditures accordingly, which does not amount to any crime, nor does it make the accused petitioner a criminal in any way.

7. According to Learned Counsel for the petitioner, the prime accused Bishal Phukan, whose name was in the FIR, was granted bail by this court and the husband of the petitioner, who was arrested on the same day along with the petitioner, was also granted default bail by this court. But the accused petitioner is still in jail and her name is not even mentioned in the FIR.

8. It is also the submission of Learned Counsel for the petitioner that the accused petitioner is subjected to default bail as the CBI failed to submit the charge-sheet within the stipulated time of 60 days and the accused petitioner has been languishing in judicial custody for more than 60 days. In view of the above as well as considering the length of detention, the petitioner may be enlarged on bail.

9. In support of his submission, learned counsel has relied on the following case laws-

(a) 2023 Live Law (SC) 352 (Ritu Chhabaria v. Union of India and others).

(b) Bail application no. 712 of 2023 (Irfan Moiuddin Saiyyed and others v. State of Maharashtra).

(c) Special leave to appeal (Crl) no. 9949/2023 (Ashok Kumar v. UT Chandigarh).

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(d) 1996 (39) Drj 293 (Delhi High Court) (Sukhram v. CBI)

(e) 2012 (Vol. 1) SCC 40 (Sanjay Chandra v. CBI).

10. Per Contra, Learned Standing Counsel, CBI has vehemently opposed in granting bail to the petitioner alleging that the period of the offence committed against the thousands of investors also varies and spreads across the period when IPC was in force to the period when BNS has become the penal law of the land. Accordingly, Section 409 IPC was added to address the offences committed prior to 01/07/2024 and Section 316(5) was invoked for offences committed after 01.07.2024 by filing petition before the Learned Special Judge, CBI, Guwahati. Accordingly, accused was produced before the Learned Special Judge, CBI and after affording opportunity of being heard, the court allowed the invocation of aforesaid provisions of law.

11. The Learned Standing Counsel, CBI has pointed out that the maximum punishment prescribed u/s 409 IPC and Section 316(5) is life imprisonment, which provides for a mandatory period of 90 days. Section 409 IPC was added to the case on 30.10.2024 well before the completion of 60 days of the accused petitioner's arrest. Accordingly, the CBI allowed the police custody of the accused petitioner on 30.10.2024 beyond 40 days and before 60 days. This is applicable only in cases where the detention period is 90 days u/s 187(2) BNSS. The accused petitioner did not challenge the order of the Ld. Special Judge, CBI, thereby acknowledging the legal position emanating from the invocation of Section 409 IPC, now has no locus standi to oppose the same at this stage before Page No.# 5/9 the conclusion of the 90 days period.

12. Further submission of the Ld. Standing Counsel, CBI is that sufficient materials are available in the case diary which shows that the accused petitioner had lured innocent people for making investment with Bishal Phukan with a false promise of huge return within a very short period. Being influenced with her work, many investors had invested their hard earned money to Bishal Phukan which ultimately resulted in default. These deposits were misappropriated by the accused persons including the present petitioner for their personal use. Such expenses include marriage of the accused petitioner worth of Rs more than 2.6 crores at Udaipur, Rajasthan as well as several foreign trips apart from the others.

13. Ld. Standing Counsel, CBI has stressed his argument on the point that the accused petitioner was arrested on 12.09.2024 but the remand would start after 24 hours of her arrest i.e. since 13.09.2024. Section 316(5) was added by the CBI Court on 11.11.2024 i.e. on the 60 th day of the statutory period of custody, wherein the mandatory period of custody is 90 days. Before completion of 90 days, charge-sheet has been laid. Under such backdrop, the question of default bail does not arise.

Ld. Standing Counsel, CBI has referred the following case laws-

(a) (2007) O Supreme (Guj) 466 (Rijaibhai Malabhai Bharwad and Others v. State of Gujarat and another).

(b) (2007) O Supreme (SCC) 1215 (Dinesh Dalmia v. CBI).

14. Having heard the Ld. Counsel for the parties and after going through the relevant provisions of law and the judgments referred by the Ld. Counsel, the question which is posed for consideration of this court is while releasing the Page No.# 6/9 accused on default/ statutory bail u/s 167(2) CrPC (corresponding to Section 187 BNSS), when the remand period will be calculated either from the date of arrest, production or after 24 hours of his/her arrest.

15. It is no doubt true that after going through the record as well as the case diary, it reveals that there are sufficient incriminating materials available against the accused petitioner that she is involved in a large scale financial scam. It is also not in dispute that the accused petitioner has been languishing in judicial custody since her arrest on 12.09.2024. It is also an admitted fact that the CBI has filed a petition before the CBI Court to add Section 409 IPC and accordingly, S. 409 IPC was added on 30.10.2024, prior to completion of 60 days mandatory period. As it appears that FIR has been lodged on 02.09.2024 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 S. 409 IPC by filing a petition before the CBI court 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 u/s 316(5). Subsequently, another petition was filed by the CBI before the CBI Court to add S. 316(5) of BNS and 316(5) was added on 11.11.24 and by that time the petitioner has completed the mandatory period of 60 days in judicial custody.

16. In a recent decision vide (2023) O. Supreme (SC) 300 (Enforcement Directorate v. Kapil Wadhawan), Hon'ble Supreme Court has held that-

"The stipulated 60/90 day remand period u/s 167 CrPC ought to be computed from the date when a Magistrate authorizes remand. If the first day of remand is excluded, the remand period will extend beyond the permitted 60/90 days' period resulting in unauthorized detention beyond the period envisaged u/s 167 CrPC. In cases where the charge-sheet/final report is filed on or after the 61st/91st day, the accused would be entitled Page No.# 7/9 to default bail".

17. In the said case, it was also observed as follows -

"Section 57 of the CrPC mandates that the accused be produced before a Magistrate within 24 hours of arrest and under Section 167(2) the Judicial Magistrate is required to scrutinize the executive action and determine whether the rights of the accused are not subjugated by police action. The separation of the Executive and the Judicial exercise of power, ultimately protects an individual's personal liberty which is also constitutionally protected under Articles 21 and 22(2). If the date of remand ordered by a Magistrate is ignored, then an accused even though in custody, the same will not be counted within the 60/90 day period. The custody on the date of remand is distinct from the arrest of an accused under Section 56 CrPC as that is considered as a period prior to production before the Magistrate. By this logic, even if the accused is under custody it would neither be under Section 56, nor under 167(2) of the CrPC. This will lead to an apparent legal vacuum. This can however be avoided if the remand period is considered from the very day of the remand order. Furthermore, if an accused is remanded by a Magistrate on say, 01.01.2023, then, the police, post judicial scrutiny, is empowered to investigate, starting on the same day, as per Section 167 CrPC, irrespective of whether the police actually commence investigation on the same day. So, if the police is empowered to investigate an accused person on the day of the remand order itself, the 60/90 day stipulated period, upon whose expiry, the right of default bail accrues to the accused, should logically be calculated from that day itself. Ignoring the date of remand under Section 167 CrPC in the 60/90 day period, would in our opinion, militate against the legislative intent of providing an accused protection from being in prolonged custody, because of slothful investigation. In *Rakesh Kumar Paul vs. State of Assam*, (2017) 15 SCC 67 a three-judge Bench of this Court while examining the ratio in *Union of India vs. Nirala Yadav*, (2014) 9 SCC 457 and *Uday Mohanlal Acharya vs. State of Maharashtra*, (2001) 5 SCC 453 observed that on the expiry of the 60/90 day period as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in completion of the investigation within the prescribed period. The opinion in *Sanjay Dutt Vs. Bombay through C.B.I.*, 1994 (5) SCC 410 was also considered, wherein the Constitution Bench laid down that if the charge-sheet is not filed and the right for "default Page No.# 8/9 bail" has ripened into the status of indefeasibility, such right cannot be frustrated by the prosecution".

18. Now it is to be seen whether the accused petitioner is entitled for default bail. Admittedly, the petitioner was arrested on 12.09.24 and on the same day she was produced before the Learned Sessions Judge, Dibrugarh for the offence u/s 61(2)/238/316(2)/318(4) of BNS, 2023 r/w Section 21/23 of the BUDS Act, 2019, wherein the mandatory period is 60 days. S. 316(5) BNS was added on 11.11.24 i.e. 61st day of the period of remand and charge-sheet has not been laid on the 61st day. In view of the judgment of Hon'ble Supreme Court in *Kapil Wadhawan (Supra)* in cases where the charge-sheet/final report is filed on or after the 61st/91st day, the accused would be entitled to default bail. Hence, in the instant case, the accused/petitioner is entitled for default bail.

19. 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 the Special Judge, CBI, Guwahati, Assam, on the conditions that -

(i) The petitioner shall not leave the territorial jurisdiction of the learned Special Judge, CBI, Guwahati without prior written permission from him/her till disposal of the case.

(ii) The petitioner shall submit her passports, if any, to the CBI/trial court.

(iii) 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 tamper with the evidence of the case in any manner Page No.# 9/9 whatsoever.

(iv) The petitioner shall not commit any offence, while she 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.

20. Accordingly, the bail application stands disposed of.

JUDGE Comparing Assistant