

# Page No.# 1/2 vs The Central Bureau Of Investigation ... on 26 November, 2024

**Author: Malasri Nandi**

**Bench: Malasri Nandi**

Page No.# 1/21

GAHC010235522024

2024:GAU-AS:11674

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

Case No. : Bail Appln./3422/2024

BISHAL PHUKAN  
S/O LATE BIPIN CHANDRA PHUKAN, R/O F. NO. 503, PRABHANJALEE  
RESIDENCY, BISHNU NAGAR, UNDER DIBRUGARH PS, DIST DIBRUGARH,  
ASSAM.

VERSUS

THE CENTRAL BUREAU OF INVESTIGATION (CBI)  
REPRESENTED BY SC, CBI.

Advocate for the Petitioner : MR. D K BAIDYA, A HALIM, MR. R BARTHAKUR, FARIDUL  
AMIN, MR. P DAS

Advocate for the Respondent : SC, CBI,

BEFORE  
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 26.11.2024 Heard Mr. A.M. Bora, learned Senior counsel assisted by Mr. D. K. Baidya, learned counsel for the petitioner. Also heard Mr. M. Haloi, learned Standing counsel, CBI.

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2. By filing this application u/s 483 of BNSS, 2023, the petitioner, Bishal Phukan, has sought for bail in connection with Dibrugarh P.S. Case No. 352/2024 u/s 316(2)/ 318(4) of BNS, 2023, read with section 21(1),(2),(3)/ 23 of Banning of Unregulated Deposit Scheme Act, 2019 (herein after referred as BUDS Act), re-registered as RC2212024E0017 of CBI, EO-III, New Delhi.

3. On 02/09/2024 an FIR has been lodged by a police personnel alleging that one news channel broadcasted a news vide its face book handle surfaced a video clip portraying the present petitioner of Dibrugarh, a businessman by profession, was actively indulged in financial scam outside the guidelines laid down by RBI/SEBI. As reported the petitioner induced the individual to enter into a notarised agreement with the assurance of high return on investments and deposited their money into his own demat account against the guidelines of SEBI. Further, he utilised the fund collected from the public to fulfil his desire of a lavish lifestyle and that of others associated with him. Thus, fraudulently betraying his clients who are the general public and fell prey to his scam. Also it has been alleged that the petitioner induced people to invest in his unregulated deposit schemes and has fraudulently misappropriated the depositor's huge sum of money amounting to Rs. 50-60 crores for his personal gain along with others. Accordingly, a case was registered vide Dibrugarh P.S. Case No. 352/2024 and subsequently re-registered as RC2212024E0017 of CBI, EO-III New Delhi.

4. Learned Senior counsel for the petitioner has submitted that 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. The accused/ petitioner has been languishing in Judicial custody for last 84 days since his arrest on Page No.# 3/21 04/09/2024. His mandatory period was expired on 02/11/2024. The bail application of the present petitioner was filed on 07/11/2024 and on 11/11/2024, the CBI filed a petition before the trial court to add section 316(5) of BNS, 2023 and accordingly the said section was added.

5. According to learned Senior counsel for the petitioner, as the petitioner has completed the mandatory period of sixty days in custody on 02/11/2024, and, thereafter, section 316(5) BNS was added on 11/11/2024, the petitioner is entitled for default bail.

6. It is further submitted that the allegations made against the accused/ petitioner are frivolous and baseless. The accused has not engaged in any activity that would constitute the violation of the provisions of the BUDS Act. There is no credible evidence linking the accused/ petitioner to any unregulated deposit schemes or fraud as alleged in the FIR.

7. Learned Senior counsel for the petitioner has also raised the point regarding notification dated 09/10/2024 and 11/10/2024 to accord consent to the extension of powers and jurisdiction of the members of the Delhi Special Police Establishment throughout the State of Assam for the investigation of offences under relevant sections of IPC and BNS and other Acts as mentioned in the FIR. According to learned Senior counsel, as per section 3 of Delhi Police Act, the Central Government may by notification in the official gazette specify the offences or classes of offences which are to be investigated by the Delhi Police Establishment which is not done in this case, as such

CBI has no power to investigate the same.

The learned counsel has also referred a case law -

Page No.# 4/21 Kanwal Tanuj vs. State of Bihar and others, reported in (2020) 20 SCC 531.

8. Another contention raised by the learned Senior counsel for the petitioner that all the documents pertaining to the alleged financial scams were seized and the bank accounts of the petitioner were frozen. The CBI has not interrogated the accused/petitioner since 02/11/2024 till date. It is also pointed out that before passing any order by the trial court to add any section, it is mandatory in law to hear the accused, which has not been done in this case.

9. Learned Senior counsel for the petitioner has also contended that section 30 of BUDS Act, requires reference to be made by competent authority i.e., in this case by the Commissioner and Secretary, Finance Department Government of Assam, which is also missing in this case. Learned counsel has also submitted that Section 35 of BUDS Act is to be applied along with other laws for the time being in force. Hence, learned Senior counsel for the petitioner submitted that as there are lots of irregularities found in investigation of the case and considering the length of detention, the accused/ petitioner may be enlarged on bail.

10. In response, learned Standing counsel CBI, has vehemently opposed in granting bail to the petitioner by stating that it is an economic offence and large amount of public money is involved in the instant case. The accused/ petitioner in collusion with others had been operating an unregulated deposit scheme, soliciting deposits from investors under the pretext of high returns. He has executed notarised agreements promising 30% returns on deposits within 60 working days but has defaulted after accepting the deposits. His actions were found to be in contravention of the statutory provisions of the BUDS Act.

Page No.# 5/21 The investigation further reveals that he has also committed a criminal breach of trust as an agent/broker in respect of the deposits entrusted to him by the depositors and he misappropriated the sums for his personal gain and defaulted on the repayments. It is further submitted that his actions as individual businessman and as proprietor of his firm M/S Percelia Consultancy in course of business, where prima facie found involving offence u/s 409 IPC and section 316(5) of BNS, 2023.

11. It is also the submission of learned standing counsel CBI that the maximum punishment u/s 409 IPC and section 316(5) of BNS is life imprisonment which provides for a mandatory period of 90 days of judicial custody. 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. Additionally, the learned special judge CBI, allowed the custody of the accused petitioner on 30/10/2024 beyond 40 days and 60 days. This is applicable only in cases where the detention period is 90 days u/s 187(2) of BNSS. Learned Standing counsel, CBI also pointed out that the accused petitioner did not challenge the said order of the learned Special Judge, CBI, thereby acknowledging the legal position emanating from the invocation of section 409 IPC and now has no locus standi to oppose the same at this stage before

the conclusion of the 90 days period.

12. The last limb of argument submitted by learned standing counsel CBI that the accused/ petitioner has collected Rs. 60 crores, hard earned money from the common people and till date Rs. 45 crores of rupees are outstanding. The accused/ petitioner has no plan to return the money to the innocent public. During custodial interrogation, the accused/ petitioner has failed to justify the Page No.# 6/21 expenses made by him for the purposes other than which the funds were collected from the innocent people. If the accused with such clear cut intention to cheat the people is released on bail at this stage of investigation, he may hinder the collection of remaining evidences in the case.

13. 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, the section 409 was added on 30/10/2024, two days 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 section 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 under section 316(5). Subsequently, another petition was filed by the CBI before the CBI 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. The accused/ petitioner then filed a petition on 07/11/2024 seeking default bail.

14. 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 Page No.# 7/21 maintainability of BUDS Act etc. Hence, the point in issue to be discussed in this bail application whether the petitioner is entitled for default bail!

15. Before going to discuss the issue in question, it is apt to mention the provision of section 167 Cr.PC (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 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 Page No.# 8/21 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 Page No.# 9/21 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.

[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 Page No.# 10/21 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 the orders made by an Executive Magistrate under this sub-

Page No.# 11/21 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 Page No.# 12/21 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."

16. On a bare look at the provision, as per section 167(2) of Cr.PC, 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 the final report has not been filed.

17. 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.

18. 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.

19. 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 Page No.# 13/21 applies for default bail and is prepared to furnish bail bond.

20. 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 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.

21. 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.

22. 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 Page No.# 14/21 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 the Code of Criminal Procedure.

23. 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

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".....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 Page No.# 15/21 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."

24. Further, this legal position was again reiterated in Satendar Kumar Antil v. CBI & Anr. reported in (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:-



"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.

Page No.# 16/21 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)."

25. Further, in the case of Ashok Munilal Jain & Anr. v. Assistant Director, Directorate of Enforcement, reported in (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.

26. 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 filing of petition addressed to the court, seek the extension of remand more than the period prescribed under Section 167 of the Cr.PC. As discussed above, the extension of remand, particularly after adding new sections constituting the Page No.# 17/21 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 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.

27. 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.

28. Section 167 of the Cr.PC 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.

29. 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 Page No.# 18/21 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 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.

30. In view of the aforesaid rival contentions, the question is whether barely addressing a letter 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?

31. 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 Page No.# 19/21 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 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/invocation 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 Page No.# 20/21 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."

32. In view of the above, this Court is of the view 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 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 infeasible right.

33. 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 -

(i) The petitioner shall attend the concerned investigating agency as and when required on till filing of charge sheet.

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(ii) The petitioner shall submit his passports, if any, to the 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 to any police officer or tamper with the evidence of the case in any manner whatsoever.

(iv) 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.

(v) 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).

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

JUDGE Comparing Assistant