A.F.R.

Judgment Reserved On 03.6.2022

Judgment Delivered On 01.07.2022

Court No. - 45

Case :- APPLICATION U/S 482 No. - 29733 of 2021

Applicant :- Anwar Ali
Opposite Party :- State of U.P. and Another
Counsel for Applicant :- Mohd Raghib Ali,Saghir Ahmad(Senior Adv.)
Counsel for Opposite Party :- G.A.

Hon'ble Syed Aftab Husain Rizvi,J.

1. Heard learned counsel for the applicant and learned AGA for the State and perused the material on record.

2. This application U/s 482 Cr.P.C. is filed to quash/ set aside the order dated 25.11.2021 passed in connection with default bail application filed under Section 167(2) Cr.P.C. in case crime no. 327 of 2019 under Section 302, 397/34 IPC, P.S. Mauaima, District Prayagraj by the court of CJM Allahabad. It is further prayed that applicant be released on bail in the aforesaid case crime.

3. On 19.07.2019 at 13:40 hrs, an FIR was lodged by informant Naveen Kumar Jaiswal against three unknown motorcycle riders registered as case crime no.327 of 2019 under Section 397 and 302 IPC at P.S. Mauaima, Prayagraj with respect to the incident dated 19.07.2019 at 9:40 am with regard to loot and murder of Anil Dohre, Branch Manager, Allahabad Bank. During the course of investigation, the name of the applicant came into the light. He moved an application for surrender and on the basis of police report, the applicant surrendered on 26.08.2021 and taken into judicial custody and sent to jail.

4. Learned counsel for the applicant submitted that even after completion of 90 days on 24.11.2021 from the first date of judicial remand, the Investigating Officer has not filed a police report under Section 173(2)

Cr.P.C. against the applicant. On 25.11.2021 at 10:00 am the applicant has applied for default bail under Section 167 (2) Cr.P.C. The Chief Judicial Magistrate passed an order and called a report from the Additional Public Prosecutor vide order dated 25.11.2021. In compliance of the aforesaid order, the Additional Public prosecutor submitted its report, thereafter he submitted another report before the Chief Judicial Magistrate, Allahabad. In the intervening time of two reports of the Additional Public Prosecutor, the Investigating Officer has enough time to submit a charge-sheet in the case against the applicant. The Chief Judicial Magistrate after receiving the copy of police report/ charge-sheet registered it as case no.13041 of 2021 and taken cognizance but the reference of the offence is not mentioned therein. So this cognizance order is illegal. The Chief Judicial Magistrate has authorized the detention of the applicant against the procedure established by law in violation of Article 21 of the Constitution of India. On 25.11.2021, the Chief Judicial Magistrate after receiving the second report, submitted by Additional Public Prosecutor, heard and rejected the default bail application of the applicant-accused. Learned counsel further contended that till the filing of the default bail application and inasmuch as also the first report submitted by Additional Public Prosecutor, the Investigating Officer has not submitted the charge-sheet, whereas according to Section 167 (2) Cr.P.C. the prescribed time limit i.e. 90 days has already expired on 24.11.2021. The second report dated 25.11.2021 submitted by Additional Public Prosecutor reveals that the Investigating Officer was called to submit charge-sheet. The Chief Judicial Magistrate has awaited for second report submitted by Additional Public Prosecutor and after receiving thereof, heard and rejected the default bail application, whereas the Chief Judicial Magistrate ought to heard and decide the default bail application on the basis of first report dated 25.11.2021 submitted by Additional Public Prosecutor. The Chief Judicial Magistrate only in order to anyhow extinguish statutory/ fundamental right of the applicant for default bail has awaited for a second report, whereas the applicant has already availed the

remedy and make out a case of default bail prior to the submission of the charge-sheet. Thus, the right of default bail of the applicant cannot be extinguished but even though the Chief Judicial Magistrate has denied the applicant, his statutory as well as fundamental right as provided in Section 167(2) Cr.P.C. and article 21 of the Constitution of India respectively. The impugned order dated 25.11.2021 is against the procedure established by law and is sans of merit and not sustainable in the eye of law. Applicant undertakes that if he is released on bail, he will neither abscond nor tamper the prosecution case and not misuse the liberty of bail and will abide by the terms and conditions if so imposed by the Court. It is also submitted that reliance placed upon the judgment in ***Pragyna Singh Thakur vs. State of Maharashtra (2011) 10SCC 445*** and Constitution Bench Judgment in ***Sanjay Dutt's*** case by learned Magistrate for rejecting the application for default bail is misconceived. The Pragyna Singh Thakur case has been observed as per incuriam by subsequent judgment of Hon'ble Supreme Court in ***Bikramjit Singh vs. State of Punjab 2020 (10) SCC 616***. Learned counsel placed reliance on the following citations:

I) *Bikramjit Singh vs. State of Punjab, 2020 (10) SCC 616*

ii) *M. Ravindran vs. The Intelligence Officer, Directorate of Revenue intellegence, 2021 (2) SCC 485*

iii) *Criminal Misc. Application U/s 482 Cr.P.C. No.10247 of 2021 (Rajendra Singh Yadav alias Raju Jahreela vs. State of U.P.) decided on 15.11.2021*

iv) *Chhotu vs. State of U.P., 2020 (5) ADJ 572.*

v) *Harendra vs. State of U.P. 2020 (5) LLJ 170*

vi) *Gayasuddin alias Gayasuddin Mian vs. State of Jharkhand, 2005 (Cr.LJ 4230).*

Learned counsel further submitted that an indefeasible right has accrued to the applicant. Charge-sheet has been filed after moving of the bail application. Hence impugned order is perverse and against the law.

5. Learned AGA opposing the application submitted that impugned order is perfectly just and legal. Learned Magistrate ha not committed any illegality in rejecting the default bail application. The reasoning recorded by the learned Magistrate cannot be said to be illegal, perverse or erroneous which is based on a judgment in Pragyna Singh Thakur's case (Supra) and Constitution Bench Judgment of Sanjay Dutt's case. No jurisdictional error has been committed by the learned Magistrate in exercising his jurisdiction.

6. The provision of Section 167 (2) Cr.P.C. provides as follows:

> *"Section 167(2) in The Code Of Criminal Procedure, 1973*
>
> *(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 Magistrate having such jurisdiction: Provided that-*
>
> *(a) 1 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,-*
>
> *(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 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. 1 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;]. 2 Explanation II.- If any question arises whether*

> *an accused person 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.]"*

7. It is undisputed that accused has surrendered on 26.08.2020 and was remanded to judicial custody on the same date while charge-sheet has been filed on 25.11.2021. A three Judge Bench in ***M. Ravindran*** (***Supra***) has observed that while computing the period of 90 days under Section 167(2) Cr.P.C. the date on which the accused was remanded to judicial custody has to be excluded and the date on which charge-sheet is filed has to be included. According to this period of 90 days will expire on 24.11.2021. The charge-sheet has been submitted on 25.11.2021. It is also established from the record that on 25.11.02021 before filing of charge-sheet, the accused-applicant has moved the bail application on which report was called by the learned Magistrate from the Public Prosecutor. He submitted his report. Thereafter a second report was submitted and meanwhile, charge-sheet was filed. So it is established that accused-applicant has availed his right of bail before filing of charge-sheet. It does not matter whether any order has been passed on the aforesaid application or not.

8. A three Judges Bench of Hon'ble Supreme Court in ***Bikramjit Singh Vs. State of Punjab, 2020 (10) SCC 616*** after considering almost the entire gamut of case law on the point including Sanjay Dutt (supra) has observed as follows in paragraphs- 27 to 31 and 36.

> *"27. The second vexed question which arises on the facts of this case is the question of grant of default bail. It has already been seen that once the maximum period for investigation of an offence is over, under the first proviso (a) to Section 167(2), the accused shall be released on bail, this being an indefeasible right granted by the Code. The extent of this indefeasible right has been the subject matter of a number of judgements. A beginning may be made with the judgment in Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC 602, which spoke of "default bail" under the provisions of the Terrorist and*

Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA") read with Section 167 of the Code as follows:

"19. Section 20(4) of TADA makes Section 167 of Cr.P.C. applicable in relation to case involving an offence punishable under TADA, subject to the modifications specified therein...while clause (b) provided that reference in sub-section (2) of Section 167 to "15 days', "90 days' and "60 days' wherever they occur shall be construed as reference to "60 days', "one year' and "one year' respectively. This section was amended in 1993 by the Amendment Act 43 of 1993 with effect from 22-5-1993 and the period of "one year' and "one year' in clause (b) was reduced to "180 days' and "180 days' respectively, by modification of sub-section (2) of Section 167. After clause (b) of sub-section (4) of Section 20 of TADA, another clause (bb) was inserted which reads:

"20. (4)(bb) in sub-section (2), after the proviso, the following proviso shall be inserted, namely:--

"Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period up to one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and"'

20. ... Sub-section (2) Section 167 of the Code lays down that the Magistrate to whom the accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that section. The proviso to sub- section (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure...Section 167 read with Section 20(4)

of TADA, thus, strictly speaking is not a provision for "grant of bail" but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-sheet , if necessary, in the court. The proviso to Section 167(2) of the Code read with Section 20(4)(b) of TADA, therefore, creates an indefeasible right in an accused person on account of the "default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section 167(2) of the Code read with Section 20(4) of TADA is generally termed as an "order-on-default" as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (b) of sub- section (4) of Section 20 read with the proviso to sub- section (2) of Section 167 of CrPC an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 Cr.PC. An obligation, in such a case, is cast upon the court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section 20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. (Hussainara Khatoon case. This legal position has been very ably stated in Aslam Babalal Desai v. State of Maharashtra where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in Rajnikant

Jivanlal Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi wherein it was held that :

'9. ... "13. ... The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds."

21. Thus, we find that once the period for filing the charge- sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the court must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the "default' of the investigating/prosecuting agency and once such an application is made, the court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of "default'. The

issuance of notice would avoid the possibility of an accused obtaining an order of bail under the "default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's "default'... No other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the "default' of the prosecution."

28. In the Constitution Bench judgement in Sanjay Dutt v. State through CBI (1994) 5 SCC 410, one of the questions to be decided by the Constitution Bench was the correct interpretation of Section 20(4)(bb) of TADA indicating the nature of right of an accused to be released on default bail. The enigmatic expression "if already not availed of" is contained in paragraphs 48 of the aforesaid judgment as follows:

"48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167CrPC ceases to apply. The Division Bench

also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order.

53. As a result of the above discussion, our answers to the three questions of law referred for our decision are as under:

(2)(b) The "indefeasible right" of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is

governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage."

29. The question as to whether default bail can be granted once a charge sheet is filed was authoritatively dealt with in a decision of a three-Judge Bench of this Court in Uday Mohanlal Acharya v. State of Maharashtra (2001) 5 SCC 453. The majority judgment of G.B. Pattanaik, J. reviewed the decisions of this Court and in particular the enigmatic expression "if already not availed of" in Sanjay Dutt. The Court then held :

"13....The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally

refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in State of M.P. v. Rustam setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression "if already not availed of", used by the Constitution Bench in Sanjay Dutt. In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished objects of the Indian Constitution and

deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail...But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:

3. On the expiry of the said period of 90 days or 60 days, 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 the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

6. The expression "if not already availed of" used by this Court in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

30. B.N. Agrawala, J. dissented, holding:

"29. My learned brother has referred to the expression "if not already availed of" referred to in the judgment in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] for arriving at Conclusion 6. According to me, the expression "availed of" does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression "availed of" does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it

may be, after filing of the challan because thereafter the right under default clause cannot be exercised."

31. The law laid down by the majority judgment in this case was however not followed in Pragya Singh Thakur v. State of Maharashtra. This hiccup in the law was then cleared by the judgment in Union of India v. Nirala Yadav, which exhaustively discussed the entire case law on the subject. In this judgment, a Two-Judge Bench of this Court referred to all the relevant authorities on the subject including the majority judgment of Uday Mohanlal Acharya (supra) and then concluded:

"44. At this juncture, it is absolutely essential to delve into what were the precise principles stated in Uday Mohanlal Acharya case and how the two-Judge Bench has understood the same in Pragyna Singh Thakur. We have already reproduced the paragraphs in extenso from Uday Mohanlal Acharya case and the relevant paragraphs from Pragyna Singh Thakur. Pragyna Singh Thakur has drawn support from Rustam case to buttress the principle it has laid down though in Uday Mohanlal Acharya case the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in para 56 which has been reproduced hereinabove, has referred to para 13 and the conclusions of Uday Mohanlal Acharya case. We have already quoted from para 13 and the conclusions.

45. The opinion expressed in paras 54 and 58 in Pragyna Singh Thakur which we have emphasised, as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya which has been followed in Hassan Ali Khan and Sayed Mohd. Ahmad Kazmi. The decision in Sayed Mohd. Ahmad Kazmi case has been rendered by a three-Judge Bench. We may hasten to state, though in Pragyna Singh Thakur case the learned Judges have referred to Uday Mohanlal Acharya case but have stated the principle that even if an application for bail is filed on the ground that the charge- sheet was not filed within 90 days, but before the consideration of the same and before being released on bail,

if the charge-sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in Mustaq Ahmed Mohammed Isak case. We are disposed to think so, as the two-Judge Bench has used the words "before consideration of the same and before being released on bail", the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

46. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya case. The learned Judge dissented with the majority as far as interpretation of the expression "if not already availed of" by stating so:

"29. My learned Brother has referred to the expression "if not already availed of' referred to in the judgment in Sanjay Dutt case for arriving at Conclusion 6. According to me, the expression "availed of' does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression "availed of' does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after

> filing of the challan because thereafter the right under default clause cannot be exercised."

On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in Pragyna Singh Thakur case has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three- Judge Bench in Sayed Mohd. Ahmad Kazmi case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi case which is based on three-Judge Bench decision in Uday Mohanlal Acharya case, we are obliged to conclude and hold that the principle laid down in paras 54 and 58 of Pragyna Singh Thakur case (which has been emphasised by us: see paras 42 and 43 above) does not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be good law. Our view finds support from the decision in Union of India v. Arviva Industries India Ltd.

36. A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.

9. The judgment rendered in the case of Bikramjit Singh ***(Supra)*** had been followed in the subsequent three Judges Bench Judgment in the case of M Ravindran ***(Supra).*** The observations made in para 25.1 & 25.2 may be referred which is as follows:

> *"25.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have "availed of" or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation.*

Thus, if the accused applies for bail under Section 167(2), CrPCread with Section 36A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

25.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the Court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court. "

10. From the above discussion, it is clear that charge-sheet has been submitted after statutory period of 90 days and before filing of charge-sheet, the accused has moved application for bail. Subsequent filing of charge-sheet will not defeat the indefeasible right accrued to the applicant-accused. Learned Magistrate has failed to appreciate the facts and law on the point and order passed by learned Magistrate is against the law.

11. In view of above, present application succeeds and is hereby ***allowed.*** Accordingly, impugned order dated 25.11.2021 passed by Chief Judicial Magistrate, Prayagraj is hereby quashed. Application for default bail filed by applicant shall stand allowed. Accordingly, applicant shall be released on bail on his furnishing a personal bond and two sureties of like amount to the satisfaction of court concerned. However, in the interest of justice following conditions are also imposed.

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the date fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under section 82 Cr.P.C., may be issued and if applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.

(iv) The applicant shall remain present, in person, before the trial court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

Order Date:- 01.07.2022

C.MANI