

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

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**CrIA(D) No. 17/2023
CrIM No. 378/2023**

*Reserved on: 17.08.2023
Pronounced on:08.09.2023*

Syed Irfan Abdullah Aged about 30
S/O Abdullah Geelani
Through his father Abdullah Geelani
R/O Laribal, Handwara.

.....Appellant(s)

Through: Mr. Umair Ahmad Andrabi, Advocate

Vs.

Union Territory of J&K through
SHO Police Station Handwara, District Kupwara.

.....Respondent(s)

Through: Mr. Mohsin Qadri, Sr. AAG with
Ms. Maha Majeed, Assisting Counsel.

**CORAM: HON'BLE MR JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR JUSTICE RAJESH SEKHRI, JUDGE.**

JUDGEMENT

Sanjeev Kumar-J

1. This appeal by the appellant filed under Section 21 of the National Investigation Agency Act, 2008 ["the NIA Act"] is directed against the orders dated 25.03.2023 and 11.04.2023 passed by the Court of Additional District and Sessions Judge (designated as NIA Court), Kupwara (hereinafter referred to as "NIA Court", for short).
2. Before we advert to the grounds of challenge urged by the learned counsel appearing for the appellant, we deem it appropriate to give brief resume of the factual antecedents leading upto the filing of this appeal.

3. The appellant was arrested on 11.01.2023 in FIR No.06/23 registered in Police Station, Handwara under Section 13 and 39 of the Unlawful Activities (Prevention) Act, 1967 [“the UA(P) Act” hereafter]. The appellant was remanded to judicial custody from time to time. Vide order impugned dated 25.03.2023, the remand of the appellant was further extended upto 12.04.2023 by the NIA Court. On 11.04.2023, with the understanding that 90th day of remand was 11.04.2023, the appellant moved an application for default bail under Section 167 (2) Cr.P.C. read with Section 43-D of the UA (P) Act on 11.04.2023 at about 3.30 p.m.. The prosecution through its APP moved an application/report before the NIA Court on the same day i.e. 11.04.2023 seeking extension of the remand of the appellant for a further period of sixty days with effect from 12.04.2023. The report filed by the learned APP seeking extension of remand was taken up for consideration on 11.04.2023 and the NIA court vide impugned order dated 11.04.2023 remanded the appellant in judicial custody to be lodged in Sub Jail, Kupwara for a further period of six days w.e.f. 11.04.2023. Since the remand of the appellant had been extended by the NIA Court vide order dated 11.04.2023, as such, the application moved by the appellant for default bail was dismissed by the NIA Court as infructuous vide order dated 12.04.2023. It is, however, the admitted case of both the sides that the investigating agency completed the investigation within the extended period of remand and presented the challan before the NIA Court.

4. The appellant is aggrieved of and has assailed both the orders of remand passed by the NIA Court on 25.03.2023 and 11.04.2023, *inter alia*, on the following grounds:-

- i) The remand order dated 25.03.2023 is illegal and bad in law, in that, it has the effect of extending the remand of the appellant beyond the period of ninety days. The appellant was admittedly arrested on 11-01-2023 and, therefore, the ninetieth day of remand of the appellant was 11-04-2023 and not 12-04-2023, as has been provided by the NIA Court in its order dated 25.03.2023.
 - ii) That the remand order dated 25-03-2023 was passed by the NIA Court without following the mandatory requirements of proviso to Section 43-D (2) (b) of the UA (P) Act.
 - iii) That the remand order dated 11-04-2023 is also illegal and bad in law as the NIA Court has failed to give specific reasons for detention of the appellant beyond the period of ninety days and also that the appellant was not given a fair opportunity of being heard.
5. Apart from challenging the impugned orders on the grounds aforementioned the appellant also finds fault with the order dated 12-04-2023 passed by the NIA Court dismissing the application of the appellant for grant of default bail. To substantiate his submissions, learned counsel for the appellant relies upon the following case law:-
- i) **Hitendra Vishnu Tahkur and others v. State of Maharashtra and others, (1994) 4 SCC 602;**
 - ii) **Enforcement Director, Govt. of India v. Kapil Wadhawan and another etc. 2023 LiveLaw(SC) 249;**
 - iii) **Sunil Kumar Sharma V. State (NCT of Delhi), 2005 SCC Online Del 697;**
 - iv) **Judgebir Singh @ Jasbir Singh Samra @ Jasbir and others v. National Investigation Agency, 2023 SCC ONLINE SC 543;**
 - v) **Jigar @ Jimmy Pravindchandra Adatiya v. State of Gujrat, 2022 LiveLaw (SC) 794.**

6. The appeal is opposed by the respondent, who, in its status report, submits that the appellant is involved in commission of heinous offences. In view of the nature of evidence which was required to be collected, the investigation of the instant case could not be completed within the statutory period of ninety days. Accordingly, on the ninetieth day itself, i.e. 11-04-2023, the appellant was produced through virtual mode before the NIA Court and a formal application was moved by the Investigating Officer supported by the report of the learned APP. The application was considered on its merits and the NIA Court being satisfied that further custody of the appellant was required to enable the Investigating Officer to complete the investigation, granted remand beyond the period of ninety days in terms of the order impugned dated 11-04-2023. It is submitted that the prosecution presented the challan after due completion within the extended period of remand. Learned counsel for the respondent submits that since the appellant all along remained in the authorized custody till presentation of the challan, as such, no right of default bail ever accrued to the appellant at any point of time. It is, thus, argued that the NIA Court correctly held the default bail application moved by the appellant prematurely as having been rendered infructuous due to grant of extension in his judicial remand.

7. Having heard learned counsel for the parties and perused the material on record, we are of the considered opinion that both the orders impugned in this appeal are legal and in compliance with mandatory provisions of Section 167 of the Code of Criminal Procedure read with Section 43-D of the UA(P) Act.

8. It is not in dispute that the appellant was arrested on 11-01-2023 in FIR No.06/2023 registered in Police Station, Handwara. The appellant was

remanded in judicial custody from time to time up to 25-03-2023. Before the remand of the appellant would expire, the investigating officer i.e. SDPO In-charge Special Investigation Team, moved an application/Form Remand seeking extension in the judicial remand of the appellant and one other accused for a further period of 19 days. The request of the Investigating Officer in the shape of Form Remand presented before the Court was considered in the presence of the appellant, who was connected with the Court through virtual mode from Sub District Jail, Kupwara.

9. As is apparent from a reading of order dated 25-03-2023, the NIA Court heard the appellant as well as the police officer concerned. The Court, after perusing the Form Remand, found sufficient reasons for extending the remand of the appellant and accordingly, vide order dated 25-03-2023, authorized further extension of the appellant in judicial custody for a period of nineteen days to be reckoned w.e.f. 25-03-2023. This made the total period of custody of the accused to ninety days. True it is that the 90th day of the custody would fall on 11-04-2023, and there seems to be an inadvertent error in the impugned order dated 25-03-2023 providing that the period of extended remand would expire on 12-04-2023.

10. Be that as it is, the fact remains that an application was moved by the Investigating Officer through APP on 11-04-2023 i.e. before the expiry of extended period of remand. To be precise and unequivocal, the application was moved by the APP seeking extension of remand beyond the period of 90 days on 11-04-2023, which was the 90th day of the authorized remand of the appellant in the judicial custody. The application was supported by Form Remand of the Investigating Officer. From a reading of the Form Remand submitted by the I.O. through APP, it clearly transpires that sufficient

justification was given for seeking remand of the appellant beyond the period of 90 days. The Form Remand clearly indicates the stage of the investigation and the evidence yet to be collected in the matter. The NIA Court considered the matter on the same day in presence of the appellant, who was produced before the NIA Court through virtual mode from Sub District Jail Kupwara. The NIA Court found sufficient reasons for extending the remand and allowing the Investigating Officer to complete the investigation while the appellant was in judicial custody. This is how the impugned order dated 11-04-2023 came to be passed by the NIA Court.

11. Having bestowed our thoughtful consideration to the rival arguments and material on record, we do not find any legal infirmity or procedural irregularity in the grant of remand of the appellant in judicial custody vide order dated 25-03-2023. The mandate of Section 167 of the Code of Criminal Procedure read with Section 43-D of the UP (A) Act, has been complied with by the NIA Court in its letter and spirit. In terms of Section 167 Cr.P.C, the Magistrate before whom an arrested accused persons is presented, is empowered to authorize the detention of such a person otherwise than in custody of police beyond the period of 15 days provided he is satisfied that adequate grounds exist for doing so but shall not authorize detention of such a person in custody for a period exceeding 90 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; 60 days where the investigation relates to any other offence. It is provided that on expiry of said period of 90 days or 60 days, as the case may be, the accused persons shall be released on bail if he is prepared and does furnish bail. However, Section 167 Cr.P.C does not apply as it is to a case involving

an offence punishable under the UA (P) Act. As provided under Section 43-D of the UA (P) Act, Section 167 Cr.P.C applies in relation to a case involving an offence punishable under the UA(P) Act with such modifications as are laid down in sub-section (2) of Section 43-D. The relevant extract of Section 43-D including sub-section (1) and (2), for facility of reference are set out below:-

“43-D. Modified application of certain provisions of the Code. —

(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and “cognizable case” as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—

(a) the references to “fifteen days”, “ninety days” and “sixty days”, wherever they occur, shall be construed as references to “thirty days”, “ninety days” and “ninety days” respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:—

“Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with 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 ninety days, extend the said period up to one hundred and eighty days: Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.”.

12. From reading of Section 43-D reproduced above, it clearly transpires that the competent Court i.e. NIA Court in the instant case, to whom a person accused of an offence under the UA (P) Act is forwarded in custody, is empowered to authorize his detention otherwise than in custody of police beyond the period of 30 days provided he is satisfied that adequate grounds exist for doing so but such Court shall not authorize the detention of the accused who is forwarded to it after arrest in judicial custody for a period exceeding 90 days where the investigation relates to an offence punishable under UP (A) Act. However, Section 43-D adds proviso to Section (2) of

Section 167 Cr.P.C and provides that, if it is not possible to complete the investigation within a period of 90 days, the Court may, if it is satisfied with the report of the Public Prosecutor indicating the progress of investigation and the specific reasons for detention of the accused beyond 90 days, extend the said period up to 180 days. Any such request for extension of remand beyond the period of 90 days is required to be supported by an affidavit of the Investigating Officer. Insofar as the impugned order dated 25-03-2023 is concerned, the same only authorizes the custody of the accused up to a period of 90 days and, therefore, the requirement of law is that the Magistrate/Court has to record its satisfaction that adequate grounds exist for authorizing the detention of the accused other than in custody of police beyond a period of 30 days. Said requirement of law, as is apparent from the reading of order impugned dated 25-03-2023, has been completely fulfilled and complied with. The Court has extended the custody beyond the period of 30 days and up to the period of 90 days on the basis of Form Remand presented by the Investigating Officer. Not only the request of the Investigating officer stated in the Form Remand was considered on merits but the accused was also heard in the matter. The Form Remand which was presented by the Investigating Officer to seek remand indicates adequate grounds for the remand. The plea of the learned counsel appearing for the appellant, that the NIA Court could have granted remand only up to 11-04-2023, which was the 90th day of the custody of the accused, but the impugned order indicates the extension of remand up to 12-04-2023, is also without any substance and cannot be said to have vitiated the impugned order of remand dated 25-03-2023. This is so because the prosecution moved an application for extension of remand well within the period of 90

days i.e. on 11-04-2023 itself and the NIA Court vide its order dated 11-04-2023 extended the same with effect from 11-04-2023 itself. An inadvertent error that had crept in the order dated 25-03-2023 stood rectified by subsequent order dated 11-04-2023.

13. Similarly, the impugned order dated 11-04-2023 also does not seem to us vitiated by any procedural irregularity. As indicated above in detail, the requirements of law, which were to be kept in mind by the NIA Court while extending the remand of the accused beyond the period of 90 days were as under:-

- (i) There ought to be report of the Public Prosecutor indicating the progress of the investigation and specific reasons for seeking detention beyond 90 days;
- (ii) The recording of satisfaction with regard to the existence of specific reasons for detention of the accused beyond the period of 90 days.

14. Although there is no specific requirement of Section 43-D of the UA (P) Act to provide an opportunity of being heard to the arrested person, yet such requirement is held inbuilt and inherent in the nature of exercise of power by the Court under Section 167 Cr.P.C read with Section 43-D of the UA (P) Act. This is so because, considering the request of the prosecution/Investigating Agency for extension of custody of the accused beyond the period of 90 days for completion of the investigation, affects a vital right of the accused to be released on bail on account of failure of the investigating agency to complete the investigation within the maximum period of 90 days. Deprivation of such right by extending the period of investigation and custody of the accused cannot be made unless such person

in custody is given an opportunity to oppose such attempt on the part of the Investigating Officer. The legal position in this regard is well enunciated in the judgments relied upon by the learned counsel for the appellant. Mr. Mohsin Qadri, learned Sr. AAG, appearing for the respondents, does not dispute this settled position of law.

15. In the instant case we find that the appellant had moved an application for default bail on 11-04-2023 which was the 90th day of the authorized custody of the appellant. That being so, the application moved by the appellant for default bail was stillborn and not maintainable in law. It is also not in dispute that on 11-04-2023 itself, the application moved by the Investigating officer through APP, seeking extension of remand of the appellant beyond the period of 90 days, was allowed and the judicial custody of the appellant extended. In that view of the matter, the NIA Court rightly held the bail application moved by the appellant as rendered infructuous. We cannot lose sight of the fact that the prosecution has now presented the challan after completing the investigation within the period authorized by the NIA Court.

16. From reading of the impugned order dated 11-04-2023 in the light of the application filed by the Investigating Officer, supported with Form Remand, it clearly comes out that the NIA Court considered the application for extension of the remand in presence of the appellant, who was produced in the Court through electronic video linkage (virtual mode) from Sub District Jail, Kupwara. It is not the case of the appellant that he opposed or wanted to oppose the extension but was not permitted to do so. There is nothing on record to suggest that any such request was made by the appellant to oppose the extension prayed for by the prosecution, rather it is

fairly admitted by the learned counsel for the appellant that the appellant had been given a formal notice of the application for extension and was also produced, though through virtual mode, before the NIA Court when the application of the prosecution for extension of remand beyond the period of 90 days was taken up for consideration.

17. In the case of **Hitendra Vishnu Thakur** (*supra*), Hon'ble the Supreme Court was confronted with Section 20(4) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ['TADA' for short]. Section 20 (4) of the TADA is almost *pari materia* to Section 43-D of the UA (P) Act. Hon'ble the Supreme Court, while deliberating on the scope of Section 20 (4) of the TADA, in para 20 of the judgment held thus:-

“20. Section 57 of the Code of Criminal Procedure provides that a person arrested shall not be detained in custody by the police for a period longer than that which is reasonable but that such period shall not exceed 24 hours exclusive of the time necessary for journey from the place of arrest to the court of the Magistrate in the absence of a special order under Section 167 of the Code. The Constitution of India through Article 22(2) mandates that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to that court and that no person shall be detained in custody beyond that period without the authority of the Magistrate. Thus, the Constitution of India as well as the Code of Criminal Procedure expect that an arrested person, who has been detained in custody, shall not be kept in detention for any unreasonable time and that the investigation must be completed as far as possible within 24 hours. Where the investigation of the offence for which accused has been arrested cannot be completed within 24 hours and there are grounds for believing that the accusation or information against the accused is well- founded, the police is obliged to forward the accused along with the case diary to the nearest Magistrate for further remand of the accused person. The Magistrate, on the production of the accused and the case diary, must scrutinise the same carefully and consider whether the arrest was legal and proper and whether the formalities required by law have been complied with and then to grant further remand, if the Magistrate is so satisfied, The law enjoins upon the investigating agency to carry out the investigation, in a case where a person has been arrested and detained, with utmost urgency and complete the investigation with great promptitude in the prescribed period. Sub-section (2) of 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 subsection (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. The said chapter comprises of Sections 436 to 450 but for our purposes It is only Sections 437 and 439 of the Code which are relevant. Both these sections empower the court to release an accused on bail. The object behind the enactment of Section 167 of the Code was that the detention of an accused person should not be permitted in custody pending investigation for any unreasonably longer period. However, realising that it may not be possible to complete the investigation in every case within 24 hours or even 15 days, as the case may be, even if the investigating agency proceeds with utmost promptitude, Parliament introduced the proviso to Section 167(2) of the Code prescribing the outer limit within which the investigation must be completed. 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 CrPC. 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 (SCC p. 288, para 9)

"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."

18. It is thus trite law that Section 167 Cr.P.C read with Section 43-D of the UA (P) Act, is not a provision for grant of bail but deals only with the maximum period during which a person arrested in connection with an offence punishable under UA (P) Act, may be kept in custody to enable the investigating agency to complete the investigating and file the charge sheet, if necessary, in the Court. However, the proviso to Sub Section (2) of Section 167 Cr.P.C creates an indefeasible right in the accused to seek bail on failure of the investigating agency to complete the investigation within the maximum period prescribed/extended. Such bail order is commonly known as 'default bail'. However, with a view to avail such an order of 'default bail' it is necessary for the person in custody to file a formal application and offer to furnish bail. If the accused does not avail of such right or does not offer bail, he will lose this right on the completion of the investigation and presentation of challan in the Court, notwithstanding the fact that, such investigation is completed and challan presented after the maximum period prescribed including the extended period.

19. From reading of para 20 reproduced above, it also comes out clearly that even where the provision dealing with grant of remand to enable the investigating agency to complete the investigation does not in so many words provide for issuance of notice to accused in custody, yet such requirement of principles of natural justice is required to be read in such provision, for issuance of notice to the accused would accord fair play in action. How this requirement has to be complied with is spelled out by

Hon'ble the Supreme Court in later judgment of **Jigar** (*supra*). What is said by Hon'ble the Supreme Court in para 29 of the judgment is reproduced hereunder:-

“29. As noted earlier, the only modification made by the larger Bench in the case of Sanjay Dutt² to the decision in the case of Hitendra Vishnu Thakur¹ is about the mode of service of notice of the application for extension. In so many words, in paragraph 53(2)(a) of the Judgment, this Court in the case of Sanjay Dutt² held that it is mandatory to produce the accused at the time when the Court considers the application for extension and that the accused must be informed that the question of extension of the period of investigation is being considered. The accused may not be entitled to get a copy of the report as a matter of right as it may contain details of the investigation carried out. But, if we accept the submission of the respondents that the accused has no say in the matter, the requirement of giving notice by producing the accused will become an empty and meaningless formality. Moreover, it will be against the mandate of clause (b) of the proviso to subsection (2) of section 167 of CrPC. It cannot be accepted that the accused is not entitled to raise any objection to the application for extension. The scope of the objections may be limited. The accused can always point out to the Court that the prayer has to be made by the Public Prosecutor and not by the investigating agency. Secondly, the accused can always point out the twin requirements of the report in terms of proviso added by subsection (2) of Section 20 of the 2015 Act to subsection (2) of Section 167 of CrPC. The accused can always point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension cannot be granted.

20. From careful reading of para 29 above, it becomes abundantly clear that it is mandatory to produce the accused at the time when the application of the prosecution for extension of remand is taken up for consideration by the Court and accused must be informed that the question of extension of period of investigation is being considered. The accused present during consideration is entitled to raise any objection to the application for extension though the scope of such objection may be limited. He could point out to the Court that the application moved on behalf of the investigating agency is not by the competent person or that there are no special reasons indicated by the public prosecutor justifying extension of the remand etc. etc.

21. It is thus crystal clear that the requirement of principles of natural justice in the matter of grant of opportunity to the accused to oppose extension would be complied with once the accused is produced in the Court and is made aware that the Court is considering the request of the prosecution for extension of the remand. It is for the accused to raise objection to such an application. However, if such an objection is raised in writing or orally, it is incumbent upon the Court granting extension to deal with it objectively. Such hearing need not be an elaborate hearing nor is it incumbent upon the Court or the prosecution to provide a copy of the report filed by the Investigating Officer to the accused.

22. When the contention of the learned counsel appearing for the appellant is analyzed in the light of the position of law adumbrated above, we find the same devoid of merit for the reasons that in the instant case, when the application for extension of remand was taken up by the Court, the appellant was present through virtual mode on 11-04-2023. It is on the same day the appellant had moved an application for default bail through his counsel. That being the position, it cannot be contended by learned counsel for the appellant that accused was not made aware that the application of the prosecution for extension of his remand was being taken up for consideration by the Court.

23. Learned counsel for the appellant fairly conceded that the appellant had been given notice of such application in advance and as a consequence whereof, he was produced before the Court through virtual mode. It is nowhere pleaded by the appellant that he raised objection to the granting of application for remand or that he wanted to be heard by the Court in the matter. Viewed thus, it can safely be inferred that the appellant, though was

present and was aware when the application of the prosecution for extension of remand beyond period of 90 days was being considered, yet he raised no objection. If that be the clear position emerging in the facts and circumstances of the case, it is difficult to accept the contention of the learned counsel for the appellant that the appellant has been condemned unheard in the matter of grant of extension of remand, and, therefore, the law laid down by Hon'ble the Supreme Court in **Hitendra Vishnu Thakur** and **Jigar's** cases (*supra*) has been violated.

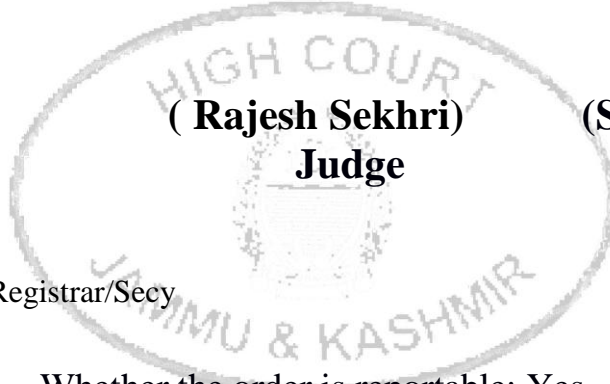
24. Apart from what is held hereinabove, we also cannot lose sight of the fact that prosecution has now presented the charge sheet in the competent Court of law after completing the investigation within the extended period of remand of the appellant.

25. Even if we were to agree with the learned counsel for the appellant that impugned remand order dated 11-04-2023 is bad in law, yet we may not be in a position to set the clock back and provide an opportunity to the appellant to avail of the benefit of default bail provision. As is well settled that the indefeasible right of default bail that accrued to the appellant in custody on account of failure of the investigating agency to complete the investigation within the prescribed period is lost on the presentation of the charge sheet in the competent Court of law if it is not availed of. The expression "availed of" is also explained by Hon'ble the Supreme Court in **Jigar's** case (*supra*) to mean that accused in custody must file an application for default bail and should be prepared to offer bail on being directed. Though in the instant case no right ever accrued to the appellant to seek the default bail, yet such application was moved by the appellant prematurely on 11-04-2023, which was the 90th day of the extended remand. That

application was not pursued and was rightly dismissed as infructuous vide order dated 12-04-2023. There is no formal application filed for default bail; after expiry of period of 90 days.

26. Be that as it is, the fact remains that the orders impugned in this appeal do not suffer from any legal infirmity or procedural irregularity and, therefore, no right to default bail ever accrued to the appellant. Otherwise also, with the presentation of the charge sheet, the right to bail on default cannot be exercised. For this reason also the relief prayed for by the appellant for grant of default bail has become a *fait accompli*.

27. For all what has been stated above, there is no merit in this appeal and the same is, accordingly, dismissed.



SRINAGAR:

08.09.2023

Anil Raina, Adl. Registrar/Secy

Whether the order is reportable: Yes