

Court No. - 14

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Case :- U/S 482/378/407 No. - 4064 of 2021

Applicant :- Varun Tiwari

Opposite Party :- State of U.P.

Counsel for Applicant :- Arun Sinha, Ram Chandra Singh, Umang Agarwal

Counsel for Opposite Party :- G.A.

Hon'ble Rajesh Singh Chauhan, J.

1. Heard Sri Arun Sinha, learned counsel for the applicant and Sri Anurag Verma, learned AGA-I for the State.
2. The precise question for consideration in this petition is as to whether the accused has an indefeasible right to 'compulsive bail' i.e. 'default bail' under proviso to section 167(2) Cr.P.C. on the expiry of the period of 90 days, (or 60 days as the case may be), if the charge-sheet has not been filed within aforesaid stipulated time.
3. So as to answer this question some facts in brief of the case are required to be considered.
4. The present applicant is an accused in Sessions Trial No. 669/2021, Crime No. 23/2021, u/s 342, 376D, 372, 506 IPC, & section 5/6 POCSO Act, P.S. Mahanagar, District Lucknow. He was sent to judicial custody on 14.1.2021.
5. As per learned counsel for the applicant this is a case wherein the investigation should be completed within a period of 90 days and charge-sheet should have been filed within aforesaid period under section 167 Cr.P.C.
6. The aforesaid 90 days period has expired on 14.4.2021 but no charge sheet has been filed before the learned trial court i.e. Special Judge, POCSO Act, Lucknow.
7. On 22.4.2021 an application under section 167(2) Cr.P.C. was filed before the learned trial court through physical filing. However, at that point of time filing of physical application was not allowed in terms of restriction

being imposed by the High Court as a Covid -19 Protocol. Thereafter, the petitioner filed an online application. Learned counsel for the applicant was appointed to file such application before the learned Court of Sessions Judge as this is a case relating to session trial. Learned counsel for the applicant has filed the certified copy of those applications with this petition as Annexure no. 7 and Annexure no. 8. Both the applications are of 22.4.2021. In both the applications before the learned trial court and before the learned sessions court it has been indicated that after expiry of 90 days period no charge-sheet has been filed, therefore, the applicant may be granted bail under section 167(2) Cr.P.C. as 'default bail'.

8. Per contra, Sri Anurag Verma, learned AGA-I has submitted that even if the applicant has filed an application under section 167(2) Cr.P.C. on 22.4.2021, he would not be entitled for default bail under section 167(2) inasmuch as the charge-sheet was filed before the learned trial court on 22.4.2021 and the cognizance thereof has been taken. Therefore, in view of the decision of Apex Court in re: ***Sanjay Dutta vs. State reported in (1994) 5 SCC 410*** the benefit of default bail may not be extended to the present applicant. Replying to the aforesaid objection being made by learned AGA -I, Sri Sinha, learned counsel for the applicant has cited some decisions of Apex Court i.e. ***Uday Mohanlal Acharya vs. State of Maharashtra (2001) 5 SCC 453, Bikramjit Singh vs. State of Punjab (2020) 10 Supreme Court Cases 616 and M. Ravindran vs. The Intelligence Officer, Directorate of Revenue Intelligence passed in Criminal Appeal No. 699 of 2020 arising out of S.I.P. (Criminal) No. 2333 of 2020*** decided on 26.10.2020.

9. Sri Sinha has submitted that the judgment of Apex Court in re: ***Sanjay Dutta (supra)*** would not be applicable in the present case inasmuch as in the case of ***Sanjay Dutta (supra)*** the challan was presented by the prosecution on 25.3.2019 and application u/s 167(2) was filed on the next date i.e. 26.3.2019. Whereas in the present case the charge-sheet was presented by the prosecution on 22.4.2021 subsequent to the application u/s 167(2) has been filed on the same day i.e. 22.4.2021. Therefore, the right of the present applicant accrued immediately after filing such application under section 167(2) since the charge-sheet was not filed by that time.

10. It would be apt to consider some recent cases of the Apex Court wherein the quashing of default bail has been considered :

***Saravanan vs State Rep. By The Inspector Of ... on 15 October, 2020
CRIMINAL APPEAL NOS. 681682 OF 2020 (Arising from S.L.P. (Criminal)
Nos.43864387/2020)***

Para 9. “.....in the case of Rakesh Kumar Paul (supra), where the investigation is not completed within 60 days or 90 days, as the case may be, and no chargesheet is filed by 60 th or 90th day, accused gets an “indefeasible right” to default bail, and the accused becomes entitled to default bail once the accused applies for default bail and furnish bail. Therefore, the only requirement for getting the default bail/statutory bail under Section 167(2), Cr.P.C. is that the accused is in jail for more than 60 or 90 days, as the case may be, and within 60 or 90 days, as the case may be, the investigation is not completed and no chargesheet is filed by 60th or 90th day and the accused applies for default bail and is prepared to furnish bail. No other condition of deposit of the alleged amount involved can be imposed. Imposing such a condition while releasing the accused on default bail/statutory bail would frustrate the very object and purpose of default bail under Section 167(2), Cr.P.C. As observed by this Court in the case of Rakesh Kumar Paul (supra) and in other decisions, the accused is entitled to default bail/statutory bail, subject to the eventuality occurring in Section 167, Cr.P.C., namely, investigation is not completed within 60 days or 90 days, as the case may be, and no chargesheet is filed by 60 th or 90th day and the accused applies for default bail and is prepared to furnish bail.

***Bikramjit Singh vs The State Of Punjab on 12 October, 2020
CRIMINAL APPEAL NO. 667 OF 2020 (@ Special Leave Petition (Crl.) No.
2933 of 2020)***

Para 11. Section 167 of the Code makes it clear that whenever a person is arrested and detained in custody, the time for investigation relating to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, cannot ordinarily be beyond the period of 15 days, but is extendable, on the Magistrate being satisfied that adequate grounds exist for so doing, to a maximum period of 90 days – See first proviso (a)(i) to Section 167(2) of the Code. The said proviso goes on to state that the accused person shall be released on bail if he is prepared to and does furnish bail on expiry of the maximum period of 90 days, and every person so released on bail be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.

Para 24. “.....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.

Para 29".....The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled.”

S. Kasi vs State Through The Inspector Of ... 19 June, 2020
CRIMINAL APPEAL NO. 452 OF 2020 (ARISING OUT OF SLP (CRL.) NO.2433/2020)

Para 12. “.....there has been very detailed consideration of Section 167 by a Three-Judge Bench of this Court in **Rakesh Kumar Paul versus State of Assam, (2017)15 SCC 67**. This Court in the above case has traced the legislative history of the provision of Section 167. This Court in the above case emptice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for “default bail” during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court.”hasised that the debate on Section 167 must also be looked at from the perspective of expeditious conclusion of investigation and from the angle of personal liberty. This Court also held that right for default bail is an indefeasible right which cannot be allowed to be frustrated by the prosecution. Following was laid down in **paragraphs 37, 38 and 39**: -

“37. This Court had occasion to review the entire case law on the subject in **Union of India v. Nirala Yadav, (2014) 9 SCC 457**. In that decision, reference was made to **Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453** and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows:

“13.(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.”

38. This Court also dealt with the decision rendered in **Sanjay Dutt, (1994) 5 SCC 410** and noted that the principle laid down by the Constitution bench is to the effect that if the charge sheet is not filed and the right for “default bail” has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond. tice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for “default bail” during the interregnum when the statutory period for filing the

charge-sheet or challan expires and the submission of the charge-sheet or challan in court.”

*39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to **Mohd. Iqbal Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722** wherein it was observed that some courts keep the application for “default bail” pending for some days so that in the meantime a charge-sheet is submitted. While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for “default bail” during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court.”*

11. Having heard learned counsel for the parties and having perused the material available on record as well as the aforesaid decisions of the Apex Court, I am of the considered opinion that the right of the accused under section 167(2) if by that time the charge-sheet has not been filed by the prosecution within stipulated period so indicated under section 167(1). The Apex Court in **Bikramjit Singh (supra)** has held vide para 29 that an accused must be held to have availed all his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 Cr.P.C. 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. Such interpretation would sub-serve the purpose and the object for which the provision in question was brought on to the statutory-book. In the same para the Apex Court has also held that 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.

12. The ratio of judgment of Apex Court in re: **Sanjay Dutta (supra)** would not be applicable in the present case inasmuch as the application under section 167(2) was filed on the next day after filing the challan by the prosecution, whereas in the instant case the application under section 167(2) was filed on

the same day i.e. 22.4.2021, by that time the charge-sheet was not presented by the prosecution before the learned trial court. However, it was presented on the same day i.e. 22.4.2021 and the learned trial court took cognizance thereof.

13. The Apex Court in re: **M. Ravindran (supra)** has held in para 18 and 18.1 as under :

"18. Therefore, in conclusion

18.1 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), Cr.P.C. read with Section 35A (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."

14. In view of the above, I find that the order passed by the learned trial court dated 7.6.2021 is patently illegal and unwarranted inasmuch as the appropriate order in an application u/s 167(2) Cr.P.C. must have been disposed of promptly and such application should have not been treated as if it is a regular bail application filed by the applicant. Had it been a regular bail application, such application should have been presented before the learned Sessions Court then it should be heard by the trial court which is special court in the present case but so far as the issue of default bail is concerned, it should be decided by the learned trial court inasmuch as the charge-sheet is presented by the prosecution before the trial court. Further, the fact as to whether the mandatory period of filing charge-sheet as per section 167(1) has expired or not can only be seen by the learned trial court and if after expiry of such mandatory period and till the filing of an appropriate application u/s 167(2) Cr.P.C. the charge-sheet has not been filed, even the learned trial court should not extend the remaining period and if any request on behalf of accused-applicant is made by his counsel even orally to the extent that he is ready to submit sureties / bail bonds as per satisfaction of the court seeking default bail, the learned trial court may not refuse bail to the accused as the right of default bail emanates from Article 21 of the Constitution of India which guarantees right to life and personal liberty. Such liberty guaranteed under chapter 3 of

the Constitution of India may not be circumvented, ignored or violated by the learned trial court.

15. Accordingly, the petition u/s 482 Cr.P.C. is allowed.

16. The order dated 7.6.2021 passed by the Special Judge, POCSO Act / Additional Sessions Judge, Lucknow rejecting the bail application of the applicant u/s 167(2) Cr.P.C. is hereby **quashed**.

17. The learned trial court is directed to **release** the present applicant on default bail u/s 167(2) Cr.P.C. in S.T. No. 669/2021, Crime No. 23/2021, u/s 342, 376D, 372, 506 IPC & Section 5/6 POCSO Act, P.S. Mahanagar, District Lucknow in the case 'The State vs. Upreta Kumar Rasail & others, pending in the court of Special Judge, POCSO Act, Lucknow on on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates 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 of the Indian Penal Code.

(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. is issued and the 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 of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion

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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.

18. Before parting with it is to mention that useful assistance has been provided by Ms. Shama Parveen, Law Clerk and Mr. Vaibhav Srivastava, Law Intern.

(Rajesh Singh Chauhan, J.)

Order Date :- 2.11.2021

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