

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CrlA(D) No. 17/2022

Reserved on: **29.06.2022**

Pronounced on: **07.07.2022**

Peerzada Rafiq Maqdoomi

...Appellant(s)

Through: Mr. N.A.Ronga, Advocate with
Mr. Umair N. Ronga, Advocate.

Vs.

Union Territory of J&K

...Respondent(s)

Through: Ms. Aasifa Padroo, AAG.

CORAM:

HON'BLE MR. JUSTICE ALI MOHAMMAD MAGREY, JUDGE

HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

JUDGMENT

Per Chowdhary, J.

1. Appellant herein moved an application for grant of regular bail before the Special Designated Court Under NIA Act Srinagar on **07.02.2022** in a case registered at Police Station Kothibagh vide FIR No.82/2020 for the commission of offences punishable under Sections 13/18/20/38 Unlawful Activities (Prevention) Act 1967 and under Sections 34/121/121-A/120-B/124-A/201/468/506 IPC.
2. On **20.01.2022**, charge-sheet was laid against the accused including the appellant herein for the commission of aforementioned offences before the same Court for judicial determination.
3. Appellant preferred another application with additional grounds for grant of bail and by virtue of these additional grounds it was prayed

for grant of default bail in his favour. The court below, after seeking objections from the other side, rejected the plea of the appellant vide order dated **19.02.2022** (hereinafter called 'impugned order').

4. The appellant has assailed the impugned order through the medium of this appeal in terms of Section 21 of NIA Act mainly on the following grounds:-

- (i) That, the learned Special Judge while deciding the application of the appellant, has not considered all the grounds urged in the bail petition and passed the impugned order without considering the grounds and arguments raised before the said court.
- (ii) That, the investigating agency had produced an incomplete challan/case before the court below on 179th day of the arrest of the appellant/accused when the time prescribed under law for production of charge-sheet was 180 days and in case of non-production of challan, right to seek default bail would accrue to the appellant/accused.
- (iii) That, in order to defeat his right to seek default bail, the respondent-investigating agency produced an incomplete challan/charge-sheet before the trial court stating that the investigation of the case was still going on and the supplementary charge-sheet shall be submitted before the court, as such, investigating agency cannot be said to have completed the investigation within the required period so as to disentitle the appellant of his fundamental right of default bail.

5. Heard, perused the record and considered the matter.

6. Learned counsel for the appellant has vehemently argued that since the investigation against the appellant/accused No.4 was still going on and the supplementary charge-sheet would be filed after completion of the same, thus, in law the investigation of the case **FIR No.82/2020** is not complete as yet and the appellant/accused is in the custody for last more than seven months, as such, he deserves to be released on bail as a right, on seeking default bail in terms of law as available to him. He further argued that the trial court had failed in its legal obligation to admit the appellant/accused to bail due to non-application of mind resulting in passing of the impugned order. It was prayed that the appellant/accused, who deserves to be released on bail, be admitted to bail and the impugned order be set aside.

7. Learned AAG, appearing for the respondents, on the other hand, argued that since the charge-sheet for the commission of offences including under UA(P) Act, was laid within 180 days from the arrest of the accused as has been pleaded by the appellant himself, the appellant was not entitled to be admitted to default bail as pleaded in this appeal. Learned AAG further argued that the trial court has rightly passed the order rejecting the plea of compulsive bail, which does not suffer from any kind of illegality, so as to warrant, any interference by this Court and it was finally prayed that the impugned order be upheld and the appeal be dismissed.

8. For proper appreciation of rival submissions, following facts of the case are required to be recorded:-

(I) The appellant/accused was arrested on **17.07.2021** in case registered at Police Station Kothibagh vide FIR No.82/2020 for

the commission of offences punishable under Sections 13/18/20/38 UA(P) Act and 34/121/121-A/120-B/124-A/201/468/506 IPC.

(II) The charge-sheet was produced against the accused including the appellant herein on 179th day of the arrest of the appellant herein.

9. The moot point to be decided is, as to whether, the appellant was entitled to be admitted to default bail also known as compulsive bail in terms of Section 167(2) of Cr.PC, 1973.

10. It is an admitted case of the parties that the charge-sheet has been laid within the period of 180 days as was available to the prosecution to lay the charge-sheet. The only point raised by learned counsel for the appellant to be considered is that as to whether the appellant was entitled to be admitted to default bail as further investigation was being carried out with regard to his role in the case by the investigating agency. The learned counsel has drawn the attention of this Court to **Para No. 11.51** of the charge-sheet, which is reproduced as under:-

“11.51- Pertinent to mention here that with regard to raising funds/money transaction for utilizing in terrorist activities by A3 (Mohammad Akbar Sofi) and his involvement in the money laundering / Benami transaction investigation shall continue in respect of accused A3. Investigation regarding additional aspects and role of A2 and A4 shall also continue and supplementary charge sheet u/s 173(8) be submitted before the court of law.”

11. For ready reference Section 167(2) of Cr.PC is reproduced as under:-

“Section 167 (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, authorize 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) the Magistrate may authorize 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 authorize 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 authorize 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 authorize detention in the custody of the police.”

12. Learned counsel for the appellant vehemently argued that in view of the incomplete charge-sheet, the appellant was entitled to be admitted to default bail and to canvass this point he has argued that there was no merit in the charge against the appellant, who is a student of law, and his role is still being ascertained by the investigating agency, as such, it cannot be said legally that the complete charge-sheet has been laid within the statutory period. He has further urged that the investigating agency has failed to complete the investigation of the case during the period prescribed under law and also after completion of time extended and permitted by the Special court. The investigating agency has also failed to submit the supplementary charge-sheet before the court within the period of 180 days, as such, the appellant was entitled to grant of bail, as a matter of right.

13. Learned counsel for the appellant has relied upon the judgment of Hon'ble Supreme Court in case titled '**Fakhrey Alam Vs. The State of Uttar Pradesh**' reported as **(2021) 2 Crimes 171**.

14. The Supreme Court while granting default bail to the accused in **Fakhrey Alam's** case (supra), had observed as under;

“We do not think that the State can take advantage of the fact that in one case there is one charge sheet and supplementary charge sheets are used to extend the time period in this manner by seeking to file the supplementary charge sheet qua the offences under the UAPA Act even beyond the period specified under Section 167 of the Cr.P.C beyond which default bail will be admissible, i.e, the period of 180 days. That period having expired and the charge sheet not having been filed qua those offences, we are of the view the appellant would be entitled to default bail in the aforesaid facts and circumstances.”

The Supreme Court in the said judgment had further observed:

“that the consequences of the UAPA Act are drastic in punishment and in that context, it has been held not to be a mere statutory right but part of the procedure established by law under Article 21 of the Constitution of India.”

15. It would be apt to have a glimpse on Section 173(8) of Cr.PC, which provides as under:

“Nothing in this Section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such

evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).”

16. In a case titled ‘**Rakesh Kumar Paul Vs. State of Assam**’ reported as (2017) 15 SCC 67, the Hon’ble Apex Court had observed as:-

“The right to get ‘default bail’ is a very important right. Ours is a country where millions of our countrymen are totally illiterate and not aware of their rights. A Constitution Bench of this Court in the case of Sanjay Dutt (supra) has held that the accused must apply for grant of ‘default bail’. As far as [Section 167](#) of the Code is concerned, Explanation I to [Section 167](#) provides that notwithstanding the expiry of the period specified (i.e. 60 days or 90 days, as the case may be), the accused can be detained in custody so long as he does not furnish bail. Explanation I to [Section 167](#) of the Code reads as follows:

“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.”

The accused does not have to make out any grounds for grant of bail. He does not have to file a detailed application. All he has to aver in the application is that since 60/90 days have expired and charge-sheet has not been filed, he is entitled to bail and is willing to

furnish bail. This indefeasible right cannot be defeated by filing the charge-sheet after the accused has offered to furnish bail.

- 17.** The right to default bail, as has been held by the judgments of the Apex Court of India, is not mere statutory right under the first proviso to Section 167(2) of the Criminal Procedure 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) of CrPC are fulfilled.
- 18.** Under the Unlawful Activities (Prevention) Act read with National Investigation Agency (NIA) Act, the Special court has jurisdiction to extend time to 180 days under the first proviso in Section 43-D(2)(b) of UA(P) Act, 1967.
- 19.** At the cost of repetition, it is noted that the appellant arrested on 17.07.2021 in the aforesaid case, moved an application for a regular bail before the Special Court under NIA Act Srinagar. It is an admitted case of both the parties that the period of 90 days in an application moved by the Investigating agency was extended to 180 days by the court below. The charge sheet was presented against all the accused including the appellant as A4 on 20.01.2022 for the commission of offences punishable under Sections 13, 18, 20 and 38 UA(P) Act 1967 and under Sections 121, 121-A, 120-B, 124-A, 506 and 34 IPC after obtaining Government sanction as required under Section 45(2) UA(P) Act. However, in Paragraph 11.51 of the charge sheet, it was recorded that the investigation shall continue in

respect of A3, whereas investigation regarding additional aspects and role of A2 and A4 (appellant herein) shall continue and supplementary charge sheet under Section 173(8) shall be submitted before the court.

20. The appellant moved an application for regular bail before the court below on 07.02.2022, however, on 08.02.2022 he moved another application seeking default bail on the plea that complete charge sheet has not been produced within the prescribed and extended time period of 180 days.

21. Right of grant of default bail becomes complete on expiry of the statutory period before a charge sheet is filed. So long as an application has been made for default bail on expiry of statutory 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 has to be granted.

22. It is an admitted fact that the plea for grant of default bail was raised after charge sheet had been laid on 179th day of arrest of the appellant, whereas the extension had already been granted by the competent court to complete the investigation within 180 days.

23. Hon'ble Apex Court in a case titled **Bikramjit Singh Vs. State of Punjab** reported as (2020) 10 SCC 616, while setting aside the judgment of **Punjab & Haryana High Court** reported as 2019 SCC Online P& H 5333, held in the concluding **Para 36**, which reads as follows:-

“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.”

24. The reliance placed by learned counsel for the appellant on the cases of **Fakhrey Alam** and **Bikramjit Singh** (supra) have been rightly distinguished by the court below for having different facts. In **Fakhrey Alam’s** case, the charge sheet had been laid even after extended period of 180 days against the accused, whereas in **Bikramjit Singh’s** case extension had been granted not by the competent court under UA(P) Act but by a Magistrate in the State of Punjab, whereas in the case on hand the extension had been granted by the Special court under NIA Act Srinagar (court below) and the charge sheet, after obtaining sanction to prosecute from the Government, was laid within 180 days from the date of arrest of the appellant.

25. The only question to be addressed as pressed by learned counsel for the appellant is that the complete charge sheet had not been

produced in view of the **Paragraph 11.51** of the charge-sheet, as extracted above, and as to whether the contention of the appellant with regard to compulsive bail was turned down rightly or wrongly by the court below.

26. The Special court on submission of the charge sheet not only took cognizance by summoning the accused but vide order dated 25.02.2022 charge sheeted the accused Nos. 2 to 4 including the appellant as A4 for the commission of offences punishable under Sections 13, 18, 20 and 38 of UA(P) Act and Section 120-B of IPC, whileas they were discharged from the commission of offences punishable under Sections 121/121-B/124-A, 468, 506 and 34 IPC.
27. In view of this development that there was sufficient material on record to summon the accused by taking cognizance and further framing of charge for trial against the accused including the appellant it cannot be said that the charge sheet was incomplete.
28. In our considered opinion, the further investigation in terms of Section 173(8) of Cr.PC cannot be a reason to say that the charge sheet filed against the accused including the appellant, whereon the cognizance was taken and the charges were also framed, can be incomplete so as to entitle the accused/appellant to grant of compulsive / statutory / default bail. **The test to be applied while considering a plea for default bail in terms of Section 167(2) CrPC, in a case where charge sheet is laid with a stipulation that further investigation is to be conducted in terms of Section 173(8) CrPC, is that whether affirmative action of taking cognizance and consideration of charge / discharge can be taken, on the basis of the charge sheet laid. In our considered opinion,**

if further action of cognizance and consideration of charge / discharge can be taken on the basis of the charge sheet laid, without waiting for further investigation and supplementary charge sheet, when such a charge sheet is laid within prescribed period, plea of statutory /default / compulsive bail is untenable.

29. The fact that the charge-sheet, complete in all respects to take cognizance and for framing of charge even without waiting for further investigation as required under Section 173(8) of Cr.PC and also supplementary charge-sheet, the same has been filed within statutory period of 180 days. Even the plea raised by the appellant at a later stage on 08.02.2022, cannot be construed to have been raised before filing of charge-sheet on 20.01.2022.

30. The court below has, thus, rightly rejected the plea of default bail raised by the appellant herein. The appellant, however, reserves a right to be admitted to bail as a statutory / default / compulsive bail, in the supplementary charge-sheet, if laid on further investigation, after the extended period of 180 days.

31. For the above stated reasons, the appeal on hand for setting aside the impugned order and grant of bail, is found without any merit and substance. As a result, the appeal is dismissed and impugned order is upheld.

32. Copy of this judgment be sent down for information.

**(M. A. CHOWDHARY)
JUDGE**

**(ALI MOHAMMAD MAGREY)
JUDGE**

Srinagar
07.07.2022
Muzammil. Q

Whether the order is reportable: Yes / No