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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.**

CRIMINAL APPEAL NO. 502 OF 2020

Shaikh Moin Shaikh Mehmood,

...**Appellant**
(Orig. Accused No. 3)

Versus

State of Maharashtra,
Through Ramtirth Police Station,
Biloli, Tq. Biloli, Dist. Nanded. ...**Respondent**

.....

Shri. S. S. Gangakhedkar and Shri. Sandeep D. Munde, Advocate for the appellant
Shri. S. G. Sangle, APP for respondent/State

.....

**CORAM : RAVINDRA V. GHUGE
AND
B. U. DEBADWAR, JJ.**

DATED : 24TH SEPTEMBER, 2020

ORAL ORDER [PER Ravindra V. Ghuge, J.] : -

1. By this appeal, the appellant-Original Accused No. 3 has set out prayer clauses (B), (C) and (D) as under :-

> "(B) The Appellant may kindly be enlarged on bail in connection with the Crime No.92/2020 lodged at Ramtirth Police Station, Tq. Biloli, Dist. Nanded for the offence punishable U/sec. 394, 397 of I.P.C. and section 3/25 of Arms Act and U/sec.3(1)(ii) of the MCOC Act.

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(C) By and order of this Hon'ble Court, kindly quashed and set aside the Order dated 02.09.2020 (Exhibit-F) passed by the learned Special Court, Biloli thereby granting extension of time in view of provisions of Section 21(b) of MCOC Act r/w Section 167(2) of Cr.P.C.

(D) By and order of this Hon'ble Court, kindly quashed and set aside the order dated 10.09.2020 (Exhibit-G) passed by the learned Special Court, Biloli in connection with Crime No.92/2020 lodged at Ramtirth Police Station Tq. Biloli, Dist. Nanded for the offence punishable U/sec. 394, 397 of IPC and Section 3/25 of Arms Act and U/sec.3(1)(ii) of the MCOC Act and consequently the application may kindly be allowed and the appellant be enlarged on bail by putting appropriate conditions and for that purpose necessary orders be passed."

2. We have heard the strenuous submissions of the learned Advocate on behalf of the appellant and the learned APP on behalf of the State, who has vehemently contended that this appeal deserves to be rejected. With the assistance of the learned Advocate, we have gone through the appeal paper book.

3. The learned Advocate for the appellant has placed reliance upon following judgments :-

i) Mustaq Ahmed Mohammed Isak and Ors. v. State of Maharashtra [AIR 2009 Supreme Court 2772]

ii) State of Maharashtra Vs. Rahul Ramchandra Taru [2011 All.M.R.(Cri) 2100]

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iii) Union of India through C.B.I. v. Nirala Yadav alias Raja Ram Yadav @ Deepak Yadav [AIR 2014 SC 3036]

iv) Prasad Shrikant Purohit Vs. State of Maharashtra & Anr. [(2015) 7 SCC 440]

v) Saquib Abdul Hamid Nachan Vs. State of Maharashtra [AIR 2017 SC (Supp) 40]

vi) Sachin Ramdeo Rathod and Others Vs. State of Maharashtra [2019 ALL.M.R.(Cri) 801]

vii) State of Mahrashtra and Ors. Vs. Lalit Somdatta Nagpal & Anr. [(2007) 4 SCC 171]

viii) Rakesh Kumar Paul Vs. State of Assam [AIR 2017 SC 3948]

4. It is undisputed that the appellant is original accused No.3 in FIR bearing Crime No. 0092 of 2020 dated 02-06-2020 lodged at the Ramtirth Police Station, Biloli, Dist. Nanded for the offences punishable under Sections 394 and 397 of the Indian Penal Code and Section 3/25 of the Arms Act, 1959. He was arrested on 02-06-2020. The Special Inspector General of Police, Nanded Range granted approval for applying the provisions of Maharashtra Control of Organized Crimes Act, 1999, (hereinafter referred to as “MCOC Act”). On 30-07-2020 the provisions under Section (3)(1)(ii) of the MCOC Act were added in the FIR.

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5. On 31-08-2020, the 90 days period for filing of the charge-sheet, in view of the arrest of the appellant on 02-06-2020, expired. On 02-09-2020, the Investigating Officer made an application under Section 21(2)(b) of the MCOC Act to the Special Court seeking extension of time for tendering the charge-sheet. The learned Court perused the application of the prosecutor, report of the Investigating Officer and say of accused No.4 and heard the parties at length. The appellant herein contends that he (Accused No.3) was not served with notice and was not heard.

6. In the above backdrop, the trial Court has allowed the application dated 02.09.2020 and has extended the time for filing the charge-sheet against accused nos. 3 & 4, till 30.09.2020 (extension of 30 days). The appellant moved an application on 10.09.2020 praying for default bail in view of Section 167(2) of the Cr.P.C. By the impugned order dated 10.09.2020, the said application has been rejected by the Special Court. It was concluded that the advocate representing accused no. 4, was also representing accused no. 3 and had entered a Vakalatnama on behalf of both. He had submitted a common reply on 02.09.2020 and, therefore, a separate notice was not issued to the present appellant-accused no. 3 as the same advocate represented and conducted the matter on behalf of both the

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accused. So also, the order of extension of time dated 02.09.2020 was not challenged by the present appellant before this Court.

7. The learned advocate for the appellant has raised the issue as regards submission of a report by the Public Prosecutor and that no such report was tendered in compliance of Section 21(2)(b). He, therefore, submits in the light of the judgment delivered by the Hon'ble Apex Court in the matter of **Nirala Yadav** (supra), **Saquib Abdul Hamid** (supra), **Aslam Babalal Desai Vs. State of Maharashtra, AIR 1993 SC 1** & **Rajnikant Jivanlal and another Versus Intelligence Officer, Narcotic Control Bureau, New Delhi (1989) 3 SCC 532**, to buttress his contention that unless the public prosecutor submits a report, the Special Court is not to consider the request for extension of time. He further submits that, the moment the period of 90 days for filing a charge-sheet expires, an indefeasible right is created in favour of the arrested accused and his detention in Jail has to end instantaneously in the light of Section 167(2) of the Cr.P.C.

8. Shri. Gangakhedkar, learned advocate for the appellant, tenders an apology with regard to the contention in the appeal memo that this appellant was not served with notice by the Special Court when the application u/s 21(2)(b) of the MCOC Act was filed and heard and that it is now revealed, in the light of the submissions of

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the learned APP based on the impugned order of the Special Court dated 10.09.2020, that Advocate Shri Kulkarni had appeared on behalf of the appellant as well along with accused no. 4. He regrets that the said ground has been taken in the appeal on the basis of the briefing received by him.

9. The learned APP has strenuously opposed the appeal contending that a hyper technical approach cannot be taken in such matters, especially when the appellant has a history of commission of offences of serious nature. His chequered criminal record is available and the report submitted by the SDPO, Sub-Division, Dharmabad dated 18.08.2020 and 02.09.2020, reflects the same.

10. He strenuously contends that the learned Prosecutor tendered an application on 02.09.2020 and annexed the reports of the SDPO. He has further set out in the application the grounds for seeking extension of time. Investigation in respect of the pistol and the place from where the appellant procured it was to be carried out. The angle of other persons being involved in the crime at issue was also to be investigated. It is only after such investigation that the charge-sheet could be filed and this would require an extension of 30 days.

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11. In response to the judgments cited, the learned APP submits that such case law has to be applied to cases based on the facts and circumstances of each case. Merely because a detailed report has not been filed by the Public Prosecutor, would not be a ground for refusing extension of time when a detailed report has been filed by the SDPO. If bail is granted to such accused, his endeavour would be to destroy evidence. The history of offences committed by the present appellant indicates that he has no respect for law and he does not hesitate in taking the law in his own hands.

12. In the light of the submissions of the learned Advocate, we have perused the report of the SDPO dated 02.09.2020 insofar as the progress of the investigation and the reasons for seeking extension of time for submitting the charge-sheet. However, we find that the Public Prosecutor has tendered a single page application in which it is stated as under: -

> "Respected Sir,
> The prosecution humbly submits as under: -
>
> 1. That, in above matter I.O. to investigation in respect of pistol and place from where accused got that pistol. Still he has to investigate in respect of involvement of other persons in crime and these contentions with other persons. The I.O. has to investigate in respect of property of accused persons.
>
> 2. That, the I.O. requires more time to investigate in respect of above fact and to file charge-sheet in this Hon'ble

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Court. So one month time is required for filing charge-sheet in above matter.

3. That, offence is serious one and accused are habitual one therefore, detail investigation is required in the present matter."

Prayer

That, one month permission kindly be granted against accused i.e. 3. Shaikh Moin & 4. Shaikh Avej in the matter, till there MCR of accused no. 3 & 4 may kindly be extended and oblige.

Date : - 02/09/2020 The State
Through Through P.S. Ramtirth
Sd/-"

13. In the light of the rival submissions, we have to first assess as to whether the above reproduced application of the prosecutor could be termed as being his report. In **Nirala Yadav** (supra), on the expiry of 90 days, the prosecution neither filed a charge-sheet on or before the 90th day, nor did it file an application for extension of time. Subsequently, an application was filed after the expiry of 90 days and the accused was called upon to file a rejoinder affidavit. The Hon'ble Apex Court concluded that the moment the 90 days have expired, a right is created in favour of the accused and a court cannot act to extinguish such right which the law so confers upon him. The law has to prevail and the prosecution cannot avail of such subterfuges to frustrate or destroy the legal right of the accused.

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14. In **Saquib Abdul Hamid** (supra), the Hon'ble Apex Court dealt with the extension of the period of investigation and the entitlement of an accused to default bail. The MCOC Act was at issue in this case and the Hon'ble Apex Court observed in paragraph nos. 6 to 10 as under:

> 6. We have gone through the orders that are passed by the High Court as well as the Special Judge, MCOCA. The High Court has stated the grounds which were taken by the public prosecutor in the application for extention of time and on that basis came to the conclusion that the order of the Special Judge did not adequately deal with those grounds and, therefore, suffered with non-application of mind. The relevant portion of the order of the high Court is reproduced below:
>
> "It therefore appears that the Special Court has not considered the grounds for extension of time in its proper perspective as the order does not reflect any observation that the grounds set out by the Public Prosecutor are not justified. It is not even reflected that the Special Court was satisfied with the manner of investigation or not. There is nothing to indicate that the Special Court has considered each and every ground set out by the Public Prosecutor for seeking extension of time. There is no finding recorded to show that further investigation is not a necessary pre-requisite for filing of the charge-sheet."
>
> 7. Learned counsel for the appellant has argued that the High Court has simply found error in the approach of the Special Judge with the observations that the grounds stated by the Public Prosecutor in his application have not been considered satisfactorily. However, the High Court has not itself gone into the question as to whether the conditions contained in the proviso to **Section 21(2)(b)** were satisfied or not. It is further argued that while quashing the order of the Special Judge and allowing the appeal, the High Court has not given any directions extending the time or allowing the application of the Public Prosecutor for extention of time. On the basis of the aforesaid arguments, it is pleaded that since there is no specific extention and on the expiry of 90 days from the date of arrest since investigation could not be completed, the appellant got indefeasible right to get bail under **Section 167(2) of the Cr.P.C.**
>
> 8. Learned counsel for the respondent-State, on the other

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> hand, submitted that in the detailed order passed by the High Court, the High Court had even set out the grounds which were raised by the Public Prosecutor in his application seeking extention of time and once the order is read in its entirety it would clearly reveal that the High Court was satisfied with those grounds warranting extension of time. It is further submitted that since the order of the Special Judge is set aside by the High Court, necessary consequence thereof would be that the application for extension submitted by the Public Prosecutor stands allowed thereby extending the time for completing the investigation by another 90 days.
>
> 9. Though the order of the High Court does not categorically record that it is satisfied with the grounds on which the extension was sought, we ourselves went into each such ground raised by the Public Prosecutor in his application. After perusing the same, we are of the view that none of the grounds mentioned in the application warrant for an extension for further period of 90 days to complete the investigation.
>
> 10. No doubt, in the meantime, chargesheet has been filed. We are informed that application for discharge submitted by the appellant has also been dismissed and the trial has commenced. However, in the instant case, we are only concerned with the right of the appellant to get statutory bail under **Section 167(2) of the Cr.P.C. read with Section 21(2) of MCOCA.** Once we find that the order of the Special Judge in rejecting the application for extension of time was proper and there was no reason to set aside the same, the appellant herein shall be entitled to consideration of his application filed under **Section 167(2) of the Cr.P.C.** which was filed on 02.11.2012. We, thus, set aside the order of the High Court and direct the Special Judge to dispose of such application filed by the appellant on its own merits.

15. In **Aslam Babalal Desai** (supra), Hon'ble Justice Ahmedi, speaking for the majority, referred with approval to the law laid down in Rajnikant Jivanlal (supra) wherein it was observed as under:

> "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 chargesheet before the

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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."

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23. WE may at this stage, also on a plain reading of clause (bb) of subsection (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of

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the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "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" as occurring in clause (bb) in Ss. (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court shall release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the default of the prosecution becomes indefeasible and cannot be defeated by reasons other than those contemplated by Ss. (4) of Section 20 as discussed in the earlier part of this judgment. We are unable to agree with Mr. Madhava Reddy or the Additional Solicitor General Mr. Tulsi that even if the public prosecutor presents the request of the investigating officer to the court or forwards the request of the investigating

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officer to the court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a post office of the investigating agency nor its forwarding agency but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of Ss. (4) of Section 20. Since the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report fails in the performance of one of its essential duties and renders its order under clause (bb) vulnerable. Whether the public prosecutor labels his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the face of it that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (supra). Even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstratroi of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension."

16. It is thus obvious that the Hon'ble Apex Court has defined the role of the Public Prosecutor and has considered it to be a one of

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applying mind independently to the request of the Investigation Agency, before submitting his report to the Special Court approving the request for extension of time. He is not a mere postman or a forwarding agency. If he agrees with the reasons cited by the Investigation Agency, he would prepare his own independent report to assist the Special Court to decide whether the time period needs to be extended beyond 90 days and to a maximum of 180 days. If he is not convinced, he has the freedom to disagree with the reasons cited by the Investigation Agency and it is within his power in refusing to forward a report. The essence is that he must be convinced that the Investigation Agency is rapidly progressing with the investigation and for justifiable reasons, it is unable to complete the investigation within the prescribed time frame. This, therefore, indicates that the satisfaction of the public prosecutor, with regard to the progress in the investigation is paramount and the reasons being cited for not having completed the investigation within the time limit, is an obligation in law.

17. We find that, Section 21(2)(b) of the MCOC Act and Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 are practically identical. So also, Section

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49(2)(b) of the Prevention of Terrorism Act, 2002 which replaced the TAD Act, also carries an identical provision.

18. For the sake of brevity, the above stated provisions are reproduced as under:

21(2)(b) of the MCOC Act

21(2)(b) 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 ninety days, the Special Court shall extend the said period upto one hundred and eighty days, 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 ninety days"

Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987

S. 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']

Section 49(2)(b) of the Prevention of Terrorism Act, 2002

49(2)(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 Special Court shall extend the said period up to one hundred and eighty days, on the report of the Public Prosecutor indicating the

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progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety 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 from 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."

19. We are, therefore, of the considered view that the intent and the object of the legislature in all these enactments was aimed at protecting the personal liberty of an accused and fetters were imposed on the investigation agency with regard to completion of investigation within the time frame. Extension of the time frame was permissible under stringent conditions.

20. The role of the public prosecutor is therefore obvious and very much pronounced/significant in view of the above reported judgments. It is in the backdrop of this significant role that he has to play, that we are examining the application filed by the prosecutor in the instant case, which is reproduced in para 12 herein above.

21. Notwithstanding the strenuous submissions of the learned APP - Shri Sangle, we find in the case in hand, the application tendered "through the APP" can be hardly said to be a report of the

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prosecutor. A representative of the Police Station, Ramtirth is shown to have signed below the said application. In fact, the certified copy of the application placed before us indicates that no authority has signed below the said application and the prosecutor has signed the said application which hardly could be said to be his report.

22. In the light of the above, we deem it advantageous, for the benefit of the litigants and the lawyers, to observe that a report as understood under the above reproduced provisions of the various enactments, has to be an independent report comprising of (a) reasons evidencing the personal satisfaction of the public prosecutor as regards the progress in investigation made, (b) the reasons for which the investigation could not be completed and (c) the object to be achieved through investigation for which an extended period of time is necessary. These ingredients have to form a part of the report of the prosecutor and he has to tender the said report to the Special Court under his signature. It cannot be in the form of a miscellaneous application to be filed for seeking extension of time. In addition to his report, he should append the report of the Investigation Agency so as to convince the Special Court that extension needs to be granted.

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23. It is settled by a judgment of this Court in the matter of **Sachin Namdeo Rathod** (supra) that the accused has to be served with a notice and has to be heard before the court passes an order of granting extension. So also, considering the law laid down in **Nirala Yadav** (supra), the request for extension of time has to be filed before the Special Court on or before the last day of the time frame available in law for investigation since the moment the time frame expires, the right to the accused under Section 167(2) of the Cr.P.C. is born and that right accrues to him instantaneously. Such right in law is an indefeasible right.

24. The learned APP Shri. Sangle has strenuously canvassed that the I.O. himself was down with Corona virus infection and was treated and quarantined. The SDPO has narrated his practical difficulties in his report dated 02.09.2020 expressing that it was becoming extremely difficult to continue the investigation at an expected pace since there was a lock-down, inter-district and across the border movements were restricted and visiting people for investigating into the crime was almost difficult for the fear of physical contact and the spread of the virus.

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25. At first blush, we were impressed with the said submission as the ld. APP had voiced his practical difficulties which we surely can perceive. However, it was brought to our notice, that the Hon'ble Apex Court (three Judges bench) has delivered an order on 19.06.2020 in Criminal Appeal No. 452 of 2020 filed by ***S. Kasi Vs State*** reported in ***2020(3) MLJ (Crl) 229***. The Madurai Bench had rejected the default bail application of the accused u/s 439 of the Cr.P.C. r/w Section 167(2) of the Cr.P.C., in the backdrop of Covid-19 pandemic. It was held by the Apex Court in paragraph nos. 19 to 32 as under:

> 19. Learned Single Judge in paragraph 13 of the impugned judgment has also observed that the lockdown announced by the Government is akin to proclamation of Emergency. Learned Single Judge has also referred to Financial Emergency under Article 360 of the Constitution. Learned Single Judge also noticed that presently though the State is not passing through Emergency duly proclaimed but the whole nation has accepted the restrictions for the well-being of the mankind. Let us also examine as to whether in event of proclamation of Emergency under Article 352 of the Constitution, whether right to liberty as enshrined under Article 21 stands suspended?
>
> 20. We may recall the Constitution Bench Judgment of this Court in ***Additional District Magistrate, Jabalpur versus Shivakant Shukla, (1976) 2 SCC 521***, where majority of the Judges (**Justice H. R. Khanna dissenting**) had taken the view that after proclamation of Emergency under Article 352, no proceedings can be initiated for enforcement of right under Article 21. **Justice A. N. Ray, C.J.**, with whom three other Hon'ble Judges have concurred in paragraph 136 and paragraph 137 laid down following:-
>
>> "136. First, In view of the Presidential Order dated June 27, 1975 under clause (1) of Article 359 of our Constitution no person has locus standi to move any writ petition under Article 226 before a High Court

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for Habeas Corpus or any other writ or order or direction to enforce any right to personal liberty of a person detained under the Act on the grounds that the order of detention or the continued detention is for any reason not under or in compliance with the Act or is illegal or mala fide.

137. Second, Article 21 is the sole repository of rights to life and personal liberty against the State. Any claim to a writ of habeas corpus is enforcement of Article 21 and, is, therefore, barred by the Presidential Order."

21. Another Three-Judge judgment of this Court in ***Union of India and others versus Bhanudas Krishna Gawde and others, (1977) 1 SCC 834***, took the same view following the majority of this Court in **ADM, Jabalpur versus Shivakant Shukla**. In paragraph 23, following was observed: -

"23.........Accordingly, if a person was deprived of his personal liberty not under the Defence of India Act or any rule or order made thereunder but in contravention thereof, his locus standi to move any court for the enforcement of his rights, conferred by Articles 21 and 22 of the Constitution was not barred. More or less, similar was the pattern and effect of the presidential Order dated November 16, 1974. The position with respect to the Presidential Orders dated 27, 1975 and January 8, 1976 is, however, quite different. These orders are not circumscribed by any limitation and their applicability is not made dependent upon the fulfilment of any condition precedent. They impose a total or blanket ban on the enforcement inter alia of the fundamental rights conferred by Articles 19, 21 and 22 of the Constitution which comprise all varieties or aspects of freedom of person compendiously described as personal liberty. [See *A.K. Gopalan v. State of Madras, AIR 1950 SC 27; Kharak Singh v. State of U.P., AIR 1963 SC 1295 and A.D.M. Jabalpur v. Shivakant Shukla (supra).*] Thus there is no room for doubt that the Presidential orders dated June 27, 1975, and January 8, 1976, unconditionally suspend the enforceability of the right conferred upon any person including a foreigner to move any court for the enforcement of the rights enshrined in Articles 14, 19, 21 and 22 of the Constitution."

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22. Article 359 of the Constitution was amended by the Forty-fourth Constitutional Amendment Act, 1978. In sub-Article (1) of Article 359, the expression "except Articles 20 and 21 have been inserted". After the amendment, Article 359(1) reads as follows:-

> "**Suspension of the enforcement of the rights conferred by Part III during emergencies.**
>
> 359(1). Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Article 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order"

23. The sting of the judgment of this Court in ***Additional District Magistrate, Jabalpur versus Shivakant Shukla (supra)***, and retrograde steps taken in respect of right protected under Article 21 was, thus, immediately remedied by the Parliament by the above Constitutional Amendment. The minority judgment of Justice H.R. Khanna in ***Additional District Magistrate, Jabalpur versus Shivakant Shukla (supra)*** has held that State has no power to deprive the person of his life or liberty without the authorities of law. In paragraphs 525 and 530, Justice Khanna observed:-

> "525.... I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law. Many modern Constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness.

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530. Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Article 21 incorporates an essential aspect of that principle and makes it part of the fundamental rights guaranteed in Part III of the Constitution. It does not, however, follow from the above that if Article 21 had not been drafted and inserted in Part III, in that event it would have been permissible for the State to deprive a person of his life or liberty without the authority of law. No case has been cited before us to show that before the coming into force of the Constitution or in countries under the rule of law where there is no provisions corresponding to Article 21, a claim was ever sustained by the courts that the State can deprive a person of his life or liberty without the authority of law……………………………..."

24. We may notice that the Constitution Bench Judgment of this Court in ***A.D.M., Jabalpur versus Shivakant Shukla (supra)***, foundation of which judgment was knocked out by Forty-fourth Constitutional Amendment has been formally over-ruled by Seven - Judges Constitution Bench Judgment in ***K.S. Puttaswamy and another versus Union of India and others, (2017) 10 SCC 1. Dr. D.Y. Chandrachud, J.***, speaking for the Court in paragraphs 136 and 139 held:-

"**136**. The judgments rendered by all the four judges constituting the majority in ADM Jabalpur are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in Kesavananda Bharati, primordial rights. They constitute rights under Natural law. The human element in the life of the individual is integrally

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founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the state without either the existence of the right to live or the means of enforcement of the right. The right to life being inalienable to each individual, it existed prior to the Constitution and continued in force under Article 372 of the Constitution. Khanna, J. was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the state on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the Rule of Law which imposes restraints upon the powers vested in the modern state when it deals with the liberties of the individual. The power of the Court to issue a Writ of Habeas Corpus is a precious and undeniable feature of the rule of law.

139. ADM Jabalpur must be and is accordingly overruled. We also overrule the decision in Union of India v. Bhanudas Krishna Gawde, which followed ADM Jabalpur."

25. We, thus, are of the clear opinion that the learned Single Judge in the impugned judgment erred in holding that the lockdown announced by the Government of India is akin to the proclamation of Emergency. The view of the learned Single Judge that the restrictions, which have been imposed during period of lockdown by the Government of India should not give right to an accused to pray for grant of default bail even though charge sheet has not been filed within the time prescribed under Section 167(2) of the Code of Criminal Procedure, is clearly

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erroneous and not in accordance with law.

26. We, thus, are of the view that neither this Court in its order dated 23.03.2020 can be held to have eclipsed the time prescribed under Section 167(2) of Cr.P.C. nor the restrictions which have been imposed during the lockdown announced by the Government shall operate as any restriction on the rights of an accused as protected by Section 167(2) regarding his indefeasible right to get a default bail on non-submission of charge sheet within the time prescribed. The learned Single Judge committed serious error in reading such restriction in the order of this Court dated 23.03.2020.

27. There is one more reason due to which the impugned judgment of the learned Single Judge deserves to be set aside. A learned Single Judge of Madras High Court in **Crl.OP(MD)No. 5291 of 2020, *Settu versus the State***, had already considered the judgment of this Court dated 23.03.2020 passed in Suo Moto W.P (C) No.3 of 2020 and its effect on Section 167(2) of Cr.P.C. The above was also a case of a bail where the accused was praying for grant of default bail due to non-submission of charge sheet. The prosecution had raised objection and had relied on the order of this Court dated 23.03.2020 passed in Suo Moto W.P (C) No.3 of 2020 claiming that period for filing charge sheet stood extended until further orders. The submission of prosecution was rejected by learned Single Judge. The learned Single Judge had made following observations in paragraphs 14 and 15:-

> "14. Personal liberty is too precious a fundamental right. Article 21 states that no person shall be deprived of his personal liberty except according to procedure established by law. So long as the language of Section 167(2) of Cr.P.C. remains as it is, I have to necessarily hold that denial of compulsive bail to the petitioner herein will definitely amount to violation of his fundamental right under Article 21 of the Constitution of India. The noble object of the Hon'ble Supreme Court's direction is to ensure that no litigant is deprived of his valuable rights. But, if I accept the plea of the respondent police, the direction of the Hon'ble Supreme Court which is intended to save and preserve rights would result in taking away the valuable right that had accrued to the accused herein.

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> 15. Of course, the construction placed by me will have no application whatsoever in the case of certain offences under certain special laws, such as Unlawful Activities (prevention) Act, 1967 and NDPS Act, 1985. For instance, Section 36-A (4) of the NDPS Act enables the investigation officer to apply to the special court for extending the period mentioned in the statute from 180 days to 1 year if it is not possible to complete the investigation. Thus, under certain statutes, the prosecution has a right to apply for extension of time. In those cases, the benefit of the direction of the Hon'ble Supreme Court made 23.03.2020 in Suo Motu Writ Petition (Civil) No.3 of 2020 will apply. But, in respect of the other offences for which Section 167 of Cr.P.C. is applicable, the benefit of the said direction cannot be availed."

28. The Prayer of the accused in the said case for grant of default bail was allowed. The claim of the prosecution that by order of this Court dated 23.03.2020, the period for filing charge sheet under Section 167 Cr.P.C. stands extended was specifically rejected.

29. The view taken by learned Single Judge of Madras High Court in **Settu versus The State (supra)** that the order of this Court dated 23.03.2020 passed in Suo Moto W.P (C) No.3 of 2020 does not extend the period for filing charge sheet under Section 167(2) Cr.P.C. has been followed by Kerala High Court as well as Rajasthan High Court. Kerala High Court in its judgment dated 20.05.2020 in **Bail Application No. 2856 of 2020 – Mohammed Ali Vs. State of Kerala and Anr**. after noticing the contention raised on the basis of order of this Court dated 23.03.2020 passed in Suo Moto W.P (C) No.3 of 2020 rejected the said contention and followed the judgment of the learned Single Judge of Madras High Court in **Settu versus The State (supra)**. Kerala High Court in paragraph 13 of the judgment observes: -

> "13. I respectfully concur with the exposition of law laid down by the learned Single Judge of the Madras High Court in Crl.O.P.(MD) No.5291 of 2020 as well by the learned Single Judge of Uttarakhand High Court when their lordships held that the investigating agency cannot benefit from the directions issued by the Supreme Court in the Suo moto Writ Petition."

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30. Rajasthan High Court had occasion to consider Section 167 as well as the order of this Court dated 23.03.2020 passed in Suo Moto W.P (C) No.3 of 2020 and Rajasthan High Court has also come to the same conclusion that the order of this Court dated 23.03.2020 has no consequence on the right, which accrues to an accused on non-filing of charge sheet within time as prescribed under Section 167 Cr.P.C. Rajasthan High Court in **S.B. Criminal Revision Petition No. 355 of 2020 – Pankaj Vs. State** decided on 22.05.2020 has also followed the judgment of learned Single Judge of the Madras High Court in **Settu versus The State (supra)** and has held that accused was entitled for grant of the default bail. Uttarakhand High Court in **First Bail Application No.511 of 2020 – Vivek Sharma Vs. State of Uttarakhand** in its judgment dated 12.05.2020 has after considering the judgment of this Court dated 23.03.2020 passed in Suo Moto W.P (C) No.3 of 2020 has taken the view that the order of this Court does not cover police investigation. We approve the above view taken by learned Single Judge of Madras High court in **Settu versus The State (supra)** as well as the by the Kerala High Court, Rajasthan High Court and Uttarakhand High Court noticed above.

31. Learned Single Judge in the impugned judgment has taken a contrary view to the earlier judgment of learned Single Judge in **Settu versus The State (supra)**. It is well settled that a coordinate Bench cannot take a contrary view and in event there was any doubt, a coordinate Bench only can refer the matter for consideration by a Larger Bench. The judicial discipline ordains so. This Court in ***State of Punjab and another versus Devans Modern Breweries Ltd. and another, (2004) 11 SCC 26***, in paragraph 339 laid down following:-

> *"339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a Larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1 followed in Union of India Vs. Hansoli Devi, (2002) 7 SCC 273. But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores (supra) and K.K. Narula (supra) both have been*

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> *rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority."*

32. Learned Single Judge did not follow the judicial discipline while taking a contrary and diagonally opposite view to one which have been taken by another learned Single Judge in ***Settu versus The State (supra)***. The contrary view taken by learned Single Judge in the impugned judgment is not only erroneous but also sends wrong signals to the State and the prosecution emboldening them to act in breach of liberty of a person.

33. We may further notice that learned Single Judge in the impugned judgment had not only breached the judicial discipline but has also referred to an observation made by learned Single Judge in ***Settu versus The State*** as uncharitable. All Courts including the High Courts and the Supreme Court have to follow a principle of Comity of Courts. A Bench whether coordinate or Larger, has to refrain from making any uncharitable observation on a decision even though delivered by a Bench of a lesser coram. A Bench sitting in a Larger coram may be right in overturning a judgment on a question of law, which jurisdiction a Judge sitting in a coordinate Bench does not have. In any case, a Judge sitting in a coordinate Bench or a Larger Bench has no business to make any adverse comment or uncharitable remark on any other judgment. We strongly disapprove the course adopted by the learned Single Judge in the impugned judgment.

34. In view of the foregoing discussions, we allow this appeal, set aside the judgment of learned Single Judge, direct that appellant be released on default bail subject to personal bond of Rs.10,000/- with two sureties to the satisfaction of trial court.

[Emphasis supplied]

26. In the case in hand, the impugned order dated 02.09.2020, passed by the Special Court reads as under:

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"ORDER

Perused application, report of I.O., say of accused No.4. Heard both at length. It appears that, the accused No. 1 to 4 are involved in this crime accused N.1 and 2 are released on default bail as per order dated 31.08.2020. On today accused No.1 furnished his surety bond on today after releasing accused No.1. APP filed present application for extension of time of one month for filing charge sheet against accused No.3 and 4. So in view of 21 (b) of MCOC Act as per its proviso - "Special Court shall extend the said period up to one hundred and eighty days, on the report of public prosecution indicating the progress of investigation if it is not possible to complete the investigation within the time. So on present of application and report of IO it appears that, there is progress in the investigation of accused No.3 and 4. So in view of Section 21 (b) of the its proviso considering the nature of offence and short period of present IO one month time extended for further investigation and filing of charge sheet against accused No. 3 and 4 as prayed by learned APP and IO."

27. In view of the above, we find that the impugned order dated 02.09.2020, which is a cryptic and unreasoned order, deserves to be quashed and set aside. Consequentially, the impugned order dated 10.09.2020 rejecting the default bail application of the appellant also deserves to be quashed and set aside. While doing so, we deem it appropriate to note that accused nos. 1 and 2 in the same crime have been granted default bail by the same Special Court under certain conditions. We deem it appropriate to maintain parity with regard to the conditions to be imposed on the present applicant while granting bail.

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28. The Criminal Appeal is, therefore, allowed. The impugned orders dated 02.09.2020 and 10.09.2020 stand quashed and set aside. The default bail application dated 10.09.2020 filed in Crime No. 92 of 2020, stands allowed with the following directions:-

[a] The accused no. 3 - Shaikh Moin Shaikh Mehmood be released on the ground of default bail under Section 167(2) of the Cr.P.C. in Crime No. 92 of 2020 for the offences punishable u/s 394, 397 of the Indian Penal Code, u/s 3/25 of the Arms Act and u/s 3(1)(ii) of the MCOC Act on his furnishing a Personal Bond and a Surety Bond of Rs.1,00,000/- (Rupees One Lakh) with one or more solvent sureties.

[b] The accused no. 3 - Shaikh Moin Shaikh Mehmood shall not tamper with the prosecution witnesses. He shall not commit any offence while on bail. He shall not enter Nanded district except for attending the case, if any, filed against him in future. He shall give his address of residence, outside of Nanded and within Maharashtra State to the concerned Police Station and he shall not leave that district in the State of Maharashtra without taking prior permission of the trial Court.

29. Since we find in several cases that the public prosecutor appearing before the Special Courts are either casual or are unaware

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about the position in law of tendering a Report, as settled by the Hon'ble Apex Court which we have relied upon in this judgment, we direct the learned Registrar (Judicial) to place a copy of this order before the Chief Secretary, State of Maharashtra, the Director General of Police, State of Maharashtra and the Director of Prosecution for perusal, so as to issue directions for enlightening the prosecutors for meticulously following the crystallized position in law of submitting their report with reasons for seeking extension of time for investigation.

[B. U. DEBADWAR]
JUDGE

[RAVINDRA V. GHUGE]
JUDGE

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