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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **BAIL APPLN. 207/2016****JANKI**

..... Petitioner

Through

Mr. Raman Sawhney and Mr. S.N.
Pandey, Advocates

versus

STATE GOVT OF NCT OF DELHI

..... Respondent

Through

Ms. Neelam, APP along with Sub
Inspector Mahinder, PS Rajouri Garden.**CORAM:****HON'BLE MS. JUSTICE SUNITA GUPTA****ORDER****%****11.05.2016**

1. This is an application under Section 167(2) read with Section 439 & 482 of Cr.P.C. moved by the petitioner for grant of regular bail in case FIR No. 1267/2015 under Section 307/34 IPC read with Section 25/27 Arms Act, registered at Police Station Rajouri Garden on the ground that despite noticing that the charge sheet was not submitted within the stipulated period of 90 days yet, the petitioner has not been released on bail.

2. FIR in the instant case was registered on the basis of a complaint made by injured Praveen stating therein that in the evening of 30th August, 2015 at about 8:00 PM, some quarrel was going on amongst Sushil Arora and Ghisa outside the house of the applicant. He along with his friend Rupesh intervened but petitioner exhorted Ghisa and Amru to assault him upon. On this, both of them took out their pistol and fired in the air. Thereafter Amru fired upon him and

the bullet hit on the lower part of his abdomen.

3. The petitioner was arrested on 31st August, 2015 and was sent to judicial custody on the same day. Since the charge sheet was not filed by the Investigating Officer of the case within 90 days, as such, the application u/s 167 (2) Cr.P.C. was moved by the petitioner for grant of compulsive bail. However, the application was dismissed on 30th November, 2015 on the ground that on 28th November, 2015, 90 days custody was not completed and no right of compulsive bail accrued in favour of the accused/petitioner. Moreover, the Trial Court relied upon *Sanjay Dutt vs. State through CBI*, 1994 (5) SCC 410 and *Pragyna Singh Thakur vs. State of Maharashtra*, 2011 X SCC 445 for observing that since the charge sheet has been filed prior to the consideration of the bail application, as such, the petitioner is not entitled for compulsive bail.

4. Counsel for the petitioner submits that the petitioner is entitled to be released on bail, *inter alia*, on the following grounds:-

- (i) Reliance placed by the learned Trial Court on *Sanjay Dutt* (supra) and *Pragyna Singh Thakur* (supra), no longer holds good law in view of subsequent pronouncement by the Hon'ble Supreme Court in *Union of India vs. Nirala Yadav*, MANU/SC/0580/2014.
- (ii) Since the application was moved for grant of compulsive bail u/s 167(2) Cr.P.C. and the charge sheet was not filed

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by the Investigating Officer of the case within 90 days, as such, mere fact that the concerned Magistrate did not pass any order on the same day does not extinguish the right of the petitioner to the grant of bail.

- (iii) One of the grounds taken by the State for not filing the charge sheet within stipulated period is that on 28th November, 2015, one of the co-accused Gheesa was got declared proclaimed offender and the next date, i.e., 29th November, 2015 was Sunday, therefore, the charge sheet was filed on 30th November, 2015. The provisions of Section 10 of General Clauses Act does not apply to such an eventuality and, therefore, the prosecution does not get any benefit of the fact that 29th November, 2015 was a Sunday.
- (iv) The applicant is an old aged ailing lady of about 63 years and has been suffering from heart problem, high blood pressure and is a diabetic patient. She, being a lady, is otherwise entitled to the benefit of provisions of Section 437(i) (ii) Cr.P.C.
- (v) Even on merits, the petitioner has good case as the petitioner was not present at the spot. She had gone to Sunday Bazar which is located about 2 kms from her house. The complainant party barged into her house and broke motorcycle, scooter, fridge and all window pane of

the house. On receipt of information regarding the breaking and destruction of her house from a neighbour, she rushed back to her house and then informed the police at 100 number, on the basis of which, FIR No.1268/2015 was registered at Police Station Rajouri Garden. If the applicant had been present at the time of alleged occurrence as stated in the present FIR, she would not have dared to lodge the FIR at the same time with the same Investigating Officer of the case.

- (vi) The prosecution is relying upon the previous antecedents of the accused, however, it is submitted that she has been acquitted in all those cases. Certified copies of the orders have been placed on record.
- (vii) Lastly, the petitioner has deep roots in the society. There are no chances of her absconding or tampering with the prosecution evidence. She is in custody since 31st August, 2015. As such, she be released on bail.

5. The application is opposed by the learned Additional Public Prosecutor for the State on the ground that the petitioner is not entitled for compulsive bail as after the filing of the charge sheet, the petitioner filed application u/s 167(2) Cr.P.C. There was only one day delay in filing the charge sheet. The same could not be filed in time because one of the co-accused was got declared proclaimed offender

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on 28th November, 2015 and 29th November, 2015 was a Sunday, therefore, on the opening day, the charge sheet was filed.

6. It is further submitted that the petitioner is a registered bad character of bundle A of Police Station Rajouri Garden and is involved in 14 criminal cases. Most of them are u/s 21 of NDPS Act. As such, it is submitted that the petitioner is not entitled to be released on bail.

7. It is not in dispute that the petitioner was arrested on 31st August, 2015. Since the petitioner was booked for offence u/s 307/34 IPC r/w Section 25/27 of Arms Act, as such, the punishment for offence u/s 307 IPC is imprisonment which may extend upto 10 years and if hurt is caused, then it can go up to imprisonment for life. In view of Section 167 (2)(a) Cr.P.C., the charge sheet is required to be filed within a period of 90 days. It is not in dispute that the 90 days in the instant case expired on 28th November, 2015 but the charge sheet has been filed on 30th November, 2015 meaning thereby that it was filed on 92nd day. The bail application u/s 167(2) Cr.P.C. was filed on 28th November, 2015 but it was taken up for hearing on 30th November, 2015 by which date, challan was filed.

8. The question, therefore, for consideration is whether under the provisions of Section 167(2), an accused against whom the charge sheet is not presented before the Court within the period of 90 or 60 days, as the case may be, is entitled to be offered bail as a matter of right. Learned Trial Court relied upon the judgment passed by this

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Court in *Sanjeev Bhatia vs. State* decided on 26th March, 2014, where by relying upon the ratio of *Sanjay Dutt vs. State through CBI*(supra) and *Pragyna Singh Thakur vs. State of Maharashtra*(supra), it was held that once the charge sheet has been filed, Magistrate is to consider the application for bail on merits and not under Section 167(2) Cr.P.C. In that case, the charge sheet was filed on the same day but after the bail application was moved on behalf of the accused. Relying on this judgment, the learned Trial Court dismissed the bail application on the ground that since the charge sheet has been filed prior to consideration of the bail application, therefore, the application does not lie.

9. Learned counsel for the petitioner relies upon *Nirala Yadav*(supra), wherein challenge was to the order passed by learned single Judge of High Court of Judicature at Patna whereby the respondent was enlarged on bail solely on the ground that he was entitled to the benefit under the proviso appended to Section 167(2) of the Code of Criminal Procedure. Hon'ble Supreme Court referred to various judgments passed by the Apex Court and then referred to the judgment of *Udai Mohanlal Acharya vs. State of Maharashtra*, (2001) 5 SCC 453 where after referring to the Constitution Bench decision in *Sanjay Dutt's case*, the majority posed the question about the true meaning of the expression of the following lines:-

"the indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed.

After referring to various decisions, the Court culled out six

conclusions which are necessitous to be produced. They are:-

1. Under Sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.
2. Under the proviso to the aforesaid Sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.
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.
4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.
5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to Sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of used by this Court in Sanjay Dutt case MANU/SC/0554/1994 : (1994) 5 SCC 410 must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to Sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

10. Elaborating further, the Court held that if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished and, therefore, if an accused is entitled to be released on bail by application of the proviso to Sub-section (2) of Section 167 Code of Criminal Procedure, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. The Court further proceeded to say that such an accused, thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in

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accordance with the law laid down by the Court in the case of *Mohd. Iqbal* (supra).

11. The Apex Court referred to the subsequent decisions as well rendered in *Ateef Nasir Mulla v. State of Maharashtra*, (2005) 7 SCC 29; *Union of India v. Hassan Ali Khan and Anr.*, (2011) 10 SCC 235; *Sayed Mohd. Ahmad Kazmi v. State (Government of NCT of Delhi) and Ors.*, (2012) 12 SCC 1 and held that the principle laid down in *Pragyna Singh Thakur* (supra) does not state the correct principle of law. That was a case w/s 302 and various other provisions of Indian Penal Code besides Section 27 of the Arms Act and Section 49(2) (b) of Prevention of Terrorist Activities Act which provided the initial period for filing charge sheet as 90 days, however, the period could be extended on appropriate application moved by the State. On factual matrix of the case, it was found that prior to the date of expiry of 90 days, the prosecution neither had filed charge sheet nor had it filed an application for extension. After the accused filed the application for release on bail, the prosecution submitted an application seeking extension of time for filing of the charge sheet. It was observed that the day the accused filed the application for benefit of the default provision as engrafted under proviso to Sub-section (2) of Section 167 Code of Criminal Procedure the Court required the accused to file a rejoinder affidavit by the time the initial period provided under the statute had expired. There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the learned Magistrate was

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misconceived. He was obliged on that day to deal with the application filed by the accused as required Under Section 167(2) Code of Criminal Procedure. We have no hesitation in saying that such procrastination frustrates the legislative mandate. A Court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. As such, it was observed that there was no error in the order of the High Court in granting the benefit to the respondent and the appeal was dismissed.

12. In view of this latest legal proposition, once the petitioner had filed the application u/s 167(2) on account of default on the prosecuting agency to file the charge sheet within the stipulated period of 90 days, the mere fact that subsequent thereto the charge sheet was filed by the State, the right accrued in favour of the petitioner was not extinguished. Moreover, as held in *Powell Nwawa Ogechi vs. The State (Delhi Administration)*, 1986 Cri. LJ 2081, Section 10 of the General Clauses Act does not apply to such a situation and it cannot be invoked to defeat the accrued right of an accused person to be freed. The right of accused to be released on bail is absolute and indefeasible unless he/she fails to furnish bail.

13. Moreover, coming to the other pleas taken by the petitioner, the role assigned to the present petitioner is that of exhortation to co-accused, however, according to the petitioner, she was not present at

the spot at the time of incident and in fact, according to her, the complainant party had ransacked her house. On getting the information, she rushed back to her house, informed the police and on their arrival lodged a complaint which resulted in registration of cross-FIR. This aspect also requires consideration during the trial of the case.

14. Right of the petitioner to be released on bail is also challenged by the prosecution on account of her involvement in several cases. As per the status report, the petitioner is involved in following cases:-

Sr. No.	Case FIR No.	Police Station	Present status of the case
1.	525/88 u/s 21 NDPS Act	Rajouri Garden	Acquitted
2.	146/90 u/s 21 NDPS Act	Rajouri Garden	Acquitted
3.	270/93 u/s 21 NDPS Act	Rajouri Garden	Acquitted
4.	719/02 u/s 21 NDPS Act	Tialk Nagar	Acquitted
5.	04/03 u/s 21 NDPS Act	Narcotics	Acquitted
6.	53/04 u/s 21 NDPS Act	Narcotics	Acquitted
7.	814/05 u/s 21 NDPS Act	Tilak Nagar	P.T.
8.	11/06 u/s 21 NDPS Act	Narcotics	P.T.

9.	96/06 u/s 21 NDPS Act	Narcotics	Convicted on 7.9.2010 by the court of SIL VK Bansal, ASJ, Rohini court with 3 months sentence and Rs. 15,000/- fine.
10.	418/07 u/s 498A/406/34 IPC	Khyala	P.T.
11.	78/08 u/s 21 NDPS Act	Narcotics	P.T.
12.	101/11 u/s 380/411 IPC	Tilak Nagar	P.T.
13.	447/11 u/s 21 NDPS Act	Tilak Nagar	P.T.
14.	1267/15 u/s 307/34 IPC & 25/27/54/59 Arms Act	Rajouri Garden	P.T.

15. When the status report was filed by the State, at that very juncture, counsel for the petitioner had stated at bar that at present no case is pending against the petitioner and she has been acquitted in all other cases. Subsequent thereto, he has placed on record certified copies of the orders. A perusal of the same goes to show that as per the list of involvements filed by the State, so far as case No. 1 to 6 are concerned, it was reported that the petitioner has been acquitted in those cases. As regards serial Nos. 7,8,10,11,12,13, the petitioner has

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placed on record the certified copies which reflects that now the status of these cases is as under:-

Sl. No.	Present status of the case	Date
7.	Acquitted	19.03.2012
8.	Status report dated 2.4.2016 filed by the State stating therein that petitioner is not involved in this case	
10.	Acquitted on	18.03.2013
11.	discharged on	11.02.2009
12.	Acquitted on	11.03.2014
13.	Acquitted on	07.05.2014

16. It is very shocking state of affairs that in the status report, the Investigating Officer has shown these cases as pending against the petitioner which reflects that the record maintained by the police is not updated. Conduct of the Investigating Officer was seriously commented upon by the learned Trial Court while dismissing the bail application of the petitioner on the ground of compulsive bail by observing as under:-

"Before parting with bail application, it may be mentioned that charge sheet has been filed by Sub Inspector Mohinder Singh after stipulated time and therefore, copy of this order be sent to concerned Joint commissioner of Police for intimation and necessary action against SHO Police Station RG and Investigating Officer Sub Inspector Mohinder Singh. This is not the first time that Sub Inspector Mohinder Singh has committed blunder as an investigating officer. In FIR No. 1616/15 Police Station RG, Investigating Officer did not invoke the relevant section despite being pointed out by the court and Ld. APP. There was clear lack of supervision on the part of SHO Police Station RG also and resultantly, accused was granted bail by Ld. ASJ. In another instance of negligence on

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behalf of SHO Police Station RG in FIR No. 1763/15 copy of FIR in a murder case was not sent to the court as per CrPC. Show cause notice were issued in FIR No. 1616/15 and 1763/15 to SHO but it seems that he is not taking his job seriously and he has miserably failed to supervise the work and investigation of cases of Police Station RG.

Copy of this order be sent to Joint Commissioner of Police for intimation and necessary action at his end. It is expected by this court that action taken against SHO Police Station RG and Sub Inspector Mohinder Singh be communicated to this court within 15 days from today. Copy of orders in FIR No. 1616/15 and 1763/15 be also annexed with the present order for kind perusal of worthy Joint CP."

17. It seems that despite passing of such strictures against the Investigating Officer of the case as well as the concerned SHO, things have not improved. The casual manner in which the status report has been filed speaks for itself. Learned Additional Public Prosecutor for the State on behalf of the Investigating Officer who was present during the hearing of this application, submitted an unconditional apology, however, mere tendering an apology orally does not mean anything unless the Investigating Officer mends his ways which is not reflected in the present status report. It is not clear whether the action taken against the SI Mahender Singh and SHO Police Station Rajouri Garden was communicated to the Court by Joint Commissioner of Police as directed vide order dated 30th November, 2015. In case, the same has not been communicated so far, the same be communicated within 15 days from today.

18. Keeping in view the fact that the petitioner is a lady and, as submitted by the counsel for the petitioner, is suffering from heart problem and other diseases and is in custody since 31st August, 2015,

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she is admitted to bail on furnishing a personal bond in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of the learned Trial Court concerned. She is further directed to furnish her address and contact number to this Court as well as to the learned Trial Court. She is further directed neither to indulge in any illegal activities nor to coerce or threaten any prosecution witness.

The application stands disposed of accordingly.

A copy of this order be given *dasti* under the signatures of the Court Master to counsel for the appellant.

MAY 11, 2016

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Sunita Gupta
SUNITA GUPTA, J