

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.835 of 2015

Arising Out of PS.Case No. -96 Year- 2015 Thana –Gopalganj Town District- GOPALGANJ

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1. Vikarma Pal Son of Late Bhola Pal resident of village - Bhitbherwa, P.S. Gopalganj, District - Gopalganj

.... Petitioner/s

Versus

1. The State of Bihar through Superintendent of Police, Gopalganj
2. The Inspector General of Police, Bihar, Patna
3. The D.I.G., Saran Range, Saran
4. The Superintendent of Police, Gopalganj
5. The Officer - in - Charge, Town Police Station, Gopalganj
6. The Investigating office of Gopalganj Town Police Station Case No. 96/2015

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Alok Kumar Sinha, Adv.
Mr. Indrajeet Bhushan, Adv.
For the Respondent/s : Mr. U.S.S.Singh, GP-1

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 15-09-2015

By way of the present writ petition under Articles 226 and 227 of the Constitution of India, the petitioner challenges the impugned order dated 22.07.2015 passed by the learned Chief Judicial Magistrate, Gopalganj in connection with Gopalganj Town P.S.Case No.96 of 2015 whereby the application under Section 167(2) of the Code of Criminal Procedure (for short 'Cr.P.C.') filed by the petitioner was dismissed.

2. At the outset it is necessary to state that the facts of the case are not in dispute. On 20.03.2015, the informant Satya Narayan Pal lodged a written report on the basis of which Gopalganj Town



P.S. Case No. 96 of 2015 was registered under Sections 304-B read with 34, 201 and 120-B of the Indian Penal Code. On 21st March, 2015, the petitioner having been made accused in the aforesaid police case was arrested and remanded to judicial custody. Though the statutory period of detention of the petitioner for a total period of 90 days under section 167(2)(a)(i) Cr.P.C. expired on 20th June, 2015, the petitioner filed an application for being released on bail on default under the proviso (a)(ii) to Section 167(2) Cr.P.C. on 21st July, 2015 and offered to furnish bail bond with local and sound sureties to the satisfaction of the court. On the same day, i.e. on 21st July, 2015, the learned Magistrate called for a report from the G.R. Clerk as to whether or not the charge-sheet has been filed by the investigating agency in the case. The G.R. Clerk submitted his report to the court stating therein that no charge-sheet has been filed in the court by the police. It would be evident from the impugned order that on 21st July, 2015 itself at 4.00 p.m., the learned Magistrate granted bail to the petitioner on furnishing bail bond of Rs.10,000/- (Rupees ten thousand) with two sureties of the like amount. It would further appear from the record that on 21st July, 2015 itself, at 4.30 p.m., charge-sheet with original case diary was filed by the Investigating Officer of the case in the court of the Magistrate. On the next day, i.e. on 22nd July, 2015, bail bond was furnished by the accused as directed by the

learned Magistrate vide order dated 21st July, 2015 at 4.00 p.m., but the same was rejected and the petitioner was not released on bail because by then charge sheet had already been filed by the Investigating Officer of the case.

3. Mr. Alok Kumar Sinha, learned counsel for the petitioner has submitted that the application for bail was filed on 21st July, 2015 in the forenoon and the learned Magistrate after making an enquiry from the office regarding non-filing of the charge-sheet granted bail to the petitioner at 4.00 p.m. subject to the condition of furnishing bond and sureties to the satisfaction of the court. The subsequent filing of charge-sheet at 4.30 p.m. would not disentitle the petitioner from being released on bail. In this regard, he has relied upon judgments of the Supreme Court in the case of *Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors.* [(1994) 4 SCC 602]; *Sanjay Dutt Vs. State through C.B.I., Bombay* [(1994) 5 SCC 410]; *Uday Mohanlal Acharya Vs. State of Maharashtra* [(2001) 5 SCC 453]; *Syed Md. Ahmad Kazmi Vs. State (Govt. of NCT of Delhi) & Ors.* [2012]12 SCC 1] and *Union of India Vs. Nirala Yadav* [(2014) 9 SCC 457].

4. Relying upon the aforesaid judgments of the Supreme Court, he has submitted that after the lapse of statutory period of 90 days and before filing of the charge sheet an indefeasible right had accrued in favour of the petitioner to be granted and released on bail



under the proviso (a)(ii) to Section 167(2) Cr.P.C., as before filing of charge-sheet the petitioner had 'availed of' that right by filing bail application and offering to furnish bail bond as directed by the court. He submits that the law is settled by the Supreme Court that if the accused has 'availed of' the indefeasible right under the proviso (a)(ii) to Section 167(2) Cr.P.C., it would remain enforceable even upon filing of the charge-sheet.

5. On the other hand, Mr. U.S.S. Singh, GP-1, learned counsel for the State has submitted that the right to consider the bail in default of completion of investigation under section 167(2) Cr.P.C. does not survive after filing of charge-sheet. According to him, a duty is cast upon the court to examine the availability of right on the date it considers the question of bail and not merely on the date of presentation of petition for bail. He has submitted that the matter would have been different if the court would have adjourned the application filed by the petitioner on one pretext or the other and because of that the right of the petitioner would have been defeated but here is a case in which the day the petitioner filed an application for being released on bail on default under the proviso to Section 167(2) Cr.P.C., the court passed the order granting him bail subject to filing of bond and sureties to the satisfaction of the court. Since the petitioner failed to comply with the terms and conditions of bail



granted by the court and in the meantime the Investigating Officer submitted charge sheet with original case diary, the petitioner could not have been released on the strength of furnishing of bail bond on a subsequent date under the proviso (a)(ii) to Section 167(2) Cr.P.C. He has submitted that an indefeasible right arises from the time of default in filing the charge-sheet and continues till the filing of the police report, but does not survive once the charge-sheet is filed. Thereafter grant of bail would be decided on merits. In support of his contention that the right to consider bail under section 167(2) Cr.P.C. does not survive after filing of charge sheet, he has placed his reliance on the judgments of the Supreme Court in the case of *Sanjay Dutt* (Supra); *Uday Mohanlal Acharya* (Supra); *Dr. Bipin Shantilal Panchal Vs. State of Gujarat* [(1996) 1 SCC 718]; *Dinesh Dalmia Vs. CBI* [(2007) 8 SCC 770; *Mustaq Ahmed Mohammed Isak and Ors. Vs. State of Maharashtra* [(2009) 7 SCC 480] and *Pragyna Singh Thakur Vs. State* [(2011) 10 SCC 445].

6. I have heard learned counsel for the parties and perused the material available on record.

7. The primary question which arises for consideration in this case is whether the petitioner is entitled for bail on default under proviso (a)(ii) to Section 167(2) Cr.P.C. when the charge-sheet has been filed after grant of bail but before furnishing bail bond and

sureties.

8. The Code of Criminal Procedure deals with the investigation of offence by the police under Chapter XII. Section 167(2) Cr.P.C. under Chapter XII, which is relevant for understanding the issue involved in this case, reads as under :-

“167. Procedure when investigation cannot be completed in twenty-four hours

(1) XXXX XXXX XXXX

(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, authorise the detention of the accused in such custody as such Magistrate thinks fit, 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 authorise 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 authorise 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 subsection shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise 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 authorise detention in the custody of the police.

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.

Explanation II—If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

Provided further that in case of a woman under the eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution”

9. From a perusal of Section 167(2) Cr.P.C., it would be clear that the Magistrate has the power to detain an accused for a period of 60 days or 90 days as the case may be and beyond the prescribed period, the Magistrate has no power to extend the detention unless charge sheet is filed. The power to authorize detention by the Magistrate extinguishes on 60th or 90th day, as the case may be, and the law provides that on expiry of such period, the accused person shall be released on bail, if he is prepared to and does furnish bail.

10. It is settled principle of law that when the application for bail on default is filed, the merits of the case are not to be gone into. The effect of proviso to Section 167(2) Cr.P.C. was stated in *Natabar Parida Bisnu Charan Vs. State Of Orissa [(1975)2 SCC 220]* in

paragraph 8 as under :

“8. Let us now examine the position of law under the New Code. No police officer can detain a person in custody, arrested without a warrant, for a period longer than 24 hours as mentioned in Section 57 corresponding to Section 61 of the Old Code. Section 167 occurring in Chapter XII bearing the heading “Information to the police and their powers to investigate” — the same as in Chapter XIV of the Old Code — has made some drastic departure. Similar is the position in regard to Section 309 of the New Code corresponding to Section 344 of the Old Code. While retaining the provision of forwarding the accused to the nearest Magistrate (of course under the New Code to the Judicial Magistrate), and while authorising the Magistrate to remand the accused to either police or judicial custody for a period not exceeding 15 days, proviso (a) has been added in these terms:

Provided that—

(a) the Magistrate may authorise detention of the accused person, otherwise than in 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 authorise the detention of the accused person in custody under this section for a total period exceeding sixty days, and on the expiry of the said period of sixty days, 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 section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

The expression “the Magistrate” in the proviso would mean the Magistrate having jurisdiction to try the case. Section 309(2) says:

If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Although the expression “reasonable cause” occurring in sub-section (1-A) of Section 344 is nowhere to be found



in Section 309 of the New Code, the explanation to Section 344 of the Old Code has been retained as Explanation 1 to Section 309 in the identical language. The law as engrafted in proviso (a) to Section 167(2) and Section 309(2) of the New Code confers the powers of remand to jail custody during the pendency of the investigation only under the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded. In such a situation what is the purpose of Explanation-1 in Section 309 is not quite clear. But then the command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation may still be proceeding. In serious offences of criminal conspiracy — murders, dacoities, robberies by inter-State gangs or the like, it may not be possible for the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the accused released on bail under Section 167 will be deemed to be so released under the provisions of Chapter XXXIII and for the purposes of that Chapter. That may empower the court releasing him on bail, if it considers necessary so to do, to direct that such person be arrested and committed to custody as provided in sub-section (5) of Section 437 occurring in Chapter XXXIII. It is also clear that after the taking of the cognizance the power of remand is to be exercised under Section 309 of the New Code. But if it is not possible to complete the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a “paradise for the criminals”, but surely it would not be so, as sometimes it is supposed to be, because of the courts. It would be so under the command of the Legislature.”

11. It would, thus, appear that even in serious offences of

criminal conspiracy, murder, dacoities, robberies etc. if the Investigating Officer fails to complete the investigation within the statutory period, the legislature has given no discretion to the court and it has made it obligatory for the court to release the accused on bail.

12. At this stage, after having taken into consideration the relevant provision of Cr.P.C., it would be appropriate to deal with the judgments of the Supreme Court on which reliance has been placed by respective counsel for the parties.

13. In *Hitendra Vishnu Thakur* (Supra), in paragraph 30, it has been held that if the statutory period has expired, the court shall have no option but to release the accused on bail if he seeks it and is prepared to furnish the bail as directed by the court. (Emphasis supplied).

14. In *Sanjay Dutt* (Supra), clarifying the judgment delivered in *Hitendra Vishnu Thakur's* case (Supra), the Constitution Bench of the Supreme Court in paragraph 48 observed as under :-

“48. The indefeasible right accruing to the accused in such situation is enforceable only prior to filing of the Challan and it does not survive or remain enforceable on the Challan being filed, if already not availed of.”

15. The aforesaid observation of the Supreme Court clearly means that ordinarily the indefeasible right accruing to the accused

will not survive or remain enforceable on the charge-sheet being filed but if the indefeasible right has been 'availed of' prior to filing of charge-sheet then the said right will survive or remain enforceable even upon filing of the charge-sheet. Therefore, what is of significance is whether the accused has 'availed of' the indefeasible right accruing to him by filing bail application and offering to furnish the bail as directed by the court, prior to the filing of the charge-sheet.

16. In *Uday Mohanlal Acharya* (Supra), a three-Judge Bench of the Supreme Court while interpreting the expression "..... Indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of" as has been held by the Constitution Bench in Sanjay Dutt's case (Supra), observed in paragraph 13 as under :-

"13.....The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal,



inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression “availed of” is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression “if not availed of” in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in *State of M.P. v. Rustam* setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression “if already not availed of”, used by the Constitution Bench in *Sanjay Dutt [(1994)5 SCC 410]*.....”

17. Thereafter the Supreme Court culled out six conclusions, which are as under :-

“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* 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.

(Emphasis supplied)

18. Elaborating and explaining the aforesaid conclusions, the Supreme Court further held that if the charge sheet is filed subsequent to the availing of indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then 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.

19. Taking into consideration the aforesaid interpretation of the expression 'availed of', it can be safely contended that the moment an accused files an application for being released on bail and offers to abide by the terms and conditions of bail, he will be deemed to have

‘availed of’ his indefeasible right and then in that case his right to be released on bail will remain enforceable even upon filing of the charge-sheet, as held in Sanjay Dutt’s case (Supra).

20. In Syed Mohd. Kazmi (Supra), a three-Judge Bench of the Supreme Court has held in paragraph 25 as under :-

“**25.** Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General Mr Raval. There is no denying the fact that on 17-7-2012, when CR No. 86 of 2012 was allowed by the Additional Sessions Judge and the custody of the appellant was held to be illegal and an application under Section 167(2) CrPC was made on behalf of the appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of the appellant for a further period of 90 days with retrospective effect from 2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the appellant on the expiry of 90 days from the date when the appellant was taken into custody. Such right, as has been commented upon by this Court in *Sanjay Dutt v. State*, (1994)5 SCC 410 and the other cases cited by the learned Additional Solicitor General, could only be distinguished once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before the charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.”

21. Thereafter, the Court opined in paragraph 26 as under :-

“26. The circumstances, in this case, however, are different in that the Appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.”

22. Thus, it would be evident from the aforesaid decision that if an accused does not exercise his right to grant of statutory bail before the charge-sheet is filed then he loses his right to such benefit once such charge-sheet is filed. Clearly meaning thereby that if the accused has ‘availed of’ his indefeasible right by filing the bail application and offering to comply with the terms and conditions of bail before filing of charge-sheet then the said right cannot be defeated by subsequent filing of charge-sheet and the accused will have to be released on bail.

23. The aforesaid decision in *Syed Mohd. Ahmad Kazmi* (Supra) placed reliance on *Uday Mohanlal Acharya* (Supra), and therefore, the principle with regard to the time and manner of availability of the proviso appended to sub-section (2) of Section 167 Cr.P.C. has been further explained.

24. In *Dr. Bipin Shantilal Panchal* (Supra), a three-Judge Bench of the Supreme Court held in paragraph 4 as under :-

“4. Therefore, if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the

maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet, as pointed out in Aslam Babalal Desai vs. State of Maharashtra, (1992) 4 SCC 272.”

(Emphasis supplied)

25. In *Dinesh Dalmia Vs. C.B.I.* (Supra), in paragraph 39, the Supreme Court held as under :

“39..... Whereas only when a charge sheet is not filed and investigation is kept pending, benefit of proviso appended to Sub-section (2) of Section 167 of the Code would be available to an offender; once, however, a charge sheet is filed, the said right ceases.....”

26. In *Mustaq Ahmed Mohammed Isak* (Supra), the Supreme Court held in paragraphs 16 to 18 as under :-

“16. In the instant case, the appellants were arrested on 13-5-2006, the first extension was granted on 7-8-2006 for a period of 15 days i.e. up to 21-8-2006 and the second extension was granted on 21-8-2006 for a period of 15 days i.e. up to 4-9-2006 and the charge-sheet has been filed on 4-9-2006. The application for bail on the default ground came to be filed for the first time on 4-9-2006 i.e. the date on which the charge-sheet was submitted, which is Bail Application No. 32 of 2006. Prior to this, there was no application under Section 21(2)(b) of the MCOC Act, 1999 read with Section 167(2) of the Code on default ground. Affidavit of Assistant Commissioner of Police, Mr Uttam Chopane specifically states that such an application on a default ground was made for the first time on 4-9-2006 and not on 18-8-2006 as incorrectly contended by the appellants herein.

17. The appellants are contending that the appeal filed by them on 18-8-2006 should be considered as their



application for bail. This appeal filed in the High Court was challenging the order dated 7-8-2006 of the Special Court granting extension till 21-8-2006 and on 21-8-2006 extension was granted till 4-9-2006. The appeal filed on 18-8-2006 cannot be considered as an application for bail. Even if it is treated as an application for bail the same was not tenable on default ground as the Special Court extended the period on 7-8-2006 till 21-8-2006 and further extended the period on 21-8-2006 till 4-9-2006. Thus, the prosecution filed the charge-sheet. On 4-9-2006 the charge-sheet has been filed and on that day itself, the application for bail was filed by the appellants on default ground and therefore, the application for bail was rejected by the courts below.

18. We are of the view that the impugned judgment of the High Court does not suffer from any infirmity to warrant interference. The appeals fail and are dismissed accordingly.”

27. In *Pragyna Singh Thakur* (Supra), after considering the provisions of Section 167(2) Cr.P.C. and the case laws on the subject, a two-Judge Bench of the Supreme Court held in paragraph 49 that the right in regard to default bail is lost once charge sheet is filed. It further held in paragraphs 54 to 58 as under :-

“54. There is yet another aspect of the matter. The right under Section 167(2) CrPC to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. In other words, even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost. After the filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from the Constitution Bench decision of this Court in *Sanjay Dutt v. State* [paras 48 and 53(2)(b)]. The reasoning is to be

found in paras 33 to 49.

55. This principle has been reiterated in the following decisions of this Court:

(1) *State of M.P. v. Rustam*, SCC para 4;

(2) *Bipin Shantilal Panchal v. State of Gujarat*, SCC para 4. It may be mentioned that this judgment was delivered by a three-Judge Bench of this Court;

(3) *Dinesh Dalmia v. CBI*, SCC para 39; and

(4) *Mustaq Ahmed Mohammed Isak v. State of Maharashtra*, SCC para 12.

56. In *Uday Mohanlal Acharya v. State of Maharashtra* a three-Judge Bench of this Court considered the meaning of the expression “if already not availed of” used by this Court in the decision rendered in *Sanjay Dutt* in para 48 and held that if an application for bail is filed before the charge-sheet is filed, the accused could be said to have availed of his right under Section 167(2) even though the court has not considered the said application and granted him bail under Section 167(2) CrPC. This is quite evident if one refers to para 13 of the reported decision as well as the conclusion of the Court at p. 747.

57. It is well settled that when an application for default bail is filed, the merits of the matter are not to be gone into. This is quite evident from the principle laid down in *Union of India v. Thamisharasi*, SCC para 10, placita *c-d*.

58. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, before the consideration of the same and before being released on bail if charge-sheet is filed, the said right to be released on bail, can be only on merits. So far as merits are concerned the learned counsel for the appellant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all.”

28. The opinion expressed in paragraphs 54 and 58 in *Pragyna Singh Thakur* (Supra) was considered by the Supreme Court in *Union of India Vs. Nirala Yadav* (Supra). After taking into consideration almost all the previous judgments on the point of

Section 167(2) Cr.P.C., the Supreme Court concluded and held that the principle laid down in paragraphs 54 and 58 of *Pragyna Singh Thakur* case (Supra) does not state the correct principle of law and it runs counter to the principles stated in *Uday Mohanlal Acharya* case (Supra), which has been followed in *Union of India Vs. Hassan Ali Khan*, [(2011) 10 SCC 235] and *Syed Mohd, Kazmi* case (Supra). The relevant paragraphs of *Union of India Vs. Nirala Yadav* case in this regard would be paragraphs 44 to 46, which are being reproduced herein below :-

“44. At this juncture, it is absolutely essential to delve into what were the precise principles stated in *Uday Mohanlal Acharya* case and how the two-Judge Bench has understood the same in *Pragyna Singh Thakur*. We have already reproduced the paragraphs in extenso from *Uday Mohanlal Acharya* case and the relevant paragraphs from *Pragyna Singh Thakur*. *Pragyna Singh Thakur* has drawn support from *Rustam* case to buttress the principle it has laid down though in *Uday Mohanlal Acharya* case the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in paragraph 56 which have been reproduced hereinabove, as referred to paragraph 13 and the conclusions of *Uday Mohanlal Acharya* case. We have already quoted from paragraph 13 and the conclusions.

45. The opinion expressed in paras 54 and 58 in *Pragyna Singh Thakur* which we have emphasised, as it seems to us, runs counter to the principles stated in *Uday Mohanlal Acharya* which has been followed in *Hassan Ali Khan* and *Sayed Mohd. Ahmad Kazmi*. The decision in *Sayed Mohd. Ahmad Kazmi* case has been rendered by a three-Judge Bench. We may hasten to state, though in *Pragyna Singh Thakur* case the learned Judges have referred



to *Uday Mohanlal Acharya case* but have stated the principle that even if an application for bail is filed on the ground that the charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in *Mustaq Ahmed Mohammed Isak case*. We are disposed to think so, as the two-Judge Bench has used the words “before consideration of the same and before being released on bail”, the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

46. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in *Uday Mohanlal Acharya case*. The learned Judge dissented with the majority as far as interpretation of the expression “if not already availed of” by stating so: (SCC p.481, paras 29-30)

“29. My learned brother has referred to the expression ‘if not already availed of’ referred to in the judgment in *Sanjay Dutt case* for arriving at Conclusion 6. According to me, the expression ‘availed of’ does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression ‘availed of’ does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised.”

On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in *Pragyna Singh Thakur case* has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three-Judge Bench in *Sayed Mohd. Ahmad Kazmi case*. Keeping in view the principle stated in *Sayed Mohd. Ahmad Kazmi case* which is based on three-Judge Bench decision in *Uday Mohanlal Acharya case*, we are obliged to conclude and hold that the principle laid down in Paras 54 and 58 of *Pragyna Singh Thakur case* (which has been emphasised by us: see paras 42 and 43 above) does not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be good law. Our view finds support from the decision in *Union of India v. Arviva Industries India Ltd.*”

29. In the present case, both the parties have relied upon the Constitution Bench Judgment of the Supreme Court in *Sanjay Dutt* (Supra) and a three-Judge Bench decision of the Supreme Court in *Uday Mohanlal Acharya* (Supra). In *Uday Mohanlal Acharya* (Supra), all the previous judgments of the Supreme Court including Constitution Bench judgment has been considered. The expression ‘if already not availed of’ used by the Supreme Court in *Sanjay Dutt* case

(Supra), has been explained by the Bench to mean that the accused filed an application and is prepared to offer 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.

30. From perusal of the conclusions arrived at by the Supreme Court in *Uday Mohanlal Acharya* case (Supra) it would be clear that if the accused files an application for enforcement of his indefeasible right on account of default on the part of the investigating agency in completion of investigation within the specified period, the court must dispose of it forthwith. If the accused is unable to furnish the bail as directed by the Magistrate, his detention would not be unauthorized and even if during that period investigation is complete and charge sheet is filed, the so called indefeasible right cannot be frustrated.

31. On a careful reading of the law laid down by three-Judge Bench of the Supreme Court in *Uday Mohanlal Acharya's* case (Supra), which has been followed further by three-Judge Bench in *Syed Mohd. Kazmi's* case (Supra) and recently in *Union of India Vs. Nirala Yadav* case (Supra), there remains no dispute regarding expression 'if not already availed of' referred to in the Constitution Bench judgment of the Supreme Court in *Sanjay Dutt's* case (Supra).



It would be evident that if an accused before filing of charge sheet has applied for bail and has offered to comply with the terms and conditions of bail as directed by the court, then it will be deemed that he has 'availed of' his indefeasible right to be released on bail under the proviso (a)(ii) to Section 167(2) Cr.P.C. and it will remain enforceable even upon filing of the charge sheet. It is well settled that if charge sheet is filed during consideration of bail application then it will not defeat the right of the accused to be released on bail under proviso (a)(ii) to Section 167(2) Cr. P.C.

32. The view if the charge sheet is filed prior to the actual furnishing of bail bond then there is no question of indefeasible right, howsoever valuable and indefeasible it may be, after filing of the charge sheet was minority view expressed in paragraphs 29 and 30 in *Uday Mohanlal Acharya's* case (Supra). There is no quarrel with respect to the proposition that as long as the majority view occupies the field it is a binding precedent. In that view of the matter, I am of the opinion that the reliance placed upon the case laws by the counsel for the State are those which have followed the minority view expressed in *Uday Mohanlal Acharya's* case (Supra).

33. Coming back to the facts of the present case, there is no dispute regarding dates and event of facts which took place. The First Information Report was registered on 20th March, 2015 under sections



304-B read with 34, 201 and 120-B of the Indian Penal Code. The petitioner was arrested and remanded to judicial custody on 21st March, 2015. The statutory period of 90 days prescribed under section 167(2) Cr.P.C. expired on 20th June, 2015. However, an application for bail was filed under proviso (a)(ii) to Section 167(2) Cr.P.C. on 21st July, 2015 and on the same day after seeking a report from the office at 4.00 p.m. the learned Magistrate granted bail to the petitioner on furnishing of bail bonds as directed. On the same day, at 4.30 p.m. the Investigating Officer of the case submitted charge sheet in the case. The petitioner furnished bail bond on 22nd July, 2015 but the same was rejected and the petitioner was not released on bail because on 21st July, 2015 itself at 4.30 p.m. the Investigating Officer had filed charge sheet before the Magistrate. It would be evident from the aforesaid discussion that such filing of charge-sheet would not extinguish the indefeasible right of the petitioner to be released on bail.

34. In the instant case, the petitioner has been denied right to be released on bail under proviso (a)(ii) to Section 167(2) Cr. P.C. because charge sheet was filed before actual furnishing of bail bond.

35. In view of the discussions made hereinabove, I am of the considered opinion that the learned Magistrate has failed to appreciate the law in correct perspective while passing the impugned order dated

21st July, 2015. Clearly the learned Magistrate has erred in law by not accepting the bail bonds on 22.07.2015 after granting statutory bail to the petitioner.

36. In that view of the matter, the impugned order dated 22nd July, 2015 passed by the learned Chief Judicial Magistrate, Gopalganj in connection with Gopalganj Town P.S. Case No.96 of 2015, is set aside and the petitioner is directed to be released on bail on furnishing bail bond and sureties to the satisfaction of the Magistrate concerned.

37. The application stands allowed.

(Ashwani Kumar Singh, J)

Pradeep/-
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