

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM No.M-32076 of 2015

Date of Decision: November 19, 2015

Amit Sachdeva

...Petitioner

VERSUS

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE INDERJIT SINGH

1. To be referred to the Reporters or not? **YES**
2. Whether the judgment should be reported in the Digest? **YES**

Present: Mr.C.L.Verma, Advocate
for the petitioner.

Mr.Varun Sharma, Asstt. Advocate General, Punjab
for the respondent-State.

INDERJIT SINGH, J.

Petitioner has filed this petition under Section 167(2) Cr.P.C. read with Section 439 Cr.P.C. for grant of regular bail in case FIR No.97 dated 03.03.2015 under Section 18 of the NDPS Act, registered at Police Station Focal Point, District Ludhiana City.

Notice of motion was issued and learned State counsel appeared and contested the petition.

I have heard learned counsel for the petitioner as well as learned State counsel and have gone through the record.

From the record, I find that vide impugned order dated 03.09.2015 passed by learned Judge, Special Court, Ludhiana, the bail application dated 02.09.2015 under Section 167(2) Cr.P.C. on

behalf of the accused-applicant Amit Sachdeva has been dismissed. The perusal of the impugned order shows that the application was filed at 9.45 A.M. on 02.09.2015 and prosecution furnished the challan against the accused-applicant at 10.20 A.M. i.e. within 35 minutes of filing the bail application. In this order, it was held that the bail application was filed by the accused after the expiry of 180 days of presentation of challan. It is also clear from impugned order dated 03.09.2015 that the challan was presented after filing of the bail application after 35 minutes. The Court below dismissed the bail application by relying upon the law laid down in **Pragyna Singh Thakur vs. State of Maharashtra, 2012(1) RCR (Crl.) 302**, by holding that when the challan is presented, the right to be released on bail would be lost.

Learned counsel for the petitioner relied upon the law laid down by the Hon'ble Supreme Court in **Sanjay Dutt vs. State through C.B.I. Bombay, 1994(3) RCR (Criminal) 684**, in which it is held as under:-

“(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of

the accused to be released on bail after filing on the challan, notwithstanding the default in filing it within the time allowed, as governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage.”

From the perusal of the above-cited judgment, I find that it is held by the Constitutional Bench of the Hon'ble Supreme Court that the right to file the application under Section 167(2) Cr.P.C. will accrue to the accused after lapse of period of presentation of challan and before presentation of challan and if the application is filed by the accused after the expiry of period of presentation of challan, then he is to be released on bail forthwith. As per the above judgment, the right of filing the bail application under Section 167(2) Cr.P.C. after presentation of challan does not survive. This right is only after expiry of the period of presentation of challan and till the filing of the challan. The accused can exercise this right during this period and not after the presentation of challan nor before the expiry of period of presentation of challan.

Learned counsel for the petitioner further cited judgment passed by the Hon'ble Supreme Court in **Sayed Mohd. Ahmed Kazmi vs. State, GNCTD and others, 2012(4) RCR (Criminal) 875**, in which it is held under:-

“24. 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 17th July, 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) Criminal

Penal Code 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 20th July, 2012 extended the time of investigation and the custody of the Appellant for a further period of 90 days with retrospective effect from 2nd June, 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 the case of Sanjay Dutt (supra) 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 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.

25. *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.*

26. *We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the Appellant acquired the right for grant of statutory bail on 17th July, 2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the Appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise.”*

The perusal of above cited judgment also shows that the

Three Judges' Bench of the Hon'ble Supreme held that right accrue to the petitioner after the expiry of the period of presentation of challan and till the presentation of challan and it is an indefeasible right and the accused, if exercises his right under Section 167(2) Cr.P.C. during the period before presentation of challan and after the expiry of the period for presentation of challan, then he has the statutory right to bail but he cannot enforce this right after presentation of challan. It is further held that if the Court adjourns the bail application etc. and then the application for extension of period of presentation of challan is filed, that would have no affect on the right of the accused.

Further, I find that the Three Judges' Bench of the Hon'ble Supreme Court in ***Suresh Kumar Bhikamchand Jain vs. State of Maharashtra and another, 2013(2) RCR (Criminal) 170***, in which same proposition has been laid down and it is held as under:-

“17. From the above dates, it would be evident that both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the Petitioner's arrest and remand to police custody. It is true that cognizance was not taken by the Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but does such failure amount to non-compliance of the provisions of Section 167(2) Criminal Procedure Code is the question with which we are confronted. In our view, grant of sanction is nowhere contemplated under Section 167 Criminal Procedure Code. What the said Section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the Legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of

not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the Court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as the ones referred to hereinbefore. Both the decisions in Natabar Parida's case(supra) and in Sanjay Dutt's case (supra) were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) Criminal Procedure Code and an application having been made for grant of bail prior to the filing of charge-sheet, this Court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits."

Learned counsel for the petitioner also cited judgment passed by the Hon'ble Supreme Court in ***Union of India through***

C.B.I. vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, 2014

(3) RCR (Criminal) 534, in which it is held as under:-

38. The opinion expressed in paragraph 54 and 58 in Pragyna Singh Thakur (supra) which we have underlined, as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya (supra) which has been followed in Hassan Ali Khan and another (supra) and Sayed Mohd. Ahmad Kazmi. The decision in Sayed Mohd. Ahmad Kazmi's case has been rendered by a three-Judge Bench. We may hasten to state, though in Pragyna Singh Thakur's case the learned Judges have referred to Uday Mohanlal Acharya's case but as 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's 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.

39. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya’s case. The learned Judge dissented with the majority as far as interpretation of the expression “if not already availed of” by stating so:-

“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.”

40. On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in Pragyna Singh Thakur’s 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’s case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi’s case which has based on three-Judge Bench decision in Uday Mohanlal Acharys’s case, we are obliged to conclude and hold the principle laid down in Paragraph 54 and 58 of Pragyna Singh Thakur’s case (which have been underlined by us) do 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 a good law. Our view finds support from the decision in **Union of India and others v. Arviva Industries India Limited and others, (2014) 3 SCC 159.***

*41. Coming to the facts of the instant case, we find that prior to the date of expiry of 90 days which is the initial period for filing the charge-sheet, the prosecution neither had filed the charge-sheet nor had it filed an application for extension. Had an application for extension been filed, then the matter would have been totally different. After the accused respondent filed the application, the prosecution submitted an application seeking extension of time for filing of the charge-sheet. Mr.P.K.Dey, learned counsel for the appellant would submit that the same is permissible in view of the decision in *Bipin Shantilal Panchal (supra)* but on a studied scrutiny of the same we find the said decision only dealt with whether extension could be sought from time to time till the completion of period as provided in the Statute i.e., 180 days. It did not address the issue what could be the effect of not filing an application for extension prior to expiry of the period because in the factual matrix it was not necessary to do so. In the instant case, the day the accused filed the application for benefit of the default provision as engrafted under proviso to sub-Section (2) of Section 167 CrPC 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 misconceived. He was obliged on that day to deal with the application filed by the accused as required under Section 167(2) CrPC. 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. If we permit ourselves to say so, the prosecution exhibited sheer negligence in not filing the application within the time which it was entitled to do so in law but made all adroit attempts to redeem the cause by its conduct.”*

In view of the above law laid down by the Hon'ble Supreme Court, the reliance of the trial Court upon the judgment passed in

Pragyna Singh Thakur's case (supra) is not correct.

When the bail application under Section 167(2) Cr.P.C. in the present case has been filed after the expiry of the period of presentation of challan, the accused got the statutory right for release on bail forthwith and the presentation of challan thereafter, may be after 35 minutes, cannot destroy indefeasible right of the accused for grant of bail.

In view of the above discussion, the present petition is allowed and the petitioner is ordered to be released on bail subject to his furnishing personal bonds in the sum of ₹50,000/- with one surety in the like amount to the satisfaction of the trial Court/Duty Magistrate.

November 19, 2015
Vgulati

(INDERJIT SINGH)
JUDGE