

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.178 of 2015

Arising Out of PS.Case No. -null Year- null Thana -null District- MUNGER

Birbal Murmu @ Panchu Murmu, Son of Late Fagu Murmur @ Fagu Da, Resident of Village - Matiyakor, Bagdhaswa, P.S. - Belhar, District - Banka.

.... Petitioner

Versus

1. The State of Bihar through the District Magistrate, Munger.
2. The District Magistrate, Munger.
3. The Superintendent of Police, Munger.

.... Respondents

Appearance :

For the Petitioner/s : Mr. Ajit Kumar Singh, Advocate

For the Respondent/s : Mr. Manoj Kumar, AC to GA-10

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 05-04-2016

By way of the present application under Articles 226 and 227 of the Constitution of India, the petitioner challenges the order dated 02.01.2015 passed by the learned Sessions Judge, Munger in G.R. No. 1930 of 2010 arising out of Haveli Kharagpur P.S. Case No. 265 of 2010 whereby the order dated 28.11.2014 passed by the learned Sub-Divisional Judicial Magistrate (For short 'SDJM'), Munger granting bail to the petitioner under Section 167(2) of the Code of Criminal Procedure (For short 'CrPC') has been set aside and the bail bond furnished by the petitioner and accepted by the

Sessions Judge has been cancelled.

2. Shorn of details, brief facts necessary for disposal of this application are that one Shamshad Ali, S.H.O. of Haveli Kharagpur Police Station submitted his written report dated 26.10.2010 on the basis of which, Haveli Kharagpur P.S. Case No. 265 of 2010 dated 26.10.2010 was registered under Section 147, 148, 149, 121-A, 122, 379, 427, 307, 353 of the Indian Penal Code, Section 27 of the Arms Act, Sections 10, 13 of the Unlawful Activities (Prevention) Act, 1967 (For short 'the UAP Act') and Section 17 of the Criminal Law Amendment Act against altogether ten named and 50-60 unknown accused persons. The petitioner is one of the accused named in the first information report.

3. In course of investigation, the petitioner was arrested and remanded to judicial custody on 28.03.2014. He filed an application for being released on bail on default under the proviso (a)(ii) to Section 167(2) of the CrPC and offered to furnish bail bond to the satisfaction of the Court. On the same day, the learned SDJM called for a report from the office as to whether or not on completion of investigation, the investigating officer of the case has submitted report under Section 173(2) of the CrPC. At about 4:30 p.m. the office reported that the police report has not been filed by the investigating agency in the court. Thereafter, the learned SDJM

ordered the petitioner to be released on bail on furnishing bail bond of Rs. 5,000/- with two sureties of the like amount each to the satisfaction of the Court subject to the condition that out of the two sureties one must be a government servant.

4. On 01.12.2014, the SHO of Haveli Kharagpur police station filed a petition in the court of SDJM, Munger praying therein not to release the petitioner. Immediately, thereafter, on 01.12.2014 itself, the investigating officer of the case filed the police report under Section 173(2) of the CrPC in the Court. On the same day, the learned Additional Public Prosecutor conducting the case filed an application in the court of SDJM contending therein that in a writ petition bearing Cr.WJC No. 487 of 2014, vide order dated 04.08.2014, a Division Bench of this Court has held that the Court of Magistrate has no jurisdiction to pass any order in the cases in which offence is alleged to have been committed under the UAP Act. It was also contended that in absence of Special Court having been constituted in the State of Bihar, the Court of Sessions has to deal with the case in the same manner as may have been dealt with by a Special Court in cases arising out UAP Act.

5. The learned SDJM, Munger after hearing the learned Additional Public Prosecutor and having gone through the judgment passed in the aforesaid Cr. WJC No. 487 of 2014



transferred the record of the case to the court of Sessions Judge, Munger. The record was received in the court of Sessions Judge on transfer on 02.12.2014 whereafter on 04.12.2014, the petitioner furnished sureties and bail bond in the court of Sessions in compliance with the order dated 28.11.2014 passed by the learned SDJM, Munger which was found in order and, hence, it was accepted. After accepting the sureties and the bail bond, the learned Sessions Judge directed for issuance of release order of the petitioner. However, no release order was issued and the petitioner continued to remain in custody.

6. In the meantime, the learned Sessions Judge, Munger vide his order dated 23.12.2014 issued notice to the petitioner as to why his bail bond be not cancelled. The petitioner was directed to submit his reply to the show cause notice on 24.12.2014. It would be evident from the record that no cause was shown by the petitioner to the notice dated 23.12.2014 and ultimately, learned Sessions Judge vide impugned order dated 02.01.2015 not only set aside the order granting bail to the petitioner by the learned SDJM vide order dated 28.11.2014 but also cancelled the bail bond furnished by the petitioner on the ground that the SDJM had no jurisdiction to entertain any bail application for the offence committed under the provisions of the UAP Act and the

acceptance of bail bond by him after submission of charge-sheet was also not proper in the eye of law. The aforesaid order dated 02.01.2015 reads as under:-

“The case record is put up today. Perusal of case record goes to show that the accused Birbal Murmu was issued a show-cause notice as per order dt. 23-12-14 directing him to file his show-cause on 24-12-14 failing which it shall be considered that he has nothing to show-cause. Perusal of order dt. 23.12.14 also reveals that it was submitted on behalf of prosecution that the learned S.D.J.M. had no power to entertain any bail application for the offence U/s U.A.P. Act and his order of bail dated 28.11.14 granting bail to the aforesaid accused under the provision U/s 167(2) Cr.P.C. exceeding his jurisdiction is illegal and order of acceptance of bail bond by this court after submission of charge-sheet was also not good in the eye of law. But the accused Birbal Murmu has not filed his show-cause in spite of issuance of show-cause notice dt. 23-12-14. The contention taken on behalf of prosecution is convincing and as such the bail bond of above named accused is hereby cancelled. As the petitioner is already languishing in jail in connection with Kharagpur P.S. Case No. 04/2005 and 119/2012, issue custody warrant forthwith. Put up on date fixed.”

7. The petitioner, being aggrieved by the aforesaid

order dated 02.01.2015 has challenged the same in the present application.

8. I have heard Mr. Ajit Kumar Singh, learned counsel for the petitioner and Mr. Manoj Kumar, learned AC to GA-10 for the State and carefully perused the record.

9. Mr. Ajit Kumar Singh, learned counsel for the petitioner has submitted that the application for bail was filed on 28.11.2014 in the forenoon and on the same day, after making an inquiry from the office, the learned SDJM granted bail to the petitioner. He has contended that since one of the conditions imposed by the Court while granting bail whereby it was directed that one of the sureties must be a government servant was onerous one, the petitioner could not furnish sureties immediately. However, with great effort, while being in jail the moment the petitioner could persuade a government servant to stand on surety for him, he furnished sureties to the satisfaction of the court on 04.12.2014 in the court of Sessions Judge, Munger where records were transferred by the learned SDJM and on being satisfied, the learned Sessions Judge vide order dated 04.12.2014 itself had directed to issue release order in favour of the petitioner after accepting the bail bond and sureties furnished in the Court.

10. Mr. Singh has further contended that once the

Sessions Judge had accepted the bail bond and sureties furnished by the petitioner to his own satisfaction and had passed the release order and signed it, he could not have recalled the same, as Section 362 of the CrPC bars the court from reviewing or modifying its own judgment except in cases of minor clerical and arithmetical errors.

11. Advancing his argument, he has contended that the law laid down in the matter of **Aasif P.K. @ Md. Aaripha @ Aasif @ Md. Aasipha @ Md. Aasif @ Aarif Vs. The State of Bihar & ors. [(2015) 1 PLJR 1017]** by a Division Bench of this Court insofar as it held that the Magistrates will have no jurisdiction to entertain and deal with a case instituted under the UAP Act has been held to be bad by a Full Bench of this Court in the matter of **Bahadur Kora & Ors. Vs. The State of Bihar [(2015) 2 PLJR 289]**. According to him, in view of the aforesaid Full Bench judgment, the impugned order dated 02.01.2015 passed by the learned Sessions Judge is not sustainable in law.

12. Mr. Singh has contended that after the lapse of statutory period of 90 days and before filing of the police report under Section 173(2) of the CrPC, 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) CrPC, as before filing of charge-sheet the petitioner had 'availed of' that right by filing bail

application and offering to furnish sureties to the satisfaction of the court. He has submitted that the law is settled by the Supreme Court that if the accused has 'availed of' the indefeasible right, it would remain enforceable even upon filing of the charge-sheet.

13. *Per contra*, Mr. Manoj Kumar, learned counsel for the State has submitted that the right to consider the bail in default of completion of investigation under Section 167(2) CrPC does not survive after filing of charge-sheet. Since the petitioner failed to comply with the terms and conditions of bail granted by the Court and in the meantime, 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 under the proviso (a)(ii) to Section 167(2) CrPC. 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.

14. Mr. Manoj Kumar has further contended that the ratio laid down by the Full Bench in the matter of **Bahadur Kora (supra)** will have no application in the present case as the same was delivered on 27.03.2015, whereas the learned Sessions Judge had passed his order on 02.01.2015 in obedience to the judgment dated



04.08.2014 passed by a Division Bench of this Court in **Aasif's case (supra)**. He has further contended that every Court has an inherent power to recall its order if the order has been pronounced without jurisdiction or where an order has been obtained by an abuse of the process of Court which would really amount to its being without jurisdiction. He has submitted that the order dated 04.12.2014 passed by the learned Sessions Judge, Munger was patently bad in the eye of law as the police had already submitted charge-sheet in the case on 01.12.2014 and, hence, the learned Sessions Judge has rightly recalled the order dated 04.12.2014 vide impugned order dated 02.01.2015.

15. On hearing the parties, three issues arise for consideration in the present case. They are:-

(i) Whether the order dated 28.11.2014 passed by the learned SDJM granting bail to the petitioner under proviso (a)(ii) to Section 167(2) of the CrPC was without jurisdiction?

(ii) Whether the petitioner is entitled for bail on default under the proviso (a)(ii) to Section 167(2) of the CrPC when the charge-sheet has been filed after grant of

bail but before furnishing bail bond and sureties ?

(iii) Whether the Sessions Judge, Munger had the jurisdiction to recall his own order whereby he had accepted the bail bond and sureties furnished by the petitioner and had directed for issuance of release order in his favour ?

16. In order to find out the answer of the first question this order has examined the above referred Division Bench and Full Bench judgments passed by this Court.

17. In **Aasif's case (supra)** the Division Bench has held that the UAP Act is one of the enactments listed in the Schedule to NIA Act and in that view of the matter, wherever an allegation referable to the provisions of UAP Act is made against an accused, the procedure prescribed under the NIA Act must be followed. It further held that even if the investigation was undertaken by the State Investigating Agencies, and not by the National Investigation Agency (For short 'NIA'), the trial of such offences shall be conducted by the Court of Sessions, as provided for under sub-section (3) of Section 22 of the Act, even if no Special Court is constituted by the State under sub-Section (1) thereof. It also held



that the court of Chief Judicial Magistrate is not the competent court for production of an accused who is alleged to have been involved in the commission of Scheduled Offence as it has no power to order remand of such an accused. Consequently, such a court cannot take cognizance of an offence under the Indian Penal Code if the case involves commission of a Scheduled Offence too, and in such a case, if the accused is produced before a Chief Judicial Magistrate or any other Magistrate, he would be bound to forward the case along with arrested accused to the Special Court, if such court stands constituted or to the jurisdictional court of Sessions, if the Special Court has not been constituted.

18. Relying on the law laid down by the Division Bench in **Aasif's case**, the learned Sessions Judge had set aside the order passed by the SDJM whereby he had granted bail to the petitioner vide order dated 02.01.2015. It would further appear that for the same reason the learned Sessions Judge had recalled his own order dated 04.12.2014 whereby he had accepted the bail bond and sureties furnished by the petitioner and had order for his release.

19. However, the legality of the ratio laid down in **Aasif's case** was tested by a Full Bench of this Court in the matter of **Bahadur Kora (supra)**. The Full Bench elaborately dealt with the findings of the Division Bench in **Aasif's case** and held in para 46 as

under:-

“46. We, therefore, hold that-

(A) the judgment in **Aasif's case** (supra), insofar as it held that investigating agency of the State Government can investigate and try offences in accordance with the provisions of the N.I.A. Act, in the cases where offences punishable under the Unlawful Activities (Prevention) Act are alleged, and that such cases must be tried by the Courts of Sessions under sub-section (3) of Section 22 of the N.I.A. Act, cannot be said to have laid the correct law;

(B) The cases even where offences punishable under the provisions of U.A.P. Act are alleged shall be tried by the courts as provided for under the Cr.P.C. and not in accordance with the special procedure, under the Act unless (i) the investigation of such cases is entrusted by the Central Government to the N.I.A. and (ii) the N.I.A. transfers the same to the investigating agency of State Government.

The appeals shall be treated as bail applications, to be heard under Section 439 of Cr.P.C. and the registry shall place the same before the learned Single Judges after requiring the parties to alter the provisions of law;

(C) all the cases in the State of Bihar, which are being tried by the Courts of Sessions, on the basis of the judgment of this Court in **Aasif's case** (supra),

shall stand transferred to the courts that otherwise have jurisdiction to try them; and

(D) none of the steps taken in such cases that were pending before the Court of Sessions shall render the investigation or trial, invalid or unlawful.”

20. Thus, it would be evident from the findings of the Full Bench judgment in **Bahadur Kora (supra)** that the ratio laid down by the Division Bench insofar as it held that investigating agency of the State Government can investigate and try in accordance with the provisions of the NIA Act, in cases where offences punishable under the UAP Act are alleged and that such cases must be tried by the court of Sessions under sub-section (3) of Section 22 of the NIA Act, cannot be said to have laid the correct law. The Full Bench has further held that the cases in which the provisions of the UAP Act are alleged shall be considered by the courts as provided for under the CrPC and not in accordance with the special procedure under the Act unless (i) the investigation of such cases is entrusted by the Central Government to the N.I.A. and (ii) the N.I.A. transfers the same to the investigating agency of State Government.

21. It is an admitted position in the present case that the investigation was being conducted by the local police and not by the NIA. Further, the NIA had not transferred the investigation to the

State Government.

22. In view of the aforesaid judgment of the Full Bench, the law laid down by the Division in **Aasif's case (supra)** stands nullified and the positions relating to remain, bail etc. stood restored as it was prior to the judgment in **Aasif's case (supra)**.

23. The provisions prescribed under CrPC clearly stipulates that during pendency of investigation right from the stage of transmitting the FIR from the police station after institution of the FIR upto the stage of cognizance the matter shall be dealt with by the jurisdictional Magistrate and the Sessions Court would deal with the case which are triable by the court of Sessions only after commitment is made by the Magistrate under Section 209 of the CrPC after complying with the provisions of Section 207 CrPC. Thus, this Court is of the view that the order passed by the learned SDJM in exercise of power conferred under Section 167(2)(a)(ii) of CrPC was proper and legal and the same cannot be held to be without jurisdiction. For the same reason, the recall of the earlier order passed by the Sessions Judge whereby he had accepted the bail bond and sureties and directed for release of the petitioner is also bad and cannot be sustained in law.

24. The second question for consideration is whether or not the petitioner is entitled for bail on default under proviso (a)



(ii) to Section 167(2) of the CrPC when charge-sheet has been filed before furnishing bail bond and sureties by the petitioner before the Court. Section 167 CrPC relates to procedure when investigation cannot be completed within 24 hours whenever any person is arrested and detained in custody. Section 167(2) speaks that the Magistrate may authorize the detention of an accused in police or judicial custody, as the Magistrate may deem fit for a term not exceeding fifteen days in the whole. The detention beyond the period of fifteen days in judicial custody may be authorized up to a period of ninety days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years and sixty days where the investigation relates to any other offence.

25. Section 167(2) of the CrPC 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 sub-section 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, nor specially empowered in this behalf by the High Court, shall authorize 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 persons may be proved by his signature on the order authorizing 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.”

26. From a perusal of Section 167(2) CrPC, 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.

27. In **Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors. [(1994) 4 SCC 602]**, 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.

28. In **Sanjay Dutt vs. State through C.B.I., Bombay [(1994) 5 SCC 410]**, 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.”

29. 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.

30. 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]*.....”

31.

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.

32. 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.

33. 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).

34. From perusal of the conclusions arrived at by the Hon’ble Supreme Court in **Uday Mohanlal Acharya’s 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 completed and charge-sheet is filed, the so called indefeasible right cannot be frustrated.

35. Thus, in view of a three-Judge Bench judgment of the Hon’ble Supreme Court in the matter of **Uday Mohanlal**



Acharaya's case (supra) there remains no dispute regarding expression "if not already availed of" referred to in the Constitution Bench judgment of the Hon'ble Supreme Court in **Sanjay Dutt's case (supra)**. It would be evident that if an accused before filing of the charge-sheet had applied for bail and had offered to comply with the terms and conditions of bail as directed by the court then it shall be deemed that he has "availed of" his indefeasible right to be released on bail under the proviso (a)(ii) to Section 167(2) of the CrPC and will remain enforceable even upon filing of the police report under Section 173(2) of the CrPC in the court. The view that if 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 no. 29 and 30 and **Uday Mohanlal Acharaya's case (supra)**.

36. Coming back to the facts of the present case, there is no dispute regarding dates and event of facts which took place. As noted above, the first information report was registered on 26.10.2010. The petitioner was arrested and remanded to judicial custody on 23.08.2014. The statutory period of detention of the petitioner for a total period of ninety days expired on 21.11.2014. The petitioner filed an application for being released on bail on



default under Section 167(2)(a)(ii) of the CrPC on 28.11.2014 and offered to furnish bail bond and sureties to the satisfaction of the court. The same day, the learned SDJM called for a report and on being satisfied that the police report under Section 173(2) CrPC was not filed before the court by the investigating officer of the case, granted bail to the petitioner with certain conditions mentioned hereinabove. Even before the petitioner could furnish sureties to the satisfaction of the court, the investigating officer submitted police report under Section 173(2) CrPC in the court on 01.12.2014, the date on which at the request of the learned Additional Public Prosecutor, the learned SDJM transferred the record of the case to the Court of Sessions. The petitioner furnished sureties and bail bond to the satisfaction of the Sessions Judge on 04.12.2014 and the Sessions Judge, upon being satisfied, accepted the sureties and the bond and directed for issuance of release order of the petitioner. However, since the release order was not forwarded to the jail, the petitioner continued to remain in jail. Subsequently, the order dated 28.11.2014 granting bail to the petitioner by the learned SDJM was set aside and the order by which bail bond was accepted and release order was directed to be issued by the learned Sessions Judge was recalled by a composite order passed by the learned Sessions Judge on 02.01.2015.



37. In view of the discussions made hereinabove, this Court is of the opinion that the impugned order dated 02.01.2015 cannot be sustained. This Court has already held that the learned SDJM acted well within his jurisdiction while granting bail to the petitioner under the proviso (a)(ii) to Section 167(2) of the CrPC. It is an admitted position that the petitioner had applied for bail and had offered to comply with the terms and conditions of bail as directed by the court. Thus, he had “availed of” his indefeasible right to be released on bail and this right will remain enforceable even upon filing of the charge-sheet as held by a Constitution Bench of the Hon’ble Supreme Court in the matter of **Sanjay Dutt (supra)** and further interpreted by a three Judge Bench of the Supreme Court in the matter of **Uday Mohanlal Acharaya (supra)**.

38. Now, the only question left to be answered is as to whether the learned Sessions Judge, Munger had the jurisdiction to recall his own order whereby he had accepted the bail bond and sureties furnished by the petitioner and had directed for issuance of release order in his favour. In this regard, I find substance in the argument advanced by the learned counsel for the petitioner that the Sessions Judge could not have reviewed or recalled his own order dated 04.12.2014 in view of the prohibition contained in Section 362 of the CrPC.

39. Section 362 of the CrPC reads as under:-
“362. **Court not to alter judgment.**-Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

40. From perusal of Section 362 of the CrPC it is crystal clear that no criminal court can review or alter the judgment or final order passed in a case except to correct a clerical or arithmetical error. The prohibition contained in Section 362 of the CrPC is absolute. An arithmetical error is a mistake in calculation and a clerical error is a mistake in writing and typing. A perusal of the order dated 04.12.2014, would make it clear that there was neither any clerical nor any arithmetical error in the order. Thus, also the impugned order dated 02.01.2015 whereby the learned Sessions Judge has recalled his earlier order dated 04.12.2014 accepting the bail bond and sureties furnished by the petitioner and directing for issuance of his release order cannot be sustained in law. The order of recall is a nullity in view of the provision prescribed under Section 362 of the CrPC.

41. Regard being had to the discussions made hereinabove, the impugned order dated 02.01.2015 passed by the

learned Sessions Judge, Munger in connection with G.R. No. 1930 of 2010 arising out of Haveli Kharagpur P.S. Case No. 265 of 2010 is set aside and the petitioner is directed to be released on the bail bond and sureties already furnished by him in the case earlier on 04.12.2014.

42. The application stands allowed.

(Ashwani Kumar Singh, J.)

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