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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO. 390 OF 2016

Mr Vinayak Laxman Palve,
Aged : 41 years, Occ: Estate Agent,
R/o 1/1, Artist Village, Sector-8
CBD Belapur, Navi Mumbai
(At present he is lodge at Taloja
Central Prison, Navi Mumbai). ..APPLICANT

VERSUS

The State of Maharashtra
(At the instance of Nerul
Police Station, Navi Mumbai
vide their C.R. No.I-196/15). ..RESPONDENT

Mr Shirish Gupte, Senior Counsel a/w Mr M.K.
Kocharekar i/by Mr R.A. Kale, Counsel for the
applicant;
Ms S.S. Kaushik, A.P.P. for the respondent/State

CORAM : N.W. SAMBRE, J.

DATE : 1st DECEMBER, 2016

ORAL ORDER :

The applicant is seeking regular bail in
Crime No. I-196 of 2015 registered with Nerul
Police Station, Navi Mumbai for an offence
punishable under Sections 384, 385, 386, 387, 201,
34 of the Indian Penal Code and Sections 3 and 25
of the Arms Act along with Sections 3(1)(ii), 3(2),

(2)

3(4) of the Maharashtra Control of Organised Crime Act, 1999 (for short 'MCOC Act').

2. Relevant dates, for deciding present application, as the applicant is seeking default bail i.e. non filing of the charge sheet within stipulated period, are as under :

Date of arrest of the applicant : 21st July, 2015

Date of first remand by the Magistrate : 22nd July, 2015

Provisions of MCOC Act invoked against the applicant : 31st July, 2015

The application for extension of 45 days to file charge sheet moved on 6th October, 2015, which was decided on 12th October, 2015 granting 45 days time.

Another application for further extension of 45 days time for filing the charge sheet moved by the applicant on 18th November, 2015 and the Court granted extension of 15 days from 26th November, 2015.

The applicant filed application under Section

(3)

167(2) of the Code of Criminal Procedure on 11th December, 2015 at around 11-00 a.m.

The application preferred by the prosecution for extension of 10 days time to file charge sheet; on 11th December, 2015

The charge sheet filed on 14th December, 2015.

The Court below rejected the application on 14th December, 2015

3. The facts in nutshell for deciding the application, particularly in the matter of attributions against the applicant in the crime in question are as under :

Applicant herein is a property broker and is alleged to have supplied the information about development projects of the complainant to the main accused Hazi. From the applicant, mobile phone, vehicle four wheeler was recovered.

4. The learned trial Court while rejecting the bail application of the applicant has observed

(4)

that the last date of extended period of filing the charge sheet is upto 10th December, 2015 and further observed the exclusion of said date i.e. 10th November, 2015, the charge sheet could have been filed on 11st December, 2015. The learned Court below then observed that as on 11th December, 2015 there was an application for extension of time to file charge sheet which was preceded with the application for grant of bail in default by the applicant and since the charge sheet was filed on 14th December, 2015, it has to be presumed that there is deemed extension in favour of the prosecution on 14th December, 2015 for filing the charge sheet. It is also observed that in view of what has been observed herein above, the ground for statutory bail was not accrued to the applicant and as such rejected the same.

5. In the above referred back ground, it is not disputed before me that the charge sheet should have been filed by 10th November, 2015 and there was no charge sheet filed on that day. It is also not in dispute that the applicant first filed

(5)

application for releasing him on default bail on 11th December, 2015 which was followed by the application for extension of time to file charge sheet by the prosecution.

6. In this back ground, the law laid down by the Apex Court so as to determine whether the applicant is entitled for bail needs to be dwelt upon.

7. In **Afzal Ibrahim Jariwala vs. State of Maharashtra** reported in **2003(2) Mh.L.J. 684**, this Court in paragraph Nos. 6,7 and 10 has observed thus :

"6. The application for bail preferred by the applicant on 13-8-2001 under Section 167(2), Criminal Procedure Code came to be rejected by the Special court by order dated 6-9-2001. The main ground for rejecting the said application was that the period of 90 days would not be computed from 19-3-2001 but as the provisions of the MCOC Act came to be applied on 27-4-2001, the period would have to be computed from 27-4-2001 and thus, the Special Court was

(6)

of the opinion that the period of 90 days was not over on 16-6-2001. Hence, the application for bail under Section 167(2) came to be rejected. However, now it is settled law that even if the provisions of the MCOC Act are applied at a later date, the time of the remand period has to be computed from the first date of remand i.e. from the first date when the accused was produced in Court. Therefore, the period would start running from the first date of remand i.e. 19-3-2001 and not from the date the provisions of MCOC Act are applied. Therefore, the view taken by the learned Sessions Judge is clearly erroneous.

7. However, in the present case, it is an admitted fact that the chargesheet came to be filed on 23-7-2001. Period of 90 days expired on 16-6-2001 and the application for bail under Section 167(2) was preferred only on 13-8-2001. In the decision of the Apex Court in the case of Sanjay Dutt v. State through C.B.I., Bombay, the Apex Court has observed thus:--

"46. On the other aspect, Shri Kapil Sibal conceded that the indefeasible right for grant of bail on expiry of the initial period of 180 days for completing the investigation or the extended period

(7)

prescribed by Section 20(4)(bb) as held in Hitendra Vishnu Thakur is right of the accused which is enforceable only upto the filing of the challan and does not survive for enforcement on the challan being filed in the court against him. Shri Sibal submitted that the decision of the Division Bench in Hitendra Vishnu Thakur cannot be read to confer on the accused an indefeasible right to be released on bail under this provision once the challan has been filed if the accused continues in custody. He stated unequivocally that Upon filing of the challan, such a right which accrued prior to filing of the challan has no significance and the question of grant of bail to an accused in custody on filing of the challan has to be considered and decided only with reference to the provisions relating to grant of bail applicable after filing of the challan, since Section 167, Criminal Procedure Code has relevance only to the period of investigation.

47. The learned Additional Solicitor General, in reply, agreed entirely with the above submission of Shri Sibal and submitted that the principle enunciated by the Division Bench in Hitendra Vishnu Thakur must be so read.

(8)

48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right, had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167, Criminal Procedure Code ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on

(9)

bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4) (bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. 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. It is settled by constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detentions on the basis of a valid order."

Thus, it is clear that the indefeasible right accrued to an accused is enforceable only prior to the filing of chargesheet and does not survive for enforcement on the

(10)

chargesheet being filed. Once the chargesheet has been filed, the question of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail after filing of the chargesheet. Thus, it is clear that there is no question of enforcement of any right once the chargesheet is filed, as the said right is extinguished the moment the chargesheet is filed because thereafter Section 167, Criminal Procedure Code has relevance only to the period of investigation.

10. So also in the case of Uday Mohanlal Acharya v. State of Maharashtra, the Apex Court has observed thus-

"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.

When an application for bail is filed by an accused for enforcement of his indefeasible

(11)

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.

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."

(12)

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.

With the aforesaid interpretation of the expression "availed of if the chargesheet is filed subsequent to the availing of the 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 the accused moves the higher forum for consideration a chargesheet is filed, the so-called

(13)

indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail."

8. What could be gathered from the above referred judgment is, even if the provisions of MCOC Act are invoked at later date than that of the date of first remand, the first date of the remand i.e. when the accused was produced in the Court for the first date will have to be taken into account for calculating the period as prescribed under Section 167(2) of the Code of Criminal Procedure.

9. The Apex Court considered the dictum of Constitution Bench judgment in the case of **Sanjay Dutt vs State**, reported in **1994(5) SCC (Cri) 410** and also the majority view in the case of **Uday Mohanlal Acharya vs State of Maharashtra**, reported in **2001(5) SCC 453** in the judgment of **Union of India Through Central Bureau of Investigation vs Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav** reported in **2014(9) SCC 457** and particularly in paragraph Nos. 22, 23, 24, 25 and 26 and

(14)

reiterated the law that failure to file charge sheet within period prescribed in the statute gives indefeasible right to claim bail after making categorical statement that he is ready and willing to furnish bail, which right has to be exercised before filing of the charge sheet or before filing the application for extension of time to file the charge sheet.

10. An eventuality as to whether the application is moved by the prosecution seeking extension of time to file charge sheet which precedes with an application by the accused may be on the same date offering his intention to comply with the conditions of bail if so released is dealt with, in my opinion, by the Apex Court in the matter of **Sayed Mohd. Ahmad Khazmi vs. State (Govt. of NCT of Delhi)** reported in **2012(12) SCC 1**. In paragraph-27 of the said judgment, the Apex Court has observed as under :

"27. We are unable to appreciate the procedure adopted by the Chief Metropolitan

(15)

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 17-7-2012, 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 for grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise."

It is observed by the Apex Court that the right for grant of statutory bail has been accrued to the accused, once the charge sheet is not filed within statutory period and accused has offered to comply with the conditions if released on bail.

11. Even if the application for extension of time is filed which is later in point of time, still, in my opinion, it has to be observed and held that the applicant has exercised his right pursuant to the provisions of Section 21 of MCOC

(16)

Act read with Section 167(2) of the Code of Criminal Procedure.

12. In view of what has been observed by the Apex Court and admitted dates qua first remand, expiry of extension to file charge sheet, date of filing of the application by the accused for getting default bail, a case for bail is made out. Hence, the following order is passed : -

(i) The applicant be released on bail in Crime No. I-196 of 2015 registered with Nerul Police Station, Navi Mumbai for an offence punishable under Sections 384, 385, 386, 387, 201, 34 of the Indian Penal Code and Sections 3 and 25 of the Arms Act along with Sections 3(1)(ii), 3(2), 3(4) of the Maharashtra Control of Organised Crime Act, 1999, upon furnishing P.R. bond of Rs.2,00,000/- (Two lacs) with one or two sureties in the like amount.

(ii) He shall not leave the jurisdiction of this Court without prior permission and if not surrendered, shall surrender his pass port.

(17)

(iii) Two consecutive absence of the applicant before the Court below will entail the Court below to initiate the proceedings for cancellation of bail of the applicant.

13. The application is allowed in above terms.

(N.W. SAMBRE, J.)

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