

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-41691 of 2015 (O&M)
Date of decision: 11.02.2016

Gurcharan Singh @ Mintu

.....Petitioner

versus

State of Haryana

.....Respondent

CORAM: Hon'ble Mr.Justice Kuldip Singh

Present: Mr.Jatinder Pal Singh, Advocate for the petitioner
Mr.M.S.Sidhu, Additional A.G. Haryana
Mr.Vivek Goel, Advocate for the complainant

- 1. Whether Reporters of Local Newspapers may be allowed to see the judgment ?*
- 2. To be referred to the Reporters or not ?*
- 3. Whether the judgment should be reported in the Digest?*

Kuldip Singh, J.

In this petition under Section 482 of Code of Criminal Procedure, the petitioner seeks the quashing of order dated 13.11.2015 (Annexure P2), passed by the learned Judicial Magistrate 1st Class, Panchkula under Section 167(2) of Code of Criminal Procedure vide which application of the petitioner for releasing him on bail under Section 167(2) of Code of Criminal Procedure was dismissed. Also challenged is the order dated 1.12.2013 (Annexure P5), passed by the learned Additional Sessions Judge, Panchkula, vide which the revision of the petitioner was dismissed.

The undisputed facts of the case are that one FIR No.99 dated 5.8.2015 was registered regarding the murder of Mukul Bhardwaj. During the course of investigation, the police found that

the present petitioner, namely, Gurcharan Singh @ Mintu is involved in the crime. Accordingly, the present petitioner was arrested by the police on 14.8.2015 and was produced before the learned Judicial Magistrate 1st Class, Panchkula on 15.8.2015. As per the report of the Ahlmad, on 10.11.2015 at about 4.45 PM, the police filed the challan before the Ahlmad of the Court. On 13.11.2015, the present petitioner moved an application under Section 167(2) of Code of Criminal Procedure for grant of bail on the ground that the period of 90 days has elapsed but challan has not been presented. Therefore, he has acquired indefeasible right of bail. The learned Magistrate called for the report of the Ahlmad, on which the Ahlmad reported that the challan was filed before him on 10.11.2015 at 4.45 PM. The Ahlmad accordingly produced the challan before learned Judicial Magistrate 1st Class, Panchkula. The learned Magistrate took the view that even if the challan had not been presented on 10.11.2015 even then the period of 90 days has not elapsed since the accused was produced for the first time before him on 15.8.2015 and the said day i.e. 13.11.2015 is 90th day of investigation. Hence the application was dismissed.

Aggrieved by the said order, the present petitioner preferred a revision before the learned Additional Sessions Judge, Panchkula, wherein the learned Additional Sessions Judge has computed that from 15.8.2015 to 12.11.2015 the total period comes to 90 days. The period was calculated as follows:-

15.8.2015 to 31.8.2015	=	17 days
1.9.2015 to 30.9.2015	=	30 days
1.10.2015 to 31.10.2015	=	31 days

1.11.2015 to 12.11.2015	=	<u>12 days</u>
Total	=	<u>90 days</u>

Learned Additional Sessions Judge held that as per observations of the lower Court the application under Section 167(2) Cr.P.C. was moved before the lower Court on 13.8.2015 at 9.30 A.M. but the Court held that on the date on which, the accused was remanded in judicial Custody i.e. 15.8.2015 is to be excluded while computing the limitation and hence it is held that the period of 90 days had not elapsed. The first appellate Court relied upon the authorities 1994(4) RCR (Criminal) 682 (HP) Satish Katoch versus State of H.P. 1997(3) RCR(Criminal) 736 (P&H) Jagdish vs. State of Haryana. 2012(1) RCR (Criminal) 302 (SC) Pragyna Singh Thakur versus State of Maharashtra.

I have heard learned counsel for the parties and have also carefully gone through the file.

First of all, it is to be noted that the chart produced above shows that from 15.8.2015 to 12.11.2015, the period of 90 days was complete and the challan was first time put up before the learned Magistrate on 13.11.2015.

The first question which requires consideration before this Court is as to whether presentation of challan before the Ahlmad of the Court is legal presentation or not? Section 173(2) Cr.P.C. provides as under:-

173. Report of police officer on completion of investigation -

(1)

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a

Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

- (a) the names of the parties;*
 - (b) the nature of the information;*
 - (c) the names of the persons who appear to be acquainted with the circumstances of the case;*
 - (d) whether any offence appears to have been committed and, if so, by whom;*
 - (e) whether the accused has been arrested;*
 - (f) whether he has been released on his bond and, if so, whether with or without sureties;*
 - (g) whether he has been forwarded in custody under section 170*
- (ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given*

It is clear that the challan is to be presented before the Magistrate and not before the Ahlmad. The challan was presented at 4.45 PM i.e. after the Court hours. If the Magistrate was not available, then challan could have been presented at the residence of the Illaqa Magistrate or before the Duty Magistrate. It is to be noted that it is not disputed that 11.11.2015 and 12.11.2015 were holidays being second Saturday and Sunday. The order of the Magistrate shows that when the application under Section 167(2) Cr.P.C. was moved and only when the Magistrate called for the report from the Ahlmad, the Ahlmad brought to the notice of the Court that challan was presented before him at 4.45 PM on 10.11.2015. Original file has also been called for, which also bears the same fact. In fact, the Ahlmad gave the receipt to the investigating officer regarding receipt of challan on 10.11.2015 at 4.45 PM.

Learned counsel for the petitioner has produced copies of the complaint addressed to the Administrative Judge of Panchkula as well as Hon'ble Chief Justice of this Court filed by Shri Raj Kumar Bhatia, Advocate who was counsel for the accused before the lower Court, wherein allegations were levelled that even on 11.11.2015 and 12.11.2015, the same Magistrate was also Duty Magistrate. It is further alleged that a complaint has been made against the Ahlmad that he ante-dated the receipt regarding the receipt of the challan papers from the police.

The matter was otherwise considered by this Court in Ram Chander vs. State of Haryana, 1991(1) RCR (Criminal) 386, wherein a Single Bench of this Court observed as under:-

4. *From the above factors, it is evident that the petitioners having been arrested on 12.5.1992 had completed 90 days in police custody on 13.8.1992 on which date they had been directed to be detained till 27.8.1992. This necessitated the filing of an application on behalf of the accused for their release on bail in view of the provisions of Section 167(2) Code of Criminal Procedure. Till the date neither the challan papers were put up before the Magistrate nor there was any entry of the said challan in the relevant register maintained by the Ahlmad of the Court. As a result thereof the Magistrate had released the accused on bail vide his order dated 14.8.1992. It was only on 19.8.1992 that the Ahlmed had put up the challan before the Magistrate and brought*

*to his notice that the prosecution had forwarded the challan to the Court on 8.8.1992. It is, thus, evident that till 19.8.1992, the challan was not put up before the Magistrate. If the information supplied by the Ahalmad to the Magistrate to the effect that the challan had been forwarded by the prosecution on 8.8.1992 is taken to be true even then it can at the best be said that the challan was filed by the prosecution with the Ahalmad. So, the question would be as to whether the filing of the challan papers by the prosecution with the Ahalmad would tantamount to the presentation of the challan before the Magistrate. In similar circumstances, this Court in **Het Ram v. The State, 1975 CLR 658**, has held that even if the challan papers were left with the Ahalmad earlier, it was of no consequence and the only possible conclusion was that the challan was presented on the date it was actually put up before the Magistrate.”*

Therefore, if the challan papers are left with the Ahlmad, it is not proper presentation of the final report under Section 173(2) Cr.P.C. before the Magistrate. Therefore, the date of presentation of challan is to be taken as 13.11.2015.

The accused was produced for the first time before the Magistrate on 15.8.2015. Now further question would arise as to whether the day on which the accused was produced before the Magistrate is to be excluded while computing the period of 90 days or

not?

Learned counsel for the respondent-complainant has argued that the said day is to be excluded and for this purpose, reliance has been placed on the authority of the Hon'ble Supreme Court in Ravi Prakash Singh @ Arvind Singh v. State of Bihar, 2015 (2) RCR(Criminal) 89.

The said contention has vehemently been controverted by learned counsel for the petitioner who has stated that the authority in the case of State of M.P. v. Rustam, 1995 Supp (3) SCC 221, relied upon by the Hon'ble Supreme Court in this case was already over-ruled and this fact was not brought into the notice of the Hon'ble Supreme Court.

The learned counsel for the petitioner has relied upon the authority of three Judges Bench of the Hon'ble Supreme Court in the case of Uday Mohanlal Acharya v. State of Maharashtra, 2001(2) RCR (Criminal) 452, in which the said authority in the case of State of M.P. v. Rustam (supra) was specifically over-ruled and it was observed as under:-

"12. In State of M.P. v. Rustam and others (supra), this Court set aside the order of the High Court where the High Court had released the accused on bail, charge-sheet not having been filed within the period stipulated in Section 167(2) of the Code of Criminal Procedure, as by the time the High Court entertained the bail application challan had already been filed, this Court had observed that the Court is required to examine the availability of the right to compulsive bail on the date of its considering the

question of bail and not barely on the date of presentation of the petition for bail. This Court came to the conclusion “on the date when the High Court entertained the petition for bail and granted it to the accused/ respondent, undeniably the challan stood filed in Court and then the right as such was not available. A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and that right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the Court has to be passed. It is also further clear that that 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 (supra). 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."

Therefore, relying upon the said authority, it is stated that the challan was to be presented within the period of 90 days specified in Section 167(2) Cr.P.C. and the date on which, the accused was remanded by the Court for the first time is not to be excluded.

Learned counsel for the petitioner has also relied upon the two judges Bench authority of the Hon'ble Supreme Court in Union of India through C.B.I. v. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, 2014(3) RCR(Criminal) 534, wherein the authority in the case of Pragyna Singh Thakur versus State of Maharashtra (supra) was specifically over-ruled. The Apex Court has observed as under:-

"33. Learned counsel for the appellant has commended us, with immense perseverance, the authority in Pragyna Singh Thakur (supra). In the said case a contention was raised that judgment rendered by the High Court declining to enlarge the accused on

bail was violative of the mandate of Articles 22(1) and 22(2) of the Constitution and also violative of the statutory provisions engrafted under Section 167(2) CrPC. In the said case, the accused was under detention from 10.10.2008 and ninety days expired on 9.1.2009 and the charge-sheet was filed on 20.1.2009. The accused-appellant filed an application under Section 167(2) CrPC read with Section 21(4) of Maharashtra Control of Organized Crime Act, 1999 (MOCA) and also under Section 439 CrPC. The said application was resisted by the prosecution on the ground that the charge-sheet was filed on 20.1.2009 which was the eighty-ninth day from the date of his remand order, i.e., 24.10.2008. The learned Special Judge rejected the application vide order dated 9.7.2009. The High Court being moved, dismissed the application vide order dated 12.3.2010. Before this Court a question arose whether the appellant was in police custody from 10.10.2008 to 22.10.2008, for the High Court had returned a finding that the accused was arrested on 23.10.2008. This Court, on a scrutiny of the facts, held that the accused was arrested on 23.10.2008 and, accordingly, came to hold thus: -

“49. As far as Section 167(2) of the Criminal Procedure Code is concerned this Court is of the firm opinion that no case for grant of bail has been made out under the said provision as charge-sheet was filed before the expiry of 90 days from the date of first remand. In any event, right in this regard of default bail is lost once the charge-sheet is filed. This Court finds that there is no violation of Article 22(2) of the Constitution, because on being arrested on

23-10-2008, the appellant was produced before the Chief Judicial Magistrate, Nasik on 24-10-2008 and subsequent detention in custody is pursuant to the order of remand by the Court, which orders are not [pic]being challenged, apart from the fact that Article 22 (2) is not available against a court i.e. detention pursuant to an order passed by the court.”

The Apex Court also considered the authority in Uday Mohanlal Acharya v. State of Maharashtra (supra) and observed as under:-

“36. Be it noted, to say so, the learned Judges drew support from the decisions in Rustam (supra), Bipin Shantilal Panchal (supra), Dinesh Dalmia (supra) and Mustaq Ahmed Mohammed Isak (supra). Thereafter they adverted to Uday Mohanlal Acharya’s case in following terms: -

“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[24], 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.”

[Emphasis added]

37. At this juncture, it is absolutely essential to delve into what were the precise principles stated in Uday Mohanlal Acharya’s case and how the two- Judge Bench has understood the same in Pragyna Singh Thakur (supra). We have already reproduced the paragraphs in extenso from Uday Mohanlal Acharya’s case and the relevant paragraphs from Pragyna Singh Thakur (supra). Pragyna Singh Thakur (supra) has drawn support from Rustam and others case to buttress the principle it has laid down though in Uday Mohanlal Acharya’s 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's case. We have already quoted from paragraph 13 and the conclusions.

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."

Regarding the reliance on the various authorities the following extract would be helpful which shows that the authority in Chaganti Satyanarayana and others v. State of A.P., 1987 (1) RCR (Criminal) 40, was also considered by the Hon'ble Apex Court:-

"34. To arrive at the said conclusion, reliance was also placed on Chaganti Satyanarayana (supra), CBI v.

Anupan J. Kulkarni 1992(2) RCR (Criminal) 147: (1992) 3 SCC 141, State v. Mohd. Ashraft Bhat (1996) 1 SCC 432, State of Maharashtra v. Bharati Chandmal Varma 2002(1) RCR (Criminal) 99: (2002) 2 SCC 121 and Rustam (supra)."

Learned counsel for the petitioner has also relied upon the authority of this Court Ravinder Singh v. State of Punjab, 2005(2) RCR (Criminal) 340, wherein this Court took the view that the date of custody for the purpose of Section 167(2) Cr.P.C. would be considered from the date when he surrendered which is to be read in this case when he was remanded to police/ judicial custody.

Learned counsel for the petitioner has produced the authority of Chaganti Satyanarayana v. State of A.P.(supra), wherein it was held that the period of 90 days or 60 days as the case may be will begin to run from the date of order of remand and not from the date of arrest.

Similar views were expressed by another Bench of the Hon'ble Supreme Court in Central Bureau of Investigation, Special Investigation Cell-1, New Delhi v. Anupam J. Kulkarni, 1992(2) RCR (Criminal) 147.

It being so, it has to be held that for the purpose of computing the period of 90 days, 15.8.2015, when he was first time produced before the Magistrate and remanded to custody is to be included. If it is so included, the period of 90 days will elapse on 12.11.2015. Since, this Court has held that filing of papers before the Ahlmad is not the presentation of challan before the Magistrate under Section 173(2) Cr.P.C., therefore, the challan is deemed to have been

presented on 13.11.2015 when the period of 90 days had already elapsed.

In these circumstances, it is to be considered as to whether the application under Section 167(2) Cr.P.C. deemed to have been filed before the presentation of challan or not?

Admittedly, in this case, the challan papers were left with the Ahlmad on 10.11.2015 at 4.45 PM and 11.11.2015 & 12.11.2015 were holidays being second Saturday and Sunday. Apparently, for 13.11.2015, the cause list was prepared by the Ahlmad and the concerned files were put up before the Court. When the application was filed the Magistrate passed the following order:-

“File taken up on an application moved by counsel for the accused Gurcharan Singh for grant of bail to the accused under Section 167(2) Cr.P.C. Let report of the Ahlmad be called.”

It shows that the file was already placed before the Magistrate by the Ahlmad when this application was filed. However, the report of the Ahlmad was called for regarding the date of presentation of challan. The Ahlmad accordingly reported that the challan papers were left with him on 10.11.2015 at 4.45 PM. Therefore, the challan in this case is deemed to have been presented when the file was put up by the Ahlmad before the Court. It comes out that file was already put up before the Court when the present application under Section 167(2) Cr.P.C. was filed, immediately on the opening of the Court.

It being so, it has to be held that the challan was already

lying present before the Magistrate when the present application was moved.

It being so, it cannot be said that the application under Section 167(2) Cr.P.C. was moved before the presentation of final report under Section 173(2) Cr.P.C.

Consequently, the accused did not acquire any indefeasible right of grant of bail under Section 167(2) Cr.P.C.

Accordingly, the impugned orders of the learned Magistrate and the first appellate Court are upheld, though for different reasons.

Consequently, the present petition is dismissed.

11.02.2016

gk

**(Kuldip Singh)
Judge**