

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Revision No.480 of 2018

Arising Out of PS. Case No.-82 Year-2017 Thana- MAHILA P.S. District- Patna

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Aman Kumar @ Satyam Kumar Aanu, son of Sri Sanjeev Kumar Gupta,
Resident of Anivesent Road, Opposite Patna College, P.S. Pirbahore, District-
Patna.

... .. Petitioner/s

Versus

The State of Bihar.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Ajay Kumar Thakur, Adv. Mr. Malay Kumar Choudhary, Adv.
For the Respondent/s	:	Mr. Sri Chandrasen Prasad Singh. Adv.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
C.A.V. JUDGMENT

Date : 30 -11-2018

This revision application is directed against the order dated 06.03.2018 passed in Special Case No. 167/17 by the learned Additional District & Sessions Judge -1st cum Special Judge POCSO Act, Patna, whereby, the petitioner's application for grant of default bail (annexure -2 of the petition) under Section 167 (2) of Cr.P.C. has been rejected holding that chargesheet has been submitted before the filing of the application.

2. Allegation against the petitioner is that he on the allurement of marriage, established physical relationship with the informant and refused to marry her and when her mother and father went to talk with the parents of the



petitioner, they threatened them of dire consequences.

3. On the basis of the aforesaid fact, Mahila P.S. Case No. 81/17 dated 18.11.2017 was registered against the petitioner under Section 376, 384, 506/34 of the Indian Penal Code.

4. Case of the revisionist-petitioner is that he surrendered in the court on 04.12.2017 and remanded in judicial custody and since then, he has been in jail. Further case of revisionist – petitioner is that excluding the date of surrender i.e. 04.12.2017, ninety days of custody of petitioner was completed on 4.03.2018 and accordingly, on 05.03.2018, the petitioner filed an application before the learned Additional District & Sessions Judge -1st cum Special Judge POCSO Act, Patna, where the case is pending that he is ready to execute the bail bonds and as ninety days period has already expired, he may be allowed default bail.

5. Further case of the revisionist-petitioner is that on that application, the learned Additional District & Sessions Judge -1st cum Special Judge POCSO Act, Patna called for a report on 06.03.2018, which is evident from annexure -2 to the petition and the office submitted report



stating that the charge-sheet has been submitted by the Investigating Officer on 05.03.2018 being charge-sheet no. 18/18 dated 28.02.2018 and said endorsement is on the back page of default bail application (Annexure -2) of the petition.

6. The learned Additional District & Sessions Judge -1st cum Special Judge POCSO Act, Patna vide order dated 06.03.2018 rejected the prayer of the petitioner for grant of default bail under Section 167(2) Cr.P.C. on the ground that on 28.02.2018, charge-sheet has already been submitted and as the court was closed on account of holi festival from 01.03.2018 to 04.03.2018, as such, the same was received on 05.03.2018.

7. Being aggrieved by the order dated 06.03.2018, the petitioner has preferred this instant revision application.

8. Contention of learned counsel for the revisionist – petitioner is that on 04.03.2018 itself, the period of ninety days of the investigation has expired and an indefeasible right has been created in favour of the petitioner and the petitioner has filed an application for bail with undertaking that the petitioner was ready to abide by the terms and conditions of the bail and prayed for furnishing the bail



bonds, however, the aforesaid indefeasible right of the petitioner has been curtailed on the ground that on 28.08.2018 itself, the charge-sheet has been submitted and as the court was closed on account of holi festival from 01.03.2018 to 04.03.2018, the said charge-sheet was produced on 05.03.2018, which is an error apparent on the face of the record. It has further been submitted that Annexure -2 i.e. petition for bail under Section 167(2) Cr.P.C. discloses that on 06.03.2018, the learned court below has called for a report, if charge-sheet was submitted earlier, there was no question of calling for report on 06.03.2018. As such action of the learned court below, itself shows that the order has not been passed on 05.03.2018, in order to defeat the prayer for default bail of the petitioner. It has also been submitted that it is settled law that after completion of ninety days, an accused files an application that too after serving copy to the learned Public Prosecutor that he is ready to execute the bail bond as charge-sheet has not been submitted, an indefeasible right accrued in favour of the petitioner and any charge-sheet subsequently, submitted will not defeat the said right. In support of his contention, learned counsel for the



petitioner has relied upon the judgment of Hon'ble Apex Court in the case of **Rakesh Kumar Pal vs. State of Assam reported in AIR 2017 SC 3948**, three judge Bench judgment of Hon'ble Apex Court in the case of **Uday Mohan Lal Acharya v State of Maharashtra reported in AIR 2001 SC 1910**, a single Judge Bench decision of this Court in the case of **Vikarma Pal vs. State of Bihar reported in 2016 (1) PLJR 321** as well as an unreported judgment of this Court in the case of **Baharan Ali vs. State of Bihar in Cr. Revision No. 276/18**.

9. On the basis of the above, learned counsel for the revisionist – petitioner contended that the order passed by the learned Additional District & Sessions Judge –I cum Special Judge POCSO Act, Patna, rejecting the prayer of default bail of the petitioner is bad in law as well as on fact and is fit to be set aside.

10. On the other hand, learned counsel for the State has submitted that the order-sheet itself shows that the charge-sheet has been submitted on 05.03.2018 on the very date, the bail application has been filed under Section 167(2) Cr.P.C, as such, the right of the petitioner for grant of default bail extinguished and, therefore, there



is no illegality in the impugned order and the same does not require any interference.

11. The question involves in the present case is as to whether petitioner is entitled for grant of default bail, when the period of ninety days has already expired and petitioner has filed an application for that and later on the court finds that charge-sheet has already been submitted.

12. In this case, lower court records were called for, from perusal of which, it appears that on 28.02.2018, an application was filed by the informant Alka Kumari seeking protection and the order does not show that charge-sheet has been submitted. On 05.03.2018 an application has been filed on behalf of the petitioner for grant of bail under Section 167(2) Cr.P.C. The order-sheet further shows that later on, on 05.03.2018, charge-sheet was received against the petitioner under Section 376 of the Indian Penal Code and the cognizance has been taken against the accused persons. Further, order dated 06.03.2018 disclosed that the prayer for default bail of the petitioner has been rejected by the Special Judge POCSO Act, Patna on the ground that on 28.02.2018 itself, charge-sheet has been submitted but as there was holidays in



between 01.03.2018 to 04.03.2018 on account of holi festival, the same was received in the court on 05.03.2018. On the other hand, it appears from the petition filed by the petitioner (Annexure-2) that in the margin of the petition for grant of bail under Section 167(2) that the court has called for a report on 06.03.2018 and in the back of the page, there is endorsement of the office that in this case, charge-sheet has been submitted by the Investigating Officer on 05.03.2018 being C.S. No. 18/18 dated 28.02.2018. It further appears from the charge-sheet submitted by the Investigating Officer that the same was perused by the learned court below on 05.03.2018, nowhere in the charge-sheet, the time of receiving of charge-sheet has been mentioned nor in the order dated 05.03.2018, the time of receiving has been mentioned to show that charge-sheet has been submitted prior to filing of the application under Section 167(2) Cr.P.C. for default bail. Considering the facts mentioned above, the finding of learned court that the charge-sheet has been received on 28.02.2018 appears to be an error apparent on the face of record rather, there is nothing on the record to show that charge-sheet has been submitted before filing of the



application for default bail by the petitioner.

13. So far section 167 (2) Cr.P.C. is concerned that deals with the procedure when the investigation cannot be completed in twenty four hours and provides as follows:-

“(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, for 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 so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.¹ 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;].² Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.]

14. On bare perusal of Section 167 (2) Cr.P.C., it appears that power to authorize detention by the Magistrate are 60th day or 90th day as the case may be and on expiry of that period, accused persons shall be released on bail, if he prays to furnish bail, hence, an indefeasible right gets accrued in favour of the accused if the investigation is not completed within the period of sixty days or ninety days.

15. In the present case, as the offence is under Section 376 of the Indian Penal Code as well as other Sections of



the Indian Penal Code, investigation has to be completed within a period of ninety days.

16. The Hon'ble Apex Court in the case of **Uday Mohan Lal Acharya (supra)**, as relied upon by learned counsel for the petitioner, while considering the issue similar to the present one, has held in para -8 of the judgment as follows:-

“ This is only way how a balance can be struck between the so called indefeasible right of accused on failure on the part of the prosecution to file challan within the specified period and the interest of the society at large, in lawfully preventing an accused for being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our considerations as follows:-

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 in the whole.

2. Under the proviso to aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than 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 furnish 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 it of forth with, 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 bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section 2 of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and therefore, if during that period the investigation is complete and 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's case (supra) 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 paragraph (a) of 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 charge-sheet 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 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. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and



the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with law laid down by this Court in the case of Mohd. Iqbal vs. State of Maharashtra (supra).

17. The same has also been considered by the Hon'ble Apex Court in the case of **Rakesh Kumar Paul vs. State of Assam** reported in **AIR 2017 Supreme Court 3948** and observed in para 38 to 41 of the judgment, which reads as under:-

"38. This Court also dealt with the decision rendered in Sanjay Dutt and noted that the principle laid down by the Constitution Bench is to the effect that if the charge sheet is not filed and the right for 'default bail' has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to [Mohamed Iqbal](#)



[Madar Sheikh v. State of Maharashtra](#)¹² wherein it was observed that some courts keep the application for 'default bail' pending for some days so that in the meantime a charge sheet is submitted. While such a practice both on the part of prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for 'default bail' during the interregnum when the statutory period for filing the charge sheet or challan expires and the submission of the charge sheet or challan in court. Procedure for obtaining default bail."

18. It has further been held in the said judgment in Para-40 and 41 which read as follows:-

"40 In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

41. We take this view keeping in mind that in matters of personal liberty and [Article 21](#) of the Constitution, it is not always advisable to be formalistic or



technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court”.

19. Further in paragraph -45 of the said judgment after considering the facts and circumstances of the case, it has been held that :-

On 11th January, 2017 when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of ‘default bail’ since the statutory period of 60 days for filing a charge sheet had expired, no charge sheet or challan had been filed against him (it was filed only on 24 th January, 2017) and the petitioner had orally applied for ‘default bail’. Under (2012) 9 SCC 1 these circumstances, the only course open to the High Court on 11 th January, 2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him ‘default bail’ on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.

20. In the case of **Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors. [(1994) 4 SCC 602]**, has noticed in paragraph -13 of his judgment as follows:-

“13. 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”.

21. Similarly, in the case of Sanjay Dutt Vs. State through C.B.I., Bombay [(1994) 5 SCC 410], the Hon'ble Supreme Court has held in para 48 of the judgment as follows:-

“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 “

22. On the other hand, in the case of Pragya Singh Thakur reported in (2011) 10 SCC 446, Hon'ble Supreme court in para 54 ot 58 held as under:

“54. There is yet another aspect of the matter. The right under Section 167(2) CrPC to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. In other words, even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost.



After the filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from the Constitution Bench decision of this Court in Sanjay Dutt v. State [paras 48 and 53(2)(b)]. The reasoning is to be found in paras 33 to 49.

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

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

(2) Bipin Shantilal Panchal v. State of Gujarat, SCC para

4. It may be mentioned that this judgment was delivered by a three-Judge Bench of this Court;

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

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

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



13 of the reported decision as well as the conclusion of the Court at p. 747.

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

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

23. After considering the above judgments, the Single Judge Bench in the case of Vikarma Pal (supra) has held in para 28 of his judgment, which reads as follows:-

“ 28. The opinion expressed in paragraphs 54 and 58 in Pragya Singh Thakur (Supra) was considered by the Supreme Court in Union of India Vs. Nirala Yadav (Supra). After taking into consideration almost all the previous judgments on the point of Section 167(2) Cr.P.C., the Supreme Court concluded and held that the principle laid down in paragraphs 54 and 58 of Pragyna Singh Thakur case



(Supra) does not state the correct principle of law and it runs counter to the principles stated in Uday Mohanlal Acharya case (Supra), which has been followed in Union of India Vs. Hassan Ali Khan, [(2011) 10 SCC 235] and Syed Mohd, Kazmi case (Supra). The relevant paragraphs of Union of India Vs. Nirala Yadav case in this regard would be paragraphs 44 to 46, which are being reproduced herein below :-

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

45. The opinion expressed in paras 54 and 58 in Pragyna Singh Thakur which we have emphasised, as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya which has been followed in



Hassan Ali Khan and Sayed Mohd. Ahmad Kazmi. The decision in Sayed Mohd. Ahmad Kazmi case has been rendered by a three-Judge Bench. We may hasten to state, though in Pragyna Singh Thakur case the learned Judges have referred to Uday Mohanlal Acharya case but have stated the principle that even if an application for bail is filed on the ground that the charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if chargesheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in Mustaq Ahmed Mohammed Isak case. We are disposed to think so, as the two-Judge Bench has used the words —before consideration of the same and before being released on bail, the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

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

29. My learned brother has referred to the expression “if not already availed of” referred to in the judgment in Sanjay Dutt case for



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

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

On a careful reading of the aforesaid



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

24. Further the Single Judge has also discussed the judgment of Hon'ble Apex Court in the case of **Union of India Vs. Nirala Yadav [(2014) 9 SCC 457]** and held in paragraph 31 and 32 of its judgment, which reads as under:

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



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

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

25. Another Single Judge Bench of this Court in the case of **Baharan Ali (supra)**, while considering the provisions of Section 167(2) Cr.P.C. has also noticed the judgment of Hon'ble Apex Court in the case of Hitendra Vishnu Thakur (supra), Sanjay Dutt's case (supra) as well as several other judgments and also considered the



Pragya Singh Thakur's and further the judgment of Hon'ble Apex Court in the case of **Union of India through C.B.I. vs. Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav** reported in **AIR 2014 SC 3036**, has affirmed the same view as expressed in the case of Vikarma Pal (supra).

26. From the discussions made above, it clearly appears that it is well settled that the day, on which, an accused files an application for default bail and by that time, charge-sheet has not been submitted and if later on, it has been submitted, the right already accrued in favour of the accused and he availed of, the same cannot be extinguished. Hon'ble Apex Court in the case of **Rakesh Kumar Paul** (supra) as discussed above, has gone to the extent that if court finds that 90 days or 60 days period has expired and chargesheet has not been submitted and petitioner orally applied for bail the Court may enquire from the petitioner, as to whether he was prepared to furnish bail and if so then to grant him 'default bail' on reasonable conditions.

27. In the case in hand, it appears that period of 90 days have expired on 04.03.2018 and on 05.03.2018, an



application for default bail under Section 167(2) was filed by the petitioner. Further, the record shows that on application of the petitioner, a report was called for from the office on 06.03.2018 and it was reported that charge-sheet has been submitted on 05.03.2018, which is consequent to filing of the application by the petitioner for default bail. Charge-sheet also shows that it has been received on 05.03.2018 but all those places, no time has been mentioned as to when the charge-sheet has been received , whereas, the learned court below has not passed the order on 05.03.2018, the day the application of default bail of the petitioner was filed, rather a report was called from the office on 06.03.2018, which shows that the charge-sheet has been submitted on 05.03.2018. I, however, failed to appreciate that if the order dated 05.03.2018 shows that charge-sheet has been submitted and cognizance has been taken what was the occasion for the court below to call for the report on 06.03.2018 as to whether charge-sheet has been submitted or not. Furthermore, ordersheet shows that charge-sheet has been submitted later to filing of the application for default bail.



28. Considering the aforesaid aspect of the matter and lower court records also shows that petition for default bail has been filed on 05.03.2018 and by that time, the charge-sheet has not been submitted and as such an indefeasible right has accrued to the petitioner, and he availed of the same, which cannot be defeated by keeping the application for default bail pending either by the court or by the prosecution only with a purpose to get the charge-sheet submitted and in the meantime and rejecting the application of the petitioner for default bail. Such act, both on the part of prosecution as well as court below is strongly condemned, as no chicanery should be adopted to defeat the indefeasible right of the accused for default bail.

29. Accordingly, I hold that the order dated 06.03.2018 passed in Special Case No. 167/17 by the learned Additional District & Sessions Judge -1st cum Special Judge POCSO Act, Patna, suffers from serious infirmities and the same is hereby set aside. Petitioner above named, is directed to be released on statutory bail on the terms and conditions as directed by the learned court below.



30. With the above observation, this revision application stands allowed.

31. Let the lower court records be sent back to the concerned court below.

(Vinod Kumar Sinha, J)

sunilkumar/-

AFR/NAFR	AFR
CAV DATE	02.11.2018
Uploading Date	02.12.2018
Transmission Date	02.12.2018

