

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-2235-2020 (O&M)
Date of decision: 16.07.2020

Avtar Singh @ Babbu

... Petitioner

Vs.

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. D.N. Ganeriwala, Advocate
for the petitioner.

Mr. M.S. Dulat, DAG, Punjab.

ARVIND SINGH SANGWAN, J. (ORAL)

Prayer in this petition is for quashing of the order dated 07.01.2020, vide which, after granting default bail to the petitioner under Section 167 (2) Cr.P.C. on 04.01.2020, on account of non-furnishing bail/surety bonds, the Judge, Special Court, Sangrur virtually reviewed the order dated 04.01.2020 and dismissed the bail, as in the intervening period, the challan was presented by the police.

Brief facts of the case are that the petitioner is facing trial in FIR No.82 dated 06.06.2018 under Section 15 of NDPS Act, registered at Police Station Sadar Dhuri. Since the challan could not be presented within the time

prescribed, the Judge, Special Court, on 04.01.2020, passed the following order:-

“...After hearing the rival contentions of the parties, I am of the considered view that bail application under Section 167(2) Cr.P.C. is an indefeasible right which accrues to the accused on the day of expiry of the period stipulated under the Act and thereafter accused cannot be detained in view of the judgments of the Hon'ble Supreme Court of India reported in 2010 (1) Criminal Court Judgments 417 in the case titled as Sanjay Kumar Kedia @ Sanjay Kedia Versus Intelligence Officer, Narcotic Control Bureau and another and that of the Hon'ble High Court of Punjab and Haryana reported in 2011 (3) RCR (Criminal) 297 Rakesh Kumar and another Versus State of Punjab and Nirmal Singh @ Nimma Vs. State of Punjab-2016(2)- RCR(Criminal-112(P&H). As per the report of Ahlmad, bail application was presented at 12:50 PM, but the challan has not been presented. This Court is of the view that as neither the challan has been filed within the stipulated period of 180 days nor any extension has been sought as envisaged under Section 36 (A) of the ND&PS Act, detention of the accused cannot be authorized keeping in view the provisions of Section 167 (2) Cr. P. C. and Section 36 (A) of the ND&PS Act. The applicant is ready to furnish the bail bonds. Bail is granted to the applicant subject to his furnishing bail bonds in the sum of Rs.1,00,000/-

with two local sureties in the like amount, with an undertaking to appear before the Court on each and every date of hearing and not to leave the country without prior permission of the Court. Bail application be attached with the remand Papers.”

It appears that the petitioner could not arrange two sureties, so he could not furnish bail/surety bonds on the same day and after three days, he moved an application dated 07.01.2020 for furnishing bail/surety bonds and in the intervening period, the police has submitted the challan under Section 173 (2) Cr.P.C. and taking note of the same, the trial Court, while relying upon judgment of the Hon’ble Apex Court in **Uday Mohanlal Acharya Vs. State of Maharashtra, 2001 (@) RCR (Crl.) 452**, held that right of the petitioner/accused stands extinguished. The operative part of the order dated 07.01.2020 reads as under: -

“...Record has been perused and perusal of the record shows that on 04.01.2020 bail application under Section 167(2) Cr.P.C for the grant of bail has been filed by accused Avtar Singh with the averments that he is in judicial custody since 08.07.2019 and after the lapse of 180 days challan has not been presented and indefeasible right has accrued to him by virtue of Section 167(2) of Cr.P.C. After receiving of the report of the Criminal Ahlmad, the Court has granted bail to the accused subject to his furnishing bail bonds in the sum of Rs.1,00,000/- with two local sureties in the like amount, with an undertaking to appear before the Court on each and every date of hearing and not to leave the country without

prior permission of the Court. The application for furnishing of bail bonds has been moved by the counsel on 07.01.2020 but on 06.01.2020 at 10:00AM the prosecution has filed the final report under Section 173 Cr.P.C.

*Here, it is apt to make reference of the judgment passed by the Hon'ble Apex Court in **Uday Mohan Lal Acharya Versus State of Maharashtra 2001 (2) RCR (Criminal)-452**, in which Hon'ble Apex Court held that if the accused is unable to furnish bail as directed by the Magistrate then the conjoint reading of Explanation (1) and proviso (2) sub section (2) Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorized and therefore, if during that period the investigation is complete and charge sheet is filed, so called indefeasible right of the accused would stand extinguished. Even in **Rehemankha Kalukha Vs. State of Maharashtra-2002-Crl.LJ-24**, Full Bench of Hon'ble Bombay High Court had also relied upon the judgment passed by the Hon'ble Apex Court in **Uday Mohan Lal Acharya Versus State of Maharashtra (supra)**.*

The above said judicial dispensations are mutatis mutandis applicable to the present controversy which has arisen before the Court and since this issue has been laid to quietus by the above said judgments, this court finds no hesitation in reaching to the conclusion that since after the passing of the order

of the grant of bail, the bail bonds have not been furnished by the accused forthwith and in the interregnum the prosecution has filed the charge sheet and thus right of the accused stands extinguished. The judgments so relied upon by the counsel for the applicant are of no relevance in the attending circumstances and are clearly distinguishable. Papers be attached with the main file.”

Learned counsel for the petitioner submits that the trial Court has not appreciated the directions given in **Uday Mohanlal Acharaya's** case (supra), wherein it is observed as under: -

“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 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 bail, as directed by the Magistrate, then the conjoint reading of Explanation 1 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 unauthorized, 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 period specified in paragraph (a) of provision to sub-section 2 of Section 167 of 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.”

Learned counsel for the petitioner further submits that from bare perusal of the aforesaid conditions, it is apparent that the trial Court has not complied with the directions No.4 & 6, while passing the impugned order. It is also submitted that a perusal of the order dated 04.01.2020 reveals that no such time bound direction was given to the petitioner to furnish bail bonds on the same day and therefore, subsequently, the trial Court could not review the order, by passing the impugned order dated 07.01.2020.

It is next submitted that indefeasible right of the petitioner could

not be defeated by passing the subsequent impugned order, as the condition in para No.5 in **Uday Mohanlal Acharaya's** case (supra) will apply in a situation, when even after accrual of a right, neither a bail application is filed nor bail bonds are furnished. In such a situation, the accused can be denied bail, if he fails to file an application for bail or failed to furnish the bonds, after expiry of period of submission of charge sheet, as stipulated under the Act. It is also submitted that case of the petitioner will be governed by para No.6 in **Uday Mohanlal Acharaya's** case (supra), as indicated above, as the order dated 04.01.2020, granting default bail to the petitioner, itself shows that the petitioner has availed of his indefeasible right before submission of the challan and was allowed by the trial Court. Learned counsel thus submits that after grant of default bail, an indefeasible right accrued to the petitioner could not be defeated, if the charge sheet was presented on 06.01.2020 and the petitioner moved an application for furnishing bail bonds on 07.01.2020.

Learned counsel for the petitioner has further argued that even otherwise on merits, the allegations against the petitioner are that he ran away from the spot and was not arrested, whereas co-accused Raj Singh @ Jaggi was apprehended at the spot as he was driving the car, from which 100 kg of poppy husk was recovered. It is also submitted that in such a situation, it will be a debatable issue before the trial Court whether the petitioner was found to be in conscious possession of the contraband. It is next argued that though first application of the petitioner was dismissed, however, now sufficient period has passed and he is in custody since 08.07.2019 and despite lapse of one year, the trial is not proceeding due to COVID-19 pandemic situation in the country.

Learned counsel also cites a judgment of the Hon'ble Supreme Court in **Union of India through CBI Vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, Crl. Appeal No.786 of 2010**, wherein it is held that the accused gets an indefeasible right, if the challan is not presented within the stipulated time.

Learned counsel for the petitioner has also relied upon an order dated 18.06.2020 passed in CRM-M-15206-2020 by a Coordinate Bench of this Court, dealing with an identical situation, wherein the following observations are made: -

*“Mr. Gaurav Rana has rightly relied on the decision of Supreme Court in **Sanjay Dutt v. State through C.B.I., Bombay reported in (1994)5 SCC 410** on the point while dealing with Section 167(2) Cr.P.C. wherein it is observed in paragraph 48 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."

The aforesaid observation of the Hon'ble 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.

15. *That in Uday Mohanlal Acharya v. State of Maharashtra reported in (2001)5 SCC 453, a threeJudge 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 Dut'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 Cr.P.C. 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]..."

That further the Supreme Court culled out six conclusions, which are as under :-

On the aforesaid premises, we would record our conclusions as follows :-

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 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 and 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 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 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.”

16. That from the above said 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.

17. That in the present case, the petitioner rightfully exercised his right by filing the bail application under Section 167(2) Cr.P.C. and the same was also allowed by respondent no.2 vide order dated 13.03.2020 therefore, the petitioner now cannot be kept behind bars as the same would frustrate the right that has accrued in his favour.”

The legal position could not be disputed by learned State counsel.

A perusal of the judgment shows that the impugned order dated

07.01.2020 has been passed against the well settled judicial norms.

After hearing learned counsel for the parties, I find merit in the present petition, for the following reasons: -

- (a) The petitioner is in custody for the last about 01 year and as per learned State counsel, the case is fixed for prosecution evidence and it will take long time in conclusion of the trial, in view of prevailing condition in the country due to COVID-19.
- (b) As per the FIR, the petitioner was not arrested at the spot and recovery of contraband was effected from co-accused Raj Singh @ Jaggi, therefore, one of the moot point to be decided during the trial is whether the petitioner was in conscious possession of the contraband.
- (c) The trial Court, while passing the impugned order dated 07.01.2020, has virtually reviewed the earlier order dated 04.01.2020, vide which the indefeasible right was accrued to the petitioner, by allowing his default bail under Section 167 (2) Cr.P.C. A perusal of this order shows that no time was fixed for furnishing bail/surety bonds, though in ordinary cases, the trial Court, while granting bail, directs the accused to furnish bail bonds simultaneously, but this procedure was not followed by the trial Court. Therefore, case of the petitioner would be governed by para No.6 of the guidelines laid down in **Uday Mohanlal Acharaya's** case (supra).
- (d) In the order passed by the Coordinate Bench of this Court in CRM-

M-15206-2020, it is held that once the petitioner has exercised his right of filing bail application under Section 167 (2) Cr.P.C. and was allowed by the trial Court, therefore, there is no justification to keep the petitioner behind the bars, as it will frustrate the indefeasible right of the petitioner.

It is worth noticing here that the impugned order was passed on 07.01.2020 and a period of six months has lapsed and the petitioner is in custody; the trial is proceeding on very slow pace.

In view of the above, present petition is allowed and the impugned order dated 07.01.2020 is set aside.

The trial Court is directed to accept the bail/surety bonds of the petitioner in terms of the order dated 04.01.2020 and release him on bail.

[ARVIND SINGH SANGWAN]
JUDGE

16.07.2020
vishnu

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No