

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-15206-2020

Date of Decision: 18.6.2020

Raju

...Petitioner

Vs.

Union Territory of Chandigarh and another

...Respondents

CORAM:- HON'BLE MR.JUSTICE RAJIV NARAIN RAINA

Present: Mr. Gaurav Rana, Advocate for the petitioner.

Mr. Munish Jain, Advocate for the respondents.

RAJIV NARAIN RAINA, J. (Oral)

1. The case is being taken up for hearing today through video conference due to pandemic of COVID-19.

2. Heard learned counsel for the parties at considerable length on the contents of paragraph 6 of the impugned order dated 13.3.2020. Learned Additional Sessions Judge, Chandigarh admitted the petitioner to bail under Section 167 (2) Cr.P.C. subject to furnishing bail bonds in the sum of Rs. 1,00,000/- etc. It is recorded therein that counsel sought time to furnish bail bonds. The Court records that it “waited sufficiently, however bail bonds not furnished” and the learned Court ordered that papers be tagged with the remain file. Nevertheless, the result of non-furnishing of bail bonds was not specified in the order. Accordingly, the aftermath of the order left the petitioner in limbo.

3. Mr. Gaurav Rana for the petitioner submits that on Friday

the Thirteenth, 2020, when the order was passed no one knew that over the weekend 3 days thereafter, the challan would be presented by the prosecution with the FSL report. However at criminal law, the petitioner had been admitted to bail before the final report was filed under Section 173 Cr. P.C which had created a valuable right in him by virtue of bail granted under Section 167 (2) Cr.P.C. No time was fixed for furnishing bail bonds unless the law is that bail bonds must be furnished on the same day and if there is delay in furnishing bail bonds, bail stands automatically cancelled and person remains in jail at its own peril. In any case, the petitioner was in jail and was represented by counsel who was to take steps in this regard. It is not possible to segment the day in small parts of time during court hours and expect people to work mechanically like clockwork, especially when one doesn't know the time when the matter was taken up and orders passed, when they got typed and made available to the parties. That was not recorded in the order. A fastidious compliance in offshoot paperwork for bail bonds etc should not be read very strictly. Failure to do so on the same day should not be a too heavy a cost while dealing with liberty of the individual, which failure after all, leads to longer stay in jail and who would want that. This is reprehensible. Life is not cut and dry. This is how the matter came up on 16.3.2020 before the Judge when the order was passed recording that challan was presented and it was ordered to checked and registered and the case was adjourned to 23.3.2020.

4. In the circumstances, this Court is convinced that the petitioner having been granted bail deserves to put back to the position he was on Friday the 13th as his rights stood created on that day. He should be allowed an opportunity to furnish bail bonds to complete the transaction process.

5. 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 three-Judge Bench of the Supreme Court while interpreting the expression "... *Indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of*" as has been held by the

Constitution Bench in Sanjay 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.”

6. In a way, it is not correct to say that there is something basically wrong in the order but since it leaves the case hanging fire because the effect of non-furnishing of bail bonds is not specified in the order yet it tends to deliver justice. Accordingly, there may be nothing to set aside. However, in order to restore justice. the demands on a court of law are somewhat different and the principle that there is no review in criminal law is not steadfastly to be followed at least in the odd facts and peculiar circumstances of this case. The words “waited sufficiently” which have created doubt are not sufficient to deny the petitioner the right created by the Court under Section 167 (2) Cr.P.C. As explained in the judgments noticed above. It is a case where we can fit the Latin

maxims *actus curiae neminem gravabit* and *nunc pro tunc* to put the petitioner back into the position he was on 13.3.2020.

7. Accordingly, the petitioner would move a fresh application together with the copy of this order and the present petition upon which the learned Additional Sessions Judge, Chandigarh would pass a fresh appropriate order in the light of order of this Court paying due regard to the exposition of the law on Section 167 (2) by the Supreme Court. The petitioner would furnish his bail bonds which will be accepted as earlier ordered on 13.3.2020 and be released on bail on standard terms and conditions and he would abide by them.

8. Disposed of

(RAJIV NARAIN RAINA)

18.6.2020

JUDGE

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Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No