

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-43626-2019(O&M)

Reserved on : 12.10.2020

Date of decision : December 04, 2020

Ranjit Singh and another

... Petitioners

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr. H.P.S. Ishar, Advocate for the petitioners.

Mr. Sanjay Mittal, Additional A.G. Haryana.

HARINDER SINGH SIDHU, J.

In this petition the petitioners have impugned the order dated 11.9.2017 of the Ld. Sub-Divisional Judicial Magistrate, Shahabad whereby she has declined to accept the bail bonds of the petitioners and held that the default bail granted to the petitioners stood cancelled. They have also impugned the order dated 24.9.2019 of the Ld. Additional Sessions Judge, Kurukshetra whereby their revision petition against the aforesaid order has been dismissed.

The petitioners are accused in case FIR No.217 dated 7.5.2019 u/s 394, 397 IPC P.S. Shahabad, District Kurukshetra. They were arrested in the said case on 10.6.2019. As the challan was not filed within the stipulated ninety days they filed application for grant of bail under Section 167(2) Cr. P.C.

Taking note of the fact that the petitioners had been arrested and produced before the Court on 10.6.2019 and the police had not submitted the

been remanded to judicial custody, the Court held that the petitioners were entitled to the concession of bail. The application was thus allowed and they were admitted to bail on their furnishing bail bonds and surety bonds in the sum of Rs.1,00,000/- each with surety of the like amount.

The day after the grant of bail to them i.e., on 10.9.2019 the petitioners moved an application for furnishing bail bonds / surety bonds. The Ld. SDJM vide the impugned order dated 11.9.2019 refused to accept the same on the ground that the order granting bail and directing the furnishing of bail bonds / surety bonds had been pronounced on 9.9.2019 at 1.40 PM, the challan was submitted the same day at 4.15 PM . As the bail bonds were not furnished by the petitioners before the submission of the challan, the bail granted to the petitioners stood automatically cancelled.

The Ld. Additional Sessions Judge, Kurukshetra dismissed the revision petition filed by the petitioners.

The Ld. Additional Sessions Judge relied on a decision of the Hon'ble Supreme Court in ***Pragyna Singh Thakur v. State of Maharashtra, (2011) 10 SCC 445*** wherein it was held that the right for being released on bail would be lost if the chargesheet is filed before the accused is released on bail. The relevant observations are as under:

“54. There is yet another aspect of the matter. The right under Section 167(2) Cr.P.C 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 (2) v. State [paras 48 and 53(2)(b)]. The reasoning is to be found in paras 33 to 49.”

Ld. Counsel for the petitioners has argued that in a subsequent decision in ***Union of India v. Nirala Yadav, (2014) 9 SCC 457*** Hon'ble Supreme Court has held that the aforesaid observation in Pragyna Singh Thakur's case (supra) does not lay down the correct law and is contrary to earlier decisions of larger benches.

Having heard Ld. counsel for the parties I am of the view that the petition merits acceptance.

The relevant facts are that vide order dated 9.9.2019 the Ld. SDJM, Shahabad allowed the application for grant of bail to the petitioners u/s 167(2) Cr.P.C. They were directed to furnish bail bonds and surety bonds in the sum of Rs.1,00,000/- each. The very next day i.e. on 10.9.2019 the petitioners filed an application for furnishing bail bonds. Their application was dismissed on the ground that before the filing of the application the charge-sheet was filed at 4.15 PM on 9.9.2019.

Section 167(2) is reproduced below:

“167. Procedure when investigation cannot be completed in twenty-four hours.—(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the

accusation or information is well founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of Sub-Inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(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 of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(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.

Explanation I.—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in para (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II.—If any question arises whether an accused person was produced before the Magistrate as required under para (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.

(2-A)-(6) Not relevant for the present purposes.”

Hon'ble Supreme Court has consistently held the accused has an infeasible right to be released on bail under Section 167(2) Cr.P.C. if the charge-sheet has not been filed within the stipulated time. However, this right ceases on the filing of the charge sheet, if by then it has not already

The question as to when could the right be said to have been “availed of” has been considered in ***Union of India v. Nirala Yadav, (2014) 9 SCC 457*** wherein after referring to earlier decisions of the Court it has been held that the right can be said to be availed of the moment the accused files an application for being released on bail and offers to abide by the terms and conditions of bail. The relevant discussion is as under:

“19. In Uday Mohanlal Acharya (supra) the majority, after referring to the Constitution Bench decision in Sanjay Dutt's case, posed the question about the true meaning of the expression of the following lines :-

"the indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed or"

Answering the said question the court observed thus :-

"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. 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 ."

[Emphasis supplied]

After so stating the court referred to Makhan Singh Tarsikka v. State of Punjab, AIR 1952 SC 27, Ram Narayan Singh (supra) and A.K. Gopalan (supra) and proceeded to state as follows :-

"In interpreting the expression "if not availed of" in the manner in which we have just interpreted we are conscious of the fact that accused persons in several serious cases would get themselves released on bail, but that is what the law permits, and that is what the legislature wanted and an indefeasible right to an accused flowing from any legislative provision ought not to be defeated by a court by giving a strained interpretation of the provisions of the Act. In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take

away the right of the accused."

20. Thereafter the Court culled out six conclusions which are necessitous to be reproduced. They are :-

"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 on the whole.

2. Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in 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 furnishes 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 of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency.

Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of" used by this Court in Sanjay Dutt case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

21. Elaborating further, the Court held that if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished and, therefore, if an accused is entitled to be released on bail by application of the proviso to sub-section (2) of Section 167 Cr.P.C., makes the application before the

Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum 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. The Court further proceeded to say that such an accused, 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 the law laid down by the Court in the case of Mohd. Iqbal (supra).”

In Union of India v. Hassan Ali Khan and another, 2011(10)

SCC 235, a two-Judge Bench, while adverting to the submission of the learned counsel for the Union of India pertaining to the three-Judge Bench decision in Uday Mohanlal Acharya, has understood the said decision in the following manner:

“25. Reference was also made to the decision of a three-Judge Bench of this Court in Uday Mohanlal Acharya v. State of Maharashtra wherein the scope of Section 167(2) CrPC and the proviso thereto fell for consideration and it was the majority view that an accused had an indefeasible right to be released on bail when the investigation is not completed within the specified period and that for availing of such right the accused was only required to file an application before the Magistrate seeking release on bail alleging that no challan had

been filed within the period prescribed and if he was prepared to offer bail on being directed by the Magistrate, the Magistrate was under an obligation to dispose of the said application and even if in the meantime a charge-sheet had been filed, the right to statutory bail would not be affected. It was, however, clarified that if despite the direction to furnish bail, the accused failed to do so, his right to be released on bail would stand extinguished.”

From the aforesaid analysis, it is graphically clear that the learned Judges laid emphasis on how an accused avails the benefit of compulsive bail and what is the obligation cast on the Magistrate in law.

The Court specifically held that the observations in **Pragyna Singh Thakur's** case (supra) to the effect 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 the charge-sheet is filed the said right to be enlarged on bail is lost was not good law.

The relevant observations are as under:

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.

39. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya's case. The learned Judge dissented with the majority as far as interpretation of the expression "if not already availed of" by stating so:-

"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 indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."

40. On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in Pragyna Singh Thakur's 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's case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi's case which has based on three-Judge Bench decision in Uday Mohanlal Acharys's case, we are obliged to conclude and hold the principle laid down in Paragraph 54 and 58 of Pragyna Singh Thakur's case(which

have been underlined by us) do 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 a good law. Our view finds support from the decision in Union of India and others v. Arviva Industries India Limited and others, (2014) 3 SCC 159.”

In the present case, the impugned orders have been passed only taking note of the fact that before the application for furnishing bail bonds was filed on 10.9.2019 the charge sheet had been filed at 4.15 PM on 9.9.2019.

Clearly, the order for cancelling bail and dismissing the application for furnishing the bail bonds cannot be held to be justified on the ratio of the judgment of Hon'ble Supreme Court in **Nirala Yadav's** case. Accordingly, this petition is allowed. The impugned orders are quashed. It is directed that the petitioners be released on bail on their furnishing bail bonds/ surety bonds to the satisfaction of the Trial Court/Duty Magistrate, Shahabad.

December 04, 2020

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**(HARINDER SINGH SIDHU)
JUDGE**

Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No