

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE**

Present:

THE HON'BLE JUSTICE HARISH TANDON

&

THE HON'BLE JUSTICE BIBEK CHAUDHURI

C.R.M. 3526 of 2021

**Bechu Sekh
Vs.
The State of West Bengal**

**Mr. Md. Khairul, Adv.
For the Petitioner**

**Mr. Neguine Ahmed, Ld. App.
Mr. Anwar Hossain, Adv.
Ms. Anita Gaur, Adv.
For the State**

Judgment On : 5.10.2021

Harish Tandon, J.:

Recently, a practice has developed at the Bar in arguing the case taking upon which is neither pleaded nor could be ascertained from the statement of facts narrated in the petition for bail. The purpose and object of a pleading has been given a go-by and it becomes difficult for the Court when a new point is taken for foundation whereof, is conspicuously absent in the pleading. The importance of pleading has been whittled down considerably and the facts which are narrated in the

petition is completely different than the point which is agitated at the time of the hearing of the said application. Ordinarily, the Court should not travel beyond the pleading and confine its consideration within the four corners thereof and the reliefs claimed therein. It is more disturbing when a new point is taken which cannot be ascertained from the meaningful reading of the pleadings and inviting the Court to determine the same. This is one of the example where there is no pleading laying foundation for the point agitated at the time of hearing of the instant application and the judgments of the Supreme Court rendered on such point are cited as the case involves such points. There must be a sense of responsibility to be inculcated in the filing lawyer that the point which is projected at the time of an argument must have a foundation in the pleading as the court shall not be taken surprise nor the other side should be put in the same position. The aforesaid course of action augments the delayed disposal of the case as the other side seeks adjournment to consider such point in order to get prepared to meet such argument the importance of pleading has gradually diminished which we experienced in the recent past more particularly, when a Senior Counsels are engaged who thought it fit that the clinching issue is something else than what has been pleaded in the application. We could have dismissed the application for the lack of a requisite pleading but the point, which is projected before us being a pure question of law, we

permitted the Counsel to argue such point and also provided reasonable time to the other side to prepare and meet such point on the next day.

The point is based upon the record more particularly, the order passed by the Special Judge under NDPS Act and the High Court being the court of record, we permitted the certified copy of the order-sheet to be produced to ascertain the veracity of the facts argued by the learned Senior Advocate appearing for the petitioner. The certified copy of the entire order-sheet has been filed and the case needs to be considered on the basis thereof. Since it is a pure question of law based on the record, we decided to dilute the rigour of the importance of the pleading bearing in mind the Constitutional right of an individual towards the personal liberty enshrined under Article 21 of the Constitution of India.

Before we proceed to deal with the points urged before us by the learned Senior Advocate for the petitioner the facts pleaded in the instant application are required to be adumbrated as under:

The petitioner was apprehended on 28.8.2019 at about 16.40 Hrs having possessed 332.380 grams of contraband drug supposed to be Heroine as he could not offer a sufficient explanation for such possession. The FIR being no. 56 dated 28.8.2019 was registered under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 in the North Port Police Station, Kolkata. The gist of the FIR is that upon receiving an information from a credible source that a notorious narcotic drug seller would come to sell the narcotic drug in the vicinity of

the Armenian Ghat under the aforesaid police station, the raiding team was formed and upon reducing the same into writing and taking the permission of the Assistant Commissioner (one of the port division) to conduct the raid. They left for the spot and intercepted the petitioner who was holding a black colour polythene pack in his right hand and the search was made upon following the procedures required under the said Act and on the spot examination of the substance it was found to be a contraband (Heroin) and the seizure was made in presence of two independent witnesses. It is further indicated that the provision under Section 50 of the Cr.P.C has been duly complied with and the witnesses and the gazetted officers were examined on the spot under Section 161 of the Cr.P.C. It is stated in the said application that the arrest was made without maintaining the formalities required in this regard and in order to entangle the petitioner in a frivolous case, the recovery has been allegedly shown from the possession of the petitioner. It is further stated that the petitioner is languishing in jail for nearly 600 days and suffering from various ailments which would be corroborated by the fact he was admitted in the hospital by the authority of the correctional home and the physical condition is not improving as yet. It is further indicated that the investigating agency has not followed the mandate provided under Section 50 of the NDPS Act and, therefore, the petitioner is entitled to be released on bail.

That was the sum and substance of the facts pleaded in the said application. However, at the time of moving the instant application, a point is raised that the charge-sheet was not filed within the stipulated time which creates an indefeasible right into the petitioner to be released on bail. To be more precise, it is urged by the learned Senior Advocate for the petitioner that if the prosecution fails to submit the charge-sheet within the stipulated time under Section 36A of the NDPS Act or the extended time, an indefeasible right accrued to the accused to be released on default bail.

As indicated above, there is no whisper in the application in this regard but since the point strikes at the root of the right of an accused to get a default bail to be decided on the basis of the record, we directed the certified copy of the order-sheet to be filed before us which in fact has been done. It is beyond cavil of doubt that Section 57 of the Cr.P.C requires the investigation to be completed within 24 hours but Section 167(2) of the Code contemplates that where the investigation cannot be completed within the time indicated in Section 57 thereof and there being a reasonable ground for belief that the acquisition of the information is well founded, the accused shall forthwith be transmitted to a nearest Judicial Magistrate along with a copy of the entries in the diary and if the same is complied with the Magistrate may authorise the detention of the accused in such custody for a term not exceeding 15 days in a whole. However, the proviso inserted thereto expanded the investigation period

depending upon the nature of the offences. Section 36A(4) of the NDPS Act extends the period of 90 days to 180 days for submission of the charge-sheet which may further be extended by the Special Court upon recording a specific reason therefor with a outer gap of one year. From the harmonious reading of the aforesaid provision though the period of filing the charge-sheet is extended but the right to get a default bail is unaffected and/or untouched in the event the charge-sheet is not filed within the stipulated time indicated therein provided the accused is prepared to and does furnish the bail. However, explanation I to Section 167(2) creates a fetter that if the accused does not furnish bail he shall remain in detention despite the expiry of the statutory period provided for submission of the charge-sheet. Therefore, the condition precedent enshrined in the said statutory provision leaves no ambiguity that the moment a charge-sheet is not filed within 180 days or the extended period not exceeding one year on the report of the Public Prosecutor being filed indicating the progress of the investigation and the specific reasons for detention, indefeasible right accrued to the accused to be released on bail.

In ***Union of India Vs. Nirala Yadav reported in 2014 (9) SCC 457***, the primary question which was involved therein was whether the court can keep the application for bail pending having filed before the submission of the charge-sheet and subsequently reject the same as in the mean time the charge-sheet has been submitted.

An argument was advanced that the right of an accused to get a default bail is indefeasible after the date of the filing of the challan and perishes the moment the same is filed. The court notice the various judgments rendered in this case and ultimately held:

“47. Coming to the facts of the instant case, we find that prior to the date of expiry of 90 days which is the initial period for filing the charge-sheet, the prosecution neither had filed the charge-sheet nor had it filed an application for extension. Had an application for extension been filed, then the matter would have been totally different. After the respondent-accused filed the application, the prosecution submitted an application seeking extension of time for filing of the charge-sheet. Mr. P.K. Dey, learned counsel for the appellant would submit that the same is permissible in view of the decision in Bipin Shantilal Panchal but on a studied scrutiny of the same we find that the said decision only dealt with whether extension could be sought from time to time till the completion of period as provided in the statute i.e. 180 days. It did not address the issue what could the effect of not filing an application for extension prior to expiry of the period because in the factual matrix it was not necessary to do so. In the instant case, the day the accused filed the application for benefit of the default provision as engrafted under proviso to sub-section (2) of Section 167 CrPC the Court required the accused to file a rejoinder-

affidavit by the time the initial period provided under the statute had expired. There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the learned Magistrate was misconceived. He was obliged on that day to deal with the application filed by the accused as required under Section 167 (2) CrPC. We have no hesitation in saying that such procrastination frustrates the legislative mandate. A court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. If we permit ourselves to say so, the prosecution exhibited sheer negligence in not filing the application within the time which it was entitled to do so in law but made all adroit attempts to redeem the cause by its conduct.”

In case of ***Achpal alias Ramswaroop & Anr. vs State of Rajasthan reported in AIR 2018 Supreme Court***, 4647 the Apex Court took note of the law enunciated in ***Nirala Yadav (Supra)*** and held that the moment the statutory period for submission of the charge-sheet has expired and before the extension could be sought, an indefeasible right accrues in favour of the accused for being released on bail subject to the condition that he is prepared to and furnishes the bail in these words:

***“11. The principles laid down in Uday Mohanlal Acharya (AIR 2001 SC 1910) (supra) have been consistently followed by this Court namely in State of W.B. v. Dinesh Dalmia; Sanjay Kumar Kedia v. Intelligence Officer, Narcotics Control Bureau and Another; Union of India v. Nirala Yadav and in Ranbeer Shokeen v. State (NCT of Delhi). It must therefore be taken to be well settled that in terms of 3rd conclusion as recorded in Uday Mohanlal Acharya (supra), on the expiry of the period stipulated, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the ...pletion of the investigation within the period stipulated and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.*”**

The Supreme Court further notice the genesis behind the incorporation of Section 167 of the CrPC and held that the purpose behind incorporation limiting the time limit with which the investigation is required to be completed. It has further affected on the personal liberty enshrined under Article 21 of the Constitution of India and therefore, once the prosecution fails to file the charge-sheet within the time limit therein right accrued to the accused to be released on bail. It would be apposite to quote the relevant excerpts from the said judgment which runs thus:

***“17. The provision has a definite purpose in that; on the basis of the material relating to investigation, the Magistrate ought to be in a position to proceed with the matter. It is thus clearly indicated that the stage of investigation ought to be confined to 90 or 60 days, as the case may be, and thereafter the issue relating to the custody of the accused ought to be dealt with by the Magistrate on the basis of the investigation. Matters and issues relating to liberty and whether the person accused of a charge ought to be confined or not, must be decided by the Magistrate and not by the Police. The further custody of such person ought not to be guided by mere suspicion that he may have committed an offence or for that matter, to facilitate pending investigation.*”**

19. We must at this stage note an important feature. In Rakesh Kumar Paul (AIR 2017 SC 3948) (supra), in his conclusions, Madan B. Lokur, J. observed in para 49 as under:

“49. The petitioner is held entitled to the grant of “default bail” on the facts and in the circumstances of this case. The trial Judge should release the petitioner on “default bail” on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to

petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case.”

In his concurring judgment, Deepak Gupta, J. agreed with conclusions drawn and directions given by Madan B. Lokur, J. in paragraphs 49 to 51 of his judgment. According to the aforesaid conclusions, it would not prohibit or otherwise prevent the arrest or re-arrest of the accused on cogent grounds in respect of the charge in question and upon arrest or re-arrest the accused would be entitled to petition for grant of regular bail which application would then be considered on its own merit.”

In case of ***M. Rabindran vs Intelligence Officer, Director of Revenue Intelligence reported in 2020 SCC Online SC 867*** the identical issue was raised and various judgments of the Supreme Court rendered in this regard were considered. The primary question which was raised therein is whether in the grab of an indefeasible right to get a default bail the court is left with no other option but to suo motu grant bail to the accused in the event the charge-sheet is not submitted within the statutory period. To answer the aforesaid question, the Apex Court arrived at the following conclusion:

“43. Having considered both opinions, we have arrived at the conclusion that the majority opinion in Uday Mohanlal Acharya (supra) is the correct interpretation of the decision rendered by the Constitution Bench in Sanjay Dutt (supra). The decision in Snjay Dutt merely casts a positive corresponding obligation upon the accused to promptly apply for default bail as soon as the prescribed period of investigation expires. As the decision in Hitendra Vishnu Thakur (supra) expressly cautions, the Court cannot suo motu grant bail without considering whether the accused is ready to furnish bail or not. This is an in-built safeguard within Section 167(2) to ensure that the accused is not automatically released from custody without obtaining the satisfaction of the Court that he is able to guarantee his presence for further investigation, or for trial, as the case may be. Further, as the majority opinion in Rakesh Kumar Paul (supra) pointed out, there could be rare occasions where the accused voluntarily forfeits his right to bail on account of threat to his personal security outside of remand or for some other reasons. The decision in Sanjay Dutt clarifies that once a chargesheet is filed, such waiver of the right by the accused becomes final and Section 167 (2) ceases to apply.

44. However, the Constitution Bench decision in Sanjay Dutt cannot be interpreted so as to mean that even where the accused

has promptly exercised his right under Section 167(20) and indicated his willingness to furnish bail, he can be denied bail on account of delay in deciding his application or erroneous rejection of the same. Nor can he be kept detained in custody on account of subterfuge of the prosecution in filing a police report or additional complaint on the same day that the bail application is filed.

45. The arguments of the State that the expression “availed of” would only mean actual release after furnishing the necessary bail would cause grave injustice to the accused and would defeat the very purpose of the Proviso to Section 167(2), CrPC. If the arguments of Mr. Lekhi are accepted, there will be many instances where the Public Prosecutor might prolong the hearing of the application for bail so as to facilitate the State to file an additional complaint or investigation report before the Court during the interregnum. In some cases, the Court may also delay the process for one reason or the other. In such an event, the indefeasible right of the accused to get the order of bail in his favour would be defeated. This could not have been the intention of the legislature. If such a practice is permitted, the same would amount to deeming illegal custody as legal. After the expiry of the stipulated period, the Court has no further jurisdiction to remand the accused to custody. The prosecution would not be allowed to take advantage of its own default of not filing the investigation

report/complaint against the appellant within the stipulated period.

48. We agree with the view expressed in Rakesh kumar Paul (supra) that as a cautionary measure, the counsel for the accused as well as the magistrate ought to inform the accused of the availability of the indefeasible right under Section 167(2) once it accrues to him, without any delay. This is especially where the accused is from an underprivileged section of society and is unlikely to have access to information about his legal rights. Such knowledge-sharing by magistrates will thwart any dilatory tactics by the prosecution and also ensure that the obligations spelled out under Article 21 of the Constitution and the Statement of Objects and Reasons of the CrPC are upheld.”

Ultimately the Apex Court held:

“78. Therefore, in conclusion:

78.1 Once the accused files an application for bail under the proviso to Section 167(2) he is deemed to have ‘availed of’ or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary

information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

78.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher court.

78.3 However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

78.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to

furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid.

On the basis of the law so enunciated in the above referred decisions the moment an application for bail is filed immediately upon the expiration of the statutory period and in absence of the charge-sheet having filed by the prosecution, such right is an indefeasible right circumscribed by the conditions that he is prepared to and furnished the bond. The Court cannot keep the application for bail pending and invite the prosecution to file the charge-sheet in the mean time or an application seeking extension of time and accept the charge-sheet or extend the time to file the charge-sheet to subterfuge the indefeasible right accrued to the applicant. However, such indefeasible right cannot be construed to mean that the Court will immediately release the accused on bail suo motu. It is imperative on the Court to inform the accused of such right or the accused has to assert such right immediately upon the expiration of the statutory period. If such right is not exercised by the accused and in the meantime the charge-sheet is filed or the time is extended subsequent filing of an application for bail cannot be regarded as an exercise of an indefeasible right.

On the conspectus of the aforesaid law having propounded we ventured to consider the facts involved in the instant case. The orders passed in the instant case would reveal that petitioner was apprehended

on 28.8.2009 and was produced before the Special Judge under the NDPS Act on 29.8.2019 and on the prayer of the investigating officer he was remanded till 12.9.2019. On the said returnable date the remand was extended till 26.9.2019 which was further extended till 2nd November, 2019 even on that day the remand was extended till 16.11.2019 and in the meantime the order came to be passed for direction upon for sending the sample to the Director of Forensic Science for chemical examination. On 29.11.2019 the petitioner filed an application seeking direction upon the superintendent of the correctional home to extend the proper medical treatment to the petitioner which was allowed by the Court and the next date was fixed on 13.12.2019. Even on the said date the remand was extended and the order came to be passed in the meantime extending such remand till 24.2.2020. However, the case was taken up on 20th February, 2020 on the basis of an application filed by the prosecution seeking extension of time to submit the charge-sheet which was allowed by extending the same for a period of 30 days therefrom. On the date so fixed i.e. 24.2.2020, an application for bail was filed by the petitioner on the ground that he is in custody for a period of 181 days since the charge-sheet has not been submitted he is entitled to be released on bail. The application for bail was rejected without recording the fact that the time was extended for a period of 30 days on 28th of February, 2020. The matter was thereafter listed on 7th of March, 2020 and another application for bail was filed by the petitioner which

was kept on record and the hearing date was fixed on 13th March, 2020. Even on that day the hearing was not taken up and the next date was fixed on the 21st March, 2020. In the meantime, on 19.3.2020 an application was filed by the prosecution for extension of time to submit the final report, which was considered and allowed by extending the period for another 30 days. After 21.3.2020 there is no order until 12th June, 2020 when the matter was put up before the Special Judge on an application for bail filed by the petitioner in electronic form. Taking note of the said fact, the Special Judge fixed the date 19.6.2020 for hearing the application for bail. On the said date so fixed the learned Judge recorded the fact that the charge-sheet has not been filed till date but rejected the application for bail solely on the ground that the earlier application for bail filed before this Court was rejected, therefore, the petition cannot be rejected on 28.4.2020 and, therefore, the petitioner is not entitled to be released on bail. However, another application for bail was taken out on 26.2.2020 which was again fixed for hearing on 6.7.2020. Interestingly, on 8.7.2020 an application was taken out by the prosecution seeking extension of time to file the charge-sheet which was considered and allowed by the Court by extending the period by 30 days. Further extension was granted to the prosecution on 6.8.2020 to submit the report and the application for bail which was filed by the petitioner was subsequently rejected. From the aforesaid fact it revealed that the time was extended for submission of the charge-sheet on the prayer of

the prosecution having made before the expiration of the period and was extended from time to time. It is interesting to note that on 19.3.2020 the time was extended for a period of 30 days but there was no application taken out for extension before the expiry of extended period. The extension was sought on 18.7.2020 after the expiry of the extended period and the court mechanically extended the period without realising that on 12.6.2020 the petitioner applied for a bail. The said application would reveal that the petitioner invoked the right under Section 167 of the Cr.P.C as the prosecution failed to submit the charge-sheet within the extended time and asserted the indefeasible right accrued to him.

As has been held in the above noted decision, it is absolutely unjust on the part of the Court to keep the application for bail pending and invite the prosecution to file an application seeking extension of time to submit the charge-sheet and allowing the said prayer and simultaneously dismissed the application for bail. When an application for bail was filed, the extended period expired or likely to expire and if such prayer is made even at the time of the hearing of the application, the Court should not ignore the same and defeat the right accrued to him by extending the period and simultaneously dismissed the application for bail.

We, thus, find that the indefeasible right cannot be defeated in such circuitous manner and, therefore, the petitioner is entitled to be released on bail because of the statutory interdiction.

The application for bail is allowed. The petitioner shall be released on bail upon furnishing the security.

Accordingly, the petitioner shall be released on bail upon furnishing a bond of Rs. 10,000/- (Rupees Ten Thousand), with two sureties of like amount each, one of whom must be local, to the satisfaction of the learned Additional Chief Judicial Magistrate, subject to the condition that the petitioner shall appear before the Trial Court on every date of hearing until further orders.

In the event the petitioner fails to do so without any justifiable cause, the Trial Court shall be at liberty to pass necessary order in accordance with law without any further reference to this Court.

The application for bail, being CRM 3526 of 2021, is thus granted. Attend the Court case.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Bibek Chaudhuri, J.)

(Harish Tandon, J.)