

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

229

CRM-M-34265-2020

DATE OF DECISION: 05.03.2021

TEJINDER SINGH ALIAS TEJA

... Petitioner (s)

Versus

STATE OF PUNJAB AND ANOTHER

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL

Present: Mr. Saurav Bhatia, Advocate for the petitioner.

Mr. Dhruv Dayal, Senior DAG, Punjab.

ANUPINDER SINGH GREWAL, J. (ORAL)

The petitioner is seeking quashing of the order dated 31.08.2020 (Annexure P-2) passed by the Chief Judicial Magistrate, SAS Nagar, Mohali whereby investigating agency has been granted extension of time to complete investigation and order dated 18.09.2020 (Annexure P-3) passed by JMIC, SAS Nagar, Mohali whereby the petitioner has been denied right of default bail.

Learned counsel for the petitioner contends that an FIR bearing No.9 dated 01.06.2020, under Sections 153-A, 171, 465, 467, 468, 471, 473, 120-B of the Indian Penal Code, Section 25 of the Arms Act and Sections 10, 13, 18, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967, was registered at Police Station State Special Operation Cell, SAS Nagar.

Learned counsel contends that the petitioner was arrested on 01.06.2020. Challan had to be filed within a period of 90 days in terms of Section 167(2) Cr.P.C and the period of 90 days was completed on 31.08.2020. The application preferred on behalf of prosecution for extension of time before the Chief Judicial Magistrate on 31.08.2020 and it was allowed

on 31.08.2020 itself. The petitioner preferred the application for default bail on 18.09.2020 which was dismissed by the Judicial Magistrate Ist Class on 18.09.2020 on the ground that the period of completing investigation has been extended by 60 days vide order dated 31.08.2020. The investigation was completed and challan was filed on 28.08.2020. He also contends that time for investigation could not have been extended by the Court of Chief Judicial Magistrate as only designated Special Court under the Act or in the absence thereof, a Court of Sessions can extend time. In support of his submissions, learned counsel has relied upon the judgments of the Supreme Court in the cases of **Bikramjit Singh Vs. The State of Punjab, 2020 (4) R.C.R. (Criminal) 713** and **Hitendra Vishnu Thakur Vs. State of Maharashtra, 1994 (3) RCR (Criminal) 156**.

Learned State counsel, while referring to the reply in the form of an affidavit of DSP, Organized Control Crime Unit (Operations), Punjab, contends that the application for extension of time to complete investigation was preferred before the Court of Chief Judicial Magistrate in terms of the judgment of this Court in the case of **Bikramjit Singh Vs. State of Punjab, CRM-M-19259 of 2019** passed on 30.10.2019. The application for extension of time was filed on 21.08.2020 and the judgment of the High Court was in force at that time although it had been set aside later by the Supreme Court. However, another application was preferred through Additional Public Prosecutor on 27.08.2020 before the Chief Judicial Magistrate and it was allowed on 31.08.2020. He further contends that the petitioner has not availed the alternative remedy of preferring revision against the impugned order and has, instead, approached this Court under Section 482 Cr.P.C. He also

contends that the allegations are serious and the petitioner is also involved in several other cases and, therefore, he is entitled to the concession of default bail.

Learned State counsel has raised the objection with regard to the maintainability of this petition without the petitioner having availed the alternative remedy of revision. The application of the petitioner for default bail had been dismissed by the court of Judicial Magistrate on 18.09.2020. The petitioner has challenged the order, extending the time for completion of investigation dated 31.08.2020 as well as the order dated 18.09.2020 by preferring the instant petition under Section 482 Cr.P.C on 23.10.2020. Notice was issued by the coordinate Bench of this Court on 28.10.2020 and the matter had been pending adjudication since then. The petitioner could have exercised the option of preferring revision petition. In the afore-noted facts and circumstances, it could be unjust at this stage to relegate him to the alternative remedy.

It has been held by the Supreme Court in the case of **Prabhu Chawla versus State of Rajasthan, 2016 (60) SCC 30**, wherein it has been held that availability of alternative remedy of revision under Section 397 Cr.P.C. would not make a petition under Section 482 Cr.P.C. not maintainable. Para 6 of the judgment is reproduced hereunder:-

"6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section 482 Cr.P.C. is unwarranted. We would simply reiterate that Section 482 begins with a non- obstante clause to state: "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code,

or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J. "abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self- restraint, nothing more." We venture to add a further reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders! A situation wholly unwarranted and undesirable."

Heard.

It is trite that the right to be released on bail for failure to complete the investigation within the period stipulated under Section 167(2) Cr.P.C. is indefeasible statutory right. Article 21 of the Constitution of India guarantees right of personal liberty. No person can be deprived of its right except according to the procedure laid down by law. The period for completion of investigation under Section 167(2) Cr.P.C. is part of the procedure laid down by law. The issue which falls for determination in the instant case is as to whether the court of Chief Judicial Magistrate was competent to extend the period for completion of investigation. The coordinate Bench of this Court in the case of **Bikramjit Singh Vs. State of Punjab, CRM-M-19259 of 2019** passed on 30.10.2019, had set aside the order of the revisional court, directing release of the petitioner therein, in terms of Section 167(2) Cr.P.C., by holding that the court of Chief Judicial Magistrate was also competent to extend the period of limitation. However, this judgment has been set aside by the High Court in the case of **Bikramjit Singh Vs. State of Punjab**, reported as **2020(4) RCR (Criminal) 713**. It was

held by the Supreme Court that a designated Special Court was competent to extend the period of investigation and in the absence of a designated Special court, it would be the court of Sessions alone which was competent to extend the period of investigation. The court of Chief Judicial Magistrate could not extend the period of limitation. The judgment of this Court was set aside and the petitioner therein was directed to be released on default bail. The factum of the petitioner therein being involved in several cases was also noticed and various conditions were set out in the order. Relevant paras of the judgment are as follows:-

21. Before the NIA Act was enacted, offences under the UAPA were of two kinds – those with a maximum imprisonment of over 7 years, and those with a maximum imprisonment of 7 years and under. Under the Code as applicable to offences against other laws, offences having a maximum sentence of 7 years and under are triable by the Magistrate's Courts, whereas offences having a maximum sentence of above 7 years are triable by Courts of Sessions. This Scheme has been completely done away with by the 2008 Act as all scheduled offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated Court by notification issued by either the Central Government or the State Government, the fall back is upon the Court of Sessions alone. Thus, under the aforesaid Scheme what becomes clear is that so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D(2)(b) is non-existent, "the Court" being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself. The impugned judgment in arriving at the contrary conclusion is incorrect as it

has missed Section 22(2) read with Section 13 of the NIA Act. Also, the impugned judgement has missed Section 16(1) of the NIA Act which states that a Special Court may take cognizance of any offence without the accused being committed to it for trial inter alia upon a police report of such facts.

27. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the appellant acquired the right for grant of statutory bail on 17- 7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise.”

27. In a fairly recent judgment reported as Rakesh Kumar Paul v. State of Assam (2017) 15 SCC 67, a Three-Judge Bench of this Court referred to the earlier decisions of this Court and went one step further.

It was held by the majority judgment of Madan B. Lokur, J. and Deepak Gupta, J. that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted. This was stated in Lokur, J.’s judgment as follows:

“37. This Court had occasion to review the entire case law on the subject in Union of India v. Nirala Yadav [Union of India v. Nirala Yadav, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212] . In that decision, reference was made to Uday Mohanlal Acharya v. State of Maharashtra [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows: (Nirala Yadav case [Union of India v. Nirala Yadav, (2014) 9 SCC 457 : (2014) 5

SCC (Cri) 212] , SCC p. 472, para 24) “‘13. (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.’ (Uday Mohanlal case [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] , SCC p. 473, para 13)”

38. This Court also dealt with the decision rendered in Sanjay Dutt [Sanjay Dutt v. State, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] 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 Mohd. Iqbal Madar Sheikh v. State of Maharashtra [Mohd. Iqbal Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722 : 1996 SCC (Cri) 202] 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 the 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

40. In the present case, it was also argued by the learned counsel for the State that the petitioner did not apply for “default bail” on or after 4-1-2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge-sheet. Strictly speaking, this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court — he made no specific application for grant of “default bail”. However, the application for regular bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge-sheet having expired and that perhaps no charge-sheet had in fact being filed. In any event, this issue was argued by the learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail — such an application was definitely made (if not in writing) then at least orally before the High Court. 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 court concerned 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.

xxx xxx xxx Application of the law to the petitioner

45. On 11-1-2017 [Rakesh Kumar Paul v. State of Assam, 2017 SCC OnLine Gau 573] 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 24-1-2017) and the petitioner had orally applied for “default bail”. Under these circumstances, the only course open to the High Court on 11-1-2017 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.

46. It was submitted that as of today, a charge-sheet having been filed against the petitioner, he is not entitled to “default bail” but must apply for regular bail — the “default bail” chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4-1-2017 and 24-1-2017 when no charge-sheet had been filed, during which period he had availed of his indefeasible right of “default bail”. It would have been another matter altogether if the petitioner had not applied for “default bail” for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge-sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible

right for “default bail” during the interregnum between 4-1-2017 and 24-1-2017 as is evident from the decision of the High Court rendered on 11-1-2017 [Rakesh Kumar Paul v. State of Assam, 2017 SCC OnLine Gau 573] . On the contrary, he had availed of his right to “default bail” which could not have been defeated on 11-1-2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of the opinion that the petitioner had satisfied all the requirements of obtaining “default bail” which is that on 11-1-2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge-sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.

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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.”

28. Deepak Gupta, J. in his concurring opinion agreed with Lokur, J. as follows:

“82. The right to get “default bail” is a very important right. Ours is a country where millions of our countrymen are totally illiterate and not aware of their rights. A Constitution Bench of this Court in Sanjay Dutt [Sanjay Dutt v. State, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] has held that the accused must apply for grant of “default bail”. As far as Section 167 of the Code is

concerned, Explanation I to Section 167 provides that notwithstanding the expiry of the period specified (i.e. 60 days or 90 days, as the case may be), the accused can be detained in custody so long as he does not furnish bail. Explanation I to Section 167 of the Code reads as follows:

“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.” This would, in my opinion, mean that even though the period had expired, the accused would be deemed to be in legal custody till he does not furnish bail. The requirement is of furnishing of bail. The accused does not have to make out any grounds for grant of bail. He does not have to file a detailed application. All he has to aver in the application is that since 60/90 days have expired and charge-sheet has not been filed, he is entitled to bail and is willing to furnish bail. This indefeasible right cannot be defeated by filing the charge-sheet after the accused has offered to furnish bail.

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86. I agree and concur with the conclusions drawn and directions given by learned Brother Lokur, J. in paras 49 to 51 of his judgment.” P.C. Pant, J., however, dissented holding:

“113. The law laid down as above shows that the requirement of an application claiming the statutory right under Section 167(2) of the Code is a prerequisite for the grant of bail on default. In my opinion, such application has to be made before the Magistrate for enforcement of the statutory right. In the cases under the Prevention of Corruption Act or other Acts where Special Courts are constituted by excluding the jurisdiction of the Magistrate, it has to be made before such Special Court. In the present case, for the reasons discussed, since the appellant never sought default bail before the court concerned, as such is not entitled to the same.” A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail

is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.

29. On the facts of the present case, the High Court was wholly incorrect in stating that once the challan was presented by the prosecution on 25.03.2019 as an application was filed by the Appellant on 26.03.2019, the Appellant is not entitled to default bail. First and foremost, the High Court has got the dates all wrong. The application that was made for default bail was made on or before 25.02.2019 and not 26.03.2019.

The charge sheet was filed on 26.03.2019 and not 25.03.2019. The fact that this application was wrongly dismissed on 25.02.2019 would make no difference and ought to have been corrected in revision. The sole ground for dismissing the application was that the time of 90 days had already been extended by the learned Sub-Divisional Judicial Magistrate, Ajnala by his order dated 13.02.2019. This Order was correctly set aside by the Special Court by its judgment dated 25.03.2019, holding that under the UAPA read with the NIA Act, the Special Court alone had jurisdiction to extend time to 180 days under the first proviso in Section 43-D(2)(b). The fact that the Appellant filed yet another application for default bail on 08.04.2019, would not mean that this application would wipe out the effect of the earlier application that had been wrongly decided. We must not forget that we are dealing with the personal liberty of an accused under a statute which imposes drastic punishments. The

right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled. This being the case, we set aside the judgment of the High Court. The Appellant will now be entitled to be released on “default bail” under Section 167(2) of the Code, as amended by Section 43-D of the UAPA. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds, and upon arrest or re-arrest, the petitioner is entitled to petition for the grant of regular bail which application should be considered on its own merit. We also make it clear that this judgement will have no impact on the arrest of the petitioner in any other case.”

In the instant cases, the application for extension of time had been allowed by the court of Chief Judicial Magistrate which was not the competent court as held by the Supreme Court in the case of **Bikramjit Singh Vs. The State of Punjab** (supra) and, therefore, the petitioner would be entitled to release on default bail.

Consequently, the instant petition is allowed. The order dated 18.09.2020 (Annexure P-3) is set aside. The petitioner is ordered to be released on default bail on his furnishing requisite bonds to the satisfaction of the trial Court.

However, it is made clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds, and upon arrest or re-arrest, the petitioner is entitled to petition for the grant of regular bail which application should be considered on its own merit. It is also made

clear that this judgement will have no impact on the arrest of the petitioner in any other case.

(ANUPINDER SINGH GREWAL)
JUDGE

05.03.2021.
SwarnjitS

Whether speaking/reasoned : Yes / No
Whether reportable : Yes / No