

IN THE HIGH COURT AT CALCUTTA  
CRIMINAL MISCELLANEOUS JURISDICTION  
[CIRCUIT BENCH AT JALPAIGURI]

**Present: Hon'ble Justice Arijit Banerjee  
And  
Hon'ble Justice Aniruddha Roy**

**CRM 160 OF 2021  
With  
IA: CRAN 2 of 2021**

**Sanjay Kumar  
vs.  
The State of West Bengal**

**For the petitioners:**

**Mr. Sekhar Kumar Basu, Sr. Adv.,  
Mr. Soubhik Mitter, Adv.,  
Ms. Rajnandini Das, Adv.**

**For the State:**

**Mr. Arun Kumar Sarkar, Adv.,  
Mr. Tapan Bhattacharya, Adv.**

**Reserved on:**

**January 14, 2022.**

**Judgment on:**

**February 09, 2022.**

**Aniruddha Roy, J.:**

1. This is an application for bail filed under Section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C.).

**Charges:-**

2. The charge is under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, “the NDPS Act”) in connection with Special Case No.4 of 2021 arising out of Bhaktinagar P.S. Case No. 77 of 2020 dated January 28, 2020 now pending before the Learned Judge, Special Court under NDPS Act-cum- Additional Sessions Judge, 2<sup>nd</sup> Court, Jalpaiguri.

**Facts:-**

3. One Sub-Inspector named Gopal Chandra Mondal of Bhaktinagar P.S. (for short, “the informant”) registered Bhaktinagar P.S. Case No. 77 of 2020 against the petitioner and one Saje Saibo alleging that on January 28, 2020 at about 15:10 hrs, the informant received information from the said Police Station that few persons were moving suspiciously in front of the Office of the All India Radio, Siliguri and that they were carrying substantial quantity of contraband substances. The informant passed on this information to the Inspector-in-Charge, Bhaktinagar P.S. Pursuant to the instruction of the said Inspector-in-Charge, at around 15:15 hrs, the informant proceeded with a raiding team towards the Office of the All India Radio, Siliguri. The raiding team reached the spot at 15:25 hrs and intercepted the said two accused persons, one of whom is the petitioner. The accused persons were carrying red and yellow colour plastic bags. Upon serving due notice of search and seizure at around 16:15 hrs in the presence of a Gazetted Officer, the Inspector-in-Charge searched the plastic bags, which were in possession of the said two accused persons one of whom is the petitioner. Yaba Tablets much above the commercial quantity were

recovered. The recovered contraband was duly seized and was sent to Bhaktinagar P.S. Malkhana and the accused persons including this petitioner were taken into custody. Accordingly to the State, the entire exercise stated herein was carried out in strict and due compliance of the provisions of the NDPS Act.

4. The petitioner was arrested on January 28, 2020. The petitioner was produced before the Learned Jurisdictional Magistrate on January 29, 2020. The statutory period of 180 days for completion of the investigation as envisaged under Section 36 A(4) of the NDPS Act expired on July 24, 2020. On July 31, 2020 the petitioner filed an application seeking default bail and on the self same day the prosecution preferred an application praying for extension of the period for completion of investigation beyond the statutory period of 180 days. The explanation offered on behalf of the prosecution for such delayed application was that due to the nationwide lock down imposed by the Government of India on account of outbreak of COVID-19 pandemic, the application could not be filed before the expiry of the statutory period.
5. By an order passed on the self same date i.e. July 31, 2020, the Learned Judge being the Special Court under NDPS Act, 2<sup>nd</sup> Court, Jalpaiguri (for short, “the NDPS Court”) rejected the petitioner’s prayer for default bail and allowed the application of the prosecution by extending the period for investigation with retrospective effect from July 24, 2020. The investigating officer submitted

charge sheet against the petitioner and the co-accused Saje Saibo within the extended period.

6. The petitioner then moved CRM 6510 of 2020 with CRAN 1 of 2020 before a Coordinate Bench of this Court seeking bail. By an order dated October 15, 2020, the Coordinate Bench dismissed the said bail application.
7. The instant bail application, thus, is renewal of the prayer for bail filed by the petitioner.

**Arguments:-**

8. Mr. Shekhar Kumar Basu, Learned Senior Counsel, ably assisted by Mr. Soubhik Mitter, Learned Advocate, appearing for the petitioner submitted that, on July 24, 2020, the statutory period for completion of investigation ended and immediately thereafter on July 31, 2020 the petitioner applied for statutory bail before the Jurisdictional NDPS Court. On the same day i.e. on July 31, 2020, the prosecution filed an application seeking extension of the statutory period for completion of investigation in terms of Section 36A(4) of the NDPS Act. Mr. Basu, Learned Senior Counsel submitted that, the moment the statutory period expired for completion of investigation, an indefeasible and valuable right accrued in favour of the petitioner to be released on statutory bail and such valuable right is supported by and emanated from Article 21 of the Constitution of India. Everyday's detention thereafter is illegal detention and in violation of Article 21 of the Constitution of India.

9. He further submitted that, in the event the prosecution, as in the instant case, does not take step and file an application before the Jurisdictional NDPS Court prior to expiry of the said statutory period for completion of investigation, no such application would be maintainable in the eye of law and any order of extension passed thereupon would be non est and wholly without jurisdiction. Thus, the application filed by the prosecution seeking extension of statutory period for completion of investigation after expiry of the said statutory period was not maintainable and liable to be rejected in limini.
10. Learned Senior Counsel for the petitioner further submitted that, it is the bounden duty of the Court to serve appropriate notice on the accused to intimate him as to his right of statutory bail immediately after the statutory period for completion of investigation stands expired.
11. In support of the aforesaid contentions Mr. Basu, Learned Senior Counsel relied upon the following judgments:-
  - (i) *In the matter of: S. Kasi vs. State, Through the Inspector of Police Samaynallur Police Station Madurai District, reported at AIR 2020 Supreme Court 2921;*
  - (ii) *In the matter of: M. Ravindran vs. Intelligence Officer, Directorate of Small Revenue Intelligence, reported at (2021) 2 SCC 485.*
  - (iii) *In the matter of: Gurupada Roy vs. State of West Bengal, reported at 2018 Cri LJ 247;*

(iv) *In the matter of: Hussainara Khatoon & Ors. vs. State of Bihar, reported at (1980) 1 SCC 108;*

(v) *In the matter of: Rakesh Kumar Paul vs. State of Assam, reported at (2017) 17 SCC 67 and;*

(vi) *In the matter of: State of West Bengal vs. Dharam Paswan (C.R.M. No. 1105 of 2019). Reported at 2020 SCC Online Cal 739.*

12. Mr. Basu then submitted that, on October 15, 2020 when CRM 6510 of 2020 was dismissed which was filed by the petitioner praying for bail on the previous occasion, the law on the subject by referring to the aforesaid decisions was not argued before the then Coordinate Bench as it appears from the said order itself. Hence the petitioner subsequently was advised to take out the instant application for renewal of his prayer for bail. It was then submitted that, the petitioner as of right is entitled for a statutory bail and be enlarged as such by this Court forthwith. Everyday's detention of the petitioner in the facts of this case is illegal and wrongful.

13. Mr. Arun Kumar Sarkar, Learned Counsel for the prosecution/state submitted that, the Jurisdictional NDPS Court was not available during the period July 24, 2020, till July 30, 2020, and as such the prosecution had no opportunity to apply for extension of the statutory period for completion of investigation. On July 31, 2020, when on the first opportunity the Jurisdictional NDPS Court was available, the extension application was filed and the order of extension

was passed w.e.f. July 24, 2020. He submitted that, there was no laches, delay or lack of diligence on the part of the prosecution in applying for extension of the statutory period for completion of investigation.

14. Mr. Sarkar, Learned Prosecution Counsel submitted that, the charge in the present case under the NDPS Act is very serious. To grant default bail to the petitioner in the facts of this case, the object and reasons behind the enactment of the NDPS Act and the rigour under Section 37 thereof should strictly be of paramount consideration to this Court. Admittedly the contraband substances recovered from the petitioner were much above the commercial quantity which attracted the rigour of Section 37 of the NDPS Act. In as much as, the statutory period for completion of investigation as provided under Section 36A(4) of the NDPS Act had been extended on the first available opportunity with retrospective effect from day i.e. July 24, 2020, when it originally expired, the question of granting statutory bail to the petitioner in the facts of this case did not, does not and cannot arise.
15. He further submitted that, the issue had already received attention and consideration of this Court by another Coordinate Bench on October 15, 2020 in CRM 6510 of 2020. Such Bench after considering the entire facts and situation rejected the prayer of the petitioner for bail on the self same set of facts. Thus, this second application on the self same ground is misconceived and abuse of the process of law and should be dismissed. The petitioner, if at all felt aggrieved with the earlier order of the Coordinate Bench dated October

15, 2020, the appropriate legal course for him was to apply before the Hon'ble Supreme Court.

16. Mr. Sarkar submitted that, since the Jurisdictional NDPS Court has already extended the statutory period for completion of investigation against the petitioner, this Court should reject the present prayer for bail.
17. He then submitted that, every judgment relied upon by the petitioner referred to above, has to be read in the facts and circumstances of that particular case and need to be assessed in the light of the facts of the case in which such judgments were passed. The precedential law gets settled on the facts of each case and not otherwise. In support of his contention the Learned Prosecution Counsel relied upon the following judgments of the Hon'ble Supreme Court:

(i) *In the matter of: The Punjab University, Chandigarh vs. Vijay Singh Lamba & Ors., reported at (1976) 3 SCC 344 and;*

(ii) *In the matter of: State of Madhya Pradesh vs. Narmada Bachao Andolan & Anr., reported at (2011) 7 SCC 639.*

**Court's View:**

18. We have considered the submissions made on behalf of the parties, perused and considered the memo of evidence/case diary and material on record produced by the prosecution/state before this Court. Before going into the merits of the application, at the outset the last objection taken by the prosecution is being dealt with first, as to the mind of this Court, the same is a

technical one. The principle of res judicata and/or principles analogous thereto do not apply in a proceeding seeking bail. From a close perusal of the previous rejection order by a Coordinate Bench of this Court dated October 15, 2020 passed in CRM 6510 of 2020, it appears that the points argued by the learned senior counsel for the petitioner before this Court were not argued before the Coordinate Bench and more emphatically the precedents relied upon before this Court on the settled law were not cited before the previous Coordinate Bench. An accused can apply for bail and renew his prayer for any number of times. Every additional day's detention gives the accused a fresh right to seek bail. Therefore, in the present case there is no bar for the petitioner for renewal of his prayer for bail on the self same bundle of facts and as such the objection of the prosecution stands overruled and rejected.

19. The relevant provision for adjudicating the issue fell for consideration before this Court, namely, whether the petitioner is entitled to default/statutory bail as of right in the facts of this case under sub-section(4) to section 36A of the NDPS Act, which is reproduced below:

***“36A. Offences triable by Special Court:***

.....

***(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to “Ninety days”, where they occur, shall be construed as reference to “one hundred and eighty days”:***

***Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days”.***

20. The aforesaid provision of the NDPS Act clearly states that, in respect of persons accused, inter alia, for offences involving commercial quantity of contrabands, as in the instant case, the references in sub-section(2) to section 167 of the Cr.P.C., thereof to ‘ninety days’, where they referred shall be construed as reference to **‘one hundred and eighty days’** and the proviso states that, if it is not possible to complete the investigation within the said period of **one hundred and eighty days**, the Jurisdictional NDPS Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for detention of the concerned accused beyond the said period of **one hundred and eighty days**. Plain reading of the said provision of the statute clearly denotes that the outer limit or the ceiling limit for completion of the investigation as provided under the statute should strictly be construed and understood as **one hundred and eighty days** and not beyond, unless the same is extended in the manner mentioned in the proviso by a Jurisdictional NDPS Court. The said provision must be read in conjunction with sub-section(2) to section 167 of Cr.P.C. which specifically states that, on expiry of the statutory period as defined thereunder for completion of investigation the accused person

shall be released on bail, if he is otherwise, prepared to satisfy the conditions for obtaining bail. The conjoint and harmonious reading of both the said provisions under NDPS Act and the Cr.P.C. show that the same were made in consonance with the valuable right guaranteed under Article 21 of the Constitution of India.

21. *In the matter of S. Kasi (supra)*, the Hon'ble Supreme Court was pleased to observe that:

*“17.The limitation for filing petitions/applications/suits/appeals/all other proceedings was extended to obviate lawyers/litigants to come physically to file such proceedings in respective Courts/Tribunals. The order was passed to protect the litigants/lawyers whose petitions/applications/suits/appeals/all other proceedings would become time barred they being not able to physically come to file such proceedings. The order was for the benefit of the litigants who have to take remedy in law as per the applicable statute for a right. The law of limitation bars the remedy but not the right. When this Court passed the above order for extending the limitation for filing petitions/applications/sits/appeals/all other proceedings, the order was for the benefit of those who have to take remedy, whose remedy may be barred by time because they were unable to come physically to file such proceedings. The order dated 23.03.2020 cannot be read to mean that it ever intended to extend the period of filing charge sheet by police as contemplated under Section 167(2) of the Code of Criminal Procedure. The Investigating Officer could have submitted/filed the charge sheet before the (Incharge) Magistrate. Therefore, even during the lockdown and as has been done in so many cases the charge-sheet could have been filed/submitted before the Magistrate (Incharge) and the Investigating Officer was not precluded from filing/submitting the charge-sheet even within the stipulated period before the Magistrate (Incharge).*

*18. If the interpretation by learned Single Judge in the impugned judgment is taken to its logical end, due to difficulties and due to present pandemic, Police may also not produce an accused within 24 hours before the Magistrate's Court as contemplated by Section 57 of the Code of Criminal Procedure, 1973.*

25. We, thus, are of the clear opinion that the learned Single Judge in the impugned judgment erred in holding that the lockdown announced by the Government of India is akin to the proclamation of Emergency. The view of the learned Single Judge that the restrictions, which have been imposed during period of lockdown by the Government of India should not give right to an accused to pray for grant of default bail even though charge sheet has not been filed within the time prescribed under Section 167(2) of the Code of Criminal Procedure, is clearly erroneously and not in accordance with law.

26. We, thus, are of the view that neither this Court in its order dated 23.03.2020 can be held to have eclipsed the time prescribed time under Section 167(2) of Cr.P.C. nor the restrictions which have been imposed during the lockdown announced by the Government shall operate as any restriction on the rights of an accused as protected by Section 167(2) regarding his indefeasible right to get a default bail on non-submission of charge-sheet within the time prescribed. The learned Single Judge committed serious error in reading such restriction in the order of this Court dated 23.03.2020”.

22. In the matter of: Gurupada Roy (*supra*), the Calcutta High Court observed that:

“6. From the scheme of the aforesaid provision, it is clear that submission of a valid report of the Public Prosecutor indicating progress of investigation and disclosing specific reasons for extension of period of detention is a *sine qua non* for extension of the period of the detention under Section 167(2) Cr.P.C. from six months to one year. [See *Sanjay Kumar Kedia v. N.C.B.*, (2009) 17 SCC 631 (para-12). Hence, it is axiomatic that the stringent pre-conditions for extension of the time period is to be sought for by submission of a report by the Public Prosecutor prior to the expiry of the said period and not thereafter. It is, therefore, mandatory for the Public Prosecutor to submit report specifying the progress of investigation and the compelling reasons for detention beyond 180 days prior to the expiry of the said period so as to confer jurisdiction on the Special Court to act on such report and extend the period of detention, as aforesaid. Any report filed after the expiry of period of 180 days is clearly *non est* in the eye of law and cannot confer jurisdiction on the Special Court to retrospectively legitimise the detention of the accused after expiry of the statutory period by granting a retrospective extension of time after lapse of the statutory period of detention [See *Sayed Mohd Ahmad Kazmi v. State*, (2012) 12 SCC 1]. It is another thing if the report is filed within the statutory period but the Court is unable to consider the report before the expiry of the period and passes an order extending the period subsequent to the expiry of 180 days as, in such cases, the

*extension shall relate to the date of filing of the report and not the date of the order of extension. In the instant case, public prosecutor admittedly did not file any report before the expiry of 180 days and, therefore, any order extending period of detention beyond 180 days on the strength of a report which was filed after the said period had already expired is clearly beyond the jurisdiction of the Special Court. Therefore, I am of the opinion that the right of the petitioner to avail statutory bail had already surfaced upon expiry of 180 days and was rightly availed of 25<sup>th</sup> January, 2017. Belated filing of a report by the Public prosecutor on the self same day i.e. on the 183<sup>rd</sup> day of detention after the period of detention had expired is an exercise in futility and I hold that the report filed by the Public Prosecutor after the expiry of 180 days was non est in the eye of law and could not have conferred jurisdiction on the Special Court to extend the period of detention till 3.2.2017 and reject the prayer for statutory bail by the impugned order dated 25.1.2017. Accordingly, I hold that the petitioner was entitled to statutory bail and had rightly availed of such right on 25.1.2017 and the said right could not have been extinguished by retrospective extension of period of detention on the basis of the report of the Public Prosecutor which had been belatedly filed after the expiry of the statutory period on 22.1.2017. it is trite law that if statutory bail had been availed of and was illegally denied, the said right does not stand eclipsed by the subsequent filing of charge-sheet. Reference in that regard may be made to Union of India v. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, reported in (2014) 9 SCC 457”.*

23. *In the matter of: Hussainara Khatoon & Ors. (supra), the Hon’ble Supreme Court was pleased to observe that:*

*“3. We find that pursuant to the directions given by us in our order dated March 9, 1979, Bageshwari Prasad Pandey, Superintendent of the Patna Central Jail has filed an affidavit dated April 4, 1979 along with a chart showing the dates on which Petitioners 1, 2 3 4, 5, 6, 7, 8, 9 and 17 confined in the Patna Central Jail prior to their release on personal bond, were produced before the Magistrates in compliance with the proviso to Section 167(2) of the Code of Criminal Procedure. A similar affidavit dated April 4, 1979 has also been filed by Pradeep Kumar Ganguly, Superintend of Muzaffarpur jail along with a chart showing the dates on which Petitioners 10, 11, 12, 13, 15, 16 and 18 who were previously confined in the Muzaffarpur Central Jail prior to their release on personal bond, were produced before the Magistrate in compliance with the requirement of the proviso to Section 167(2). Bhuwan Mohan Munda, Superintendant of the Ranchi Central Jail has also filed an affidavit dated April 12, 1979 together with a chart*

*showing the dates on which some of the undertrial prisoners referred to in our order dated March 9, 1979 were produced before the Magistrate in compliance with the requirement of the proviso to Section 167(2). It is apparent from these charts that some of the petitioners and other undertrial prisoners referred to in these charts have been produced numerous times before the Magistrates and the Magistrates have been continually making orders of remand to judicial custody. It is difficult to believe that on each of the countless occasions on which these undertrial prisoners were produced the Magistrates and the Magistrates made order of remand, they must have applied their mind to the necessity of remanding those undertrial prisoners to judicial custody. We are also very doubtful whether on the expiry of 90 days or 60 days, as the case may be, from the date of arrest, the attention of the undertrial prisoners was drawn to the fact that they were entitled to be released on bail under proviso (a) of sub-section (2) of Section 167. When an undertrial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may be, the Magistrate must before making an order of further remand to judicial custody, point out to the undertrial prisoner that he is entitled to be released on bail. The State Government must also provide at its own costs a lawyer to the undertrial prisoner with a view to enabling him to apply for bail in exercise of his right under proviso (a) to sub-section (2) of Section 167 and the Magistrate must take care to see that the right of the undertrial prisoner to the assistance of a lawyer provided at State cost is secured to him and he must deal with the application for bail in accordance with the guidelines laid down by us in our Order dated February 12, 1979. We hope and trust that every Magistrate in the country and every State Government will act in accordance with this mandate of the Court. This is the constitutional obligation of the State Government and the Magistrates and we have no doubt that if this is strictly carried out, there will be considerable improvement in the situation in regard to undertrial prisoners and there will be proper observance of the rule of law”.*

24. *In the matter of: Rakesh Kumar Paul (supra), the Hon’ble Supreme Court was pleased to observe that:*

*“44. Strong words indeed. That being so we are of the clear opinion that adapting this principle, it would be equally be the duty and responsibility of a court on coming to know that the accused person before it is entitled to “default bail”, to at least apprise him or her of the indefeasible right. A contrary view would diminish the respect for personal liberty, on which so much emphasis has been laid by this*

*Court as is evidenced by the decisions mentioned above, and also adverted to in Nirala Yadav”.*

25. *In the matter of: M. Ravindran (supra), the Hon’ble Supreme Court was pleased to observe that:*

*“24. In the present case, admittedly the appellant-accused had exercised his option to obtain bail by filing the application at 10.30 a.m. on the 181<sup>st</sup> day of his arrest i.e. immediately after the court opened, on 1-2-2019. It is not in dispute that the Public Prosecutor had not filed any application seeking extension of time to investigate into the crime prior to 31-1-2019 or prior to 10.30 a.m. on 1-2-2019. The Public Prosecutor participated in the arguments on the bail application till 4.25 p.m. on the day it was filed . It was only thereafter that the additional complainant came to be lodged against the appellant. Therefore, applying the aforementioned principles, the appellant-accused was deemed to have availed of his indefeasible right to bail , the moment he filed an application for being released on bail and offered to abide by the terms and conditions of the bail order i.e. at 10.30 a.m. on 1-2-2019. He was entitled to be released on bail notwithstanding the subsequent filing of an additional complaint.*

*24.1. It is clear that in the case in hand, the State/the investigating agency has, in order to defeat the indefeasible right of the accused to be released on bail, filed an additional complaint before the court concerned subsequent to the conclusion of the arguments of the appellant on the bail application. If such a practice is allowed, the right under section 167(2) would be rendered nugatory as the investigating officers could drag their heels till the time the accused exercises his right and conveniently file an additional complaint including the name of the accused as soon as the application for bail is taken up for disposal. Such complaint may be on flimsy grounds or motivated merely to keep the accused detained in custody, though we refrain from commenting on the merits of the additional complaint in the present case. Irrespective of the seriousness of the offence and the reliability of the evidence available, filing additional complaints merely to circumvent the application for default bail is, in our view, an improper strategy. Hence, in our considered opinion, the High Court was not justified in setting aside the judgment and order of the trial court releasing the accused on default bail.*

*24.2. We also find that the High Court has wrongly entered into merits of the matter while coming to the conclusion. The reasons assigned and the conclusions arrived at by the High Court are unacceptable”.*

26. *In the matter of: State of West Bengal (supra)*, the Calcutta High Court observed that:

*“20. In the case of Uday Mohanlal Acharya (supra) the question that arose for consideration by the Hon’ble Supreme Court was, when can an accused be said to have availed of his right for being released on bail under the Proviso to Section 167(2) of the Cr.P.C., if a challan is not filed within the period stipulated thereunder. In the course of answering that question, the Hon’ble Court observed as follows in various paragraphs of the Judgment:*

*“The power under Section 167 is given to detain a person in custody while the police goes on with the investigation and before the magistrate starts the enquiry. Section 167, therefore, is the provision which authorized the Magistrate permitting detention of an accused in custody and prescribing the maximum period for which such detention could be ordered. Having prescribed the maximum period, as stated above, what would be the consequences thereafter has been indicated in the proviso to sub-section (2) of Section 167. The proviso is unambiguous and clear and stipulates that the accused shall be released in bail if he is prepared to and does furnish the bail which has been termed by judicial pronouncement to be “compulsive bail” and such bail would be deemed to be a bail under Chapter 33. The right of an accused to be released on bail after expiry of the maximum period of detention provided under Section 167 can be denied only when an accused does not furnish bail, as is apparent from Explanation I to the said Section. The proviso to sub-section (2) of Section 167 is a beneficial provision for curing the mischief of indefinitely prolonging the investigation and thereby affecting the liberty of a citizen.*

.....

*There cannot be any dispute that on expiry of the period indicated in the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure the accused has to be released on bail, if he is prepared to and does furnish the bail. Even though a Magistrate does not possess any jurisdiction to refuse the bail when no charge-sheet is filed after expiry of the period stipulated under the proviso to sub-section (2) of Section 167 and even though the accused may be prepared to furnish the bail required, but such furnishing of bail has to be in accordance with the order passed by the Magistrate.*

*The Constitution Bench in Paragraph 48 (Sanjay Dutt v. State through CBI: (1994) 5 SCC 410) stated thus:*

*“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 of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(b), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applied for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure.”*

.....

*A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and that right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the court has to be passed. It is also further clear that the indefeasible right does not survive or remain enforceable on the challan being filed, it already not availed of, as has been held by the Constitution Bench in Sanjay Dutt (supra) case.*

.....

*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 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.

.....

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 first 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. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. **When the law provides that the Magistrate could authorize the detention of the accused in custody up to a maximum period as indicated in the provisions to subsection (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorizing detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency**

**indicated in Explanation I, namely, if the accused does not furnish the bail.**(Emphasis is ours). It is in this sense it can be started that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed, then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the Court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum,. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecution agency. On the aforesaid premises, we would record our conclusions as follows:

Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorize detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorize 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.

**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 in bail, if he is prepared to and furnishes the bail as directed by the Magistrate.**

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.*

*If the a,ccused 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 a,ccused even beyond the specified period in para (a) will not be unauthorized, 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.*

*The expression “if not already availed of” used by this Court in Sanjay Dutta (supra) 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 a,ccused 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. In the more recent case of Achpal alias Ramswaroop (supra), the appellants had been in custody from 09.04.2018. Hence, the investigation in terms of Section 167 of the Cr.P.C. had to be completed by 07.07.2018. The investigation was completed and challan under Section 173 of the Cr.P.C. was filed by the police before the concerned Judicial Magistrate on 05.07.2018. However, two days before that, an order had been passed by the High Court recording submission of the Public Prosecutor that investigating in the matter would be conducted by a Gazetted Police Officer. The investigation which led to filing of the report on 05.07.2018, was not in conformity with the statements made before the High Court, since, the report was filed by a police officer lower in rank than an ASP and who was not a Gazetted Police Officer. For this reason, the papers were returned by the Magistrate. The statutory period of 90 days expired on 07.07.2018. Immediately the accused persons applied for statutory bail. The Learned Magistrate by his order dated 09.07.2018 rejected the application observing that the Charge-sheet that was filed on 05.07.2018 was returned due to technical fault and also by observing that the effect of the High Court’s*

order dated 03.07.2018 was extension of period within which the investigation could be completed..

Such rejection of prayer for statutory bail was challenged by the accused persons before the High Court. While rejecting the petition of the accused persons, the High Court observed that no case for grant of bail under Section 167(2) of Cr.P.C. had been made out as the time as extended by the High Court and the I.O. was afforded two months' time to file charge-sheet. It was further observed that the I.O. had produced the charge-sheet before the concerned Court prior to 90 days but the same was returned in view of the order of the High Court.

The matter being carried to the Hon'ble Apex Court, two questions were formulated for consideration. Firstly, could it be said that the investigation was complete for the purposes of Section 167(2) of the Cr.P.C. so as to deny the benefit to the accused in terms of the said provision? Secondly, whether the order of the High Court could be construed as one under which the period for completing the investigating stood extended?

22. The Hon'ble Apex Court noted the earlier decisions of that Court including the one in the case of Uday Mohanlal Acharya (supra) and also noted the recommendations of the Law Commission of India pursuant to which the new Cr.P.C., 1973 was introduced. Having done so, the Hon'ble Court held as follows:

“18. In the present case as on the 90<sup>th</sup> day, there were no papers or the charge-sheet in terms of Section 173 of the Code for the concerned Magistrate to assess the situation whether on merits the accused was required to be remanded to further custody. Though the charge-sheet in terms of Section 173 came to be filed on 05.07.2018, such filing not being in terms of the order passed by the High Court on 03.07.2018, the papers were returned to the Investigating Officer. Perhaps it would have been better if the Public Prosecutor had informed the High Court on 03.07.2018 itself that the period of completing the investigation was coming to a close. He could also have submitted that the papers relating to investigation be filed within the time prescribed and a call could thereafter be taken by the Superior Gazetted Officer whether the matter required further investigation in terms of Section 173(8) of the Code or not. That would have been an ideal situation. But we have to consider the actual effect of the circumstances that got unfolded. **The fact of the matter is that as on completion of 90 days of prescribed period under Section 167 of the Code there were no papers of investigation before the concerned Magistrate. The accused were thus denied of protection established by law. The issue of their custody had to be considered on merits by the concerned Magistrate and they could not be simply remanded to**

custody de hors such consideration. In our considered view the submission advanced by Mr. Dave, Learned Advocate therefore has to be accepted. We now turn to the subsidiary issue, namely, whether the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventually. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act., 1985 and Maharashtra Control of Organized Crime Act., 1999 which clearly contemplated extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no Court could either directly or indirectly extend such period. In any event of the matter all that the High Court had recorded in its order dated 03.07.2018 was the submission that the investigation would be completed within two months by a Gazetted Police Officer. The order does not indicate that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission of the Public Prosecutor could not be taken to be an order granting extension. We thus reject the submissions in that behalf advanced by the Learned Counsel for the State and the complainant.

*In our considered view the accused having shown their willingness to be admitted to the benefits of bail and having filed an appropriate application, an indefeasible right did accrue in their favour”.\_*

27. The ratio laid down by the Supreme Court in the matter of: *The Punjab University, Chandigarh (supra)* and in the matter of: *Narmada Bachao Andolan & Anr (supra)*, relied upon by the Learned Counsel for the Prosecution are on the point of precedential value. The ratios in the said two judgments are of no relevance in the facts of this case and as such the same do not lay any assistance to adjudicate upon the instant bail application.

28. Insofar as the contention of the prosecution is concerned, that, during the period between July 24, 2020, when the statutory period of **one hundred and eighty days** had expired and July 31, 2020 when the said statutory period was

extended under sub-section(4) of Section 36A of the NDPS Act, the concerned NDPS Court was not available due to the outbreak of COVID-19 pandemic and the prosecution did not have any forum available to apply for such extension, this Court is of the view that, it is the duty of the Judicial Administration of the State to oversee the affairs of the NDPS Court. In the event any such NDPS is not available, then it is the bounden duty of the State Judicial Administration immediately to give charge to another competent Court and such Court would exercise the jurisdiction of the concerned NDPS Court which was not available. This is clearly an Administrative Act and a ministerial job on the part of the State Judicial Administration. In absence thereof, the indefeasible right of the accused to obtain default bail pursuant to sub-section(2) to Section 36A of the NDPS Act should not suffer and more so such right of an accused flows from Article 21 of the Constitution of India and the same cannot be infringed. In such a situation the Court should weigh the personal liberty guaranteed under Article 21 of the Constitution of India being acknowledged under sub-section(4) to Section 36A of the NDPS Act vis a vis the administrative affair or the ministerial job of the State Judicial Administration. In weighing the said two factors, this Court is of the view that the right to personal liberty guaranteed to an accused under Article 21 of the Constitution of India must prevail beyond doubt at any circumstance.

29. The law of limitation bars the remedy and not the right. During the pandemic the Hon'ble Supreme Court from time to time had extended the period of limitation, inter alia, for initiating proceedings for the benefit of the litigants

who wished to avail of their legal remedies as per the applicable statute for a right of such decision of the Supreme Court from time to time was adopted by the various High Courts including our High Court. Such order for extension cannot be read to mean that it ever intended to extend the period of filing charge sheet by police as contemplated under Section 167(2) of the Cr.P.C. The Investigating Officer could have submitted/filed the charge sheet before the Magistrate (Incharge). Similarly it was open for the prosecution to apply for extension of the said statutory period in an identical manner. Therefore, even during the lock down as in the instant case contended by the prosecution, the relevant charge sheet could have been filed/submitted before the Magistrate (Incharge) or the investigating officer could have applied for necessary extension thereof in a similar manner. The investigating officer was not precluded from filing/submitting the charge sheet even within the stipulated period before the Magistrate (Incharge). The unavailability of an appropriate Court which depends on the administrative decision and ministerial job of the State Judicial Administration cannot be held to have eclipsed the time prescribed under sub-section(4) to Section 36A of the NDPS Act read with sub-section(2) to Section 167 of the Cr.P.C. nor the restrictions which had been imposed during the lock down announced by the government shall operate any restriction or bar on the rights of an accused as protected under the said two provisions of the two statutes regarding his indefeasible right to get default bail, on non submission of charge sheet within the time prescribed.

30. From the scheme of the aforesaid provisions namely sub section (4) of Section 36A of the NDPS Act read with sub section(2) of Section 167 of the Cr.P.C., it is clear that submission of a valid report of the Public Prosecutor indicating progress of investigation and disclosing specific reasons for extension of period of detention is a sine qua non for extension of the period of detention under sub section(2) of Section 167 of the Cr.P.C. Hence, it is apothegmatic and aphoristic that the stringent preconditions for extension of time period is to be sought for by submission of a report by the Public Prosecutor prior to the expiry of the period mentioned under the statute, in the instant case, **one hundred and eighty days** and not thereafter. It is, thus, imperative and compulsory for the Public Prosecutor to submit report specifying the progress of investigation and the compelling reasons for detention beyond one hundred and eighty days prior to the expiry of the said period so as to confer jurisdiction on the NDPS Court to act on such report and extend the period of detention, as aforesaid. Any report filed beyond the expiry of the period of **one hundred and eighty days** as mandated under sub section(4) to Section 36A is totally non est in the eye of law and cannot confer any jurisdiction on the Special NDPS Court to retrospectively legitimize the detention of the accused after expiry of the statutory period by granting retrospective extension of time once the statutory period of detention stands expired.
31. In view of the fore going discussions and reasons this Court is of the firm view that a valuable and indefeasible right for default/statutory bail arose in favour

of the petitioner on July 24, 2020 which must be recognized and accepted and the petitioner must get the benefit thereof, to which he is entitled to in law.

32. The petitioner is, thus, enlarged on bail subject to the following conditions:

(a) *The petitioner shall furnish bond for a sum of Rs.25,000/- with two sureties of like amount each, one of whom must be local to the satisfaction of the Learned Judge Special Court under NDPS Act cum Additional Sessions Judge, 2<sup>nd</sup> Court, Jalpaiguri or the Learned Judge/Court Incharge with the same power and jurisdiction;*

(b) *The petitioner shall not leave the jurisdiction of the Bhaktinagar Police Station without the express leave being obtained from the said Special Court under the NDPS Act mentioned in the preceding Clause (a) and shall report his attendance every ten days before the Officer-in-charge Bhaktinagar Police Station.*

(c) *The petitioner shall attend everyday hearing before the concerned NDPS Special Court as and when the matter shall be taken up.*

(d) *The petitioner shall not tamper with any records or documents pertaining to the subject NDPS case and shall not intimidate any witness in the matter;*

(e) *The petitioner shall comply with terms and conditions mentioned under Section 437(3) of the Cr.P.C.*

It is made clear that, in absence of compliance of any of the aforesaid conditions or any default thereof, the said NDPS Special Court mentioned in

Clause (a) above shall be entitled to cancel the bail forthwith without any reference to this Court.

33. On the aforesaid terms **CRM 160 of 2021 with IA: CRAN 2 of 2021** stand allowed.

**Arijit Banerjee, J.:**

1. I have had the advantage of reading the judgment authored by my learned brother and I completely agree with the conclusion. I just wish to add a few words.
2. Once the statutory period for investigation in connection with charges under the NDPS Act expires without charge sheet having been filed by then, immediately a right accrues in favour of the accused who is in custody to obtain bail. This is loosely called default bail or statutory bail. This is an indefeasible right in the sense that it cannot be defeated by the prosecution seeking extension of time to complete investigation keeping the accused in custody. Any extension of time that the prosecution may intend to obtain in terms of the provisions to Section 36-A(4) of the NDPS Act must be so obtained prior to the aforesaid indefeasible right accruing in favour of the accused. Once the right to obtain bail accrues in the favour of the accused he may exercise the same at any time prior to filing of the charge sheet. The indefeasible right to

obtain bail can only be defeated by filing of a charge sheet prior to the accused exercising the right to obtain bail.

3. In the instant case as discussed elaborately by my learned brother, the right of the petitioner to obtain bail accrued on July 24, 2021, i.e. when the 180 days statutory period expired without charge sheet having been filed. The State filed the application for extension of time to complete investigation detaining the petitioner in custody on July 31, 2021. Such an application could not in any manner adversely affect the right of the accused to obtain bail. In other words, an application filed by the prosecution for custodial investigation must necessarily be filed prior to expiry of the initial period prescribed by the NDPS Act. After expiry of such statutory period, an application for extension of time for custodial investigation cannot be allowed.
4. In view of the aforesaid, I completely agree with my learned brother that this is a fit case where the petitioner should be enlarged on bail on the conditions enumerated by my learned brother in his detailed judgment.

**(Arijit Banerjee, J.)**

**(Aniruddha Roy, J.)**