

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO.817 OF 2022

- Petitioners** : 1. Naresh s/o Netram Nagpure,
Aged about 35 years,
R/o Kachara Mohalla, Krushnapura Ward,
Behind Durga Mandir, Gondia, Dist. Gondia.
2. Shubham @ Chaddha @ Bharat S/o Rajkumar
Bhatwar, Aged about 20 years,
R/o Kachara Mohalla, Krushnapura Ward,
Behind Durga Mandir, Gondia, Dist Gondia.
3. Amar s/o Mahendrasingh Baanafar,
Aged about 20 years,
R/o Near Head Post Office, Civil Lines,
Gondia, Dist Gondia.
4. Narayan s/o Santosh Sharma,
Aged about 22 years,
R/o Kachara Mohalla, Krushnapura Ward,
Behind Durga Mandir, Gondia, Dist Gondia.
5. Dhiraj s/o Munnalal Uike,
Aged about 29 years,
R/o Basant Nagar, Gondia, Dist Gondia.
6. Ajay s/o Deepak Bansod,
Aged about 31 years,
R/o Gadda Toly, Azad Ward, Gondia, Dist Gondia.
7. Ajay s/o Mitaram Lilhare,
Aged about 29 years,
R/o Basant Nagar, Gondia, Distt. Gondia.
- All r/o Gondia, Distt. Gondia.
- Versus –
- Respondent** : The State of Maharashtra,
Through Police Station Officer,
P.S. Ramnagar, Gondia, District Gondia.

Shri Anil Mardikar, Senior Advocate with
Shri R.M. Daga, Advocate for the Petitioners.
Shri S.M. Ghodeswar, A.P.P. for the Respondent/State

CORAM : **SUNIL B. SHUKRE AND M.W. CHANDWANI, JJ.**
RESERVED ON : **5th DECEMBER, 2022.**
PRONOUNCED ON : **23rd DECEMBER, 2022.**

J U D G M E N T : (Per M.W. Chandwani, J.)

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the parties.

02] Arrestees in Crime No.47/2022 take out the application for default bail. The order favours prosecution agency. Aggrieved arrestees make an unsuccessful attempt of availing revisional jurisdiction. By way of this writ petition, they challenge the orders.

03] The brief facts, which give rise to the present petition are as under:

The petitioners are being prosecuted by Police Station, Ramnagar, Gondia in Crime No.47/2022 registered for the offences punishable under Sections 302, 307, 324, 143, 147, 148 read with Section 149 of the Indian Penal Code, 1860 (I.P.C.) and Section 135 of the Maharashtra Police Act, 1951. The petitioners were arrested in the said crime on 25/02/2022 and

were produced before the Judicial Magistrate First Class, Court No.3, Gondia. The petitioners initially were sent to Police Custody Remand (PCR) and thereafter to Magisterial Custody Remand (MCR).

04] On 30/03/2022, the prosecution invoked the provisions of Sections 3(1) and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as “MCOC Act” for short) in the present case. Accordingly, by communication dated 31/03/2022, information was given to the Special Court. The prosecution thereafter also sought PCR of the petitioners till 12/04/2022, which was granted. Now they are in MCR.

05] On 21/05/2022, the prosecution moved an application under Section 21(2)(b) of the MCOC Act before the Special Court for extension of time for a period of 90 days more for submission of charge-sheet. By order dated 24/05/2022, the Special Judge granted extension of 90 days for completing the investigation for the reasons mentioned in the order. By communication dated 22/08/2022, the Additional Director General of Police (A.D.G.P) refused to grant sanction to prosecute the petitioners under the provisions of MCOC Act. On the same day, i.e. on 22/08/2022 at 04:00 p.m., the petitioners filed an application for default bail before the learned Special Judge. The learned Judge passed order to call for the status report. Office of the Chief Judicial Magistrate informed that till 04:25 p.m., no charge-sheet in

the said case was filed. The prosecution filed application before the Special Court for remitting the matter back to the Court of Judicial Magistrate First Class. Thereafter the application came to be filed before the Court of Judicial Magistrate First Class, Gondia. However, on the same day, i.e. on 22/08/2022, the Investigating Officer filed charge-sheet before the Court after 04:30 p.m. The Court of Judicial Magistrate First Class, Gondia, after considering the rival submissions of the respective parties, rejected the application of the petitioners for default bail. The petitioners made an unsuccessful attempt by filing revision against the order of the Court of Judicial Magistrate First Class before the Additional Sessions Judge, Gondia. Feeling aggrieved by the orders of the learned Magistrate and the learned Additional Sessions Judge, the petitioners are invoking the writ jurisdiction by filing this writ petition.

06] The State filed its reply and opposed the contention of the petitioners. It is contended that immediately after learning that the A.D.G.P did not give sanction to prosecute the petitioners under the provisions of MCOC Act, Police on the same day, filed charge-sheet before the learned Chief Judicial Magistrate. Before that, in the wake of refusal of permission to prosecute the petitioners under the MCOC Act, the Police had approached the Special Court for referring the matter to the Judicial Magistrate First Class. The learned Chief Judicial Magistrate referred the matter to the Judicial Magistrate First Class, Gondia for accepting the charge-sheet. Initially, the

petitioners had filed application before the Special Court at 04:00 p.m., but after learning that the charge-sheet was being filed before the Judicial Magistrate First Class, the petitioners filed another application, which may have been filed after filing of the charge-sheet before the Judicial Magistrate First Class. The said application, it appears, has not been filed purposefully on record.

07] It is also contended in the reply that the order for extension of time to file charge-sheet had never been challenged. The extended period to file the charge-sheet was till 23/08/2022 and the charge-sheet has been filed on 22/08/2022 i.e. before expiry of the extended period. Therefore, the petitioners are not entitled for grant of default bail under Section 167 of the Code of Criminal Procedure (Cr.P.C.).

08] Learned Senior Counsel Shri Anil Mardikar for the petitioners vehemently submits that indefeasible right in favour of the petitioners occurred as soon as the A.D.G.P refused to give sanction to prosecute the petitioners under the provisions of the MCOC Act. The petitioners immediately applied for their indefeasible right of default bail at 04:00 p.m. and they were ready to furnish the surety. The petitioners had already availed the indefeasible right for default bail by filing application and subsequent filing of charge-sheet by the prosecution will not extinguish indefeasible right occurred

in favour of the petitioners. He further submits that the law has been crystallized by various judgments of the Apex Court that filing of application for default bail with readiness to furnish surety is amounting to availing of the indefeasible right and subsequent filing of charge-sheet, though on the same date, will not dis-entitle the petitioners. To buttress his submissions, he seeks to rely on the following judgments.

- i. *Fakhrey Alam vs. State of Uttar Pradesh – 2021 SCC OnLine SC 532*
- ii. *Bikramjit Singh vs. State of Punjab – (2020) 10 SCC 616.*
- iii. *M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence – (2021) 2 SCC 485.*
- iv. *Jigar alias Jimmy Pravinchandra Adatiya vs. State of Gujarat – 2022 SCC OnLine SC 1290.*

09] *Per contra*, learned Additional Public Prosecutor Shri S.M. Ghodeswar reiterated his reply and submitted that charge-sheet was filed on the very same day of refusal of sanction to prosecute the petitioners under the provisions of the MCOC Act. He went on submitting that the extended period of 180 days was to expire on 23/08/2022 and charge-sheet has been filed before a day i.e. on 22/08/2022 and, therefore, the indefeasible right for default bail never occurred in favour of the petitioners. He supported the order passed by the learned Judicial Magistrate First Class and the learned Additional Sessions Judge, Gondia.

10] In order to appreciate the arguments of the learned Counsel for the respective parties in their proper perspective, it will be germane to note the provisions of Section 167(2) of the Cr.P.C., which read thus :

“167. Procedure when investigation cannot be completed in twenty-four hours. -

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

[(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

[(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.]

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.”

11] It is also relevant to note here Section 21(2)(b) of the MCOC Act.

“21. Modified application of certain provisions of the Code--

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in sub-section (2), -

(b) After the proviso, the following proviso shall be inserted, namely -

Provided further *that if it is not possible to complete the investigation within the said period of ninety days, the Special*

Court shall extend the said period up to one hundred and eighty days, 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 ninety days.”

12] It can be seen from the aforesaid provisions that Section 167(2) of Cr.P.C. lays down that the Magistrate to whom the accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that Section 167(2) of Cr.P.C. or extended period if any as per the provisions of Section 21(2)(b) of the MCOC Act. In case the investigation is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be granted of bail under Chapter XXXIII of Cr.P.C.

13] The right to bail under Section 167(2) of Cr.P.C. first proviso is absolute. It is a legislative command and not the Court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days or extended period, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days or extended period.

14] The law in this regard has been well settled way back in the judgments of the Apex Court since 1994 in the case of *Sanjay Dutt Vs. State of Maharashtra* till the recent judgment in the case of *M. Ravindran* (*supra*) that the right to default bail is not mere statutory right under the first proviso to Section 167(2) of Cr.P.C., 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. The Apex Court and various High Courts have held that when the accused has filed an application and is prepared to offer bail on being directed, he gets indefeasible right. Therefore pending his application, the right of the accused will not be extinguished by filing charge-sheet after filing an application for default bail by the accused. Keeping these principles in mind, let us turn to the facts of the present case.

15] Indisputably, the petitioners were arrested on 25/02/2022 in a crime registered for the offence punishable under Sections 302, 307, 324, 143, 147, 148 read with Section 149 of I.P.C. The maximum permissible period for detention under Section 167(2) of Cr.P.C. was 90 days for the aforesaid offences. By order dated 24/05/2022, the learned Special Judge extended 90 days more for filing of charge-sheet, since the provisions of the MCOC Act had been invoked in this case. Period of 180 days was to expire here on 23/08/2022. On 22/08/2022, the A.D.G.P refused to grant sanction

to prosecute the petitioners under the provisions of the MCOC Act. The petitioners filed an application for default bail initially before the Special Court at about 04:00 p.m. and thereafter before the learned Magistrate. On the same day, charge-sheet came to be filed by the Police after filing of the application by the petitioners. It is also a matter of record that the order dated 24/05/2022 for grant of extension for the period of 90 days more for completing the investigation has not been challenged by the petitioners by filing any separate proceeding or in the present writ petition. Consequently, the said order has become final.

16] A question remains, whether or not refusal of sanction by the A.D.G.P. under the provisions of the MCOC Act by itself will invalidate the grant of extension of period up to 180 days and would automatically reduce the judicial custody remand to its original period of 90 days, especially when the extension had been granted under a judicial order, not challenged by the petitioners. It is to be noted the investigation for an offence and cognizance of the offence under the provisions of MOCC Act are governed by Section 23 of the MCOC Act, which are reproduced here.

“23. Cognizance of, and investigation into, an offence -

(1) Notwithstanding anything contained in the Code, - Section 167

(a) no information about the commission of an offence of organised crime under this Act, shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police;

(b) no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police.

(2) No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police.”

17] It is worthy to note here that the power to extend the period to complete the investigation up to 180 days is exercised under Section 167(2) of Cr.PC. by invocation of provisions made under Section 21 of the MCOC Act and whereas power to grant or refuse sanction to prosecute has its source in Section 23 of the MCOC Act. Former power is exercised by the Court and latter power by a Police Officer. Objects of both kinds of powers are different. Custody extension is done for, *inter alia*, ensuring effective and speedy investigation, without any hindrance, while sanction is necessary to enable the Special Court to take cognizance of an offence under the MCOC Act, which is disclosed by the charge-sheet. In other words, former power exists for facilitating the investigation, while the latter power is to facilitate trial of the accused. Thus, both these powers operate in different fields. After considering

the magnitude of the investigation required in a particular case, the Special Judge enables in depth investigation by extending custody period, and whereas, there is an embargo created by Section 23(2) of the MCOC Act on the cognizance taking by the Special Court without previous sanction of the A.D.G.P. The purpose of incorporating such embargo is to provide double filter before roping in anybody under the stringent provisions of law.

18] Thus, extending further time of 90 days for completing the investigation by the Special Judge is one thing and giving sanction by the A.D.G.P. is a different thing. Once, the Special Court after giving reasons has extended the period of investigation up to 180 days, the refusal of sanction will not take away the extended period of 90 days granted by the Special Court or even curtail the extended period granted by the Special Court. The detention here was authorized by a legal order of the Court under Section 21(2)(b) of the MCOC Act, after considering the material then available with police and with reasoned order and it was never challenged and, therefore, it became a final order. The detention of the petitioners after 90 days thus can not be said to be unauthorized detention.

19] Further, it is not the case of the petitioners that the prosecution acted in a *mala fide* manner and with intent to detain the petitioners, invoked the provisions of the MCOC Act. Rather, the record shows that the

prosecution started investigation after approval from the DIG, Gadchiroli and got extension of time through reasoned order passed by the Special Court and, therefore, the prosecution cannot be blamed.

20] For the aforesaid reasons, we do not find force in the argument of the learned Senior Counsel for the petitioners that in the wake of refusal of sanction by the A.D.G.P, the authorized period of detention would reduce to 90 days and any further detention would be unauthorized. Thus, the period for completing the investigation here would have expired only on completion of 180 days i.e. on 23/08/2022 and not before that.

21] The issue can be examined from a different angle. If we assume for the sake of argument that the effect of the order refusing sanction to prosecute the accused as amounting to not disclosing of any offence under the MCOC Act, the further consequence thereof would, at the most, be that the custody extension order will cease to have any effect at the end of the day on which sanction is refused and till that day, the extension order would have to be held as valid. Even from this view point, the petitioners are not entitled to be released on default bail as the essential condition required for accrual of indefeasible right under Section 167(2) of Cr.P.C. to the petitioners is not fulfilled. This can be seen from the facts available on record, which show

that charge-sheet has been filed on 22/08/2022 and on the same day, the application under Section 167(2) of Cr.P.C. was moved by the petitioners. Of course, it is the contention of the learned Counsel for the petitioners that the application of the petitioners was filed about 30 minutes before the charge-sheet was filed and, therefore, their application was first in point of time and as such there was an accrual of right of default bail to the petitioners. The argument, in our view, is really not relevant for deciding the controversy involved in the petition. The reason being that, the day on which sanction was refused by the authority, would have to be considered to be the day on which the extended period of custody expired and, therefore, the right to seek default bail would arise on the immediate next day. It also means that when sanction is refused, as for example on Monday, this day of Monday would be the last day on which extended period of custody would come to an end, though in normal circumstances it would have expired later, and therefore, the Investigating Officer would have to take care that he files the final report on that day or otherwise he risks the grant of default bail to the accused. This is because of the fact that the provisions made under Section 167(2) of Cr.P.C. speak not in terms of hours, minutes and seconds, but only in terms of number of days completed. For the purpose of ascertaining as to when the period of authorized custody comes to an end, it is only the number of completed days, which is relevant and not the time at which the event having

the effect of rendering the custody as unauthorized took place.

22] If we examine the issue from the above alternative, which we have proposed only by way of assumption and for the sake of argument, still the petitioners cannot be said to be fulfilling the essential requirement of Section 167(2) of Cr.P.C. in order to avail of right of default bail. The application under Section 167(2) of Cr.P.C. was filed by them on 22/08/2022 and that was the day when the sanction to prosecute the petitioners was refused. It was thus the day which became the last day of their authorized custody, which was otherwise extended up to 23/08/2022. Therefore, the right to avail of default bail in terms of Section 167(2) of Cr.P.C. really arose in their favour only from 23/08/2022.

23] From the above referred view point, we find that the petitioners' application was premature, having been filed on a day when no right to get default bail had accrued to them. It would have been a different thing if the petitioners had filed their such application on 23/08/2022 and thereafter the charge-sheet had been filed.

24] In the case of **Fakhrey Alam** (*supra*) relied upon by the petitioners, the sanction was awaited to prosecute the accused under the Unlawful

Activities (Prevention) Act (hereinafter referred to as “UAP Act” for short), and the prosecution filed charge-sheet on or before completion of 180 days for the offence punishable under the provisions of the Indian Penal Code and after completion of 211 days and two days later of filing of application by the accused for default bail, the charge-sheet under the UAP Act came to be filed. In that scenario, the Apex Court has held that filing of supplementary charge-sheet will not take away the indefeasible right of the accused for default bail in the present writ petition. Therefore, it will not be helpful to the petitioners. As far as the cases of M. Ravindran and Bikramjit Singh (*supra*) are concerned, in those cases the Courts have held that mere filing of the application will amount to availing of right by the accused within the meaning of Section 167(2) of Cr.P.C. and the indefeasible right will not be extinguished by filing the charge-sheet by the prosecution agency pending disposal of the bail application of the accused. In the present case, even the charge-sheet has been filed prior to expiry of 180 days, therefore, these cases will not be applicable. In the case of Jigar @ Jimmyu (*supra*), there was challenge to the extension granted by the Special Court. While setting aside the extension of period granted by the Special Court, the Apex Court enlarged the accused on default bail under Section 167(2) of Cr.P.C. on the ground of non hearing the accused. Whereas, the facts of present case are different from the facts in the said case. In the present case accused was served with report of special

prosecutor and was heard through his counsel, therefore case of Jigar @ Jimmyu (*supra*) would not assist the petitioners here.

25] To conclude, in view of above, we hold that there is no merit in the petition and, accordingly, we dismiss the same.

(M.W. CHANDWANI, J.)

(SUNIL B. SHUKRE, J.)

*sandesh