

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

207

**CRR-1718-2021
Date of decision: 02.02.2022**

JATINDER SINGH ALIAS HAPPY

....Petitioner

Versus

THE STATE OF PUNJAB

...Respondent

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present : Mr. Baljeet Singh Kathuria, Advocate
for the petitioner.

Ms. A.K. Khurana, DAG Punjab.

VINOD S. BHARDWAJ. J. (ORAL)

This case has been taken up through Video Conferencing via Webex facility in the light of Pandemic Covid-19 situation and as per instructions.

2. By means of instant revision petition, a challenge has been raised to the order dated 17.11.2021 passed by learned Judge, Special Court, SBS Nagar, whereby the application of the petitioner for furnishing bail/surety bonds has been rejected and the application filed by the prosecution to dismiss the bail application under Section 167(2) CrPC has been disposed of.

3. The case came up for hearing on 23.12.2021, when the following order was passed:-

'Learned counsel for the petitioner contends that the petitioner had been arrested on 18.05.2021 in an FIR under Sections 15 and 22 of the NDPS Act as he was allegedly found in possession of 15 injections (2 ml. each) of Buprenorphine and 3 kg. poppy husk besides 15 injections of Avil which is not covered under the NDPS Act. The period of 180 days for completing the investigation expired on 15.11.2021. The petitioner had preferred an application for default bail under Section 167(2) Cr.P.C. on 16.11.2021 which was

*allowed by the trial Court on the same day. The petitioner was directed to furnish his bail bonds and while the petitioner was in the process of doing so, the prosecution moved an application on 17.11.2021 stating therein that the challan had been presented and therefore, the petitioner could not be released on default bail. This application was allowed and the application of the petitioner for furnishing the bail bonds was declined. He further contends that once the petitioner has been directed to be released on default bail on non-completion of the investigation within the stipulated period, the valuable right of an under-trial could not be defeated on hyper-technical ground of non-submitting the bail bonds. The application of the petitioner had been allowed on 16.11.2021 and the petitioner was in the process of submitting his bail bonds on 17.11.2021 whereon the challan had been filed. In support of his submissions, he has relied on the judgment of the Coordinate Bench of this Court in the case of **Amit Chawla versus State of Haryana, 2021(4) RCR (Criminal) 248.***

Learned State counsel prays for more time to file reply.

List on 12.01.2022.

In the meantime, the petitioner shall appear before the trial Court, he will furnish requisite bonds to the satisfaction of the trial Court/Duty Magistrate and his bail bonds would be accepted.'

4. Learned State counsel has forwarded a short reply by way of an affidavit of Davinder Singh, PPS, Deputy Superintendent of Police, SBS Nagar in compliance of the order dated 23.12.2021. A copy thereof has been circulated in the WhatsApp group. Learned State counsel undertakes to file the reply in original before the Registry of this Court.

5. I have heard learned counsel appearing on behalf of the petitioner as well as Ms. A.K. Khurana, DAG Punjab and have gone through the pleadings and the documents appended along with the pleadings.

6. Learned counsel for the petitioner has reiterated the submissions

already noticed by this Court in its order dated 23rd December, 2021 and has stated that in compliance of the said order, the petitioner had appeared before the trial Court and had furnished the requisite bonds to the satisfaction of the trial Court and the same stand accepted.

7. Learned State counsel has however opposed the instant petition and has made a reference to the averments contained in Para 6 of the short reply filed on behalf of the State to defend the impugned order. The same is extracted as under:-

'6. That it is respectfully submitted that the Ld. Trial court has relied upon the judgment passed by the Hon'ble Supreme Court in Uday Mohanla Acharya Vs. State of Maharashtra, 2001 (2) RCR (Criminal) 452, wherein it was held by the Hon'ble Supreme Court that if accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorized, and, therefore, if during that period the investigation is complete and charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.'

8. The question which emerges for determination is as to whether the right of an accused to be released on bail under sub-section (2) of Section 167 CrPC would stand extinguished merely on account of failure of the accused to furnish the bail bonds.

8.1 The relevant extract of Section 167 CrPC is extracted as under:-

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

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by section 57, and there are grounds for

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

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

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

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

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

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(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. ¹ Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period

specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;].² Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.]

[Provided further that in case of a woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home and recognized social institution.]

9. Statute prescribes a mandatory period for completion of investigation where an accused is in custody. Failure to conclude the investigation entails rights in favour of an accused person to be released on bail in case he is prepared to and does furnish bail.

10. A perusal of the order dated 16th November, 2021 (Annexure P-1) shows that the petitioner did submit an application for seeking bail, thus reflecting his willingness to secure bail on the terms as may be so prescribed. Considering the said circumstances, the petitioner was admitted to bail under Section 167(2) CrPC subject to furnishing bail bonds in the sum of Rs.1 lakh with one surety in the like amount. It further transpires that an application for furnishing surety bonds was submitted by the petitioner on 17.11.2021 at 10:35 AM, when a report was made by the *Ahlmad* on an application filed by the prosecution that the challan had been presented in the Court at 10:20 AM on the same day.

11. The learned trial Court, while dismissing the application for acceptance of bail bonds filed by the petitioner, placed reliance upon the judgment of the Hon'ble Supreme Court in case of ***Uday Mohanlal Acharya Vs. State of Maharashtra 2001 (2) RCR (Criminal) 452*** (which is also been relied upon by

the State in its short reply) to hold that if the accused is unable to furnish bail, as directed by the Magistrate, the continued custody of the accused beyond the specified period will not be unauthorized, and, therefore, if during that period the investigation is complete and charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

12. Having considered the submissions advanced on behalf of the State and also the impugned order passed by the trial Court, I do not find myself in agreement with the order dated 17.11.2021, passed by the trial Court.

13. The Three-Judges' Bench of the Hon'ble Supreme Court has visited the issue in the matter of Criminal Appeal No.699 of 2020 decided on 26.10.2020 titled as **M. Ravindran Vs. Intelligence Officer, Direcotrate of Revenue Intelligence, (2021) 2 SCC 485**, and has considered the case of Uday Mohanlal (supra). The Hon'ble Supreme Court proceeded to examine the parameters of the right to be granted default bail under Section 167(2) CrPC against the fundamental right to life and personal liberty. The relevant extract of the observation recorded by the Hon'ble Supreme Court in M. Ravindran (supra) is as under:-

'II. Section 167(2) and the Fundamental Right to Life and Personal Liberty

11. Before we proceed to expand upon the parameters of the right to default bail under Section 167(2) as interpreted by various decisions of this Court, we find it pertinent to note the observations made by this Court in Uday Mohanlal Acharya on the fundamental right to personal liberty of the person and the effect of deprivation of the same as follows:

“13...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 authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (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.”

11.1 Article 21 of the Constitution of India provides that “no person shall be deprived of his life or personal liberty except according to procedure established by law”. It has been settled by a Constitution Bench of this Court in Maneka Gandhi v. Union of India, (1978) 1 SCC 248, that such a procedure cannot be arbitrary, unfair or unreasonable. The history of the enactment of Section 167(2), CrPC and the safeguard of ‘default bail’ contained in the Proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with rule of law.

11.2 Under Section 167 of the Code of Criminal Procedure, 1898 (‘1898 Code’) which was in force prior to the enactment of the CrPC, the maximum period for which an accused could be remanded to custody, either police or judicial, was 15 days. However, since it was often unworkable to conclude complicated investigations within 15 days, a practice arose wherein investigative officers would file ‘preliminary chargesheets’ after the expiry of the remand period. The State would then request the magistrate to postpone commencement of the trial and authorize further remand of the accused under Section 344 of the 1898 Code till the time the investigation was completed and the final chargesheet was filed. The Law Commission of India in Report No. 14 on Reforms of the Judicial Administration (Vol. II, 1948, pages 758-760) pointed out that in many cases the accused were languishing for several months in custody without any final report being filed before the Courts. It was also pointed out that there was conflict in judicial opinion as to whether the magistrate was bound to release the accused if the police report was not filed within 15 days. Hence the Law Commission in Report No. 14 recommended the need for an appropriate provision specifically providing for continued remand after the expiry of 15 days, in a

manner that “while meeting the needs of a full and proper investigation in cases of serious crime, will still safeguard the liberty of the person of the individual.” Further, that the legislature should prescribe a maximum time period beyond which no accused could be detained without filing of the police report before the magistrate. It was pointed out that in England, even a person accused of grave offences such as treason could not be indefinitely detained in prison till commencement of the trial.

11.3 The suggestion made in Report No. 14 was reiterated by the Law Commission in Report No. 41 on The Code of Criminal Procedure, 1898 (Vol. I, 1969, pages 76-77). The Law Commission re-emphasized the need to guard against the misuse of Section 344 of the 1898 Code by filing ‘preliminary reports’ for remanding the accused beyond the statutory period prescribed under Section 167. It was pointed out that this could lead to serious abuse wherein “the arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner.” Hence the Commission recommended fixing of a maximum time limit of 60 days for remand. The Commission considered the reservation expressed earlier in Report No. 37 that such an extension may result in the 60 day period becoming a matter of routine. However, faith was expressed that proper supervision by the superior Courts would help circumvent the same.

11.4 The suggestions made in Report No. 41 were taken note of and incorporated by the Central Government while drafting the Code of Criminal Procedure Bill in 1970. Ultimately, the 1898 Code was replaced by the present CrPC. The Statement of Objects and Reasons of the CrPC provides that the Government took the following important considerations into account while evaluating the recommendations of the Law Commission: “3. The recommendations of the Commission were examined carefully by the Government, keeping in view among others, the following basic considerations:—

- (i) an accused person should get a fair trial in accordance with the accepted principles of natural justice;*
- (ii) every effort should be made to avoid delay in investigation and*

trial which is harmful not only to the individuals involved but also to society; and

(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community.”

11.5 It was in this backdrop that Section 167(2) was enacted within the present day CrPC, providing for time limits on the period of remand of the accused, proportionate to the seriousness of the offence committed, failing which the accused acquires the indefeasible right to bail. As is evident from the recommendations of the Law Commission mentioned supra, the intent of the legislature was to balance the need for sufficient time limits to complete the investigation with the need to protect the civil liberties of the accused. Section 167(2) provides for a clear mandate that the investigative agency must collect the required evidence within the prescribed time period, failing which the accused can no longer be detained. This ensures that the investigating officers are compelled to act swiftly and efficiently without misusing the prospect of further remand. This also ensures that the Court takes cognizance of the case without any undue delay from the date of giving information of the offence, so that society at large does not lose faith and develop cynicism towards the criminal justice system.

11.6 Therefore, as mentioned supra, Section 167(2) is integrally linked to the constitutional commitment under Article 21 promising protection of life and personal liberty against unlawful and arbitrary detention, and must be interpreted in a manner which serves this purpose. In this regard we find it useful to refer to the decision of the three-Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67, which laid down certain seminal principles as to the interpretation of Section 167(2), CrPC though the questions of law involved were somewhat different from the present case. The questions before the three-Judge Bench in Rakesh Kumar Paul were whether, firstly, the 90 day remand extension under Section 167(2)(a)(i) would be applicable in respect of offences where the maximum period of imprisonment was 10 years, though the

minimum period was less than 10 years. Secondly, whether the application for bail filed by the accused could be construed as an application for default bail, even though the expiry of the statutory period under Section 167(2) had not been specifically pleaded as a ground for bail. The majority opinion held that the 90 day limit is only available in respect of offences where a minimum ten year imprisonment period is stipulated, and that the oral arguments for default bail made by the counsel for the accused before the High Court would suffice in lieu of a written application. This was based on the reasoning that the Court should not be too technical in matters of personal liberty. Madan B. Lokur, J. in his majority opinion, pertinently observed as follows: “29. Notwithstanding this, the basic legislative intent of completing investigations within twenty-four hours and also within an otherwise time-bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time-limits have been laid down by the legislature...

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32...Such views and opinions over a prolonged period have prompted the legislature for more than a century to ensure expeditious conclusion of investigations so that an accused person is not unnecessarily deprived of his or her personal liberty by remaining in prolonged custody for an offence that he or she might not even have committed. In our opinion, the entire debate before us must also be looked at from the point of view of expeditious conclusion of investigations and from the angle of personal liberty and not from a purely dictionary or textual perspective as canvassed by the learned counsel for the State.

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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.” (emphasis supplied)

Therefore, the Courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in Article 21.

11.7 We may also refer with benefit to the recent judgement of this Court in S. Kasi v. State Through The Inspector of Police Samaynallur Police Station Madurai District (Criminal Appeal No. 452 of 2020 dated 19th June, 2020), 2020 SCC OnLine SC 529, wherein it was observed that the infeasible right to default bail under Section 167(2) is an integral part of the right to personal liberty under Article 21, and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. It was emphasized that the right of the accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a chargesheet.

11.8 Additionally, it is well-settled that in case of any ambiguity in the construction of a penal statute, the Courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedures providing for the curtailment of the liberty of the accused. With respect to the CrPC particularly, the Statement of Objects and Reasons (*supra*) is an important aid of construction. Section 167(2) has to be interpreted keeping in mind the three- fold objectives expressed by the legislature namely ensuring a fair trial, expeditious investigation and trial, and setting down a rationalized procedure that protects the interests of indigent sections of society. These objects are nothing but subsets of the overarching fundamental right guaranteed under Article 21.

11.9 Hence, it is from the perspective of upholding the fundamental right to life and personal liberty under Article 21 that we shall clarify and reconcile the various judicial interpretations of Section 167(2) for the purpose of resolving the dilemma that has arisen in the present case.

III. The meaning of “if not already availed of” in Sanjay Dutt

12. One of the relevant decisions dealing with the question of accrual and extinguishment of the right under Section 167(2) is that of the two-Judge Bench in Hitendra Vishnu Thakur (supra). In that case, the Court was called upon to construe the scope of Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ('TADA') which is in pari material with the Proviso to Section 36A (4) of the NDPS Act. The Court held that an accused person seeking bail under Section 20(4) of the TADA read with Section 167(2) has to make an application for such default bail and the Court shall release the accused on bail if the period for filing a chargesheet has expired, after notice to the public prosecutor, uninfluenced by the merits of the case. That unless the Court grants extension in time based on the report of the Public Prosecutor, the Designated Court under TADA would have no jurisdiction to deny to the accused his indefeasible right to default bail if the accused seeks and is prepared to furnish the bail bonds as directed by the Court. Further that in such a scenario, the Court is obligated to decline any request for further remand. However, it was also expressly stated that the Court cannot release the accused on its own motion if the accused does not file any such application.

12.1 Subsequently the question of the proper construction of Section 20(4)(bb) was referred to a Constitution Bench of this Court in Sanjay Dutt (supra). Reservation was expressed before this Court that the decision in Hitendra Vishnu Thakur (supra) should not be held as conferring an indefeasible right on the accused to be released on default bail even after the final report or challan has been filed. To settle this point, the Constitution Bench held that:

“48...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 CrPC ceases to apply...It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order.

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53...(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the CrPC in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies 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 CrPC. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage.” (emphasis supplied)

It appears that the term “if not already availed of” mentioned supra has become a bone of contention as Courts have differed in their

opinions as to whether the right to default bail is availed of and enforced as soon as the application for bail is filed; or when the bail petition is finally disposed of by the Court; or only when the accused actually furnishes bail as directed by the Court and is released from custody.

12.2 The majority opinion in Uday Mohanlal Acharya (supra) clarified this ambiguity by holding that the expression “if not already availed of” used by this Court in Sanjay Dutt (supra) must be understood to mean “when the accused files an application and is prepared to offer bail on being directed”. In that case, it has to be held that the accused has enforced 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 is yet to furnish the same

12.3 However, B.N. Agrawal, J. in his minority opinion partly dissented with the majority, particularly with respect to the conclusions expressed in paragraph 13.6 of Uday Mohanlal Acharya (supra). He opined that the phrase “the accused person shall be released on bail if he is prepared to and does furnish bail” in Section 167(2)(a)(ii) (emphasis supplied) and “the accused shall be detained in custody so long as he does not furnish bail” in Explanation I to Section 167(2) indicated that the right to be released on default bail could be exercised only on actual furnishing of bail. Further, that the decision of the Constitution Bench in Sanjay Dutt (supra) should be interpreted to have held that if the challan is filed before any order directing release on bail is passed and before the bail bonds are furnished, the right under Section 167(2) would cease to be available to the accused.

12.4 Having considered both opinions, we have arrived at the conclusion that the majority opinion in Uday Mohanlal Acharya (supra) is the correct interpretation of the decision rendered by the Constitution Bench in Sanjay Dutt (supra). The decision in Sanjay Dutt merely casts a positive corresponding obligation upon the accused to promptly apply for default bail as soon as the prescribed period of investigation expires. As the decision in Hitendra Vishnu

Thakur (supra) expressly cautions, the Court cannot suo motu grant bail without considering whether the accused is ready to furnish bail or not. This is an in-built safeguard within Section 167(2) to ensure that the accused is not automatically released from custody without obtaining the satisfaction of the Court that he is able to guarantee his presence for further investigation, or for trial, as the case may be. Further, as the majority opinion in Rakesh Kumar Paul (supra) pointed out, there could be rare occasions where the accused voluntarily forfeits his right to bail on account of threat to his personal security outside of remand or for some other reasons. The decision in Sanjay Dutt clarifies that once a chargesheet is filed, such waiver of the right by the accused becomes final and Section 167(2) ceases to apply. However, the Constitution Bench decision in Sanjay Dutt cannot be interpreted so as to mean that even where the accused has promptly exercised his right under Section 167(2) and indicated his willingness to furnish bail, he can be denied bail on account of delay in deciding his application or erroneous rejection of the same. Nor can he be kept detained in custody on account of subterfuge of the prosecution in filing a police report or additional complaint on the same day that the bail application is filed.

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

The prosecution would not be allowed to take advantage of its own default of not filing the investigation report/complaint against the appellant within the stipulated period.

12.6 It was noted by B.N. Agrawal, J. in his minority opinion in Uday Mohanlal Acharya (supra) that a distinction can be made between cases where the Court has adopted dilatory tactics to defeat the right of the accused and where the delay in deciding the bail application is bona fide and unintentional. In case of the former, the accused could move the superior Court for appropriate direction. Whereas in case of the latter, the Court must dismiss the bail petition if the prosecution files the challan in the meantime. In a similar manner, the Respondent/ complainant in the present case has also sought to distinguish Uday Mohanlal Acharya and subsequent decisions of this Court pertaining to Section 167(2) on the ground that the Trial Court considered the bail application on the same day it was filed, and hence there was no unjust delay which would make the accused entitled to be released on bail. appropriate direction. Whereas in case of the latter, the Court must dismiss the bail petition if the prosecution files the challan in the meantime. In a similar manner, the Respondent/ complainant in the present case has also sought to distinguish Uday Mohanlal Acharya and subsequent decisions of this Court pertaining to Section 167(2) on the ground that the Trial Court considered the bail application on the same day it was filed, and hence there was no unjust delay which would make the accused entitled to be released on bail. In our considered opinion, such a distinction cannot be adopted as it would give rise to parallel litigations necessitating separate inquiries into the motivation of the Court for delaying a bail application, or for posting it for hearing on a particular date at a particular time. Delay in deciding the bail application could be due to a number of factors and there may not be a clear-cut answer to the same in all circumstances. Hence irrespective of the reasons for delay in deciding the bail application, the accused is deemed to have exercised his indefeasible right upon filing of the bail application, though his actual release from custody is inevitably subject to compliance with the order granting bail.

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

IV. The Import of Explanation I to Section 167(2), CrPC

13. It is true that Explanation I to Section 167(2), CrPC provides that the accused shall be detained in custody so long as he does not furnish bail. However, as mentioned supra, the majority opinion in Uday Mohanlal Acharya expressly clarified that Explanation I to Section 167(2) applies only to those situations where the accused has availed of his right to default bail and undertaken to furnish bail as directed by the Court, but has subsequently failed to comply with the terms and conditions of the bail order within the time prescribed by the Court. We find ourselves in agreement with the view of the majority. In such a scenario, if the prosecution subsequently files a chargesheet, it can be said that the accused has forfeited his right to bail under Section 167(2), CrPC. Explanation I is only a safeguard to ensure that the accused is not immediately released from custody without complying with the bail order.

13.1 However, the expression ‘the accused does furnish bail’ in Section 167(2) and Explanation I thereto cannot be interpreted to mean that if the accused, in spite of being ready and willing, could not furnish bail on account of the pendency of the bail application before the Magistrate, or because the challenge to the rejection of his bail application was pending before a higher forum, his continued detention in custody is authorized. If such an interpretation is accepted, the application of the Proviso to Section 167(2) would be narrowly confined only to those cases where the

Magistrate is able to instantaneously decide the bail application as soon as it is preferred before the Court, which may sometimes not be logistically possible given the pendency of the docket across courts or for other reasons. Moreover, the application for bail has to be decided only after notice to the public prosecutor. Such a strict interpretation of the Proviso would defeat the rights of the accused. Hence his right to be released on bail cannot be defeated merely because the prosecution files the charge-sheet prior to furnishing of bail and fulfil the conditions of bail of furnishing bonds, etc., so long as he furnishes the bail within the time stipulated by the Court.

13.2 Hence we reject Mr. Lekhi's argument that the Appellant-accused is not entitled to the protection of Section 167(2), CrPC if he has not furnished bail at the time the additional complaint was filed.

13.1 The conclusion recorded by the Hon'ble Supreme Court are thus as under:-

'18. Therefore, in conclusion:

18.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

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

higher Court.

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

*18.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. **If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid.'***

14. A perusal of the aforesaid judgment shows that in order to extinguish the right accrued in favour of an accused under Section 167(2) CrPC, the accused must fail to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court. A perusal of the order dated 16.11.2021 (Annexure P-1) granting concession of bail under Section 167(2) CrPC to the petitioner shows that no such time-frame for furnishing bail bonds had been prescribed by the Judge, Special Court, SBS Nagar. It cannot thus be construed that the accused committed a default in complying with the terms and conditions of the order of bail within the specified time schedule.

15. A similar controversy came up before this Court in the matter of **Amit Chawla Versus State of Haryana, 2021(4) RCR (Criminal) 248** and it was held as under:-

'6. This Court is also of the view that the petitioner's failure to furnish his bail bonds after having been granted statutory bail due to

non-submission of Challan, where no time limit had been prescribed for furnishing such bonds, would not have the effect of extinguishing his indefeasible right to Default Bail where Challan was not submitted within the statutory period.

7. In view of the aforesaid three decisions of the Hon'ble Apex Court, consequently the present revision petition is allowed, after setting aside the impugned order, and the petitioner is permitted to be released on bail in accordance with the original order passed by the Ld. Court below on 16.10.2019 (Annexure P-2).'

16. It is evident from the order dated 16.11.2021, passed by the lower Court that no time frame for submission of bail bonds was prescribed by the Court while extending the concession of default bail. Resultantly, it cannot be construed that the petitioner committed a breach or was in default of any of the terms and conditions prescribed in the order granting bail. Thus, it cannot be deemed that the indefeasible right to claim default bail by the accused stands extinguished in the instant case.

17. In view of the above, the present revision petition is allowed and the order dated 17.11.2021 passed by the Judge, Special Court, SBS Nagar is set aside. The petitioner is permitted to be released on bail in accordance with the original order granting bail dated 16.11.2021, passed by the Judge, Special Court, SBS Nagar.

Petition allowed.

(VINOD S. BHARDWAJ)
JUDGE

February 02, 2022

S.Sharma(syr)

<i>Whether speaking/reasoned</i>	:	<i>Yes/No</i>
<i>Whether reportable</i>	:	<i>Yes/No</i>