

DEFAULT BAIL

BIKRAMJIT SINGH

VERSUS

THE STATE OF PUNJAB

CITATION : Criminal Appeal No. 667 OF 2020

CORAM : R.F. Nariman J., Navin Sinha J., K.M. Joseph J.

JUDGMENT PRONOUNCED BY : R.F. Nariman, J.

JUDGMENT PRONOUNCED ON : 12TH OCTOBER 2020

LAW POINT :

Subsequent filing of chargesheet doesnot extinguish the indefeasible right of an accused who applied for default bail

FACTS :

The Accused, Bikramjit Singh, was remanded to custody by a Sub-Divisional Magistrate (SDM). After expiry of 90 days in custody i.e. on 21.02.2019, he filed an application for default bail under Section 167 (2) of Criminal Procedure Code (hereinafter as CrPC) before SDM. This bail application was dismissed on the ground that the SDM had already extended time from 90 days to 180 days under Section 167 of the Code of Criminal Procedure, 1973 as amended by UAPA. This Order of extension of custody period was later set aside in revision on 25.03.2019 by the Special Court holding that under the UAPA read with the NIA Act, the Special Court alone had jurisdiction to extend time to 180 days under the first proviso in Section 43-D(2)(b) of UAPA. One day later i.e. on 26.03.2019, chargesheet was filed. A revision petition against the Order of dismissal of bail application was dismissed and bail was denied on the ground that chargesheet has already been filed.

Later, the Punjab and Haryana High Court set aside the Order dated 25.03.2019 of the Special Court, holding that in case the investigation is being carried out **by the State police**, the Magistrate will have power to extend the period of investigation upto 180 days and then, commit the case to the Court of Sessions as per provisions

of Section 209 Cr.P.C., whereas in case the investigation is conducted **by the agency** under the NIA Act, the power shall be exercised by the Special Court and challan will be presented by the agency before the Special Court. Thus, the Order of extension of custody by SDM being valid in law, the bail application was rightfully dismissed. Now, the appeal of the accused lies before the Hon'ble Supreme Court.

CONTENTION OF THE APPELLANT

Once the Special Court had been set up as an exclusive Court to try all offences under the UAPA, offences being scheduled offences relatable to the NIA Act, it was the Special Court alone which had exclusive jurisdiction to extend the period of 90 days to 180 days. This being the case, on an application for default bail having been made prior to the filing of the charge sheet, an indefeasible right to default bail arose immediately after 21.02.2019, when the 90 day period was over. An Order of extension of custody that was passed without jurisdiction by the SDM had been set aside by the Special Court via Order dated 25.03.2019, as a result of which his right to default bail sprung into action before filing of the charge sheet which was on 26.03.2019.

CONTENTION OF THE RESPONDENT

It was argued that the entire investigation of the case was done only by the State Police and thus the SDM had jurisdiction to extend time and having so extended time on 13.02.2019, any application for default bail after the 90 day period was over had necessarily to be dismissed.

DECISION OF THE APEX COURT

1. A cursory and a combined reading of first schedule of Cr.P.C., Provisions of UAPA and NIA Act, makes it clear that for all offences under the UAPA, the **Special Court alone has exclusive jurisdiction to try such offences.** Further, Under the NIA Act, even though offences may be punishable with imprisonment for a term not exceeding 3 years, the Special Court alone is to try such offence. The argument of the Respondent, thus, has no legs to stand on since the Special Court has exclusive jurisdiction over every Scheduled Offence investigated by the investigating agency of the State. Therefore, The SDM's jurisdiction to

extend time of custody is non-existent as it is only the special Court that can exercise such discretion and even in cases where the special Courts have not been set up, it is the Court of Session that has the power to do so.

2. The next issue that arose was that of grant of default bail under Section 167 (2) of CrPC which briefly provides that once the maximum period for investigation of an offence is over, under the first proviso (a) to Section 167(2), the accused shall be released on bail, this being an indefeasible right granted by the Code.

The Court relied upon various judgments as follows –

Hitendra Vishnu Thakur v. State of Maharashtra (1994 SC)

Section 167 of CrPC read with TADA, would show that strictly speaking this is not a provision for “grant of bail” but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the chargesheet in the Court. It is for this reason that an Order for release on bail under proviso (a) of Section 167(2) of CrPC read with TADA is generally **termed as an “Order-on-default” as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period.** An obligation, then, is cast upon the Court to decline the police request for further remand. There is yet another obligation and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. The right to bail under Section 167(2) proviso (a) is absolute. It is a legislative command and not Court's discretion.

Sanjay Dutt v. State through CBI (1994 SC)

The Constitution Bench held that the indefeasible right of the accused 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. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the CrPC. 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. Also, 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, both of them should be considered together. In such a case, no bail can be given 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. The “indefeasible right” of the accused to be released on bail 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 not thereafter.

Uday Mohanlal Acharya v. State of Maharashtra (2001 SC)

It dealt with the question of what is the true meaning of the expression “**if already not availed of**” as was used in Sanjay Dutt Case ? Does it mean that an accused files an application for bail and offers his willingness for being released on bail OR does it mean that a bail Order must be passed, then the accused must furnish the bail and get him released on bail ?

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 CrPC, the moment he files 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 to abide by the terms and conditions of bail and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. At this juncture, 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 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**.

Rakesh Kumar Paul v. State of Assam (2017 SC)

The Court held that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted. In this case, no specific application for grant of default bail was made. However, an application for regular bail was filed which made averments to the factum of expiry of statutory period for filing a chargesheet. The Court held that in such a case, it is not as if the petitioner did not make any

application for default bail as such an application was definitely made (if not in writing) then at least orally. In matters of personal liberty, the Courts cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for “default bail” or an oral application for “default bail” is of no consequence. The requirement is of furnishing of bail. The accused does not have to make out any grounds for grant of bail. He does not have to file a detailed application. **All he has to aver in the application is that since 60/90 days have expired and charge-sheet has not been filed, he is entitled to bail and is willing to furnish bail.** This indefeasible right cannot be defeated by filing the charge-sheet after the accused has offered to furnish bail

3. The conspectus of the aforesaid decisions would show that so long as an application (which application need not even be in writing) for grant of default bail is made on expiry of the period of 90 days or 180 days (when the time of custody has been rightfully extended) and before a charge sheet is filed, the right to default bail becomes complete. Thereupon, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.
4. **In the facts of the present case**, the High Court was wholly incorrect. The application that was made for default bail was made on or before 25.02.2019. The charge sheet was filed on 26.03.2019. The sole ground for dismissing the application was that the time of 90 days had already been extended by the SDM by his Order dated 13.02.2019. This Order of extension of custody was correctly set aside by the Special Court holding that Special Court alone had jurisdiction to extend time to 180 days. The fact that the Appellant filed yet another application for default bail on 08.04.2019, would not mean that this application would wipe out the effect of the earlier application dated 25.02.2019 that had been wrongly decided. The Court held that it must not be forgotten that this case is dealing with the personal liberty of an accused under a statute which imposes drastic punishments. **The right to default bail**, as has been correctly held by the judgments of this Court, **are not mere statutory rights** under the first proviso to Section 167(2) of the Code, **but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled.** However, it was also made clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the Appellant on cogent grounds, and upon arrest or re-arrest, the

Appellant is entitled to petition for the grant of regular bail which application should be considered on its own merit.

DECISION :

The appeal was thus allowed and the judgment of the High Court was set aside.