IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :13.10.2023

Pronounced on :17.10.2023

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN**

Crl.O.P.SR.Nos.44185, 44187 and 44188 of 2023
in
Crl.M.P.Nos.14923, 14926 and 14927 of 2023

**Crl.O.P.SR.No.44185 of 2023**

Alex @ Alexpandiyan
Now confined in Central Prison
Puzhal, Chennai. .. Petitioner

/versus/

The State rep.by
The Inspector of Police (L&O),
Town Police Station, Nagapattinam,
(Cr.No.371 of 2022) .. Respondent

Criminal Original Petition has been filed under Section 482 of Cr.P.C., to set aside the common docket order returned dated 10.08.2023 in Crl.M.P.No.1182 of 2023 on the file of the Judicial Magistrate No.1, Nagapattinam and consequently, issue direction to call for and transfer the records in S.C.No.51 of 2023 on the file of the Principal District & Sessions Court at Nagapattinam to the Judicial Magistrate No.1, Nagapattinam for the purpose of availing records in the even of furnishing surety.

For Petitioner :Mr.M.Dhivakar
For Respondent :Mr.S.Udaya Kumar
Government Advocate (Crl.Side)

**Crl.O.P.SR.No.44187 of 2023**

Shagul Hameed(Sethappa)
Now confined in Central Prison
Puzhal, Chennai. .. Petitioner

/versus/

The State rep.by
The Inspector of Police (L&O),
Town Police Station, Nagapattinam,
(Cr.No.371 of 2022) .. Respondent

Criminal Original Petition has been filed under Section 482 of Cr.P.C., to set aside the common docket order returned dated 10.08.2023 in Crl.M.P.No.1183 of 2023 on the file of the Judicial Magistrate No.1, Nagapattinam and consequently, issue direction to call for and transfer the records in S.C.No.51 of 2023 on the file of the Principal District & Sessions Court at Nagapattinam to the Judicial Magistrate No.1, Nagapattinam for the purpose of availing records in the even of furnishing surety.

For Petitioner :Mr.M.Dhivakar

For Respondent :Mr.S.Udaya Kumar
Government Advocate (Crl.Side)

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**Crl.O.P.SR.No.44188 of 2023**

1.Lakshmanan
2.Ramachandran@ Chinnaramu
3.Muthupandi @ Kullan
4.Vasudevan@ Vasu
5.Kumar
Now confined in Central Prison
Puzhal, Chennai. .. Petitioners

/versus/

The State rep.by
The Inspector of Police (L&O),
Town Police Station, Nagapattinam,
(Cr.No.371 of 2022) .. Respondent

Criminal Original Petition has been filed under Section 482 of Cr.P.C., to set aside the common docket order returned dated 10.08.2023 in Crl.M.P.No.1356 of 2023 on the file of the Judicial Magistrate No.1, Nagapattinam and consequently, issue direction to call for and transfer the records in S.C.No.51 of 2023 on the file of the Principal District & Sessions Court at Nagapattinam to the Judicial Magistrate No.1, Nagapattinam for the purpose of availing records in the even of furnishing surety.

For Petitioner :Mr.M.Dhivakar

For Respondent :Mr.S.Udaya Kumar
Government Advocate (Crl.Side)

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COMMON ORDER

The complaint in Cr.No.371/2022, dated 08/12/2022 was registered by the Nagapattinam Town Police Station for offences under Sections 147,148,341,307 and 302 IPC against Alex, S/o Kesavan and 5 others. The informant was one Vinothkumar a friend of the slain Sivapandi and also the injured witness. The Respondent Police failed to complete the investigation

within a period of 90 days from the date of the arrest of the suspected accused. Hence ,the suspected accused got default bail from the Judicial Magistrate No:1, Nagapattinam as below:-

(A-10 to A-14), Petitioners in Cr.O.P.SR.44188/2023: : Arrested on 20/12/2022: Default bail granted on 20/03/2023 on condition to furnish two sureties for Rs.10,000/- each and out of which, one must be a blood relative.

(A-8): Petitioner in Crl.O.P.SR.No:44185/2023: Arrested on 12/12/2022. Default bail granted on 13/03/2023 on condition to furnish two sureties for Rs.10,000- each and out of which one must be a blood relative.

(A-3): Petitioner in Crl.O.P.SR.No:44187/2023: Arrested on 10/12/2022. Default bail granted on 13/03/2023 on condition to furnish two sureties for Rs.10,000- each and out of which one must be a blood relative.

2. These petitioners though availed their right under Section 167(2) of Cr.P.C and got bail on condition to furnish sureties, they did not furnish sureties till the respondent police completed the investigation and filed the final report against Munishwaran and 13 others. The challan filed before the Judicial Magistrate No.1, Nagapattinam was numbered as P.R.C.No:14/2023 and committed to Court of Sessions after furnishing copies under Section 207

Cr.P.C to the accused persons. The Principal Sessions Judge, Nagapattinam had taken the case on file on 08/06/2023 and assigned S.C.No: 51/2023 on 09/06/2023. The case is now stand posted to 18/10/2023.

3. In the meanwhile, the petitioners/accused have filed memo before the Judicial Magistrate No.I, Nagapattinam stating that they wish to furnish surety in compliance of the default bail orders. The trial Court has declined to entertain the memo on two grounds stating that the case already been committed to the Court of Sessions and in such circumstances, surety could not be verified by the Court (Judicial Magistrate No.1) and in view of the Division Bench judgment in Crl.O.P.NO.7736/2021, dated 23/12/2021, ***(Kannan @ Senthil Kumar @ Minnal –vs- State Rep. By the Deputy Superintendent of Police, 'Q' Branch CID, Coimbatore)*** the right to seek default bail got extinguished. Therefore, returned the memo seeking clarification from the learned counsel for the petitioners. In response to the return, the Learned Counsel for the petitioners/accused represented the memo with endorsement referring a judgment of this High Court rendered by a Learned Single Judge in ***Punaekkar Seetharaman Dikule –vs- State rep by the Inspector of Police,***

***Twon West Police Station, Tanjavur, om Crl.O.P.(MD)No.4432 of 2023 dated 21.03.2023,*** and prayed for entertaining the petitions.

4. The trial Court after considering the two judgments and facts of this case, returned the memo stating that the decision of the Division Bench (Kannan @ Senthil) binds him and the judgment of learned Single Judge in Punaekkar case is not relevant to the present case. The trial Court in fact had held that after filing the charge sheet, the case been committed to the Court of Session, therefore, the right accrued to the accused persons got extinguished, since they have not availed the right within time.

5. The learned counsel for the petitioners submitted that the right under Section 167(2) Cr.P.C is an indefeasible right and once accrued and availed it will not get extinguished for the failure of the accused by not furnishing surety.

6. Per contra, the Learned Government Advocate appearing for the State submitted that, the right which get accrued by default of the investigation

cannot sustain endlessly. Once the challan filed and the stage is set for trial, the accused by his own default lost the advantage of Section 167(2) Cr.P.C. The decision of the Division Bench of the High Court is binding on the trial Court and same cannot be ignored. The Learned Single Judge had distinguished the facts of the *Punekkar Seetharaman Dikule case,* he decided fromthe facts of the case decided by the Division Bench in *Kannan case*.

7. Section 167(2) Cr.P.C had been under the judicial scanner on different occasions and on different context. One can easily find enough decisions and literatures about this provision. The broad understanding of this Section and uncontraverted basic feature are:-

(a)The right under this Section is interrelated to the completion of the investigation.

(b)The right is independent to the nature of the crime or the merit of the case under investigation.

(c)The right to seek default bail commences on the expiry of the period prescribed for completion of investigation. ( 60 days/90 days or 180 days as the case may be).

8. Instance like the present, there are cases where the accused after availing the default bail provision and get bail order but for some reason could not furnish surety. Before he could arrange for surety, the investigation may get completed and challan filed and taken on file. The Hon'ble Supreme Court had occasions to deal with such circumstances and had laid down how the right accrued under Section 167(2) CrPC construed to be availed and when such right gets extinguished.

9. To begin with, it is first necessary to understand what bail means and how default bail under Section 167 (2) Cr.P.C. differs from a regular bail granted under Sections 437 or 439 of Cr.P.C

> **Bail:** Bail connotes the process of procuring the release of an accused charged with certain offence by ensuring his future attendance in the Court for trial and compelling him to remain within the jurisdiction of the Court. A person released on bail is still considered to be detained in the constructive custody of the Court through his surety.

10. In the Criminal Procedure Code, Chapter XXXIII deals with Bails and Bail bonds. In the Code, offences are broadly classified as Bailable offences and Non-bailable offences. Whether bailable offence or non bailable offences, any person arrested or detained, the Court may release him on bail, with or without surety obtaining bail bond and imposing condition. The process of seeking bail commence on filing petition for bail and gets completed and reach the logical end on acceptance of surety by the Court.

11. Apart from the provisions under Chapter XXXIII of the Code, yet another provision which gives right to an arrested person to get release is Section 167(2). It is a right which blossom into a fundamental right, if the investigation agency, which arrest a person and detains him in prison, not able to complete the investigation within the time limit prescribed under the Criminal Code or the time limit fixed in the respective Special Act. The accused arrest gets a special reason to seek bail under Section 167(2) of Cr.P.C. It is independent of all other reasons for which the arrested person can seek bail under Section 437 or Section 439 of the Criminal Procedure Code.

12. The Courts in India had invariable held that the fundamental right of life and liberty cannot be curtailed perpetually under the guise of investigation. The paramount consideration of the legislature while enacting Section 167(2) Cr.P.C and the proviso thereto was that the investigation must be completed expeditiously and that the accused should not be detained unreasonably for long period. Thus, the law as well as judicial pronouncements are very clear on the point that, the accused arrested on suspicion of a cognizable offence gets right to seek bail on expiry of the period prescribed for completion of investigation. The dispute is whether the investigation if completed, such right will still survive or get extinguished on filing the final report.

13. Earlier two Judge Bench of the Supreme Court in ***Raghubir Singh and others v. State of Bihar*, [(1986) 4 SCC 481] : [1986 SCC (Cri) 511],** at page 497 held that:-

> ***"20.****The effect of the new proviso is to entitle an accused person to be released on bail if the investigating agency fails to complete the investigation within 60 days. A person released on bail under the proviso to Section 167(2) for the default of the investigating agency is statutorily*

*deemed to be released under the provisions of Chapter XXXIII of the Code for the purposes of that chapter. That is provided by the proviso to Section 167(2) itself. This means, first, the provisions relating to bonds and sureties are attracted. Section 441 provides for the execution of bonds, with or without sureties, by persons ordered to be released on bail. One of the provisions relating to bonds is Section 445 which enables the court to accept the deposit of a sum of money in lieu of execution of a bond by the person required to execute it with or without sureties. If the bond is executed (or the deposit of cash is accepted), the court admitting an accused person to bail is required by Section 442(1) to issue an order of release to the officer-in-charge of the jail in which such accused person is incarcerated. Sections 441 and 442, to borrow the language of the Civil Procedure Code, are in the nature of provisions for the execution of orders for the release on bail of accused persons. What is of importance is that there is no limit of time within which the bond may be executed after the order for release on bail is made. Very often accused persons find it difficult to furnish bail soon after the making of an order for release on bail. This frequently happens because of the poverty of the accused persons. It also happens frequently that for various reasons the sureties produced on behalf of accused persons may not be acceptable to the court and fresh sureties will have to be produced in such an event. The accused persons are not to be deprived of the benefit of the*

*order for release on bail in their favour because of their inability to furnish bail straightway. Orders for release on bail are effective until an order is made under Section 437(5) or Section 439(2). These two provisions enable the Magistrate who has released an accused on bail or the Court of Session or the High Court to direct the arrest of the person released on bail and to commit him to custody. The two provisions deal with what is known in ordinary parlance as cancellation of bail. Since release on bail under the proviso to Section 167(2) is deemed to be release on bail under the provisions of Chapter XXXIII, an order for release under the proviso to Section 167(2) is also subject to the provisions of Sections 437(5) and 439(2) and may be extinguished by an order under either of these provisions.*

*It may happen that a person who has been accepted as a surety may later desire not to continue as a surety. Section 444 enables such a person, at any time, to apply to a Magistrate to discharge a bond either wholly or so as it relates to the surety. On such an application being made the magistrate is required to issue a warrant of arrest directing the person released on bail to be brought before him. On the appearance of such person or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as it relates to the surety, and shall call upon such person to find other sufficient surety and if he fails to do so, he may commit him to jail (Section 444). On the discharge*

*of the bond, the responsibility of the surety ceases and the accused person is put back in the position where he was immediately before the execution of the bond. The order for release on bail is not extinguished and is not to be defeated by the discharge of the surety and the inability of the accused to straight way produce a fresh surety. The accused person may yet take advantage of the order for release on bail by producing a fresh, acceptable surety.*

14. Then in ***Hitendra Vishnu Thakur v. State of Maharashtra*** *reported in* ***[(1994) 4 SCC 602 : 1994 SCC (Cri) 1087*** ]: the Apex Court summarized its conclusion as under:

*"In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail under Section 20(4) has to make an application to the court for grant of bail on grounds of the 'default' of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail under Section 20(4) of TADA and both the provisions operate in separate and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without*

*notice to an accused to have his say regarding the prayer for grant of extension under clause (bb). In this view of the matter, it is immaterial whether the application for bail on ground of 'default' under Section 20(4) is filed first or the report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under clause (bb) but the charge-sheet is not filed within the extended period, the court shall have no option but to release the accused on bail, if he seeks it and is prepared to furnish the bail as directed by the court. Moreover, no extension under clause (bb) can be granted by the Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in clause (bb), which must be strictly construed."*

*(emphasis in original)*

15. Then, came the Constitutional Bench Judgment in ***Sajay Dutt –vs-State reported in (1994 (5) SCC 410).*** In the case, the decision of Two Judges Bench in ***Hitendra Vishnu Thakur*** *case* came up for reconsideration by the

Constitutional Bench, since it was canvassed that Thakur case judgement is being construed by the Designated Courts to mean that the right of the accused to be released on bail in such a situation is indefeasible in the sense that it survives and remains enforceable, without reference to the facts of the case, even after the challan has been filed and the court has no jurisdiction to deny the bail to the accused at any time if there has been a default in completing the investigation within the time allowed.

16. The Constitution Bench on considering the submissions, held that,

> *"48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4) (bb) is based on a correct reading of the principle indicated in that decision. 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 accrud 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".*

Again in conclusion, the Constitutional Bench in *Sajay Dutt case* said,

> *'(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 Code of Criminal Procedure 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 ensures 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 Code of Criminal Procedure. The right of the accused to be released on bail after filing on the challan, notwithstanding the default in filing it within the time allowed, as governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage'.*

17. Then came the judgment in ***Uday Mohanlal Acharya –vs- State of***

***Maharashtra*** reported in ***[2001 (5) SCC 453]*** consisting of 3 Hon'ble Judges. It was a split verdict 2:1 Justice B.N.Agrawal partly dissented. The conclusion of the majority judges and the minority view are as below:-

> *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 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 that indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433]. The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? 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, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail.*
>
> *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 bail 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. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution.*

*A two-Judge Bench decision of this Court in State of M.P. v. Rustam [1995 Supp (3) SCC 221 : 1995 SCC (Cri) 830] setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression*

*"if already not availed of", used by the Constitution Bench in Sanjay Dutt [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] . We would be failing in our duty if we do not notice the decisions mentioned by the Constitution Bench in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] which decisions according to the learned counsel, appearing for the State, clinch the issue.*

*In Makhan Singh Tarsikka v. State of Punjab [1951 SCC 1140 : AIR 1952 SC 27 : 1952 Cri LJ 321 : 1952 SCR 368] an order of detention had been assailed in a petition filed under Article 32, on the ground that the period of detention could not be indicated in the initial order itself, as under the provisions of the Preventive Detention Act, 1950, it is only when the Advisory Board reports that there is sufficient cause for detention, the appropriate Government may confirm the detention order and continue the detention of the detenu for such period, as it thinks fit. On a construction of the relevant provisions of the Preventive Detention Act, as it stood then, this Court accepted the contention and came to hold that the fixing of the period of detention in the initial order was contrary to the scheme of the Act and could not be sustained. We fail to understand as to how this decision is of any assistance for arriving at a just conclusion on the issue, which we are faced with in the present case.*

*The next decision is the case of Ram Narayan Singh v. State of Delhi [AIR 1953 SC 277 : 1953 Cri LJ 1113 : 1953 SCR 652] . In this case on a habeas corpus petition being filed under Article 32, the Court was examining the legality of the detention on the date the Court was considering the matter. From the facts of the case, it transpires that there was no material to establish that there was a valid order of remand of the accused. The Court, therefore, held that even if the*

*earlier order of remand may be held to be a valid one, but the same having expired and no longer being in force and there being no valid order of remand, the detention was invalid. It is in this context, an observation has been made that in a question of habeas corpus, lawfulness or otherwise, custody of the person concerned will have to be examined with reference to the date of the return and not with reference to the institution of the proceedings. There cannot be any dispute with the aforesaid proposition, but in the case in hand, the consequences of default on the part of the investigating officer in not filing the charge-sheet within the prescribed period have been indicated in the provisions of the statute itself and the language is of mandatory character, namely the accused shall be released on bail. In view of the aforesaid language of the proviso to sub-section (2) of Section 167 and in view of the expression used in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] to the effect "if not availed of", the aforesaid decision will be of no assistance.*

*The third decision referred to in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] is the case of A.K. Gopalan v. Govt. of India [AIR 1966 SC 816 :1966 Cri LJ 602 : (1966) 2 SCR 427] . This was also a case for issuance of a writ of habeas corpus, filed under Article 32. In this case the Constitution Bench observed:*

> *"It is well settled that in dealing with a petition for habeas corpus the court has to see whether the detention on the date on which the application is made to the court is legal, if nothing more has intervened between the date of the application and the date of hearing."*

*In that case, the detenu was detained by orders passed on 4-3-1965 and the earlier order of detention passed on 29-12-1964 was no longer in force, when the detenu filed the application in the Supreme Court. The Court, therefore observed that it is not necessary to consider the validity of*

*the detention order made on 29-12-1964 and the Court is only concerned with the validity of the order of detention dated 4-3-1965. The observations made by the Court and the principles enunciated referred to earlier would support our conclusion that the rights whether accrued or not to an accused, will have to be considered on the date he filed the application for bail and not with reference to any later point of time.*

*There is no provision in the Criminal Procedure Code authorising 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. It is in this sense it can be stated 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 prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:*

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

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

*3*. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

*4*. 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.

*5*. If the accused 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 accused even beyond the specified period in para (*a*) will not be unauthorised, 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.

*6*. The expression "if not already availed of" used by this Court in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] 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 accused 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.

*With the aforesaid interpretation of the expression "availed of" if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167,*

*makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with the law laid down by this Court in the case of Mohd. Iqbal v. State of Maharashtra [(1996) 1 SCC 722 : 1996 SCC (Cri) 202]*

**18.** One of the Learned Judge partly dissented the above view and extract of his dissent is as below:-

> **B.N. Agrawal, J.**(partly dissenting)— I have perused the judgment of my learned brother Pattanaik, J., for whom I have the highest regard and while agreeing with him with respect to Conclusions 1 to 5, I find myself unable to agree on Conclusion 6, enumerated hereunder, upon which alone decision of this appeal is dependent, and observations and direction connected therewith: (para 13 above)
>
> "The expression 'if not already availed of' used by

this Court in *Sanjay Dutt* v. *State through CBI (II)* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] 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 accused 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."

19. The two Judges Bench which decided ***M.Ravindran –vs- Intelligence Officer, Directorate of Revenue Intelligence, reported in [*(2021) 2 SCC 485 : 2020 SCC OnLine SC 867**]*** *at page 507 has explained the three judges decision in Mohanla Acharya case as below:-*

**18.3.** The majority opinion in *Uday Mohanlal Acharya* [*Uday Mohanlal Acharya* v. *State of Maharashtra*, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] clarified this ambiguity by holding that the expression "*if not already availed of*" used by this Court in *Sanjay Dutt* [*Sanjay Dutt* v. *State*, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] 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.

**18.4.**However, B.N. Agrawal, J. in his minority opinion partly dissented with the majority, particularly with respect to the conclusions expressed in para 13.6 of *Uday Mohanlal Acharya* [*Uday Mohanlal Acharya* v. *State of Maharashtra*, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] . 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* [*Sanjay Dutt* v. *State*, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] 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.

**18.6.** However, the Constitution Bench decision in *Sanjay Dutt* [*Sanjay Dutt* v. *State*, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] 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.

**18.7.**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) Cr.P.C. 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.

**18.8.**It was noted by B.N. Agrawal, J. in his minority opinion in *Uday Mohanlal Acharya* [*Uday Mohanlal Acharya*

v. *State of Maharashtra*, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] 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* [*Uday Mohanlal Acharya* v. *State of Maharashtra*, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] 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.

20. The Division Bench of this Court, while deciding *Kannan case* as well as the learned Single Judge, while taking a contra view in *Punaekkar Seetharaman Dikule case* were aware about the march of law and had extensively discussed the case laws and applied it to the facts of the case they decided

21. In *Kannan case* the Division Bench held the right got

extinguished, since the bail was granted on 04/06/2016, but the accused came forward to furnish surety on 27/01/2021 (after nearly 4 ½ years). Meanwhile, while filing challan, the charges were altered and the offences under UAPA added. The case transferred to the Special Court and trial was about to commence.

22. In *Punaekkar Seetharam Dikule case* decided by a Learned Single Judge of this Court, the petition for compulsive bail filed on 30/11/2022. On the same day, the prosecuting agency filed the final report. The trial Court granted default bail on 01/12/2022. When the surety was arranged on 09/02/2023 and memo presented, the trial Court returned the memo holding that the accused right to seen default bail got extinguished. The learned trial Judge, considering the Division Bench judgment in *Kannan case,* held that the right accrued for bail got extinguished because of the failure to furnish surety in time.

23. This matter when came up for consideration before the High Court, the learned Single Judge referring *M.Ravindran –vs- The Intelligence Officer,*

*Directorate of Revenue Intelligence (cited supra)* had observed that when no time limit prescribed for furnishing surety, the right accrued under Section 167(2) Cr.P.C will not get extinguished for not furnishing surety before filing of the final report/challan. If genuine reason given for not furnishing surety within reasonable time, the right is saved and any other contra view will defeat the very purpose, reason and import of the statutory provisions under Section 167(2) Cr.P.C.

24. From the judgments of the Hon'ble Supreme Court referred above, particularly the Constitutional Bench judgment (Sanjay Dutt case) and three Judges Bench judgement (Uday Mohanlal Acharya case) as well the Division Bench judgment of this High Court (Kannan case) read along with the view of the Single Judge in *Punaekkar Seetharaman Dikula case,* we find one opinion expressed uniformly by all Courts is that the accused, who is entitled for default bail, should **'avail it'**. Meaning, seek for bail under Section 167 of CrPC before filing of Final Report and express his readiness to offer surety. If the prosecution to defeat the said accrued right, even if file the Final Report soon after the bail petition or during the hearing of the bail petition or just before

furnishing surety, the right accrued will not extinguish the right gained by the accused. Contrarily, if the accused failed to seek bail, though right to seek default bail accrued but not avail till the filing of the Final Report or after availing bail, fail to furnish surety, within the time prescribed or if time not prescribed, surety not furnished within a reasonable time explaining the reason for not furnishing the surety in time, then the right shall get extinguished on filing of Final Report. The reason for delay in not furnishing the surety must relate to external factors not within the control of the accused.

25. In the case in hand, the default bail granted to some of the petitioners on 09/03/2023 and others on 13/03/2023. The Final Report was filed on 10/04/2023. The case committed to Sessions Court on 08/06/2023. The memo to furnish surety is filed on and after 27/07/2023. Going through the bail conditions, we find they are not onerous condition difficult to comply. The accused were asked to execute bond for Rs.10,000/- and two surety of likesum. One surety must be a blood relative. No reason stated in the petition, why there was delay of more than 3 months to furnish surety, even after availing the right under Section 167 (2) Cr.P.C. The learned counsels for the petitioners states

that there was difficulty in getting a blood relative as surety. The said explanation only goes to show the accused persons are not even trusted by their own kith and kin. The delay therefore on filing of final report and committal to the Court of Sessions extinguish the right accured. The default of the investigating agency which gave the right to seek compulsive bail got extinguished due to the default of the accused by not furnishing surety, which is an essential procedure to get release from jail.

26. The judgment of the Division Bench of this Court in *Kannan case* is in tune with the dictum laid by the Hon'ble Supreme Court in the Jdgement rendered by the Constitutional Bench and the Bench consisting of three Judges. The subsequent two Judges opinion in *M.Ravidran case* is on different set of facts and not a stare decisis for the legal issue, which had been settled by Larger Bench. Therefore, these Criminal Original Petitions are dismissed at SR stage itself.

27. The dismissal of the petition shall no way take away the right of the petitioners/accused to seek regular bail. It is made clear that the dismissal of

the petitions is purely on the law governing the field of default bail/compulsive bail and not on merits of the individual cases. Consequently, connected Miscellaneous Petitions are closed.

17.10.2023

Index:yes
Speaking order/non speaking order
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To:
1.The Judicial Magistrate No.1, Nagapattinam.
2.The Inspector of Police (L&O), Town Police Station, Nagapattinam,
3.The Public Prosecutor, High Court, Madras.

**Dr.G.JAYACHANDRAN, J.**

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**delivery Common Order made in**
Crl.O.P.SR.Nos.44185, 44187 and 44188 of 2023
in
Crl.M.P.Nos.14923, 14926 and 14927 of 2023

**17.10.2023**