IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 03.11.2020

\+ **CRL.REV.P. 1219/2019 and CRL.M.A. 10252/2020**

MOHD. ARBAZ .....Petitioner

Versus

STATE OF NCT OF DELHI ..... Respondent

AND

\+ **CRL. REV.P. 1220/2019**

ABDUL RASHID .....Petitioner

Versus

STATE OF NCT OF DELHI ..... Respondent

AND

\+ **CRL. REV.P. 1222/2019**

MOHD. NAZIM .....Petitioner

Versus

STATE OF NCT OF DELHI ..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Rudro Chatterjee, Mr Shariq Nisar and Mr Faisal Mohammed, Advocates.

For the Respondent : Mr Ravi Nayak, APP for State.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners impugn a common order dated 20.08.2019, whereby their respective applications for grant of bail in default under Section 167(2) of Code of Criminal Procedure (hereafter the 'Cr.PC') were rejected.

2. The petitioners' claim that they are entitled to bail in default is premised on the assertion that the investigating agency has failed to file a police report under Section 173(2) of the Cr.PC within the stipulated period of one-hundred and eighty days. Although, it is not disputed that a report was filed within the stipulated period, the petitioners contend that the said report was incomplete as it was not accompanied by the report of the Chemical Examiner.

3. The petitioners are being prosecuted for committing an offence under Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 2012 (hereafter the 'NDPS Act'). They claim it cannot be asserted that the substance allegedly recovered from them was a narcotic drug or psychotropic substance without a Chemical Examiner's report indicating the same. This being the foundation of the allegation against the petitioners, a police report not accompanied by a Chemical Examiner's report cannot be considered as a report under Section 173(2) of the Cr.PC. The Chemical Examiner's report

was furnished before the learned Special Court on the same date when the applications filed by the petitioners were taken up for consideration. Nonetheless, the petitioners claim that they are entitled to bail in default under Section 167(2) of the Cr.PC as their respective applications seeking the same were filed prior to the Public Prosecutor placing the FSL Report before the Special Court.

4. In view of the above, the following questions fall for consideration of this Court:

(i) Whether in a case of commission of an offence punishable under the provisions of the NDPS Act, which is founded on recovery of narcotic drugs and/or psychotropic substance, a police report under Section 173(2) of the Cr.PC can be considered as such if it is not accompanied by a Chemical Examiner's Report with regard to the substance recovered, and;

(ii) Whether an accused would be entitled to bail in default under Section 167(2) of the Cr.PC where his application for such bail has been filed prior to the submission of the report under Section 173(2) of the Cr.PC but is taken up for consideration simultaneously with the said report being filed.

5. The relevant facts necessary to address the aforesaid controversy are set out below:

5.1 It is alleged that on 16.12.2018 at about 09:00 pm, information was received through a special messenger at the office of Special Cell, Sector- 7, Pushp Vihar, New Delhi – that one Abdul Rashid (petitioner in Crl. Rev. P. 1220/2019), who is a resident of Bhilwara, Rajasthan and deals in the business of narcotic drugs (Heroin) would arrive near Ambedkar Park, Sector 12, R.K. Puram, Ring Road on that date in a vehicle bearing Registration No. RJ 06 UA9729 between 09:00 pm and 12:00 pm. It was informed that he would be carrying heroin for its distribution in Delhi. After obtaining the necessary authorization, a raiding team was constituted. The raiding team so constituted positioned themselves near the spot (Ambedkar Park, Sector 12, R.K. Puram, New Delhi) at about 10:15 pm. It is alleged that at about 11:40 pm, a white coloured Ertiga car was seen approaching the spot. The driver of the said vehicle parked the same approximately ten meters from the spot. It was observed that the registration number plate of the said vehicle bore the same registration number as informed by the messenger. It was observed that there were three persons in the said vehicle including Abdul Rashid, who was driving the car. All the three persons came out of the car and stood outside. At that stage, Abdul Rashid handed over one bag each to two other persons who slung it on their back. At that stage, they were surrounded by the raiding team. The driver of the vehicle (Abdul Rashid) took out one bag from the said vehicle and attempted to flee in the direction of Hyatt Hotel. He

was apprehended by one of the members of the raiding team. The bags carried by the said three persons were searched and were found to contain five kgs of light coloured brown powder each. In addition, 15 kgs of the said similar looking substance was also recovered from the vehicle. It was tested on a field-testing kit and the same yielded a positive result for heroin.

5.2 The petitioners were arrested. Thereafter, on 17.12.2018, the FIR in question (FIR No. 150/2018), under Sections 21 and 29 of the NDPS Act was registered with PS Special Cell.

5.3 On 27.05.2019, a police report under Section 173(2) of the Cr.PC was filed with the Special Court. The said report was not accompanied by the Chemical Examiner's report confirming that the substance recovered from the petitioners and their vehicle was heroin.

5.4 The statutory period of one hundred and eighty days for completion of the investigation under Section 36A(4) of NDPS Act read with Section 167 of the Cr.PC expired on 15.06.2019.

5.5 On 29.07.2019, the petitioners filed an application seeking bail in default under the provisions of Section 167(2) of the Cr.PC. This was premised on the basis that the investigating agency had failed to file the complete police report under Section 173(2) of the Cr.PC within the stipulated period of one hundred and eighty days as the report filed 27.05.2019 was not accompanied with the Chemical Examiner's report and therefore, was incomplete and could not be considered as a report under Section 173(2) of the Cr.PC. Further, it

had neither sought extension of the said period in terms of Section 36A(4) of the NDPS Act nor any such permission was granted. It is stated that the said application was filed in the Registry at about 10:00 am.

5.6 On the same day, the petitioners were produced before the Special Court. And, the learned Additional Public Prosecutor filed the Chemical Examiner's Report and supplied a copy of the same. At that time, the applications were filed by the petitioners at 10:00 am on the same date were not before the Court and therefore, the hearing of the matter was deferred till 02:00 pm on that date. The applications were heard and orders were reserved.

5.7 The applications filed by the petitioners were dismissed by the Special Court by a common order dated 20.08.2019, which is impugned in the present petition.

6. The learned Special Court held that the proceedings on that day (that is, 29.07.2019) for purposes of the case could take place only when the accused were placed before the Court. Thus, even if the applications for seeking bail in default were filed on that date, prior to the accused being produced, it would deem to coincide with the appearance of the accused before the Court and since the IO had filed the FSL Report at the same time, it could not be stated that the applications filed by the accused (petitioners) seeking bail in default, were filed prior to the filing of the FSL Report. The learned Court held that since the right to statutory bail under Section 167(2) of the Cr.PC

cease as soon as the FSL Report is filed and the said report had been filed simultaneously to the petitioners being produced in Court, their applications were liable to be dismissed.

Whether a report under Section 173(2) of the Cr.PC is incomplete if not accompanied with the Chemical Examiner's Report

7. Mr. Chatterjee, learned counsel appearing for the petitioners contended that the entire purpose of submitting a report under Section 173(2) of the Cr.PC is to enable the Magistrate/Court to take cognizance of the said offence. And, a Magistrate cannot take cognizance of an offence, which is founded on the basis of recovery of narcotic drug or psychotropic substance, if the Chemical Examiner's report indicating the nature of substance recovered is not placed before the Court. He submitted that there may be other offences where the Chemical Examiner's report or an expert examiner's report may not be of a pivotal importance and the cognizance of the offence can be taken without reference to the said report. However, in a case relating to an offence punishable under the NDPS Act, which is founded on the basis of recovery of contraband, a Chemical Examiner's report would be necessary as the Court would not be in a position to take cognizance of the said offence without the same. He referred to a decision of the Division Bench of the Punjab and Haryana High Court in ***Ajit Singh @ Jeeta and Anr. v. State of Punjab: Crl. Rev. No. 4659/2015, decided on 30.11.2018***; a decision of the Division Bench of the Bombay High Court in ***Sunil Vasantrao Phulbande and Anr. v. State of Maharashtra: (2002) 3 MahLJ 689*** and a decision of this

Court in ***Nitin Nagpal v. State: 2006 (90) DRJ 745,*** in support of his contention.

8. Mr. Nayak, learned APP for the State countered the aforesaid submissions. He submitted that the decision in the case of ***Ajit Singh @ Jeeta*** (*supra*) cannot be considered good law as the said decision is contrary to the decision of the Full Bench of the Punjab and Haryana High Court in ***State of Haryana v. Mehal Singh and Ors.: AIR 1978 P&H 341***. He further referred to the decision in ***Himmat Singh v. State of Rajasthan: (1995) Crl. LJ 2967***, whereby the Rajasthan High Court had not accepted the reasoning of the Division Bench of the Punjab and Haryana High Court in ***Ajit Singh's*** (*supra*) case. He also referred to the decision of the Division Bench of this Court in ***Taj Singh v. The State (Delhi Admn.): (1988) Crl. LJ 1634*** and the decision of the Supreme Court in ***Tara Singh v. State: (1951) AIR SC 441*** in support of his contention.

9. It is apparent from above that there are divergent opinions whether a report under Section 173(2) of the Cr.PC could be considered as a complete report in absence of the Chemical Examiner's Report/FSL Report. There appears to be no dispute that absence of the Chemical Examiner's Report/FSL Report or an Expert's report does not render the report under Section 173(2) of the Cr.PC an inchoate report, incapable of being considered as such, in cases where the prosecution's case is not founded on recovery of contraband. In such cases, such expert report may not be central to the prosecution's case. However, in cases of offences under the NDPS

Act, where the prosecution's case rests on recovery of an illicit substance, the Chemical Examiner's Report evidencing the nature of the substance allegedly recovered would undoubtedly be at the core of the prosecution's case. It is in this context that certain courts have held that a report under Section 173(2) of the Cr.PC would be incomplete if it is not accompanied by a Chemical Examiner's Report identifying the substance recovered.

10. In ***Mehal Singh*** (*supra*), the full Bench of the Punjab and Haryana High Court examined the question whether the investigation of an offence could be considered complete in terms of Section 173(2) of the Cr.PC, even though the police officer investigating the case had not received the reports of experts such as the chemical examiner, the serologist, the ballistic expert or the finger print expert, which are admissible in law under Section 293 of the Cr.PC. And, whether such a chargesheet would qualify to be termed as a police report in terms of Section 190(1)(b) of the Cr.PC to enable a Magistrate to take cognizance of the offence disclosed therein. The Court referred to the decision of the Supreme Court in ***Noor Khan v. State of Rajasthan: AIR 1964 SC 286*** and observed that it was deducible from the said decision that it is not incumbent upon the investigating officer to reduce in writing the statements of witnesses. The Court held that he may merely include their names in the list of witnesses in support of the prosecution's case when submitting the chargesheet. The Court reasoned that surely if the chargesheet thus submitted would be complete as enabling the Magistrate to take cognizance of the offence,

there is no rational basis for holding that a similar chargesheet would not be a police report of the requisite kind if the statement of witnesses, which although recorded under Section 161(3) of the Cr.PC are not appended to the report, either by design or by inadvertence.

11. The Court further reasoned that the contention that a chargesheet would be incomplete if not accompanied by the report of experts such as chemical analyst, serologist, ballistic expert, fingerprint expert etc. stands on a weaker ground.

12. In ***Mehal Singh*** (*supra*), the Court also referred to the decision of the Supreme Court in ***Tara Singh v. The State: (1951) SCR 729***. However, in ***Ajit Singh @ Jeeta*** (*supra*), the Division Bench of the Punjab and Haryana High Court distinguished the aforesaid decisions. It observed that the courts in those decisions had interpreted the scope of the Cr.PC in the backdrop of general offences confined to the Indian Penal Code, 1860 (hereafter the 'IPC') and some other statutes; but the Courts were not ceased of a matter relating to a special act such as the NDPS Act, which although raises a similar question but requires to be addressed keeping in view the specific provisions of aspecial act. The Division Bench, thereafter, referred to various provisions of the NDPS Act and observed as under:

> "What would also necessary flow from this, would be a prima facie opinion by the Court of the commission of an offence which under the N.D.P.S. Act would revolve around establishing the possession of contraband, its nature, content and extent.

With respect to the question posed by the learned Single Judge regarding some of the contraband being identifiable through naked eye, inspection based on experience and knowledge, would be a great fallacy and we would respectfully state that it would be grossly unsafe to rely upon such an opinion based on naked eye inspection backed by experience or knowledge to arrive at a prima facie opinion of the commission of an offence to submit an accused to the rigors of trial by the Magistrate in the exercise of its powers under Section 190 Cr.P.C.

The only way that it can be done is to establish the nature of contraband on the basis of the Chemical Examiner's report and for this reason, the Chemical Examiner's report assumes an immense significance for the trial Court, to formulate an opinion as the very cognizance of an offence would depend on it. Non-inclusion of the Chemical Examiner's opinion in the report under Section 173 Cr.P.C. would expose the accused to unfounded dangers imperiling and endangering his liberty since the provisions of the N.D.P.S. Act in its applicability to a trial and conclusion are stringent in consequence.

For this reason as well, it is essential that the report of the Chemical Examiner be included in the report under Section 173 Cr.P.C. and without which it can at best be termed to be an incomplete challan depriving the Magistrate of relevant material take cognizance and if it is not submitted within the requisite period of 180 days, it would essentially result in a default benefit to the accused unless an application is moved by the Investigating Agency apprising the Court of status of investigation with a prayer for extension of time to the satisfaction of the Court.

We emphasize on the stringent aspect of the N.D.P.S. Act which would compellingly persuade us to take the aforesaid view. Without determining the nature and

> content of the contraband, it would be draconian to propel an accused into the throes of a trial. The liberty of an individual would constantly be imperiled at the hands of dubious officials of the police who may venture to falsely implicate a person.
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> It is for this reason that we would unhesitatingly conclude that the Chemical Examiner's report is an essential; integral and inherent part of the investigation under the N.D.P.S. Act as it would lay the foundation of an accused's culpability without which a Magistrate would not be enabled to form an opinion and take cognizance of the accused's involvement in the commission of offence under the Act."

13. The Division Bench of the Bombay High Court took a similar view in ***Sunil Vasantrao Phulbande*** (*supra*). The Court reasoned that in a case involving seizure of contraband, the prosecution's case would rest on the substance seized being either a narcotic drug or a psychotropic substance. And, a police report under Section 173 of the Cr.PC which is not accompanied by a Chemical Examiner's report could not be contemplated as a chargesheet/report under Section 173(2) of the Cr.PC, as the Magistrate would not be in a position to take cognizance of the offence. The relevant extract of the said decision embodying the reasoning of the Court is set out below: -

> "15. In the instant case, it is not in dispute that report of Chemical Analyser is the foundation on the basis of which Magistrate can proceed to take cognizance of the offences. The contraband, which is seized in the present case, is Ganja and unless and until sample, which was drawn by the prosecution, conforms with the article, which is seized during investigation, i.e. Ganja, the Magistrate is not in a position to proceed to take

cognizance of the offence. The charge-sheet/report as contemplated under section 173(5) of the Code, forwarded to the Magistrate should be such that on the basis of which Magistrate should be able to proceed further and take cognizance. The documents, which are required to be accompanied with the charge-sheet/report as contemplated under sub-section (5) of section 173 of the Code, therefore, assume importance, without which charge-sheet/report submitted by the Police under section 173 of the Code would be incomplete and Magistrate also may not be in a position to proceed to take cognizance on the basis of the said report. The concept of filing of charge-sheet by the Police in the Court must fulfil requirement of section 173(2) and (5) of the Code and it is only after such compliance, report which is filed by the Police in the Court can be construed as complete report under section 173(2) and (5) of the Code.

16. It is true that in the given case, certain documents which are formal in nature, if not accompanied with the report/charge-sheet may not change the nature of report/charge-sheet contemplated under section 173(2) and (5) of the Code particularly when material is sufficient for the Magistrate to take cognizance of the offence as per provisions of the Code. However, in the instant case, the Chemical Analyser's report is the basis for deciding whether substance which is seized during raid is Ganja or not, which would determine whether provisions of the Narcotic Drugs and Psychotropic Substances Act are attracted or not. The Magistrate in such situation undoubtedly cannot proceed to take cognizance of the offence for want of complete charge-sheet/report and, therefore, in the present case, the charge-sheet/report which is submitted by the Police in the Court on 4-8-2001 cannot be said to be a charge-sheet/report as contemplated under section 173(5) of the Code."

14. A similar view was expressed by the Single Judge of the Bombay High Court in ***Ranjeet Manohar Machrekar v. State of Maharashtra, Crl. Bail Appln. No. 509/2014***. In ***Manik Sahebrao Chougule v. State of Maharashtra: Crl. Bail Appln. No. 241 of 2017, decided on 23.03.2017***, another bench of the Bombay High Court followed the aforesaid decision and held as under:

> "6. In a similar case, *Ranjeet Manohar Machrekar* (supra) was prosecuted under section 20(b) of N.D.P.S Act. When the chargesheet was filed, it was without report of the Chemical Analyzer. The learned Single Judge of this Court has considered that section 167(2) of Cr.P.C. does not speak about the filing of the chargesheet, but refers to the completion of investigation. It is further explained that without collection of any evidence i.e. report of Chemical Analyzer, how the investigation in respect of psychotropic substances could be said to be completed in the absence of such Chemical Analyzer's report, where the material is seized and then the chargesheet is filed in the Court. The investigation was not completed for want of evidence on most vital aspect of the prosecution case and then the bail was allowed to the accused under section 167(2) of Cr.PC, as modified by sub-section (4) of Section 36A of the N.D.RS. The present case is identical and therefore the ratio laid down in the *Ranjeet Machrekar* (supra) is squarely applicable to the present case. In the present case also the chargesheet is filed without report of Chemical Analyzer."

15. In ***Ravinder v. State of Haryana: 2015 (4) RCR (Cri) 441***, the Punjab and Haryana High Court set aside an order where charges were framed by the Trial Court without obtaining a Chemical Examiner's report. In the aforesaid context, the Court held as under:

"11. ….. Thus, it is clear that the trial Court is to accept the challan only on completion of investigation and by considering that all allegations levelled in the FIR have been investigated completely and charge can be framed only after considering the complete investigation report. Meaning thereby, that in case, any report of Forensic Science Laboratory or Narco Analysis or any other document, which is necessary for adjudication and the same has not been received so far, then the Court is to proceed further after receiving said report. One thing is clear that the question of framing charge comes only when the complete investigation report is with the trial Court.

12. In the present case, the charge has been framed against the petitioner without obtaining Chemical Examiner's Report and in the absence of Chemical Examiner's Report in case of NDPS Act, it cannot be said as to whether the substance found in the bags recovered from the petitioner was a narcotic substance or not. In the absence of CFSL report, the trial Court cannot take cognizance of the offence and in the absence of Chemical Analysis Report, the charge sheet/challan cannot be said to be completed. Failure to file complete charge-sheet within a prescribed period confers on the accused right to be released on bail and the court is not competent to take cognizance of the offence on incomplete charge-sheet. Charge sheet is hot complete unless it is accompanied by requisites contemplated under Section 173(5) of the Code.

13. In view of the above facts, it is clear that the charge cannot be framed on the basis of incomplete report and the final report, without having any FSL, narco-analysis and Chemical Examiners' Report is incomplete. The Court is to proceed for framing of charge only after receiving the same."

16. In ***Rafael Palafox Garcia v. Union of India and Anr.: 2008 Vol. 110 (9) Bom. L.R. 3392***, a Single Judge of the Hon'ble Bombay High Court did not accept the view that a final report would be incomplete if not accompanied by a Chemical Examiner's report in a case relating to offences under the NDPS Act. The Court distinguished the decision of the Division Bench of the Bombay High Court in ***Sunil Vasantrao Phulbande's*** case (*supra*) on the ground that in that case there was no mention of the samples of the seized material being tested at the spot by using a Field Testing Kit. The Court also referred to the decision of the Supreme Court in ***Jagdish Budhroji Purohit v. State of Maharashtra: (1998) 7 SCC 270***, wherein the Court had upheld the conviction on the reasoning that the evidence on record was sufficient to convict the appellants even if the Chemical Examiner's reports were ignored.

17. This Court is unable to respectfully concur with the view that statements made to the effect that the seized substance tested on a Field Testing Kit had yielded positive results indicating the substance to be a narcotic drug or psychotropic substance, are sufficient to take cognizance of an offence which is premised on recovery of a narcotic drug or a psychotropic substance. First of all, the results from a Field Testing Kit are not conclusive and there is considerable scope of error. Clearly, in such circumstances the oral statements/testimony of witnesses that the substance had yielded a positive result for a narcotic drug or a psychotropic substance would not be sufficient to raise a strong suspicion of commission of an offence under the NDPS Act,

which is premised on recovery of contraband. Even in the handbook issued by NCB, the results of the Field Testing Kit are not accepted as conclusive and the said results are only meant as a guide for the prosecution agency to proceed further.

18. The decision of the Supreme Court in ***Jagdish Budhroji Purohit v. State of Maharashtra*** (*supra*) was also rendered in context of the facts in that case. In that case, the Chemical Examiner's reports were on record and it was the appellant's contention that the same ought to be ignored since they were not accompanied by any data regarding the analysis. The Supreme Court did not accept the aforesaid contention. However, the Court also observed that there was sufficient evidence on record to convict the appellants even if the Chemical Examiner's reports were ignored. The observations were made in the context where two of the witnesses had testified that they had sufficient training and knowledge and methods of testing them. The said case is not an authority for the proposition that oral testimony of witnesses as to the nature and identity of the recovered substance, without any report as to the chemical analysis of the said substance, is sufficient to establish the nature and composition of the substance recovered.

19. In ***Taj Singh*** (*supra*), the Division Bench of this Court held that even if an investigating officer had not received the report of the CFSL, so far as his job of collecting the evidence is concerned, the same was over the moment he had collected the exhibits and dispatched the same for the opinion of the CFSL. The Court reasoned

that in this view, it would not be correct to state that a police report which did not include the CFSL Report would be an incomplete one. The Court found support in this view from the decision of the Full Bench of Punjab and Haryana High Court in ***Mehal Singh*** (*supra*). Mr. Nayak had also stressed on this decision and contended that this view was binding on this Court. However, it is seen that the decision in ***Taj Singh's*** (*supra*) case was not rendered in the context of the NDPS Act.

20. There is a material difference in other cases relating to offences under the IPC or other statutes and certain cases relating to the NDPS Act, where the allegation of commission of an offence is founded predominantly on the recovery of an illicit substance. Unless, there is evidence to establish the identity and nature of the said substance, it would not be feasible for any court to take cognizance of an offence. Till recently, it was also necessary to ascertain the purity of the illicit substance for the purposes of determining the punishment imposable for the same, that is, whether it was a commercial quantity or a small quantity. Although, the said view is no longer good law in view of the decision of the Supreme Court in ***Hira Singh v. Union of India: CRL. A. 722 of 2017, decided on 22.04.2020***, it cannot be disputed that the very nature and identity of an alleged illicit substance recovered forms the foundation of certain cases relating to offences under the NDPS Act. In such cases, the Chemical Examiner's report is of primary importance. In such cases the police report would be insufficient to take cognizance of the offence if the same is not accompanied with

material (an expert's report on the analysis of the substance) to establish the substance recovered. And, therefore could not be considered as a complete report. In ***Nitin Nagpal*** (*supra*), a Coordinate Bench of this Court had pointed out the said distinction in the following words:

> "17. Keeping in mind the provisions of law as well as the decisions of the Courts referred to above, let me, now examine the facts of the present case in the light of the above discussions. The first question that is emerges is whether the challan filed on 20.9.2005 was incomplete. As noted above, the first point taken by Mr Andley was that the CFSL report had not been obtained and, therefore, investigation had not been completed. There is no doubt that some of the decisions referred to by him and particularly that of the Bombay High Court in the case of *Sunil Vasantrao Phulbande* (supra) seem to be in line with his submissions. In the latter case, the Bombay High Court observed that the Chemical Analyser's report not having been filed, the charge-sheet was incomplete. However, if one were to examine that decision, it would be apparent that the Chemical Analyser's Report in that case was crucial to the foundation of the case itself and in the absence of such a report the Magistrate could not have taken cognizance of the offence. The question there was whether the substance recovered was Ganja or not. If it was Ganja then the provisions of the NDPS Act would apply and if it was not a Narcotic Drugs or a Psychotropic Substance then the provisions of the NDPS Act would not apply. Therefore, the result of the Chemical Analysis was crucial to the very foundation of the case for the prosecution. Without such a report it could not be ascertained whether an offence had been committed at all and, therefore, the

> Magistrate was hindered in taking cognizance of such an offence under the NDPS Act. It is also material to note that in that case the Court observed that there may be situations where documents of a formal nature which did not come in the way of the Magistrate taking cognizance are not filed along with the charge-sheet yet the charge-sheet would not be construed as being incomplete. In any event, no further debate is necessary on this aspect of the matter insofar as this Court is concerned inasmuch as the issue stands settled by the Division Bench decision in the case of *Taj Singh* (supra) wherein the Division Bench concluded that a police report which did not include the CFSL report would still be a complete report as envisaged in Section 173(2) of the Code. The case before the Division Bench was also one under Sections 307/302/34 IPC and Section 25 of the Arms Act, 1959. Distinct from the case before the Bombay High Court, the case before the Division Bench in Taj Singh as well as the present case is not one under the NDPS Act wherein the CFSL Report would be of vital importance for the purposes of the Magistrate taking cognizance. Therefore, the absence of the CFSL report in the facts of the present case would not mean that the challan filed on 20.9.2005 was incomplete."

21. The reasoning in the case of ***Ajit Singh @ Jeeta*** (*supra*); ***Sunil Vasantrao Phulbande*** (*supra*); and ***Nitin Nagpal*** (*supra*) are undoubtedly compelling. It does stand to reason that a report on the basis of which a Magistrate cannot take cognizance of the offence under the NDPS Act, which is founded on recovery of an illicit substance, would be an incomplete report and cannot be considered as a report under Section 173(2) of the Cr.PC. This is particularly so, because the Chemical Examiner's report in such circumstances would

be a vital piece of evidence. An investigation is completed only when evidence is collected.

22. However, in ***Kishan Lal v State: 1989 (39) DLT 392***, the Division Bench of this Court took a somewhat different view. The Division Bench held that the provisions of Section 173 of the CrPC must be considered as separate and distinct from Section 190(1)(b) of the Cr.PC. The Court held that the report under Section 173(2) of the Cr.PC would not be incomplete if it is not accompanied by a Chemical Examiner's report as it would be open for the Magistrate not to take cognizance on the offence if the same could not be taken on the basis of the said report. It is relevant to note that the said decision was rendered in the context of the NDPS Act. The relevant extract of the said decision is as under:

> "15. We respectfully agree with the earlier decision of this Court in *Tej Singh's* case (supra). The decision in *Hari Chand and Raj Pal v. State* (supra) by a Single Judge of this Court wherein it has been held that an "incomplete challan" is not a police report within the ambit of Section 173(2) of the Code does not support the case of the petitioners. From the reported judgment it is not clear where all the witnesses or some of them "acquainted with the circumstances of the case" were yet to be examined when the report was filed. The reason for calling it incomplete is not discernible. But it is safer to assume from the reading of the judgment that the investigation was not complete. Thus the report as envisaged under Section 173(2) of the Code could not have been filed.
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> 16. It is unnecessary for us to notice other judgments cited by the learned Counsels in support of their plea

that the investigation in a case like the present is to be held to be incomplete. In our view the Supreme Court decision in *Tara Singh's* case (supra) holding, *inter alia*, that a police report which is not accompanied by the expert's opinion, is to be held to be complete report as long as the witnesses who are acquainted with the circumstances of the case have been examined, continues to be law in spite of amendments in Section 173 of the Code.

17. Now to advert to the main plea. It is contended that for offences under the NDPS Act, the report under Section 173(2) of the Code, which in law is complete (the Investigating Officer having carried out all his mandatory duties), is to be considered "incomplete" in the absence of the opinion of the expert. In our view the submission is entirely misconceived. Apparently the power of the Magistrate to take cognizance of offences upon police report is being related to the duty of the S.H.O. to forward a report on completion of investigation. The duty of the Investigating Officer under the Code is to complete the investigation without unnecessary delay. On its completion which necessarily means that the witnesses acquainted with the circumstances of the case have been examined, the officer incharge of the police station has to forward a police report in a prescribed form to a Magistrate empowered to take cognizance of the offence. However, no duty is cast on the Magistrate to take cognizance of the offence on a report which although complete except for the expert's opinion, does not make out an offence. While exercising his judicial discretion it is open to the Magistrate to seek a copy of the expert's opinion. There may even be cases under the NDPS Act where no public witnesses have been cited but that fact by itself would not show that till such time the Government expert's opinion is received, the investigation is incomplete. The police report if filed in accordance with the provisions of

> Section 173(2) of the Code would be complete report but the Magistrate in his judicial discretion may not take cognizance of the offence. Thus the provisions of Section 173(2) of the Code have to be considered separate and distinct from Section 190(l)(b) of the Code.
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> 18. As far as the expert's report is concerned, we may note that by virtue of Sub-section (4) of Section 293 of the Code, any document purporting to be report under the hand of the Director or a Deputy Director or Assistant Director of a Central Forensic Science Laboratory or State Forensic Science Laboratory can be used as evidence in any inquiry, trial or other proceedings under the Code. It is true that it is open to the Court where it thinks fit to summon and examine the Government scientific expert. But he is not a formal witness and, therefore, no duty is cast upon the Investigating Officer to cite him as a witness.
>
> 19.We 'thus' hold that under Section 173(2) of the Code there is no mandate that a police report must enclose the document purporting to be a report under the hand of a Government Scientific Expert. In the present cases, as cognizance of the offences taken by the Magistrate was proper and valid, no order releasing the petitioners on bail under Section 167(2) of the Code was required to be passed.

23. In ***Babu v. State: Bail Appln. No. 2075 of 2020, decided on 25.09.2020***, a Coordinate Bench of this Court had referred to the aforesaid decision and observed as under:

> "18. Though this Court is of the view that the decision of the Division Bench of the Punjab and Haryana High Court is an appropriate opinion in relation to cognizance of an offence under NDPS Act without the FSL report being an illegality, however, bound by the Division

> Bench decision of this Court, judicial discipline mandates this Court to follow the same. Consequently, in view of the decision of the Division Bench of this Court in *Kishan Lal* v. *State* (supra), it is held that the petitioner is not entitled to grant of bail under Section 167(2) CrPC for non-filing of the FSL report along with the charge sheet."

24. This Court concurs with the view expressed by the Coordinate Bench of this Court in ***Babu*** (*supra*). Thus, the view expressed by the Division Bench of Punjab and Haryana High Court in ***Ajit Singh @Jeeta*** (*supra*) and the view expressed by the Bombay High Court in ***Sunil Vasantrao Phulbande*** (*supra*),convinced this Court that the view of the Division Bench in ***Kishan Lal*** (*supra*) is binding.

25. In view of the above, the petitioners' contention that the report submitted on 27.05.2019 could not be construed as a report under Section 173(2) of the Cr.PC must be rejected. The first question is, thus, answered in the negative.

Whether the right to avail bail in default is availed of at the time when the application is filed or when it is considered

26. In view of the above, the question whether the petitioners were entitled to bail in default does not arise. However, for the sake of completeness, this Court considers it apposite to also decide the question whether the applications filed by the petitioners amounted to them availing their right to bail prior to the FSL Report being filed.

27. The Special Court had proceeded on that basis that even though the petitioners may have filed that application at an earlier point of

time than the learned Public Prosecutor placing the Chemical Examiner's report on record, the same could only be considered as having been filed when the accused were produced in Court. And, this according to the Special Court was simultaneous with the Public Prosecutor filing the Chemical Examiner's report, which terminated their right to seek a bail in default, if any. At the outset, it is necessary to bear in mind that there is no inherent power with the Court to remand an accused to custody. Such power can be exercised only in terms of the statue expressly conferring such power. (See: ***Union of India v. Thamisharasi And Ors.: (1995) 4 SCC 190*** and ***Natabar Parida and Ors. v. State of Orissa: (1975) 2 SCC 220***). The power of the Magistrate to remand a suspect to custody pending investigation can be traced to Section 167(2) of the Cr.PC.

28. In terms of sub-section (1) of Section 167 of the Cr.PC, whenever a person is arrested and detained in custody and it appears that the investigation cannot be completed within a period of twenty four hours as fixed under Section 57 of the Cr.PC 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 is required to forward a report to the nearest Judicial Magistrate a copy of the entries made in his diary and also produced the accused before such Magistrate. The Magistrate before whom the accused is produced has the power to remand the accused to custody in terms of Section 167(2) of the Cr.PC. The said sub-section is set out below:

"167(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 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 of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the

> accused either in person or through the medium of electronic video linkage;
>
> (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police."

29. It is clear from the plain language of the aforesaid provision that after the period of sixty days or ninety days as the case may be expires, the Magistrate would have no power to remand him to custody and he is required to be released on bail, if he is prepared to and furnishes the bail. It is also expressly provided that every person released on bail under the said sub-section would be deemed to be released under the provisions of Chapter XXXIII of the Cr.PC for the purposes of that Chapter. Once the maximum period for completing the investigation as specified under Section 167(2) of the Cr.PC is expired and once the accused indicates that he is prepared to furnish bail and does so, he is bound to be released.

30. In ***Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.: (1994) 4 SCC 602***, the Supreme Court held that although the accused would be entitled to bail in default, in case the investigation is not complete in terms of Section 167(2) of the Cr.PC read with Section 20(4) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereafter 'TADA') provided such bail cannot be granted by the court on its own motion without any application being made by the accused person of his offering to furnish bail. The Court also clarified that at that stage, that it would only consider

whether the challan has been filed within the maximum period as prescribed or whether the said period has been extended under Clause (bb) of Sub-section (4) of Section 20 of the TADA. The court would not be concerned with any other consideration such as the gravity of the case, seriousness of the offence or character of the offender.

31. In a subsequent decision rendered in the case of ***Sanjay Dutt v. State: (1994) 5 SCC 410***, the Constitution Bench of the Supreme Court further clarified that the right accruing to the accused for seeking bail in default under Section 167(2) of the Cr.PC would only be enforceable prior to filing of the chargesheet. The same would not survive or remained enforceable once the chargesheet is filed. The relevant extract of the said decision is set out below:

> "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 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. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused 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. 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. (See Naranjan Singh Nathawan v. State of Punjab [1952 SCR 395 : AIR 1952 SC 106 : 1952 Cri LJ 656] ; Ram Narayan Singh v. State of Delhi [1953 SCR 652 : AIR 1953 SC 277 : 1953 Cri LJ 1113] and A.K. Gopalan v. Government of India [(1966) 2 SCR 427 : AIR 1966 SC 816 : 1966 Cri LJ 602] .)

49. This is the nature and extent of the right of the accused to be released on bail under Section 20(4)(bb) of the TADA Act read with Section 167 CrPC in such a situation. We clarify the decision of the Division Bench in Hitendra Vishnu Thakur [(1994) 4 SCC 602: 1994 SCC (Cri) 1087: JT

(1994) 4 SC 255], accordingly, and if it gives a different indication because of the final order made therein, we regret our inability to subscribe to that view.

**** **** ****

53. As a result of the above discussion, our answers to the three questions of law referred for our decision are as under:

(1) In the prosecution for an offence punishable under Section 5 of the TADA Act, the prosecution is required to prove that the accused was in conscious 'possession', 'unauthorisedly', in 'a notified area' of any arms and ammunition specified in columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962 or bombs, dynamite or other explosive substances. No further nexus with any terrorist or disruptive activity is required to be proved by the prosecution in view of the statutory presumption indicated earlier. The accused in his defence is entitled to prove the non-existence of a fact constituting any of these ingredients. As a part of his defence, he can prove by adducing evidence, the non-existence of facts constituting the third ingredient as indicated earlier to rebut the statutory presumption. The accused is entitled to prove by adducing evidence, that the purpose of his unauthorised possession of any such arms and ammunition etc. was wholly unrelated to any terrorist or disruptive activity. If the accused succeeds in proving the absence of the said third ingredient, then his mere unauthorised possession of any such arms and ammunition etc. is punishable only under the general law. by virtue of Section 12 of the TADA Act and not under Section 5 of the TADA Act.

(2)(a) Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the CrPC and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to Clause (bb) of Sub-section (4) of Section 20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in Hitendra Vishnu Thakur. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

(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."

32. In ***State of M.P. v. Rustam And Ors.: (1995) Supp. 3 SCC 221***the Court referred to the decision of the Constitution Bench in ***Sanjay Dutt's***(*supra*) case and held that "*the court is required to examine the availability of the right of compulsive bail on the date it is considering the question of bail and not barely on the date of the presentation of the petition for bail*".

33. As noted above, the Supreme Court in ***Sanjay Dutt's*** (*supra*) case had held that indefeasible right accruing to the accused would be only enforceable prior to filing of the chargesheet and would not survive on the chargesheet being filed "*if already not availed of*".

34. Apparently, this was construed by the Supreme Court in ***Rustam's*** (*supra*) case to mean that the right of bail should survive on the date when that question is considered by the Court and not on the date on which the petition for bail in default is presented. Thus, according to this decision, the question whether the right to default in bail would survive would have to be tested on that point of time when that application was considered by the Court and not when it was filed.

35. In ***Mohamed Iqbal Madar Sheikh v. State of Maharashtra: (1996) 1 SCC 722***, the Supreme Court observed as under:

> "12. …. If an accused charged with any kind of offence, becomes entitled to be released on bail

> under proviso (a) to Section 167(2), that statutory right should not be defeated by keeping the applications pending till the chargesheets are submitted, so that the right which had accrued is extinguished and defeated".

36. The above observation was made by the Court in the context that in certain cases, courts had been deferring the consideration of applications of bail in default till the investigation is completed and chargesheet are filed. Thus, even though the accused had filed an application for exercising indefeasible right, the delay in considering the same was effectively defeating their rights. In a subsequent case, in ***Uday Mohanlal Acharya v. State of Maharashtra: (2001) 5 SCC 453***, a Bench of three Judges of the Supreme Court, *inter alia*, considered the question as to the import of the expression "if not already availed of" as used by the Constitution Bench of the Supreme Court in paragraph 48 of the decision in ***Sanjay Dutt's*** case. Paragraph 13 of the said judgment (***Uday Mohanlal Achaya*** [*supra*]) is relevant and is set out below:

> "13. …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]…… In interpreting the expression "if not availed of" in the manner in which we have just interpreted we are conscious of the fact that accused persons in several serious cases would get themselves released on bail, but that is what the law permits, and that is what the legislature wanted and an indefeasible right to an accused flowing from any legislative provision ought not to be defeated by a court by giving a strained interpretation of the provisions of the Act. In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an

application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could 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. 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] ."
>
> [emphasis supplied]

37. In ***Union of India v. Nirala Yadav: (2014) 9 SCC 457***, the Supreme Court analysed various earlier decisions rendered by it and after referring to the decision of ***Mohanlal Acharya***(*supra*), held as under:

> "28. ....When the charge-sheet is not filed and the right has ripened earning the status of indefeasibility, it cannot be frustrated by the prosecution on some pretext or the other. The accused can avail his liberty only by filing application stating that the statutory period for filing of the challan has expired, the same has not yet been filed and an indefeasible right has accrued in his favour and further he is prepared to furnish the bail bond. Once such an application is filed, it is obligatory on the part of the court to verify from the records as well as from the Public Prosecutor whether the time has expired and the charge-sheet has been filed or not or whether an application for extension which is statutorily permissible, has been filed. If an application for extension is filed, it is to be dealt with as has been stated in *Sanjay Dutt* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] . That is the duty of the

> Court. This is the position of law as has been stated in *Uday Mohanlal Acharya* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] ."

38. The Court also referred to its earlier decision in ***Pragyna Singh Thakur v. State of Maharashtra: (2011) 10 SCC 445*** and, *inter alia*, reproduced paragraph nos. 54 and 58 of the said decision, which are set out below:

> "54.There is yet another aspect of the matter. The right under Section 167(2) CrPC to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. In other words, even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost. After the filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from the Constitution Bench decision of this Court in *Sanjay Dutt (2)* v. *State* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] [paras 48 and 53(*2*)(*b*)]. The reasoning is to be found in paras 33 to 49.
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> **** **** ****
>
> 58. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, before the consideration of the same and before being released on bail if charge-sheet is filed, the said right to be released on bail, can be

> only on merits. So far as merits are concerned the learned counsel for the appellant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all."

39. After referring to the aforesaid paragraphs from the decision in the case of ***Pragyna Singh Thakur*** (*supra*), the Supreme Court held as under: -

> "45. After recording the above conclusions, the High Court has ultimately observed that assuming that the appellant was not told by an order in writing to attend the office of ATS at Kala Chowki, Mumbai, yet it is clear that she accompanied the officer of ATS from Surat to Mumbai on her own volition. Every single act and movement is of her own volition and no force was used. The High Court, therefore, did not go into the wider question as to whether the non-compliance with Section 160(1) including its proviso would enable the appellant to apply for release on bail. It may be stated that the prosecution has produced and relied upon written intimation dated 10-10-2008 and entries from the station diary to show that Section 160 CrPC was substantially complied with but it is not necessary to refer to the same in detail as this Court broadly agrees with the view taken by the High Court mentioned above."

40. The Supreme Court further noted that the view expressed by the Court in ***Pragyna Singh Thakur*** (*supra*) was somewhat similar to the view expressed by B.N. Agrawal J. in his dissenting opinion in ***Uday Mohanlal Acharya*** (*supra*). After observing the same, the Court, in ***Nirala Yadav*** (*supra*) concluded as under:

> "46. …. As long as the majority view occupies the filed it is a binding precedent. That apart, it has been

> followed by a three-Judge Bench in Sayed Mohd. Ahmad Kazmi's case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi's case which has based on three-Judge Bench decision in Uday Mohanlal Acharys's case, we are obliged to conclude and hold the principle laid down in Paragraph 54 and 58 of Pragyna Singh Thakur's case (which have been underlined by us) do not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be a good law. Our view finds support from the decision in Union of India and others v. Arviva Industries India Limited and Others."

41. In ***Alamkhan Umarkhan Jatmalek Jenjari Tal, Dashada Dist., Surendranagar and Anr. v. State of Gujarat: (2015) 3 GLH 737***, a Single Bench of the Gujarat High Court considered a case where the application for default bail under Section 167(2) of Cr.PC was filed at 10:35 on 10.11.2014. The chargesheet was filed on the same date in the evening and the matter was placed for consideration before the Court on the next day, that is, on 11.11.2014. The application for bail in default was rejected by the concerned Judicial Magistrate on 14.11.2014. The Court held that the applicants were entitled to default bail and the subsequent filing of the chargesheet at 04:00 o'clock in the evening would not defeat the indefeasible right of the appellants to be released on bail.

42. A similar view has also been expressed by the Jharkhand High Court in ***Deepak Mandal @ Deepu Mandal @ Chhootu v. The State of Jharkhand: Crl. Rev. No. 1184 of 2014, decided on 05.01.2015***. In that case also, the chargesheet was filed on the same date, *albeit*, at a

later point of time. The Court held that the accused had filed a bail application and was ready to furnish the bail bonds. In the circumstances, an indefeasible right for being released on bail had accrued because till filing of the application, the chargesheet had not been filed. It was filed subsequently at 01:00 pm but that could not defeat the right of the accused under Section 167(2) of Cr.PC.

43. In a recent decision rendered by the Supreme Court in the case of ***Bikramjit Singh v. State of Punjab: Crl. A. No. 667 of 2020 decided on 12.10.2020***, the Court observed as under:

> "A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the chargesheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted."

44. In ***M. Ravindran v. Intelligence Officer: Criminal Appeal No. 699 of 2020, decided on 26.10.2020,*** the accused filed an application for seeking default bail at 10:30 am of the 181st day of his arrest (that is immediately after the court opened). The Public Prosecutor filed an additional complaint on the same date at 4:25 pm. The Supreme Court

held that the accused had availed of his indefeasible right to a default bail before the charge sheet was filed and therefore was entitled to the same.

45. In view of the above, the impugned order, which is premised on the basis that the court would have to consider the question of default bail at the point when the application is taken up for consideration is unsustainable. As explained by the Supreme Court in ***Nirala Yadav*** (*supra*), "*the accused can avail his liberty only by filing an application stating that the statutory period for filing of the challan has expired, the same has not yet been filed, and an indefeasible right has accrued in his favour and further he is prepared to furnish the bail bond. Once such an application is filed, it is obligatory on the part of the court to verify from the records as well as the public prosecutor whether the time has expired and the charge-sheet is filed or not*". The question whether an accused has exercised his indefeasible right for seeking bail in default is not contingent upon the time when the said application is heard and decided. So long as the said application has been preferred in the manner as is required – that is, by filing it in the prescribed manner with the court – the accused has done whatever is expected of him for indicating that he is exercising his right. Once having done so, the court is only required to examine whether at that point the petitioner is entitled to bail in default. Any subsequent acts done on behalf of the prosecution would not be relevant for the purposes of determining whether the accused had validly exercised his rights.

46. As noted above, this is also clearly discernable from the plain language of Section 167(2) of the Cr.PC. It is relevant to note that the said provision circumscribes the power of the court to remand an accused to custody if a chargesheet has not been filed within the prescribed time and the accused indicates that he is prepared to furnish bail. The accused indicates so only by making an application. The said application can be made in writing and filing it in the manner as prescribed or even orally before Court. (See: ***Rakesh Kumar Paul v. State of Assam: (2017) 15 SCC 67***).

47. The moment the accused makes such an application, the court is required to only examine whether the conditions as prescribed under Section 167(2) of the Cr.PC have been met when the application is made. If they are, then the power of the court to remand is lost and the accused has to be granted bail. In this view, this Court is unable to concur with the reasoning of the Special Court in the impugned order. The Special Court has proceeded on an erroneous premise that the applications filed by the accused could be considered as having been moved only at the time when they were produced before the court and not before. The implicit assumption that the relevant point of time for considering whether the accused have availed of their indefeasible right would be the point at which the applications are considered and not when it is filed, as stated earlier, not sustainable.

48. Although, the decision of the Special Court is found to be erroneous, no relief can be granted to the petitioners. This is because the contention that an indefeasible right for a default bail had accrued

to the petitioners is based on an erroneous assumption that a final report under Section 173(2) of the Cr.PC had not been filed within the stipulated period.

49. In view of the above, the impugned order is set aside. However, the applications moved by the petitioners before the said court seeking bail in default under the provisions of Section 167(2) of the Cr.PC are dismissed.

50. All pending applications are also disposed of.

VIBHU BAKHRU, J

NOVEMBER 03, 2020
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