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AFR

Court No. - 93

Case :- APPLICATION U/S 482 No. - 12474 of 2020

Applicant :- Chhotu
Opposite Party :- State of U.P.
Counsel for Applicant :- Amit Daga,Niklank Kumar Jain
Counsel for Opposite Party :- G.A.

Hon'ble Shamim Ahmed,J.

This application under Section 482 CrPC has been filed by the applicant for quashing the order dated 3.6.2020 passed by Special Judge POCSO Act/Additional Sessions Judge, Etah in Bail Application No.545 of 2020 (CNR No. UPET01-002463-2020) Chhotu vs. State of U.P., in relation to Case Crime No.26 of 2020, under Sections 363, 366, 342, 328, 376, 506 IPC and Section 4 POCSO Act, Police Station Nidhauli Kalan District Etah. Further, prayer has been made to release the accused applicant on default bail in Case Crime No.26 of 2020, under Sections 363, 366, 342, 328, 376, 506 IPC and Section 4 POCSO Act, Police Station Nidhauli Kalan District Etah exercising power under Section 167(2) CrPC so that justice be done.

Heard Sri Amit Daga, learned counsel for the applicant as well as learned AGA for the State and perused the record.

The facts of the case as argued by the learned counsel for the applicant are as under:

(i) In regard to an incident which is said to have taken place on 8.12.2019 at some unknown time one First Information Report was registered at Police Station Nidhauli Kalan, District Etah on 29.1.2020 at about 16.00 hrs under the orders/direction of SSP, Etah passed on the

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application of Km. Preeti with the allegations that the informant is minor girl aged about 16 years and she is the student of Intermediate class. It is further alleged that on 8.12.2019 the informant (prosecutrix) had gone to her relative's home located in Mohalla Kila, Nidhauli Kalan, District Etah where resident of her village namely Chhotu (applicant) and Shyamveer reached and on call of Chhotu she came out from home and on the pretext of accident of her brother, aforesaid persons took her into Max vehicle and on reaching Sikandrabad, Shyamveer left their company and therefore Chhotu (applicant) took her to Delhi at some unknown place and committed rape with her till 14.12.2019 after administering some drugs to her. It is further alleged that somehow the informant (prosecutrix) informed her family members about the incident and despite various efforts the police of concerned police station neither reported the incident nor sent the informant (prosecutrix) for medical examination. On the basis of the aforesaid FIR, one criminal case as Case Crime No. 26 of 2020 for the offence punishable under Sections 363, 366, 342, 328, 376, 506 IPC and Section 4 POCSO Act was registered against the applicant and co-accused Shyamveer at Police Station Nidhauli Kalan District Etah.

(ii) After registration of the aforesaid FIR, the police started investigation. During the course of the investigation, the investigating officer recorded the statement of the informant (prosecutrix) under Section 161 CrPC in which she has allegedly reiterated the allegations of the FIR in refined manner and further alleged that she was forcibly taken to Delhi and subjected to rape till 14.12.2019 and she came out from the clutches of the accused then she made efforts to lodge the FIR. It is further alleged that she is minor and her date of birth is 15.10.2004.

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(iii) It is alleged by the prosecution that prior to recording the aforesaid statement, the informant (prosecutrix) was put up for medical examination at District Women Hospital, Etah on 30.1.2020 and on the same day she was allegedly medically examined at aforesaid hospital. As per the medical examination report of the informant (prosecutrix), in the opinion of the doctor, no injury was seen at any body part including the genital part of the informant (prosecutrix).

(iv) After showing the aforesaid statement of the informant (prosecutrix), the Investigating Officer has shown arrest of the accused applicant in the instant criminal case on 2.2.2020 and on the same day he was put up before the court of learned Magistrate for judicial custody remand.

(v) During the course of the investigation, the Investigating Officer put up the informant (prosecutrix) before the court of lernaed Magistrate for the purposes of recording her statement under Section 164 CrPC.

(vi) Thereafter the Investigating Officer recorded the statements of some independent witnesses namely Sukhbeer Singh, Mohar Singh, Brijesh Sharma and Durveen Singh under Section 161 CrPC, in which they have allegedly stated that co-accused Shyamveer, who is named in the FIR, happens to be the uncle of accused applicant Chhotu and since the applicant and Km. Preeti were having love affairs, thus the informant (prosecutrix) was enticed away by applicant Chhotu on 8.12.2019.

(vii) After recording the statements of the aforesaid independent witnesses the Investigating officer came to the conclusion that co-accused Shyamveer has nothing to do with the allegations levelled in the FIR and he has been falsely roped in the instant criminal case. With the said observation/conclusion, the Investigating Officer gave

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clean chit to co-accused Shyamveer from all the charges and further investigated the crime in question only against the accused applicant.

(viii) After conclusion of the investigation, the Investigating Officer prepared the charge sheet/challan with the observation that the applicant had committed an offence and liable to be prosecuted for the offence punishable under Sections 363, 366, 342, 376, 506 IPC and Section 4 POCSO Act and submitted the same before the court of learned Special Judge (POCSO Act) on 1.6.2020, much after expiry of 90 days. On the same day learned trial court (Special Judge POCSO Act/Additional Sessions Judge, Etah) was pleased to take cognizance on the charge sheet/challan so submitted against the accused applicant.

(ix) Learned counsel for the applicant further submits that on careful and exhaustive perusal of the charge sheet/challan, it reveals that the same was prepared by the Investigating Officer on 2.3.2020 and the same has been marked as submitted on 15.5.2020 whereupon cognizance was taken by the court below on 1.6.2020.

(x) Since the accused applicant was challaned and taken into custody in the instant criminal case on 2.2.2020 and despite expiry of 90 days no charge sheet/challan was submitted against him before the learned Special Judge, POCSO Act, Etah, thus the applicant sought default bail under Section 167(2) CrPC by moving an application dated 25.5.2020. Accused applicant is also ready to furnish adequate sureties and personal bond to the satisfaction of the court concerned.

(xi) It is categorically submitted by the learned counsel for the applicant that till 25.5.2020 the date on which the applicant moved an application under Section

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167(2) CrPC for grant of default bail, no charge sheet/challan was available before the court below and the same was filed/submitted by the concerned investigating agency before the court below after moving the said application only on 1.6.2020 and whereupon cognizance was taken by the court below on 1.6.2020.

Learned counsel for the applicant submits that despite the undisputed fact on record that the applicant was taken into custody in the instant criminal case on 2.2.2020 and despite expiry of 90 days no charge sheet/challan was submitted by the investigating agency before the court below, the court below vide order dated 3.6.2020 rejected the application of the applicant for default bail. Hence the present application under Section 482 CrPC before this Court challenging the validity of the aforesaid impugned order.

On the other hand, learned AGA appearing for the State has filed counter affidavit with the contention that from the report of D.C.R.B. there is only one case pending against the applicant except the present case. It is further contended in paragraph 6 and 7 of the counter affidavit that during the course of the investigation credible evidence has been collected against the accused applicant and thereafter the Investigating Officer has submitted charge sheet against him for the offence punishable under Sections 363, 366, 342, 376, 506 IPC and Section 4 POCSO Act before the Special Judge POCSO Act on 1.6.2020 whereby the court below has taken cognizance after perusing the material available on record. It is further contended that the learned Special Judge after perusing the material evidence on record as well as otherevidences has rightly rejected the bail application of the applicant vide order dated 3.6.2020. Further in paragraph 13 of the counter affidavit it was stated that the learned trial court has not committed any manifest error of law in misinterpreting the observation/order of the Hon'ble Apex Court. The learned court below after considering the legal

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proposition of law laid down by the Hon'ble Madras High Coiurt in the case of *Settu vs. The State represented by the Inspector of Police,* while deciding the applicant's application moved under Section 167(2) CrPC.

Sri Amit Daga, learned counsel for the applicant submits that as his argument has already been accepted by the State in paragraph 7 of their counter affidavit that charge sheet was filed in the present case on 1.6.2020 whereupon the court below has taken cognizance, he does not want to file rejoinder affidavit.

I have considered the rival submissions of the learned counsel for the parties and perused the record.

Section 167 of CrPC lays down the procedure to be followed when investigation cannot be completed in 24 hours. Section 167(1) and (2) of the Code is reproduced as under:

> "167. Procedure when investigation cannot be completed in twenty-four hours.-(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the Accused to such Magistrate.
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> (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, authorize 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:
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> Provided that (a) the Magistrate may authorise the detention of the Accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the Accused person in custody under this paragraph for a total period exceeding,--(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the Accused person shall be released on bail if he is prepared to and

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> does furnish bail, and every person released on bail under this Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter; (b) no Magistrate shall authorise detention in any custody under this Section unless the Accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage; (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police." Sub-section (2) stipulates that the magistrate cannot authorise detention of the accused in custody on expiry of such period of 90 days or 60 days as the case may be and shall release him on bail, if the accused person is prepared to and furnishes bail."

It is evident from the record itself that the applicant was taken custody in alleged crime on 02.02.2020 and till expiry of 90 days i.e. 02.05.2020 the investigating agency failed to submit any charge sheet/challan against the applicant within the meaning of Section 173(2) CrPC before the court of learned Special Judge, POCSO Act/Additional Sessions Judge, Etah and the same was filed on 01.06.2020 much after expiry of 90 days, thus the trial court ought to have allowed applicant's application moved under Section 167(2) CrPC and released the applicant on default bail, but the learned court below had committed manifest error of law in rejecting applicant's application vide order dated 3.6.2020.

Even though in the counter affidavit filed by the State, the State has also admitted this fact in paragraph 6 and 7 of the counter affidavit that during the course of investigation credible evidence has been collected against the accused applicant and the investigating officer during investigation has collected specific allegation and thereafter has submitted charge sheet for the offence punishable under Section 363, 366, 342, 376, 506 IPC and Section 4 POCSO Act before the learned Special Judge, POCSO Act on 1.6.2020 whereby the court has taken cognizance after perusing the material available on record, therefore it is beyond doubt to say that the charge sheet was filed after the expiry of 90 days from the date of the arrest of the applicant and

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the application for default bail was filed by the applicant much prior i.e. on 25.5.2020. Accordingly, in view of the provisions contained under Section 167(2) CrPC the applicant is entitled to get the benefit for grant of default bail by the court below and the impugned order passed by the court below dated 3.6.2020 was against the provisions of Section 167(2) CrPC.

In this regard, reference may be made to the law as laid down by the Hon'ble Apex Court in the case of **Rakesh Kumar Paul vs State of Assam, (2017) 15 SCC 67.** The relevant extract of the aforesaid judgment is given in paragraph 40 which is being quoted hereinbelow:

> "40. In the present case, it was also argued by learned counsel for the State that the petitioner did not apply for 'default bail' on or after 4-1-2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court – he made no specific application for grant of 'default bail'. However, the application for regular bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail – such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail."

Further, the Hon'ble Apex Court in the case of **Bikramjit Singh vs The State of Punjab** in **Criminal Appeal No.667 of 2020** arising out of **Special Leave Petition (Crl.) No.2933 of 2020,** decided on 12.10.2020, was pleased to observe in paragraph 24 to 30 as under:

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"24. The question as to whether default bail can be granted once a charge sheet is filed was authoritatively dealt with in a decision of a Three- Judge Bench of this Court in **Uday Mohanlal Acharya v. State of Maharashtra** (2001) 5 SCC 453. The majority judgment of G.B. Pattanaik, J. reviewed the decisions of this Court and in particular the enigmatic expression "if already not availed of" in **Sanjay Dutt** (supra). The Court then held:

"13.…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 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

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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…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:

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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.

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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."

[Emphasis Supplied]

B.N. Agrawal J. dissented, holding:

"**29.** My learned brother has referred to the expression "if not already availed of" referred to in the judgment in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] for arriving at Conclusion 6. According to me, the expression "availed of" does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression "availed of" does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."

25. The law laid down by the majority judgment in this case was however not followed in **Pragya Singh Thakur v. State of Maharashtra** (2011) 10 SCC 445. This hiccup in the law was then cleared by the judgment in **Union of India v. Nirala Yadav** (2014) 9 SCC 457, which exhaustively discussed the entire case law on the subject. In this judgment, a Two-Judge Bench of this Court referred to all the relevant authorities on the subject including the majority judgment of **Uday Mohanlal Acharya** (supra) and then concluded:

"44. At this juncture, it is absolutely essential to delve into what were the precise principles stated in Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] and how the two-Judge Bench has understood the same in Pragyna Singh Thakur [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] .

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We have already reproduced the paragraphs in extenso from Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] and the relevant paragraphs from Pragyna Singh Thakur [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] . Pragyna Singh Thakur [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] has drawn support from Rustam [1995 Supp (3) SCC 221 :1995 SCC (Cri) 830] case to buttress the principle it has laid down though in Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in para 56 which has been reproduced hereinabove, has referred to para 13 and the conclusions of Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] . We have already quoted from para 13 and the conclusions.

45. The opinion expressed in paras 54 and 58 in Pragyna Singh Thakur [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] which we have emphasised, as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] which has been followed in Hassan Ali Khan [(2011) 10 SCC 235 : (2012) 1 SCC (Cri) 256] and Sayed Mohd. Ahmad Kazmi [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] . The decision in Sayed Mohd. Ahmad Kazmi case [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] has been rendered by a three-Judge Bench. We may hasten to state, though in Pragyna Singh Thakur case [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] the learned Judges have referred to Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] but have stated the principle that even if an application for bail is filed on the ground that the charge- sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if the charge-sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in Mustaq Ahmed Mohammed Isak case [(2009) 7 SCC 480 : (2009) 3 SCC (Cri) 449] . We are disposed to think so, as the two-Judge Bench has used the words "before consideration of the same and before being released on bail", the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

46. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] . The learned Judge dissented with the majority as far as interpretation of the expression "if not already availed of" by stating so: (SCC p. 481, paras 29-30)

"29. My learned Brother has referred to the expression 'if not already availed of' referred to in the judgment in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] for arriving at Conclusion 6. According to me, the expression 'availed of' does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind

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> to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.
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> 30. In this background, the expression 'availed of' does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."
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> On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in Pragyna Singh Thakur case [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three- Judge Bench in Sayed Mohd. Ahmad Kazmi case [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] . Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi case [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] which is based on three-Judge Bench decision in Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] , we are obliged to conclude and hold that the principle laid down in paras 54 and 58 of Pragyna Singh Thakur case [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] (which has been emphasised by us: see paras 42 and 43 above) does 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 good law. Our view finds support from the decision in Union of India v. Arviva Industries India Ltd. [(2014) 3 SCC 159]."

26. Also, in **Syed Mohd. Ahmad Kazmi v. State (Govt. of NCT of Delhi)** (2012) 12 SCC 1, Section 43-D of the UAPA came up for consideration before the Court, in particular the proviso which extends the period for investigation beyond 90 days up to a period of 180 days. An application for default bail had been made on 17.07.2012, as no charge sheet was filed within a period of 90 days of the appellant's custody. The charge sheet in the aforesaid case was filed thereafter on 31.07.2012. Despite the fact that this application was not taken up for hearing before the filing of the charge sheet, this Court held that this since an application for default bail had been filed prior to the filing of the charge sheet the "indefeasible right" spoken of earlier had sprung into action, as a result of which default bail had to be granted.

The Court held:

> "**25.** Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General Mr Raval. There is no denying the fact that on 17-7-2012, when CR No. 86 of 2012 was allowed by the

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Additional Sessions Judge and the custody of the appellant was held to be illegal and an application under Section 167(2) CrPC was made on behalf of the appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of the appellant for a further period of 90 days with retrospective effect from 2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the appellant on the expiry of 90 days from the date when the appellant was taken into custody. Such right, as has been commented upon by this Court in Sanjay Dutt [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] and the other cases cited by the learned Additional Solicitor General, could only be distinguished (sic extinguished) once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before the charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.

26. The circumstances in this case, however, are different in that the appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.

27. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the appellant acquired the right for grant of statutory bail on 17- 7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise."

27. In a fairly recent judgment reported as Rakesh Kumar Paul v. State of Assam (2017) 15 SCC 67, a Three-Judge Bench of this Court referred to the earlier decisions of this Court and went one step further. It was held by the majority judgment of Madan B. Lokur, J. and Deepak Gupta, J. that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted. This was stated in Lokur, J.'s judgment as follows:

"**37.** This Court had occasion to review the entire case law on the subject in Union of India v. Nirala Yadav [Union of India v. Nirala Yadav, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212] . In that decision, reference was made to Uday Mohanlal Acharya v. State of Maharashtra [Uday Mohanlal Acharya v. State of

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Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows: (Nirala Yadav case [Union of India v. Nirala Yadav, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212] , SCC p. 472, para 24)

"'13. (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.' (Uday Mohanlal case [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] , SCC p. 473, para 13)"

38. This Court also dealt with the decision rendered in Sanjay Dutt [Sanjay Dutt v. State, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] and noted that the principle laid down by the Constitution Bench is to the effect that if the charge-sheet is not filed and the right for "default bail" has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge-sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to Mohd. Iqbal Madar Sheikh v. State of Maharashtra [Mohd. Iqbal Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722 : 1996 SCC (Cri) 202] wherein it was observed that some courts keep the application for "default bail" pending for some days so that in the meantime a charge-sheet is submitted. While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for "default bail" during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court.

Procedure for obtaining default bail

40. In the present case, it was also argued by the learned counsel for the State that the petitioner did not apply for "default bail" on or after 4-1-2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge-sheet. Strictly speaking, this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court — he made no specific application for grant of "default bail". However, the application for regular bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge-sheet having expired and that perhaps no

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charge-sheet had in fact being filed. In any event, this issue was argued by the learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail — such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for "default bail" or an oral application for "default bail" is of no consequence. The court concerned must deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge- sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

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Application of the law to the petitioner

45. On 11-1-2017 [Rakesh Kumar Paul v. State of Assam, 2017 SCC OnLine Gau 573] when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of "default bail" since the statutory period of 60 days for filing a charge-sheet had expired, no charge-sheet or challan had been filed against him (it was filed only on 24-1-2017) and the petitioner had orally applied for "default bail". Under these circumstances, the only course open to the High Court on 11-1-2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him "default bail" on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.

46. It was submitted that as of today, a charge-sheet having been filed against the petitioner, he is not entitled to "default bail" but must apply for regular bail — the "default bail" chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4-1-2017 and 24-1-2017 when no charge-sheet had been filed, during which period he had availed of his indefeasible right of "default bail". It would have been another matter altogether if the petitioner had not applied for "default bail" for whatever reason during this interregnum. There could be

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a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge- sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for "default bail" during the interregnum between 4-1-2017 and 24-1-2017 as is evident from the decision of the High Court rendered on 11-1-2017 [Rakesh Kumar Paul v. State of Assam, 2017 SCC OnLine Gau 573] . On the contrary, he had availed of his right to "default bail" which could not have been defeated on 11-1-2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of the opinion that the petitioner had satisfied all the requirements of obtaining "default bail" which is that on 11-1-2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge-sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.

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49. The petitioner is held entitled to the grant of "default bail" on the facts and in the circumstances of this case. The trial Judge should release the petitioner on "default bail" on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case."

28. Deepak Gupta, J. in his concurring opinion agreed with Lokur, J. as follows:

"82. The right to get "default bail" is a very important right. Ours is a country where millions of our countrymen are totally illiterate and not aware of their rights. A Constitution Bench of this Court in Sanjay Dutt [Sanjay Dutt v. State, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] has held that the accused must apply for grant of "default bail". As far as Section 167 of the Code is concerned, Explanation I to Section 167 provides that notwithstanding the expiry of the period specified (i.e. 60 days or 90 days, as the case may be), the accused can be detained in custody so long as he does not furnish bail. Explanation I to Section 167 of the Code reads as follows:

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> "Explanation I.—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in para (a), the accused shall be detained in custody so long as he does not furnish bail."
>
> This would, in my opinion, mean that even though the period had expired, the accused would be deemed to be in legal custody till he does not furnish bail. The requirement is of furnishing of bail. The accused does not have to make out any grounds for grant of bail. He does not have to file a detailed application. All he has to aver in the application is that since 60/90 days have expired and charge-sheet has not been filed, he is entitled to bail and is willing to furnish bail. This indefeasible right cannot be defeated by filing the charge-sheet after the accused has offered to furnish bail.
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> xxx xxx xxx
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> **86.** I agree and concur with the conclusions drawn and directions given by learned Brother Lokur, J. in paras 49 to 51 of his judgment."
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> P.C. Pant, J., however, dissented holding:
>
> "**113.** The law laid down as above shows that the requirement of an application claiming the statutory right under Section 167(2) of the Code is a prerequisite for the grant of bail on default. In my opinion, such application has to be made before the Magistrate for enforcement of the statutory right. In the cases under the Prevention of Corruption Act or other Acts where Special Courts are constituted by excluding the jurisdiction of the Magistrate, it has to be made before such Special Court. In the present case, for the reasons discussed, since the appellant never sought default bail before the court concerned, as such is not entitled to the same."

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 charge sheet 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 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.

29. On the facts of the present case, the High Court was wholly incorrect in stating that once the challan was presented by the prosecution on 25.03.2019 as an application was filed by the Appellant on 26.03.2019, the Appellant is not entitled to default bail. First and foremost, the High Court has got the dates all wrong. The application that was made for default bail was made on or before 25.02.2019 and not 26.03.2019. The charge sheet was filed on 26.03.2019 and not 25.03.2019. The fact that this application was wrongly dismissed on 25.02.2019 would make no difference and ought to have been corrected in revision. The sole ground for

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dismissing the application was that the time of 90 days had already been extended by the learned Sub-Divisional Judicial Magistrate, Ajnala by his order dated 13.02.2019. This Order was correctly set aside by the Special Court by its judgment dated 25.03.2019, holding that under the UAPA read with the NIA Act, the Special Court alone had jurisdiction to extend time to 180 days under the first proviso in Section 43-D(2)(b). The fact that the Appellant filed yet another application for default bail on 08.04.2019, would not mean that this application would wipe out the effect of the earlier application that had been wrongly decided. We must not forget that we are dealing with the personal liberty of an accused under a statute which imposes drastic punishments. The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled. This being the case, we set aside the judgment of the High Court. The Appellant will now be entitled to be released on "default bail" under Section 167(2) of the Code, as amended by Section 43-D of the UAPA. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds, and upon arrest or re-arrest, the petitioner is entitled to petition for the grant of regular bail which application should be considered on its own merit. We also make it clear that this judgement will have no impact on the arrest of the petitioner in any other case.

30. The appeal is, accordingly, allowed, and the impugned judgement of the High Court is set aside. "

Further, the Hon'ble Apex Court in the case of **Saravanan vs State represented by the Inspector of Police (Criminal Appeal Nos.681-682 of 2020, arising from S.L.P. (Criminal) Nos.4386/4387/2020),** decided on 15.10.2020, was pleased to observe in paragraph 8 and 9 as under:

"8.We have heard the learned counsel for the respective parties at length.

The short question which is posed for the consideration of this Court is, whether while releasing the appellant accused on default bail/statutory bail under Section 167(2), Cr.P.C., any condition of deposit of amount as imposed by the High Court, could have been imposed?

9. Having heard the learned counsel for the respective parties and considering the scheme and the object and purpose of default bail/statutory bail, we are of the opinion that the High Court has committed a grave error in imposing condition that the appellant shall deposit a sum of Rs.8,00,000/while releasing the appellant on default bail/statutory bail. It appears that the High Court has imposed such a condition taking into consideration the fact that earlier at the time of hearing of the regular bail application, before the learned Magistrate, the wife of the appellant filed an

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> affidavit agreeing to deposit Rs.7,00,000/. However, as observed by this Court in catena of decisions and more particularly in the case of Rakesh Kumar Paul (supra), where the investigation is not completed within 60 days or 90 days, as the case may be, and no chargesheet is filed by 60th or 90th day, accused gets an "indefeasible right" to default bail, and the accused becomes entitled to default bail once the accused applies for default bail and furnish bail. Therefore, the only requirement for getting the default bail/statutory bail under Section 167(2), Cr.P.C. is that the accused is in jail for more than 60 or 90 days, as the case may be, and within 60 or 90 days, as the case may be, the investigation is not completed and no chargesheet is filed by 60th or 90th day and the accused applies for default bail and is prepared to furnish bail. No other condition of deposit of the alleged amount involved can be imposed. Imposing such condition while releasing the accused on default bail/statutory bail would frustrate the very object and purpose of default bail under Section 167(2), Cr.P.C. As observed by this Court in the case of *Rakesh Kumar Paul (supra)* and in other decisions, the accused is entitled to default bail/statutory bail, subject to the eventuality occurring in Section 167, Cr.P.C., namely, investigation is not completed within 60 days or 90 days, as the case may be, and no chargesheet is filed by 60th or 90th day and the accused applies for default bail and is prepared to furnish bail."

Thus, in view of the observation made above and following the law as laid down by the Hon'ble Apex Court in *Bikramjit Singh (supra),* the right to default bail are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled.

I am in respectful agreement with the above view taken by the Hon'ble Apex Court.

Thus, considering the facts of the case that the application for default bail was filed prior to the filing of the charge-sheet, I am of the view that the applicant was entitled to be enlarged on default bail and non-grant of default bail and the rejection of the application for grant of default bail by the court below was wholly untenable in law. Therefore, the impugned order dated 03.06.2020 passed by the court below is hereby set aside.

Accordingly, the application under Section 482 CrPC is **allowed.** The applicant namely **Chhotu** is directed to be released

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on default bail under Section 167(2) CrPC on executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing

It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the default bail under Section 167(2) CrPC and must not be construed to have any reflection on the ultimate merits of the case.

However, this Court makes it clear that this order does not prohibit or otherwise prevent the arrest or rearrest of the applicant on cogent grounds, in respect of the subject charge and in that event, the applicant will have to move a regular bail

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application for grant of bail which of course will be considered on its own merits. It is also made clear that this judgment/order shall have no impact on the arrest of the applicant in any other case.

Order Date :- 09.12.2020

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