

Neutral Citation No. - 2024:AHC-LKO:63081-DB
A.F.R.

Reserved on 14.08.2024

Delivered on 12.09.2024

Court No. - 1

Case :- CRIMINAL APPEAL No. - 2217 of 2023

Appellant :- Kamal K.P.

Respondent :- State Of UR.P. Thru. Addl. Chief Secy. Home Lko.
And Another

Counsel for Appellant :- Sheeran Mohiuddin Alavi, Harsh Vardhan
Kediya

Counsel for Respondent :- G.A.

Hon'ble Attau Rahman Masoodi, J.

Hon'ble Mohd. Faiz Alam Khan, J.

(Per Mohd. Faiz Alam Khan, J.)

- (1) Heard Shri Sheeran Mohiuddin Alavi & Shri Harsh Vardhan Kediya, learned counsels appearing for the appellant and Shri Shiv Nath Tilhari, learned Additional Government Advocate for respondents and perused the record.
- (2) The instant criminal appeal under Section 21(4) of the N.I.A. Act, 2008 has been filed by the appellant- **Kamal K.P.** against the impugned order dated 26.06.2023 passed by the Additional District and Sessions Judge-5/Special Judge, NIA/ATS, Lucknow, in Bail Application No. 5048 of 2023, arising out of Case Crime No. 199 of 2020, under Sections 153-A, 295-A, 124-A, 120-B I.P.C. & Section 17 and 18 of the Unlawful Activities (Prevention) Act, 1967 [here-in-after referred to as 'UAPA' and Section 65 & 72 of the I.T. (Amendment) Act, 2008, Police Station Manth, District Mathura, Uttar Pradesh, whereby his application for default bail moved under Section 167(2) of the Code of Criminal Procedure, 1973 (hereafter referred as 'Cr.P.C.') read with Section 43-D(2) of the UAPA has been rejected.

- (3) Learned counsel for the appellant submits that appellant was arrested on 03.03.2023 and was produced before the learned Magistrate at Kerala on 04.03.2023 whereon his transit remand was granted and thereafter he was produced before the Special Judge, (NIA/ATS), at Lucknow on 06.03.2023 and was remanded to judicial custody for 14 days.
- (4) It is further submitted that appellant was also taken on Police Custody Remand (P.C.R.) for three days from 02.04.2023 to 04.04.2023 where after he was again remanded to judicial custody.
- (5) It is further submitted that the investigation of the case remained pending even after completion of 90 days and in this regard the appellant preferred an application under Section 167 (2) Cr.P.C. on 02.06.2023 for his release on statutory bail and the same was fixed for 05.06.2023 and the same was ultimately rejected vide impugned order dated 26.06.2023 on the ground that the period of investigation has already been extended by means of order dated 05.06.2023 and the charge-sheet has already been filed within 180 days of first remand of the appellant.
- (6) It is vehemently submitted that the reasoning given by the Special Court in rejecting the prayer of default bail of the appellant is not tenable in the eyes of law as the period of investigation was extended on 05.06.2023 after expiry of 90 days while the application under Section 167 (2) Cr.P.C. for grant of default bail had already been moved on 02.06.2023, thus an indefeasible right had accrued in favour of appellant, which could not be defeated by filing the charge- sheet subsequently.

- (7) It is further submitted that the Special Court has committed manifest illegality in rejecting the default bail application of the appellant as the appellant had become entitled to the default bail when the period of extension of investigation period was extended only on 05.06.2023 while the same had expired in the midnight of 01/02.06.2023.
- (8) It is further submitted that since an indefeasible right to be released on bail had accrued in favour of the appellant by non-filing of charge-sheet by the Investigating Agency within 90 days and as the period of 90 days had expired on 02.06.2023 and the period of extension of investigation has been enlarged on 05.06.2023 and the application for statutory bail was moved on 02.06.2023, the appellant should have been released on default bail and, thus, the Special Court has committed patent illegality in rejecting the bail application of applicant, therefore, the impugned order passed by the Special Court is required to be set-aside and the appellant is entitled to be released on default bail.
- (9) Learned counsel for the appellant has relied on the following case laws:-
- (i) Enforcement Directorate, Government of India Vs. Kapil Wadhwan and Another reported in 2023 SCC OnLine SC 972*
- (ii) Gautam Navlakha Vs. National Investigation Agency reported in (2022) 13 SCC 542; and*
- (iii) Judgebir Singh alias Jasbir Singh Samra alias Jasbir and others Vs. National Investigating Agency reported in 2023 SCC Online SC 543*
- (10) Shri S. N. Tilhari, learned A.G.A. relying on the short counter affidavit as well as the supplementary counter affidavit filed by the State vehemently opposes the prayer of default bail of the appellant and submits that the appellant was arrested on

03.03.2023 from Malappuram, Police Station Melattur, Kerala in connection with this case and by producing him before the local Magistrate, a transit remand was obtained on 04.03.2023 and on 06.03.2023 the appellant was again produced before the Special Judge, (NIA/ATS), Lucknow and his judicial custody remand was allowed for 14 days and which was subsequently extended vide order 20.03.2023 till 03.04.2023.

- (11) It is further submitted that on 31.03.2023 an application was filed for taking the accused on Police Custody Remand which was allowed from 02.04.2023 to 04.04.2023 and vide order dated 04.04.2023 remand was further allowed till 03.05.2023.
- (12) It is also submitted that vide order dated 03.05.2023 the judicial remand of the appellant was further allowed till 17.05.2023 and the same was again extended to 02.06.2023 vide order dated 17.05.2023.
- (13) It is vehemently submitted that before expiring of '90 days' time i.e. on 01.06.2023 Public Prosecutor had moved an application before the learned Special Judge, (NIA/ATS), Lucknow for extension of time of investigation from 90 days to 180 days, as provided under Section 43-D(2) of the UAPA and vide order dated 01.06.2023 the application was directed to be listed on 02.06.2023 and the appellant/accused was summoned from District Jail and on 02.06.2023 the remand period was extended till 05.06.2023. The Public Prosecutor filed another application before the Special Court on 05.06.2023 for extension of time for investigation for further 60 days and vide order dated 05.06.2023 the period of investigation was extended for 50 more days and the remand of the appellant was granted up to 03.07.2023 and vide order dated 03.07.2023 the remand was further allowed till 20.07.2023 and ultimately the charge-sheet against the appellant/accused was filed on

20.07.2023 i.e. within 180 days, as provided under Section 43-D(2) of the U.A.P.A. Thus, it is submitted that the extension of time to complete investigation was extended by the Special Court within 90 days i.e. on 02.06.2023 and 05.06.2023 and charge-sheet has also been filed within 180 days of the first remand of the appellant and, therefore, no indefeasible right for release on default bail had ever occurred in favour of the appellant/accused. Thus, it is submitted that there is no illegality in the order passed by the Special Court and appeal is liable to be dismissed.

- (14) Having heard learned counsel for the parties and having perused the record it appears to be appropriate that before considering the rival submissions of the learned counsels for the parties, it will be useful to look into the relevant statutory provisions and legal precedents pertaining to the matter in issue.
- (15) Section 167(2) of Code of 1973 which is relevant for the disposal of present case, existing as of now is being reproduced as under:

"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 the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but

no Magistrate shall authorise the detention of the Accused person in custody under this paragraph for a total period exceeding,-

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

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

(b) no Magistrate shall authorise detention 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."

- (16) Section 43-D of the UAPA operates as a special provision vis-a-vis the applicability of rights granted Under Section 167(2)(a) of the Code of Criminal Procedure. Section 43D is also reproduced here-in-below:

"43D. Modified application of certain provisions of the Code.-(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of Clause (c) of Section 2 of the Code, and "cognizable case" as defined in that Clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in Sub-section (2),-

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:

Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the Accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.

(3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that-

(a) the reference in Sub-section (1) thereof

(i) to "the State Government" shall be construed as a reference to "the Central Government or the State Government.";

(ii) to "order of the State Government" shall be construed as a reference to "order of the Central Government or the State Government, as the case may be"; and

(b) the reference in Sub-section (2) thereof, to "the State Government" shall be construed as a reference

to "the Central Government or the State Government, as the case may be".

(4) Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person Accused of having committed an offence punishable under this Act.

(5) Notwithstanding anything contained in the Code, no person Accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such Accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made Under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in Sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in Sub-sections (5) and (6), no bail shall be granted to a person Accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing."

- (17) Hon'ble Supreme Court in ***Judgebir Singh and Ors. vs. National Investigation Agency, MANU/SC/0501/2023***, explained the law with regard to section 167 CrPc in following words:-

"A three-Judge Bench of this Court in Uday Mohanlal Acharya v. State of Maharashtra reported in MANU/SC/0222/2001 : (2001) 5 SCC 453, has noticed the object of enacting the provisions of Section 167 of the Code of Criminal Procedure. Section 57 of the Code of Criminal Procedure contains the embargo on the police officers to detain

in custody, a person arrested beyond 24 hours. The object is that the Accused should be brought before a Magistrate without delay within 24 hours, which provision is, in fact, in consonance with the constitutional mandate engrafted Under Article 22(2) of the Constitution. The provision of Section 167 is supplementary to Section 57. The power Under Section 167 is given to detain a person in custody while police goes on with the investigation. Section 167 is, therefore, a provision which authorises the Magistrate permitting the detention of the Accused in custody prescribing the maximum period. In Uday Mohanlal Acharya (supra) this Court while dealing with Section 167 laid down the following:

5. ...This provision of Section 167 is in fact supplementary to Section 57, in consonance with the principle that the Accused is entitled to demand that justice is not delayed. The object of requiring the Accused to be produced before a Magistrate is to enable the Magistrate to see that remand is necessary and also to enable the Accused to make a representation which he may wish to make. The power Under Section 167 is given to detain a person in custody while the police goes on with the investigation and before the Magistrate starts the enquiry. Section 167, therefore, is the provision which authorises the Magistrate permitting detention of an Accused in custody and prescribing the maximum period for which such detention could be ordered. Having prescribed the maximum period, as stated above, what would be the consequences thereafter has been indicated in the proviso to Sub-section (2) of Section 167. The proviso is unambiguous and clear and stipulates that the Accused shall be released on bail if he is prepared to and does furnish the bail which has been termed by judicial pronouncement to be "compulsive bail" and such bail would be deemed to be a bail under Chapter 33. The right of an Accused to be released on bail after expiry of the maximum period of detention provided Under Section 167 can be denied only when an Accused does not furnish bail, as is apparent from Explanation I to the said section. The proviso to Sub-section (2) of

Section 167 is a beneficial provision for curing the mischief of indefinitely prolonging the investigation and thereby affecting the liberty of a citizen....

29. Again, there has been a very detailed consideration of Section 167 by a three-Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam, reported in MANU/SC/0993/2017 : (2017) 15 SCC 67. This Court in the above case has traced the legislative history of the provision of Section 167. This Court in the above case emphasised that the debate on Section 167 must also be looked at from the perspective of expeditious conclusion of investigation and from the angle of personal liberty. This Court also held that the right of default bail is an indefeasible right which cannot be allowed to be frustrated by the prosecution. Following was laid down in paras 37, 38 and 39:

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, MANU/SC/0580/2014 : (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 Maharashtra, MANU/SC/0222/2001 : (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: (Uday Mohanlal Acharya case [Uday Mohanlal Acharya v. State of Maharashtra, MANU/SC/0222/2001 : (2001) 5 SCC 453; 2001 SCC (Cri) 760], SCC p. 473, para 13)

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.

38. This Court also dealt with the decision rendered in Sanjay Dutt [Sanjay Dutt v. State, MANU/SC/0554/1994 : (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, MANU/SC/1045/1996 : (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.

30. One more judgment of this Court on Section 167 of the Code of Criminal Procedure be noticed i.e., Achpal alias Ramswaroop and Anr. v. State of Rajasthan, reported in MANU/SC/1035/2018 : (2019) 14 SCC 599. After referring to several earlier judgments of this Court including the judgments of

this Court in Uday Mohanlal Acharya (supra) and Rakesh Kumar Paul (supra), this Court had laid down that the provisions of the Code of Criminal Procedure do not empower anyone to extend the period within which the investigation must be completed. This Court held that no court either directly or indirectly can extend such period. Following are the observations of this Court in para 20 of Achpal (supra):

20. We now turn to the subsidiary issue, namely, whether the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 and the Maharashtra Control of Organised Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no court could either directly or indirectly extend such period. In any event of the matter all that the High Court had recorded in its order dated 3-7-2018 [Mahaveer v. State of Rajasthan, MANU/RH/0391/2018] was the submission that the investigation would be completed within two months by a gazetted police officer. The order does not indicate that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission of the Public Prosecutor could not be taken to be an order granting extension. We thus reject the submissions in that behalf advanced by the learned Counsel for the State and the complainant.

31. The scheme of the Code of Criminal Procedure as noticed above clearly delineates that the provisions of Section 167 of the Code of Criminal Procedure give due regard to the personal liberty of a person. Without submission of chargesheet within 60 days or 90 days as may be applicable, an Accused cannot be detained by the police. The provision gives due

recognition to the personal liberty. However, as explained by this Court in Dinesh Dalmia v. CBI reported in MANU/SC/7924/2007 : (2007) 8 SCC 770, such a right of default bail although a valuable right, yet the same is a conditional one, the condition precedent being pendency of the investigation. Therefore, once the investigation is complete with the filing of the police report, containing the details specified Under Section 173(2) of the Code of Criminal Procedure, the question of a claim or grant for default bail does not arise."

- (18) Thus, a plain reading of the above mentioned provisions makes it clear that the benefit of default bail shall be available to the accused for the offences alleged to have been committed under the UAPA also where the investigation has not concluded within 90 days of arrest of the accused irrespective of the punishment of the offences alleged to have been committed by him, unless the period has been extended within or upto maximum period of 180 days to complete the investigation on or before the due date following due procedure under the Statute.
- (19) In *Central Bureau of Investigation vs. Kapil Wadhawan and Ors., MANU/SC/0058/2024*, though the Apex Court found the accused person not entitled for default bail by holding that once the charge-sheet 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 the accused after the filing of the charge-sheet, but also highlighted that the right of default bail under Section 167(2) of CrPC is not only a statutory right but is a right that flows from Article 21 of the Constitution of India. It is an indefeasible right, nonetheless it is enforceable only prior to the filing of the challan or the charge-sheet, and does not survive or remain enforceable on the challan being filed, **if already not availed of**, in following words:-

*"15. There cannot be any disagreement with the well settled legal position that the right of default bail Under Section 167(2) Code of Criminal Procedure is not only a statutory right but is a right that flows from Article 21 of the Constitution of India. It is an indefeasible right, nonetheless it is enforceable only prior to the filing of the challan or the chargesheet, and 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 the Accused after the filing of the challan. The Constitution Bench in **Sanjay Dutt v. State through CBI, Bombay (II) MANU/SC/0554/1994 : (1994) 5 SCC 410**, while considering the provisions of Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 read with Section 167(2) Code of Criminal Procedure had very pertinently held that:*

*48. We have no doubt that the common stance before us of the nature of indefeasible right of the Accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the Accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, **if already not availed of**. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an Accused after the filing of the challan. The custody of the Accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had 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 Code of Criminal Procedure 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* [MANU/SC/0073/1952 : (1952) 1 SCC 118: 1952 SCR 395: AIR 1952 SC 106: 1952 Cri LJ 656]; *Ram Narayan Singh v. State of Delhi* [MANU/SC/0035/1953 : 1953 SCR 652: AIR 1953 SC 277 : 1953 Cri LJ 1113] and *A.K. Gopalan v. Government of India* [MANU/SC/0091/1965 : (1966) 2 SCR 427: AIR 1966 SC 816: 1966 Cri LJ 602].)"*

(Emphasis Given)

- (20) In *Hitendra Vishnu Thakur and others v. State of Maharashtra and others reported in (1994) 4 SCC 602*, while interpreting Section 20(4) of Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'TADA Act') read with Section 167 Cr.P.C., the Supreme Court held that once the period for filing the charge-sheet has expired and either no extension under Clause (bb) of Section 20 (4) of TADA Act has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail

under Sub-Section (4) of Section 20 of TADA Act read with Section 167 of Cr.P.C. and the Designated Court shall release him on bail, if the accused seeks to be released and furnishes the requisite bail bonds but that does not mean that on expiry of the period, during which investigation is required to be completed under Section 24 of TADA Act read with Section 167 of Cr.P.C., the court must release the accused on bail on its own motion even without moving any application from the accused person on his offering to furnish bail. The accused will be required to make an application if he wishes to be released on bail on account of the 'default' of the Investigating/Prosecuting Agency, and once such an application is made, the court should issue notices to the Public Prosecutor who may either show that prosecution has obtained the order for completing the investigation from the court under Clause (bb) of Section 20 (4) of TADA Act or that the charge-sheet has been filed in the Designated Court before the expiry of prescribed period or even that the prescribed period has actually not expired and thus, resists the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid a multiplicity of proceedings. It would, therefore, serve the ends of justice, if both sides are heard on the petition for bail on account of prosecution 'default'. It has been further held by the Supreme Court that when a report submitted by the Public Prosecutor to the Designated Court, for grant of extension for Clause (bb) of Section 20 (4) of TADA Act, its notice should be issued to the accused, before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. Even though neither Clause (b) nor Clause (bb) of Section 20 (4) of the

TADA Act provides for issuance of such notice but, the issuance of such notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice, and issuance of notice to the accused or the Public Prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or Public Prosecutor in the scheme of the Act, and no prejudice whatsoever can be caused by the issuance of such a notice to any party. (para 21 of Judgment on pages 627 to 628)

- (21) In ***Sanjay Dutt vs. State through C.B.I., Bombay (09.09.1994 - SC)*** : MANU/SC/0554/1994, while considering ***Hitendra Vishnu Thakur (supra)*** Apex Court opined as under:-

"52. 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 CrPC. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C.

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 CrPC. 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. The State of Punjab MANU/ SC/ 0073/ 1952 : 1952CriLJ656 ; Ram Narayan Singh v. The State of Delhi and Ors. MANU/ SC/ 0035/ 1953 : 1953CriLJ113; and A.K. Gopalan v. The Government of India MANU/SC/0091/1965 : 1966CriLJ602 .

53. 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 Cr.P.C. in such a situation. We clarify the decision of the Division Bench in Hitendra Vishnu Thakur, accordingly, and if it gives a different indication because of the final order made therein, we regret our inability to subscribe to that view.

57.(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." (Emphasis Supplied)

- (22) In *Uday Mohanlal Acharya vs. State of Maharashtra*, MANU/SC/0222/2001 Hon'ble Supreme Court while considering Sanjay Dutt (supra) opined as under:-

"6. There cannot be any dispute that on expiry of the period indicated in the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure the accused has to be released on bail, if he is prepared to and does furnish the bail. Even though a Magistrate does not possess any jurisdiction to refuse bail when no charge sheet is filed after expiry of the period stipulated under the proviso to sub-section (2) of Section 167 and even though the accused may be prepared to furnish the bail required, but such furnishing of bail has to be in accordance with the order passed by the Magistrate. In other words, without an order of the Magistrate the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 cannot be given effect to and there lies

the rub. The grievance of the accused is that for a variety of reasons the Magistrate or even the superior Court would refuse to pass an order releasing the accused on bail notwithstanding the pre-conditions required under the proviso are satisfied and then when the accused moves the High Court or the Supreme Court during the interregnum the police files a challan. It was also contended by Mr. Tulsi that a Public Prosecutor may take adjournment from the Court when the bail application was being moved and then would persuade the investigating agency to file a challan and then contend that the Court would not be entitled to release the accused on bail under the proviso to sub-section (2) of Section 167, and in that situation not only the positive command of the legislature is flouted but also an unauthorised period of custody is being legalised and this would be an infraction of the constitutional provision within the meaning of Article 22. In Hitendra Vishnu Thakur vs. State of Maharashtra MANU/SC/0526/1994 : 1995CriLJ517, two learned Judges of this Court construed the provisions of Section 167 of the Code of Criminal Procedure Code read with sub-section 4 of Section 20 TADA. After examining in detail the object behind the enactment of Section 167 of the Code of Criminal Procedure and the object of the Parliament introducing the proviso to sub-section (2) of Section 167 prescribing the outer limit within which the investigation must be completed the Court expressed that the proviso to sub-section (2) of Section 167 read with Section 20(4)(b) of TADA creates an indefeasible right in an accused person on account of the default by the Investigating Agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail and such order is generally termed as an "order on default". The Court also held that an obligation is cast upon the Court to inform the accused of his right of being released on bail and enable him to make an application in that behalf. It was also further held that the accused would be entitled to move an application for being admitted on bail and the Designated Court shall release him on bail if the accused seeks to be so released and furnishes the requisite bail. The Court declined to agree with the contention of the accused that the Magistrate must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail."

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 in the whole.*
- 2. Under the proviso to aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than 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 furnish the bail, as directed by the Magistrate. 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 it of forth with, 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 bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section 2 of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and therefore, if during that period the investigation is complete and charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression 'if not already availed of' used by this Court in Sanjay Dutt's case (supra) 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 paragraph (a) of 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 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 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 law laid down by this Court in the case of Mohd. Iqbal vs. State of Maharashtra (supra).

Having indicated the position of law, as above, and applying the same to the facts and circumstances of the present case, it appears that the prescribed period under paragraph (a) of the proviso to sub-section (2) of Section 167 expired on 16.8.2000 and the accused filed an application for being released on bail and offered to furnish the bail on 17.8.2000. The Magistrate, however, erroneously refused the bail prayer on the ground that the proviso to sub-section (2) of Section 167 has no application to case pertaining to MPID Act. The accused then moved the High Court. While the matter was pending before the Division Bench of the High Court, the learned Public Prosecutor took an adjournment and the case was posted to 31st August, 2000 and just the day before the charge-sheet was filed on 30th August, 2000 and thus the indefeasible right of the accused stood frustrated and the High Court refused to release the accused on bail on a conclusion that the accused cannot be said to have availed of his indefeasible right, as held in Sanjay Dutt's case (supra) since, he has not yet been released on bail. But in view of our conclusion as to when an accused can be said to have availed of his right, in the case in hand, it has to be held that the accused availed of his right on 17th August, 2000 by filing an application for being released on bail and offering therein to furnish the bail in question. This being the position, the High Court was in error in refusing that right of the accused for being released on bail. We, therefore, direct that the accused should be released on bail on such terms and conditions to the satisfaction of the Learned Magistrate, and further the Magistrate would be entitled to deal with the accused in accordance with law and observations made by us in this judgment, since the charge-sheet has already been filed.

In accordance with the majority view, the appeal stands allowed." (Emphasis given by us)

- (23) Thus it is clear that if the right of default bail has been availed by an accused by moving a bail application and the period of 90 days has expired and is not extended further and even if the said bail application has not been disposed by the court and remained pending for a long time and the litigation travels to the higher forum and in between charge-sheet has been filed by the investigation agency within the statutory time, the right of the accused to be released on default bail will not be extinguished or defeated.
- (24) In ***RITU CHHABARIA versus UNION OF INDIA & ORS.2023 LiveLaw (SC) 352***, the Apex Court opined as under:-

*"21. A bare perusal of the abovementioned statement of objects strongly indicates that Section 167(2) of the Cr.PC was enacted to ensure that the investigating agency completes the investigation within the prescribed time limit, failing which no accused could be detained if they are willing to avail bail. This position was also laid emphasis on by a three-judge bench of this Court in the case of **Ravindran Vs. The Intelligence Officer, Directorate of Revenue Intelligence,(2021) 2 SCC 485**, the relevant paragraphs of the same are being reproduced hereunder:*

The suggestion made in Report No. 14 was reiterated by the Law Commission in Report No. 41 on The Code of Criminal Procedure, 1898 (Vol. I, 1969, pp. 76-77). The Law Commission re-emphasised the need to guard against the misuse of Section 344 of the 1898 Code by filing "preliminary reports" for remanding the accused beyond the statutory period prescribed under Section 167. It was pointed out that this could lead to serious abuse wherein "the arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner".

Hence the Commission recommended fixing of a maximum time-limit of 60 days for remand. It was in this backdrop that Section 167(2) was enacted within the present day CrPC, providing for time-limits on the period of remand of the accused, proportionate to the seriousness of the offence committed, failing which the accused acquires the indefeasible right to bail.

22. Further, this legal position was again reiterated in Satendar Kumar Antil vs CBI & Anr. ,(2021) 10 SCC 773, wherein it was held that Section 167(2) of the Cr.PC is a limb of Article 21 of the Constitution of India, and as such, the investigating authority is under a constitutional duty to expediate the process of investigation within the stipulated time, failing which, the accused is entitled to be released on default bail. The relevant observations made in the said judgment are as under:-

“Section 167(2) was introduced in the year 1978, giving emphasis to the maximum period of time to complete the investigation. This provision has got a laudable object behind it, which is to ensure an expeditious investigation and a fair trial, and to set down a rationalised procedure that protects the interests of the indigent sections of society. This is also another limb of Article 21. Presumption of Innocence is also inbuilt in this provision. An investigating agency has to expedite the process of investigation as a suspect is languishing under incarceration. Thus, a duty is enjoined upon the agency to complete the investigation within the time prescribed and a failure would enable the release of the accused. The right enshrined is an absolute and indefeasible one, ensuring to the benefit of suspect.

As a consequence of the right flowing from the said provision, courts will have to give due effect to it, and thus any detention beyond this period would certainly be illegal, being an affront to the liberty of the person concerned. Therefore, it is not only the duty of the investigating agency but also the courts to see to it that an accused gets the benefit of Section 167(2).

34. Even at the cost of repetition, we find it pertinent to mention that the right of default bail under Section 167(2) of the CrPC is not merely a statutory right, but a fundamental right that flows from Article 21 of the Constitution of India. The reason for such importance being given to a seemingly insignificant procedural formality is to ensure that no accused person is subject to unfettered and arbitrary power of the state. The process of remand and custody, in their practical manifestations, create a huge disparity of power between the investigating authority and the accused. While there is no doubt in our minds that arrest and remand are extremely crucial for the smooth functioning of the investigation authority for the purpose of attaining justice, however, it is also extremely important to be cognizant of a power imbalance. Therefore, it becomes essential to place certain checks and balances upon the Investigation Agency in order to prevent the harassment of accused persons at their hands.”

(Emphasis Given)

- (25) In ***Judgebir Singh and Ors. vs. National Investigation Agency: MANU/SC/0501/2023 (Supra)***, the Apex Court dismissed the appeal filed by the accused persons as they failed to avail the right of default bail by filing a bail application and also noticing that the time to complete investigation, in that case, was extended on 101st day opined that the appellants would have been released on bail if they have filed any application for bail after statutory period and subsequent extension of time or filing of charge-sheet could not have extinguished their right, in following words:-

***"AN EYE-OPENER LITIGATION FOR THE NIA/
STATE POLICE***

76. As is evident from the chronology of dates and events referred to in the earlier part of our judgment, the final report Under Section 173(2) of the Code of Criminal Procedure was filed in the Court of SDJM, Ajnala on 15.11.2019. 15.11.2019 was the 161st day from the date of arrest of two of the Appellants before

*us, namely, Jasbir Singh and Varinder Singh. They were the first to be arrested on 08.06.2019. The Punjab Police applied to the Court of the Additional Sessions Judge, Amritsar, for extension of time to complete the investigation invoking the proviso to Section 43D(2)(b) of the UAPA on 04.09.2019. When this application for extension of time was filed only two days were left for 90 days to expire. This is suggestive of the fact that the 91st day would have fallen on 07.09.2019. What is important to highlight is that the Additional Sessions Judge, Amritsar, looked into the extension application dated 04.09.2019 filed by the Punjab Police and ultimately, extended the time limit vide its order dated 17.09.2019 i.e., on the 101st day. By the time, the Additional Sessions Judge, Amritsar, passed an order extending the time, the period of 90 days had already expired. Indisputably, there was no chargesheet before the Court on the 91st day i.e., on 07.09.2019. The reason why we say that this is a grey area is because what would have happened if the Appellants Jasbir Singh and Varinder Singh had preferred an application seeking statutory/default bail Under Section 167(2) of the Code of Criminal Procedure on the 91st day i.e., on 07.09.2019. The application seeking extension of time was very much pending. The Additional Sessions Judge could not have even allowed such application promptly i.e., on or before the 90th day without giving notice to the Accused persons. **The law is now well settled in view of the decision of this Court in the case of Jigar alias Jimmy Pravinchandra Aditya v. State of Gujarat reported in MANU/SC/1233/2022 that an opportunity of hearing has to be given to the Accused persons before the time is extended up to 180 days to complete the investigation. The only error or lapse on the part of the Appellants Jasbir and Varinder Singh was that they failed to prefer an appropriate application seeking statutory/default bail on the 91st day. If such application would have been filed, the court would have had no option but to release them on statutory/default bail. The Court could not have said that since the extension application was pending, it shall pass an appropriate order only after the extension application was decided. That again would have been something contrary to the well settled position of law. This litigation is an eye opener for the NIA as well as the State investigating agency that if they want to seek***

extension, they must be careful that such extension is not prayed for at the last moment.

77. The right to be released on default bail continues to remain enforceable if the Accused has applied for such bail, notwithstanding pendency of the bail application or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the court. However, where the Accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, or a report seeking extension of time is preferred before the Magistrate or any other competent court, the right to default bail would be extinguished. The court would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the Accused may still be released on bail under other provisions of the Code of Criminal Procedure.

*78. Our observations in paras 76 and 77 respectively as above are keeping in mind the decision of this Court rendered by a three-Judge Bench in the case of **Sayed Mohd. Ahmad Kazmi v. State (Government of NCT of Delhi) and Ors. reported in MANU/SC/0900/2012 : (2012) 12 SCC 1**, wherein in paras 25, 26 and 27 respectively, this Court observed as under:*

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 Additional Sessions Judge and the custody of the Appellant was held to be illegal and an application Under Section 167(2) Code of Criminal Procedure 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 [MANU/SC/0554/1994 : (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.

(Emphasis supplied)

- (26) If the facts of the instant case are appreciated in the background of the aforesaid legal position it would reflect that the factual matrix of this case has not been disputed so far as the chronology of the orders passed by the Special Court whereby remand of the appellant has been granted by the Special Court, moving of bail application as well as the applications moved by the Investigating Officer forwarded by the Public Prosecutor before the Special Court for extension of period of investigation are concerned. The State in its response, especially in para no.8 onwards of the short counter affidavit dated 27/30.09.2023, has admitted that the appellant was arrested on 03.03.2023 from Melattur Police Station Malappuram, Kerala in connection with the instant case and a transit remand was granted by the local Magistrate on 04.03.2023 and it was on 06.03.2023 the appellant was again produced before the Additional District and Sessions Judge-5/Special Judge, NIA/ATS, Lucknow and the judicial custody remand was allowed for 14 days. It is also admitted in this short counter affidavit that vide order dated 20.03.2023 the remand was further allowed till 03.04.2023 and it was on 31.03.2023 an application for seeking the Police Custody Remand of the appellant was moved and it was on 01.04.2023 the police custody remand of the appellant was accepted from 02.04.2023 to 04.04.2023 and the remand was also allowed up to 03.05.2023. Vide order dated 03.05.2023 the remand was further allowed till 17.05.2023 and vide order dated 17.05.2023 the remand was further allowed till 02.06.2023.
- (27) It is also admitted to the State, as is evident from para no.17 onwards of the short counter affidavit dated 27/30.09.2023, that on 01.06.2023 the Public Prosecutor had moved an application

before the Special Judge for extension of time of investigation from 90 days to 180 days, as provided under Section 43-D(2) of the UAPA and the Court vide its order dated 01.06.2023 fixed this application for 02.06.2023 and summoned the accused from the District Jail and vide order dated 02.06.2023 the Special Court also extended the remand period till 05.06.2023. It was on 05.06.2023 the Public Prosecutor again filed an application before the Special Court for extension of time for further 60 days as the period of remand was going to expire on 05.06.2023, vide order of the same date i.e. 05.06.2023 the period of investigation was extended for 50 more days and the remand of the appellant was also granted up to 03.07.2023 and subsequently on 03.07.2023 the remand was again allowed up to 20.07.2023 and ultimately the charge-sheet was also filed against the appellant on 20.07.2023. Thus, the case of the State is that the period of investigation was extended by the Special Court vide order dated 02.06.2023 to 05.06.2023 and thereafter vide order dated 05.06.2023 till 50 days and thereafter vide order dated 03.07.2023 till 20.07.2023 and it was on 20.07.2023 the charge-sheet has been filed i.e. within statutory period of 180 days and, therefore, the appellant is not entitled for default bail.

- (28) The contention of learned counsel for the appellant to the contrary is that an application to extend the time of investigation was moved on 01.06.2023, which was directed to be taken up on 02.06.2023 and the appellant was summoned from the jail. However, it is vehemently submitted that vide order dated 02.06.2023, which was the 91st day of the first remand of the appellant, no order with regard to the extension of time of investigation was passed and an indefeasible right for release on default bail had occurred in favour of appellant and in this scenario the Investigating Officer was compelled to

move another application for extension of time of investigation on 05.06.2023, on which the Special Court has passed an order on 05.06.2023, whereby 50 days further time was granted for completion of investigation which was subsequently extended till 20.07.2023, on which the charge-sheet appears to have been filed.

- (29) Thus, the case of the appellant is that, when the time of investigation was not extended by the Special Court on 01.06.2023 (within 90 days of the 1st remand) and was also not extended vide order dated 02.06.2023 (91st day of the 1st remand) and the same could only be extended vide order dated 05.06.2023 and as the bail application had already been filed by the appellant on 02.06.2023 (on 91st day of 1st remand), an indefeasible right to be released on bail had occurred in favour of the appellant which could not be defeated by filing the charge-sheet subsequently or by extending the time of investigation on 05.06.2023.
- (30) Perusal of the record in this regard would reflect that admittedly the transit remand of the appellant was granted by a local Court at Kerala on 04.03.2023, therefore, the 90th day of the detention of the appellant was on 01.06.2023 and an application, as is reflected from the record, for the purpose of extension of time of the investigation was moved on 01.06.2023 (on 90th day) by the prosecutor and an endorsement of date 01.06.2023 of the Presiding Officer of the Court, would reveal that on this application the accused/appellant was summoned for 02.06.2023 and vide another order of the same day the remand of the appellant was also extended till 05.06.2023. The order-sheet of date 02.06.2023, a copy of which has been placed on record as Annexure No. SCA-10 to the short counter affidavit filed by the State and perusal of this order would reveal that

only remand of the appellant was accepted/extended till 05.06.2023 with a further direction to summon the accused/appellant on 05.06.2023. Admittedly in this order of date 02.06.2023, there is no mention of extension of the time of investigation. Thereafter the Public Prosecutor moved another application for extension of period of investigation for 60 days on 05.06.2023 and perusal of the order of date 05.06.2023 passed by the Special Court, a copy of which has been placed on record as Annexure No.SCA12 to the short counter affidavit filed by the State, would reveal that vide this order (05.06.2023) the period of investigation was extended for further 50 days.

A clear distinction may be inferred from the perusal of above mentioned both orders passed by the Special Court i.e. of date 02.06.2023 and of date 05.06.2023, as vide order dated 02.06.2023 only the remand of the appellant has been extended till 05.06.2023 with a further direction to summon the accused/appellant, while vide order dated 05.06.2023 the period of investigation has been extended for further 50 days. It also appears to be an admitted situation that the appellant had moved an application for default bail alleging non-completion of the investigation within 90 days on 02.06.2023, as is evident from the order sheet of the Special Court of date 02.06.2023 and the same was directed to be listed on 05.06.2023 for hearing. It may be recalled that the 90th day of the first remand of the appellant was 01.06.2023 and the default bail application has been moved by the appellant on 02.06.2023 which is/was the 91st day of the first remand of the appellant. The confusion as to whether vide order dated 02.06.2023 the Special Court has extended time of investigation or simply remanded the accused in judicial custody till 5th June, 2023 has been cleared by the Special Judge/Special Court itself, while passing the impugned order dated 26.06.2023 whereby the default bail application

moved by the appellant has been rejected and it has been specifically stated in the impugned order by the Special Court that perusal of the record would reveal that vide order dated 05.06.2023, on an application moved by the Investigating Officer, the period of extension of the period of investigation was extended till 01.09.2023 in view of Section 43-D(2) of UAPA and charge-sheet has also been filed within 180 days of the first remand of the appellant. Thus, the air has been cleared by the Special Court itself by stating in clear and loud terms that the period of investigation could only be extended vide order dated 05.06.2023 which was the 94th day of first remand. Thus the period of investigation, as may be inferred from the impugned order dated 26.06.2023 could only be extended vide order dated 05.06.2023 and by that time an indefeasible right to be released on default bail, in our considered opinion, had already occurred in favour of the appellant and he has also availed this right by immediately moving an application for default bail before the Special Court on 02.06.2023, which has been rejected by passing impugned order of date 26.06.2023.

- (31) Thus, the Special Court has committed material illegality in rejecting the prayer of default bail of the appellant and in our considered opinion the appellant is entitled for default bail.
- (32) It is clarified that the subsequent extension of time of investigation after 02.06.2023, vide order dated 05.06.2023 or filing of charge-sheet on 30.07.2023 may not cure, suppress, vitiate or extinguish the right of the appellant/accused, to be released on default bail, which had already accrued in favour of the appellant in the midnight of 01/02.06.2023 when the same has also been acted upon/availed by the appellant by filing a default bail application on 02.06.2023.

(33) Accordingly, the appeal is **allowed** and the impugned order dated 26.06.2023, passed by the Additional District and Sessions Judge-5/Special Judge, NIA/ATS, Lucknow rejecting the default bail application filed by the appellant, is hereby, **quashed /set aside**.

(34) The appellant- **Kamal K.P.** is enlarged on default bail in Case Crime No. 199 of 2020 under Sections 153-A, 295-A, 124-A, 120-B I.P.C. & Section 17 and 18 of the Unlawful Activities (Prevention) Act, 1967 and Section 65 & 72 of the I.T. (Amendment) Act, 2008, Police Station Manth, District Mathura, Uttar Pradesh, on the following conditions:-

(i) The appellant shall furnish his personal bond with two sureties of the like amount as may be determined by the Special Court;

(ii) The appellant shall surrender his passport, if the same has been issued in his favour, to the Special Court at the time of furnishing sureties;

(iii) The appellant shall not indulge in any criminal activity and shall not interfere in any manner with the further investigation, if any and shall not make any effort to influence the prosecution witnesses; and

(iv) The appellant shall mark regular attendance with the local police station within which he is residing, at such periodical intervals as may be determined by the Special Court; and

(v) The appellant shall cooperate with the Special Court for early conclusion of the trial and shall not seek any adjournment when the prosecution witnesses would be in attendance.

(Mohd. Faiz Alam Khan, J.)

(Per Attau Rahman Masoodi, J.)

- (35) Having given an anxious thought to the ably authored judgment by my esteemed colleague, I find it my duty to put on record some further reasons to support the view taken as under:-
- (36) The legal question in the present case that has escaped the attention of the Special Court is as to whether mere pendency of an application seeking extension of time to complete the investigation would necessarily imply that the right of default bail would stand extinguished, particularly when the extension subsequently sought by the Public Prosecutor, through another application was granted by a prospective order on 05.06.2023. The next question which would simultaneously arise in the present case and was left unnoticed by the Special Court would be whether remand order was rightly passed on 02.06.2023 without passing any order on the application seeking extension of time to complete investigation and thereby the indefeasible right of default bail could be denied to the appellant.
- (37) Undisputed facts between the parties are that an application seeking extension of time by 90 days to complete investigation was made by the Public Prosecutor on the 90th day, i.e., 01.06.2023. The right of default bail accrued to the detinue at 12 O' clock in the midnight following the day, i.e., on 02.06.2023, by which time, the application seeking extension of time for completing the investigation had already been filed and ordered to come up next day when the remand as per the previous order dated 17.05.2023 would fall due.
- (38) It is already noticed that the remand was extended upto 05.06.2023 by virtue of an order dated 02.06.2023 without extension of time for investigation on the pending application filed on 01.06.2023 and the prosecution treated the pending application filed on 01.06.2023 to have become obsolete. It is for

this reason that a subsequent application seeking extension of time for completing investigation was filed on 05.06.2023. It is filing of two separate applications which has led to a vacuum insofar as the period of extension of time for completing investigation from 02.06.2023 to 05.06.2023 is concerned. The default bail application had come to be filed in the meantime on 02.06.2023. Thus the real question before the Special Court on 05.06.2023 was as to whether extension of remand on 02.06.2023 would *ipso facto* qualify the extension of time for the purpose of completing the investigation without any order being passed on the application filed on 01.06.2023. In other words, whether pendency of an application seeking extension of time for completing investigation would obstruct the accrual of right to default bail particularly when the period for completing the investigation was prospectively extended on 05.06.2023 for 50 days.

- (39) The Special Court in its order dated 26.06.2023 has clearly recorded that the extension of time for completing the investigation was granted on 05.06.2023. This clearly shows that there was complete non-application of mind by the Special Court insofar as the application made on 01.06.2023 is concerned. The Special Courts are under a bounden duty to consider and decide the respective applications seeking extension of time for completing investigation within the period of remand prescribed under law. The validity to the period of investigation legitimizes the grant of remand without which a judicial remand cannot be said to have obstructed or defeated the right of default bail, as is the case at hand.
- (40) The Special Court ought to have applied mind on the pending application seeking extension of time for completing the investigation prior to 02.06.2023 when the period of remand was extended upto 05.06.2023 without there being a qualifying order for completion of investigation on the application seeking extension of time by 90 days. This flaw on the part of the Special

Court while dealing with the earlier application on the date of its filing, i.e., 01.06.2023 or leaving it unattended on 02.06.2023 has lead to the accrual of an indefeasible right in favour of the detinue. The right accrued both on account of the fact that the first application itself was filed by the prosecution on 01.06.2023 leaving no scope for compliance of the Statute in the matter of opportunity and production of the detinue, and secondly, the Special Court having failed to apply its mind on the pending application granted judicial remand on 02.06.2023 upto 05.06.2023 without validation of extension of time to complete the investigation. This is a clear position of fact in the case at hand for which the benefit which had accrued to the appellant cannot be unsettled in view of the reasoning as has been recorded by my esteemed brother exhaustively in the judgment. Be it noted that right to personal liberty can only be curtailed by following due procedure under law. The investigating agency is obliged to stand on its toes in the matter of concluding investigation and must remain vigilant to follow the prescribed procedure, deviation whereof, it is well settled would not come to their rescue simply on the ground of procedural lapse. To be more clear it can be aptly said that right to life & personal liberty can only be confined by following due procedure but it cannot be taken away.

- (41) In the circumstances of the case, this Court would caution the Special Courts to remain careful in future on any such exigency. The administration of justice and any dereliction of duty in the matter of adjudication of such valuable rights cannot be taken a lenient view in ordinary course.
- (42) In the result, I concur with the relief granted in favour of the applicant-appellant for the cumulative reasons recorded as above.

(Attau Rahman Masoodi, J.)

Order Date: 12.09.2024/
Praveen/lakshman