Supreme Court of India
Uday Mohanlal Acharya vs State Of Maharashtra on 29 March, 2001
Author: B Agrawal
Bench: B.N. Agrawal

CASE NO.:
Appeal (crl.) 394 of 2001

PETITIONER:
UDAY MOHANLAL ACHARYA

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT: 29/03/2001

BENCH:
B.N. Agrawal

JUDGMENT:

L...I...T.....T.....T.....T.....T.....T.....T..J JUDGMENT B.N. AGRAWAL,J.

I have perused the judgment of my learned Brother Pattanaik,J., for whom I have the highest regard and while agreeing with him with respect to conclusion nos. 1 to 5, I find myself unable to agree on conclusion no. 6, enumerated hereunder, upon which alone decision of this appeal is dependent, and observations and direction connected therewith:-

The expression `if not already availed of used by this Court in Sanjay Dutt vs. State through CBI Bombay(II), (1994) 5 SCC 410, 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.

There was mushroom growth of financial establishments in the State of Maharashtra in the recent past. The sole object of these establishments was of grabbing money received as deposits from public, mostly middle class and poor on the promises of unprecedented highly attractive rates of interest or rewards and without any obligation to refund the deposit to the investors on maturity or without any provision for ensuring rendering of the services in kind in return, as assured. Many of these financial establishments had defaulted to return the deposits on maturity or to pay interest or

render the services in kind, in return, as assured to the public. As such deposits run into crores of rupees it had resulted in great public resentment and uproar, creating law and order problem in the State of Maharashtra, specially in the city like Mumbai. With a view to curb such unscrupulous activities of such financial establishments in the State of Maharashtra, it was found expedient to make suitable special legislation in public interest and accordingly Maharashtra Protection of Interest of Depositors (In Financial Establishment) Act, 1999 (hereinafter referred to as `the MPID Act) was enacted by the Maharashtra Legislature, Section 3 whereof provided that any financial establishment, which fraudulently defaults any repayment of deposit on maturity along with any benefit in the form of interest, bonus, profit or in any other form as promised or fraudulently fails to render service as assured against the deposit, every person including the promoter, partner, director, manager or any other person or an employee responsible for the management of or conducting of the business or affairs of such financial establishment shall, on conviction, be punished with imprisonment for a term which may extend to six years and with fine which may extend to one lac of rupees and such financial establishment also shall be liable to a fine which may extend to one lac of rupees.

The respondent-State of Maharashtra filed a complaint in the Court of the Special Judge, Greater Bombay, bearing C.R. No. 36 of 1999 for prosecution of the appellant for the offences under Sections 406 and 420 of the Indian Penal Code read with Section 3 of the MPID Act alleging therein that the appellant was carrying on business as a sole proprietor under the name and style of M/s. C.U. Marketing, C.U. Bhawan, S.V. Road, Andheri (W), Mumbai, during the course of which he collected about Rs. 450 crores from around 29000 depositors under a scheme floated by him promising thereunder to return the same on maturity together with highly attractive rates of interest, but failed to refund the same.

The appellant surrendered before the Special Judge and was remanded to judicial custody by order dated 17.6.2000. The period of sixty days as contemplated by proviso to Section 167(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as `the Code) was completed on 16.8.2000. On the next day, i.e., 17.8.2000 an application for being released on bail was filed on behalf of the appellant before the Special Judge alleging that no challan had been filed within the statutory period of sixty days and as such he was entitled to be released on bail under proviso to Section 167(2) of the Code. The said application was rejected by the Special Judge on the same day saying that the provisions of Section 167(2) of the Code were not applicable to the case on hand as the prosecution was for an offence under Section 3 of the MPID Act as well to which the provisions of Section 167(2) of the Code had no application. Thereafter the appellant preferred an application before the Bombay High Court which was placed for hearing before a Division Bench on 29.8.2000 on which date argument on behalf of the appellant was concluded and the case was adjourned to 31.8.2000 for hearing learned Additional Advocate General representing the State. In the meantime, challan was filed before the Special Judge on 30.8.2000. The High Court by its judgment dated 4.9.2000 came to the conclusion that proviso to Section 167(2) of the Code was applicable even to cases filed for prosecution of an accused for offences under MPID Act, but as the challan had already been filed, in view of the Constitution Bench judgment of this Court in the case of Sanjay Dutt, it was not possible to consider the prayer for bail made on behalf of the accused on the ground of non submission of challan within the period prescribed under proviso to Section 167(2) of the Code. The High Court

also placed reliance upon other judgments of this Court.

In order to appreciate the point in issue, it would be useful to refer to the provisions of Section 167(2) of the Code which run thus:-

S.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 in any custody under this section unless the accused is produced before him;

(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.

Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

[Emphasis added] It is settled by series of judgments of this Court in the last 25 years that framers of the Code conceived and desired that after expiry of the period prescribed in proviso to Section

167(2) of the Code, an accused has to be released on bail if no challan is filed because after the expiry of the statutory period prescribed therein, there is no power in Magistrate to remand for further custody, but the same proviso prescribes in clause (a)(ii) that `the accused person shall be released on bail if he is prepared to and does furnish bail. To be released on bail because of the default of submission of challan within the statutory period is a valuable right of the accused, but the framers of the Code have prescribed a condition in that very proviso referred to above that this right to be released on bail can be exercised only on furnishing of bail. Clause (a)(ii) of proviso to Section 167(2) of the Code not only says that the accused `is prepared to, but also says that the `accused does furnish bail and Explanation I to Section 167(2) of the Code clearly mandates that notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail". Just to test the scheme of the said provision, can it be conceived that if the accused is prepared to furnish bail but does not furnish the same, even in that eventuality the court concerned shall direct his release from custody only on the ground that the statutory period of filing the challan has expired? Therefore, in my view, for release from custody both the conditions aforesaid, read with the Explanation referred to above, must be fulfilled.

The next question to be considered is as to what will happen in a case where before any order directing release on bail is passed or before the bail bonds are furnished a challan is filed? It is well settled that once challan is filed, no sooner the court concerned applied its mind, cognizance shall be deemed to have been taken. Thereafter the power to remand the accused is under other provisions of the Code, including sub-section (2) of Section 309 thereof. A Constitution Bench of this Court in the case of Sanjay Dutt while considering correctness of Division Bench decision of this Court in the case of Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors., (1994) 4 SCC 602, laid down the law in paragraphs 48 and 49 of the judgment which read thus:-

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 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 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, AIR 1952 SC 106; Ram Narayan Singh v. State of Delhi, AIR 1953 SC 277 and A.K. Gopalan v. Government of India, AIR 1966 SC 816).

[Emphasis added]

49. This is the nature and extent of the right of the accused to be released on bail under Section 20(4)(bb) of the TADA Act read with Section 167 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.

[Emphasis added] On a bare perusal of law enunciated above, it would be clear that the Constitution Bench considered and in unequivocal terms disapproved the ratio of decision in the case of Hitendra Vishnu Thakur wherein it was laid down by a Division Bench of this Court that if for any reason the right of the accused to be released on bail under proviso to Section 167(2) of the Code has been denied then it can be exercised at a later stage even if challan is filed after expiry of the statutory period prescribed. The Constitution Bench in the aforesaid judgment has clearly laid down that the indefeasible right of the accused `is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if not already availed of . [Emphasis added]. It has further laid down that custody of the accused after challan has been filed is not governed by the provisions of Section 167 of the Code, but different provisions of the Code. The right of the accused cannot be enforced after the challan is filed `since it is extinguished the moment challan is filed . The case of Sanjay Dutt also referred to the views expressed by the three earlier Constitution Benches of this Court in connection with writ of habeas corpus on the ground that there was no valid order of remand passed by the court concerned. It has reiterated that a petition seeking 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 the return of the rule the custody or detention is on the basis of a valid order.

[Emphasis added].

If the writ petition filed either under Article 32 or Article 226 of the Constitution, as the case may be, for issuance of a writ of habeas corpus on the ground that accused was under custody without a valid order of remand has to be dismissed if during the pendency of such a petition a valid order of remand has been passed by the court concerned then the right of an accused claiming relief on the ground that he has a statutory right under proviso to Section 167(2) cannot be put on a higher footing than the constitutional right.

Out of the three Constitution Bench decisions of this Court referred to above and relied upon in the case of Sanjay Dutt, in the case of Naranjan Singh Nathawan & Ors. vs. State of Punjab, AIR 1952 SC 106, Patanjali Sastri, C.J., as he then was, speaking for himself, M.C.Mahajan, B.K. Mukherjea, S.R.

Das and Chandrasekhara Aiyar, JJ., while considering an application for issuance of writ of habeas corpus whereby order of detention issued under Section 3 of the Preventive Detention Act, 1950 was challenged, laid down the law at page 108 as follows:-

This is undoubtedly true and this Court had occasion in the recent case of Makhan Singh v. State of Punjab, Petn. No. 308 of 1951: (AIR (39) 1952 S.C.27) to observe `it cannot too often be emphasised that before a person is deprived of his personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected.

This proposition, however, applied with equal force to cases of preventive detention before the commencement of the Constitution, and it is difficult to see what difference the Constitution makes in regard to the position. Indeed, the position is now made more clear by the express provisions of S.13 of the Act which provides that a detention order may at any time be revoked or modified and that such revocation shall not bar the making of a fresh detention order under S. 3 against the same person. Once it is conceded that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold, in the absence of proof of bad faith, that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf.

[Emphasis added] In another Constitution Bench decision of this Court in the case of Ram Narayan Singh v. The State of Delhi & Ors., AIR 1953 SC 277, reliance whereupon has also been placed in Sanjay Dutts case, again while considering a petition for issuance of writ of habeas corpus, Patanjali Sastri, C.J. as he then was, noticed with approval, the law already laid down in the case of Naranjan Singh (supra) and observed at page 278 thus:-

It has been held by this Court that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings.

[Emphasis added] Similarly, again the Constitution Bench in its dictum in the famous case of A.K. Gopalan v. Government of India, AIR 1966 SC 816, was considering an application under Article 32 of the Constitution of India for issuance of a writ of habeas corpus challenging an order of detention issued under the Defence of India Rules wherein Wanchoo,J., speaking for himself and on behalf of P.B.Gajendragadkar, C.J., M. Hidayatullah, R.S. Bachawat & V. Ramawami,JJ., laid down the law that in dealing with a petition for habeas corpus the Court has to see whether after the filing of the writ and before the date of hearing there was any intervening factor, meaning thereby that if on the date of filing of the writ a person was under detention without there being any valid order, but if on the date of hearing a person was in detention under a valid order, merely because the detention on the date of the filing of the petition was invalid, the same cannot be a ground for issuance of writ of habeas corpus.

It is true that the right of an accused to be released on bail for default in submission of challan is a valuable and indefeasible right, but by the time the court is considering the exercise of the said right if a challan is filed then the question of grant of bail has to be considered only with reference to merits of the case under the provisions of the Code relating to grant of bail after filing of the challan which view is consistent with the view expressed by different Constitution Benches of this Court in several decades in connection with the issuance of writ of habeas corpus as well as for grant of bail.

My learned Brother has referred to the expression `if not already availed of referred to in the judgment in Sanjay Dutts case for arriving at conclusion no. 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 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 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 challan is filed.

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 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.

In case the court concerned has adopted any dilatory tactics or an attitude to defeat the right of the accused to be released on bail on the ground of default, the accused should immediately move the superior court for appropriate direction. But if the delay is bona fide and unintentional and in the meantime challan is filed then in view of the aforesaid judgments of this Court, such a petition has to be dismissed and it cannot be said that the accused has already availed of the right accruing under proviso to Section 167 of the Code. It need not be repeated that the right accruing under proviso to Section 167(2) of the Code on the expiry of the statutory period of sixty days cannot be said to have been availed of by mere making of an application for bail expressing therein willingness to furnish bail, but on furnishing bail bond as required under clause (a)(ii) of proviso read with Explanation I to Section 167(2) of the Code. If because of any bona fide view or procedure adopted by the court concerned some delay is caused and in the meantime challan is filed, the Court has no power to direct release under proviso to Section 167(2) of the Code.

The present case, where the prosecution was for an offence under the MPID Act, being a case of first impression, the Court concerned was of bona fide opinion that the provisions of Section 167(2) of the Code were not applicable. That view of the Special Judge was reversed by the High Court, but before it could fully apply its mind, the challan was filed. In this background, I am clearly of the opinion that the right of the accused to be enlarged on bail under proviso to Section 167(2) of the Code cannot be said to have been availed of in the present case.

This being the position, I have no option but to hold that the High Court has not committed any error in passing the impugned order so as to be interfered with by this Court.

Accordingly, the appeal is dismissed.

J. [B.N.AGRAWAL] MARCH 29, 2001.