

(2019) 05 J&K CK 0022

In the Jammu And Kashmir High Court

Case No : Criminal Appeals (CRA) No. 04 Of 2019, IA No. 01 Of 2019

Abdul Rehman Mir And Anr @APPELLANT@Hash State Of Jammu & Kashmir And Ors

Date of Decision : 08-05-2019

Acts Referred:

National Investigation Agency Act, 2008 — Section 6, 10, 11, 11(1), 13, 21, 21(2)(3) 21(4), 21(2), 22, 22(3)
Code Of Criminal Procedure, 1973 — Section 154, 161, 167, 167(2), 167(2)(a)(i), 167(2)(a)(ii), 173, 439
Code Of Criminal Procedure, 1898 — Section 344, 497
Unlawful Activities (Prevention) Act, 1967 — Section 3, 17, 18, 19, 21, 22, 38, 39, 40, 43D, 43D(5)
Constitution Of India, 1950 — Article 14, 16

Citation : (2019) 05 J&K CK 0022

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M.A. Qayoom, Javaid Iqbal

Final Decision : Disposed Off

Judgement

1. In terms of the instant appeal, the appellants have sought the indulgence of this Court for setting aside of order dated 05.02.2019 passed by Court of Additional Sessions Judge, Srinagar on the following grounds:

i) That the appellant No. 1 is working as Gardner in B. B. Cantt, Srinagar and the appellant No. 2 is working as Electrician and both the appellants are earning their livelihood through lawful means to sustain their families. It is true that Abdul Qayoom Mir, their brother has gone to Pakistan in the year 1993 and has married over there, but the said Abdul Qayoom Mir is also not involved in any criminal activity. He is running a Hotel in Chehla Muzaffarabad and is also living in a rented accommodation over there. Since he had to raise the construction of his residential house, therefore, he had requested the appellants and their elder brother Abdul Razaq to provide him some monetary assistance against the property which he was going to inherit. It was at his request that the appellants had decided to sell 10 Marlas of land situated at Iqbal Abad, Bemina for

consideration of Rs. 53.80 lacs out of which at the request of Abdul Qayoom an amount of Rs. 5.00 lacs was handed over by them to Showkat Ahmad their cousin for its onward transmission through Nayeem Ahmad Khan to Abdul Qayoom Mir. The appellants are not members of any banned organization, they have also no connection with any organization, which has been declared as banned or a terrorists organization. In that view of the matter they were entitled to bail, but the trial court having rejected their bail application on surmises and conjectures, therefore the order is liable to be set aside.

ii) That the police report, the allegations levelled against the appellants is that the Nayeem Ahmad Khan had obtained the money from the appellants through Showkat Ahmad for handing over the same to the militants of Hizbul Mujaddiin Organization. The learned trial court in the impugned order dated 05.2.2019 has however stated that during the course of investigation, it has been revealed that accused NO. 2 Showkat Ahmad received the money and has handed over the same to the Abdul Majid Mir and Abdul Rehman Mir so that the same could be passed onto the militants for continuing their militant activities and the police during the investigation has recovered the money from the possession of all the accused person. It is therefore obvious that the learned trial judge has not examined the matter in its proper perspective and has declined bail to the appellants on flimsy grounds. Even while considering the bail application, the learned trial Judge has not gone into the allegations leveled by the police against the appellants. He has however stated that the accused Showkat Ahmad has received the money and has handed over the same to the appellants so as to pass on the same to the appellants so as to pass on the same to the militants for continuing their militant activities. While allegation on the fact of its contrary to the police report, which renders the impugned order liable to be set aside.

iii) That it is well settled proposition of law that any confessional statement made during the investigation is not admissible in law. It has further been held that the statement recorded under Section 161 Cr. PC cannot be used for the purposes of declining the bail to the accused. All that the court while considering the application for grant of bail, has to consider is the report of the police furnished under Section 173 Cr. PC to the court or else the entries made in the case diary. Once the case of the appellants is considered in the context of the aforesaid principle of law, it is quite obvious that they are innocent and have been falsely implicated in FIR No. 85/2018. The learned trial court has not considered the case of the appellants in light of the averments made by them in their respective applications for bail and also what is stated by them here in this appeal. Therefore also the impugned order is liable to be set aside.

iv) That under Section 43-D (5) of the Unlawful Activities Act, no person accused of an offence punishable under Chapter IV and VI of the Act if in custody can be released on bail or on his own bond unless the public prosecutor is given an opportunity of being heard. The bail of the said persons can also be refused, if there are reasonable grounds for believing that accusation against the said

persons are prima facie true. It is however submitted that the allegations levelled against the appellants in the police report or in the order of the court non-existent and untrue. There was thus no prima facie grounds available to the trial court to decline the bail to the appellants. The appellants according to the police report, were arrested on 26.10.2018 and by now they have been in police custody for more than 90 days. The police had to complete the investigation within 90 days and on their failure to complete the investigation, the appellants were entitled to bail. In the instant case the appellants completed 90 days on 16.01.2019 and as no challan was filed against them, therefore the appellants were entitled to bail after the expiry of period of 90 days. This aspect of the matter was highlighted by the appellants before the learned trial court, but learned trial court has failed to consider the same in its right perspective which too renders the impugned order is liable to be set aside.

2. It requires to be mentioned herein that the appellants have preferred an application for grant of bail before the court of learned Additional Sessions Judge, Srinagar on 08-11-2018 which has been dismissed on 05.02.2019. The grounds taken therein by the appellant was that the they were wrongly implicated in the case. It was further stated by them that they had sold their land and the money which had been seized by the police is the consideration amount which they received by disposing off their land. This fact that they had disposed of their land was evident from the fact that the sale agreement had been executed by them besides this the bank statement which they had placed on record along with their application clearly establishes according to them that the said amount had been received by them by selling their land. It was also canvassed that the appellants have been in the police custody for last 90 days and were required to be admitted on bail by default clause as provided by Section 167 (2) CR. PC. More than three months have elapsed since the date of their arrest. It was also pointed out that the offence under Section 17, 18, 38, 39 and 40 of ULA (P) Act are not made out.

3. Learned Additional Sessions Judge Srinagar has dismissed the bail application with following observation after hearing the parties as:

".....When the crime alleged is cruel and heinous, the nature of such crime may induce an instant reaction to refuse the bail. The very seriousness of the offence alleged insufficient ground to reasonably believe that the accused may misuse his liberty by interference with the evidence that may be available in the case, if possible or by absconding if tempering is not possible. There is sufficient material on record which makes the court to believe that the accused is prima facie involved in the commission of offence under Section 17, 18, 38, 39 and 40 ULPA. In the backdrop of discussion as made above, the court is faced with a situation where accused are not entitled to be released on bail. The offences allegedly committed by the accused are serious and heinous and the offence is against the state and society. In the facts and circumstances of the case, I am of the considered opinion that this is a fit case for invoking exception to the general rule.

Thus keeping in view the perusal of the instant bail application, objections filed in rebuttal by the prosecution, CD file and the consideration of rival arguments advance on both the sides in the light of law on the subject as interpreted by the Hon'ble Apex Court and various authoritative courts from time to time and in particular the bar created by Section 43 D ULPA. I in the peculiar facts and circumstances of the case, am of the considered opinion that rejection alone of the bail application shall meet the ends of justice.

4. The other side had resisted the bail application in view of the bar created under Section 43-D(5) which provides that the bail cannot be granted unless the court finds in its opinion the accused have in terms of the proviso to Sub Section 5 not committed any offence as there was no scope to hold so according to respondents.

5. Learned Sr. AAG while relying on Section 21 and 22 of the National Investigation Agency Act read with Section 43 D of Unlawful Activities (Prevention) Act, 1967 submits that the instant appeal is not maintainable.

6. Learned counsel for the appellants while canvassing the order as bad has submitted that the appeal is maintainable in view of the rider placed under Sub Section 4 of Section 21 of National Investigation Agency. It has been vehemently contended that the sub section 4 is to be read independent of the sub section. Furthermore the omission the part of the learned Additional Sessions Judge to return any findings on the admissibility of the default bail claimed by the petitioner before the said court makes the order erroneous. On merit too, the appellants are entitled to concession of bail. The transaction of which reference is found in the police case has been properly explained before the investigation agency, learned Sessions Judge and before this court as well has been also submitted. Learned counsel in order to substantiate his arguments has taken reference on the judgment of the Hon'ble Apex Court in the State of Maharashtra Vs. Surendra Pundlik Gadling and Ors. Criminal Appeal No. 264 of 2019 and order passed by this court in case titled Sumaiya Rasool and anr. Vs. State of J&K Station House officer, Anantnag on 01.10.2018.

7. On the other hand, learned Sr. AAG has submitted that the appeal merits rejection in light of the mandate of Section 21 read with Section 3 of Section 22 and 43 (D) of the Unlawful Activities Prevention Act 1967. He has placed reliance on judgment of the Hon'ble Apex Court in case titled State of A.P. v. Mohd. Hussain, (2014) 1 SCC 706 to sound that the order of bail cannot be challenged before the single Judge. Further he has placed reliance on the judgment of the Coordinate Bench of this Court in case titled Parvaiz Ahmad Palla Vs. State of J&K through SHO P/s Kulgam and Bashir Ahmad Sofi Vs. State of J&K through SHO P/s Baramulla. He has also referred to the judgments of the Kerala High Court in Mohammad Nainar and anr. Vs. State of Kerala and anr. 2011 CRI.L.J.1729, Ashruff Vs. State of Kerala 2011 CRI.L.J. 1021 and Kamarudheen Vs. SHO Muvattupuzha Police State 2011 CRI.L.J. 1938 and submits that the instant appeal merits rejection. Precisely the point has been raised by learned Sr. AAG

that the order passed by the learned sessions Judge is to be challenged before the Division Bench of this Court and not before the Single Bench

8. In rebuttal learned counsel for the petitioner has submitted that the judgments relied by learned Sr. AAG are not applicable to the instant case. It is also his submission that Sub Section 2 has no application in the instant case as the state has constituted two courts one at Jammu and another at Srinagar for trial of various cases covered under the provisions of National Investigation Agency. The order passed by the learned sessions Judge cannot be deemed to have been passed in terms of Sub section 3 of the section 22 of the NIA Act. It is also his submission that the investigation of the case too has not been made by the National Investigation Agency and so the provisions of NIA Act would not be attracted in the instant case

9. Considered the rival arguments.

10. In my opinion the remedy available against the order passed by the learned Additional Sessions Judge, Srinagar impugned herein would in no case to be in the form of an appeal as is being contended by the learned counsel. The plea had also been raised in CR No. 55/2018 titled Suhail Ahmad Dar Vs. State of J&K which was turned down in light of the Judgment of the Apex Court in case titled State of Andhra Pradesh Vs. Mohammad Hussain decided on 13.09.2013.

11. This being the case, the question still remains as to what remedy could be availed or was available to the appellant herein when an application preferred for bail was rejected by the learned Additional Sessions Judge, Srinagar by taking resort to provisions of 43-D Unlawful Prevention Act. One of the contention raised in terms of the instant appeal is that even though appellant was arrested on 16.01.2019 and had completed almost 90 days and this plea when raised before the learned Additional Sessions Judge was not considered by him while passing the impugned order. Since the investigation agency has omitted to file final report in terms of Section 173 Cr. PC within the time prescribed under Section 167(2), the appellant are entitled to default bail.

12. Learned Sr. AAG has submitted as noted above that even the order passed by the learned Additional Sessions Judge, Srinagar has to be treated as an order passed by the Special Court in terms of Section 22 (3) of the National Investigating Agency Act and so the appellant if had any grievance about the passing of the said order, had to file an appeal in terms of the Section 21 (2) (3) of the National Investigation Agency Act, 2008. This argument was made while amplifying the arguments in terms of the Section 22(3) of the National Investigation Agency Act in terms of which the court of Sessions has to be treated as a special court subject to satisfaction of the condition recited therein till Special Courts were constituted by the Government.

13. The argument however would not carry any force as Special Courts have been constituted both in Kashmir as well as in Jammu Province and so the deemed position with regard to exercise of power by Sessions Courts would not

be attracted. Notification regarding creation of Special Courts reads as:

"S.O 2165 (E).__ In exercise of the powers conferred by sub- section (1) of Section 11 of the National Investigation Agency Act, 2008, the Central Government hereby notifies the Designated Courts under TADA/POTA at Jammu and Srinagar as the Special Court for purposes of the said sub- section (1) of Section 11 of the said Act for the trial of Scheduled Offences.

2. The jurisdiction of the Special Court mentioned above shall extend throughout the State of Jammu and Kashmir."

14. For proper appreciation of the contention raised it would be quote apposite to have reference of Section 17, 18, and 19, of the Unlawful Activities Prevention Act:

"17. Punishment of raising funds for terrorist Act.-

Punishment for raising funds for terrorist act. -Whoever, in India or in a foreign country, directly or indirectly, raises or collects funds or provides funds to any person or persons or attempts to provide funds to any person or persons, knowing that such funds are likely to be used by such person or persons to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.]

18. Punishment for conspiracy, etc.-Whoever conspires or attempts to commit or advocates, abets, advises or incites, directs or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

19. Punishment for harbouring, etc.-Whoever voluntarily harbours or conceals, or attempts to harbour or conceal any person knowing that such person is a terrorist shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and shall also be liable to fine:

Provided that this section shall not apply to any case in which the harbour or concealment is by the spouse of the offender.

15. It may also need reference herein that the National Investigation Agency Act had been enacted for constitution of an investigating agency at national level to investigate and prosecute the offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organizations and for matters connected therewith or incidental

thereto. The superintendence of the Agency has to vest in the Central Government under Section 4 of the Act. The mechanism for investigation of a case is provided in Section 6 of the Act which lays an obligation on the SHO Police Station concerned after receiving information under Section 154 of the Code to forward the same to the State Government. The State Government on receipt of said report has to forward it to the Central Government as expeditiously as possible. On its receipt, the Central Government has to determine whether offence is a scheduled offence or not and has also to examine gravity of the offence and other relevant factors for determining whether case is required to be investigated by the Agency. The Agency can take investigation of the case if the Central Government is of the opinion that the said case is required to be assigned to the said Agency for investigation. Even the Central Government may, suo motu, direct the Agency to investigate the offence.

16. For appreciation of the argument raised as to applicability of Section 21 of National Investigation Agency Act, it may be proper herein to refer to Section 6 of the said Act:

6. Investigation of Scheduled Offences.-

(1) On receipt of information and recording thereof under section 154 of the Code relating to any Scheduled Offence the officer-in-charge of the police station shall forward the report to the State Government forthwith.

(2) On receipt of the report under sub-section (1), the State Government shall forward the report to the Central Government as expeditiously as possible.

(3) On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is a Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.

(4) Where the Central Government is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.

(5) Notwithstanding anything contained in this section, if the Central Government is of the opinion that a Scheduled Offence has been committed which is required to be investigated under this Act, it may, suo motu, direct the Agency to investigate the said offence.

(6) Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

(7) For the removal of doubts, it is hereby declared that till the Agency takes up

the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation.

17. It may also be proper to make a mention of Section 10 of the Act, which provides as:

10. Power of State Government to investigate Scheduled Offences. -Save as otherwise provided in this Act, nothing contained in this Act shall affect the powers of the State Government to investigate and prosecute any Scheduled Offence or other offences under any law for the time being in force. ...

18. Having in view what is provided under Section 6 and 10 of the National Investigation Act, it could be safely stated that the investigation of the offences/cases under the National Investigation Agency Act which have been incorporated in the Schedule can be made both by the premier National Investigation Agency as well as State Investigation Agencies. Special Courts for trial of the scheduled offences have to be constituted under Section 11 of the said Act which would have jurisdiction under Section 13 of the said Act to try the cases investigated by the Agency. A glance on both the provisions reveals:

11. Power of Central Government to constitute Special Courts.-

(1) The Central Government shall, by notification in the Official Gazette, for the trial of Scheduled Offences, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

(2) Where any question arises as to the jurisdiction of any Special Court, it shall be referred to the Central Government whose decision in the matter shall be final.

(3) A Special Court shall be presided over by a judge to be appointed by the Central Government on the recommendation of the Chief Justice of the High Court.

(4) The Agency may make an application to the Chief Justice of the High Court for appointment of a Judge to preside over the Special Court.

(5) On receipt of an application under sub-section (4), the Chief Justice shall, as soon as possible and not later than seven days, recommend the name of a judge for being appointed to preside over the Special Court.

(6) The Central Government may, if required, appoint an additional judge or additional judges to the Special Court, on the recommendation of the Chief Justice of the High Court.

(7) A person shall not be qualified for appointment as a judge or an additional judge of a Special Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge in any State.

(8) For the removal of doubts, it is hereby provided that the attainment, by a person appointed as a judge or an additional judge of a Special Court, of the age

of superannuation under the rules applicable to him in the service to which he belongs shall not affect his continuance as such judge or additional judge and the Central Government may by order direct that he shall continue as judge until a specified date or until completion of the trial of the case or cases before him as may be specified in that order.

(9) Where any additional judge or additional judges is or are appointed in a Special Court, the judge of the Special Court may, from time to time, by general or special order, in writing, provide for the distribution of business of the Special Court among all judges including himself and the additional judge or additional judges and also for the disposal of urgent business in the event of his absence or the absence of any additional judge.

13. Jurisdiction of Special Courts.-

(1) Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried

(2) If, having regard to the exigencies of the situation prevailing in a State if,-

(a) it is not possible to have a fair, impartial or speedy trial;

or

(b) it is not feasible to have the trial without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor or a judge of the Special Court or any of them; or

(c) it is not otherwise in the interests of justice, the Supreme Court may transfer any case pending before a Special Court to any other Special Court within that State or in any other State and the High Court may transfer any case pending before a Special Court situated in that State to any other Special Court within the State.

(3) The Supreme Court or the High Court, as the case may be, may act under this section either on the application of the Central Government or a party interested and any such application shall be made by motion, which shall, except when the applicant is the Attorney-General for India, be supported by an affidavit or affirmation.

19. It does not emanate from the record or from the plea taken from the State that the Central Government had been approached by the State government to have investigation of the case by the Agency or otherwise Central Government was of the view that the investigation of the case be assigned to the Agency. The jurisdiction for grant of bail had been invoked in terms of the petition presented before the regular criminal court which was dismissed with observation referred above. The contention raised as also observed supra on behalf of the State that the prayer if any was needed to be made for grant of bail be made before the Division Bench of the High Court, has to be turned down. The judgment of the Coordinate Bench referred by the learned Senior AAG have been passed "Sub

Silentio", while assuming that the order which was in the bail application challenged before the High court being that of a Special Court, remedy in terms of Section 21(2) of the National Investigation Act had to be availed and so the petition presented before Division Bench.

18. It is conspicuous from the perusal of the order passed by the learned Sessions Judge that the plea taken for grant of bail has not been considered or dealt in terms of the said order. The Hon'ble Apex court in Rakesh Kumar Paul Vs. State of Assam (AIR 2017 SC 3948) has observed that even an oral prayer would be sufficient for considering the plea of bail. Their Lordship has observed that even presentation of the challan after the statutory period prescribed for finalizing of the investigation would not disentitle the accused to bail. Pertinent it would be proper herein to reproduce following observations made by their Lordships as:

Hon'ble Mr. Justice Madan B. Lokur

1. In Measure for Measure the Duke complains (in the given situation): "And liberty plucks justice by the nose". 1 The truth is that personal liberty cannot be compromised at the altar of what the State might perceive as justice - justice for one might be perceived as injustice for another. We are therefore unable to agree with learned counsel for the State that the petitioner is not entitled to his liberty through what is commonly referred to as 'default bail' or that the justice of the case should persuade us to decide otherwise.

2. The facts in these petitions are not in dispute and we need not go into them in any great detail since we are really concerned with the interpretation of the words "imprisonment for a term not less than ten years" appearing in clause (i) of proviso (a) to Section 167(2) of the Code of Criminal Procedure, 1973 as amended in 1978.

A few facts

3. A First Information Report No. 936 of 2016 was lodged on 27th October, 2016 in respect of allegations made under the provisions of the Prevention of Corruption Act, 1988 (PC Act) and the Indian Penal Code, 1860 (IPC). Although the petitioner was not named in the First Information Report, investigations seemed to implicate him in a very large and structured conspiracy. Accordingly, on 5th November, 2016 the petitioner was taken into custody pending further investigation.

4. Ordinarily, the maximum period of detention during the course of investigation (without a charge sheet or challan being filed) would be 60 days in terms of clause (ii) of proviso (a) to Section 167(2) of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.'). In the petitioner's case, this period would come to an end on 3rd January, 2017. However according to the State, since the petitioner had committed offences which could result in "imprisonment for a term not less than ten years" he could be kept in custody for a period of 90 days in terms of

clause (i) of proviso (a) to Section 167(2) of the Cr.P.C. Therefore, the question before us is whether, pending investigation, the petitioner could be kept in custody for a maximum period of 60 days in terms of clause (ii) of proviso (a) to Section 167(2) of the Cr.P.C. or for 90 days in terms of clause (i) of proviso (a) to Section 167(2) of the Cr.P.C. without a charge sheet being filed.

5. On 20th December, 2016 (before the expiry of 60 days), the petitioner applied for bail before the Special Judge dealing with cases relating to offences under the PC Act. His application was rejected.

6. Subsequently, on or about 11th January, 2017 (after the expiry of 60 days of detention but before the expiry of 90 days of detention), the petitioner applied for bail before the Gauhati High Court, but that application was rejected on 11th January, 2017. The prayer made in the application for bail was for grant of "regular bail" under Section 439 of the Cr.P.C. This is of some importance because, according to learned counsel for the State, assuming the petitioner could be detained only for a maximum period of 60 days during investigations, he had not applied for 'default bail', that is bail in default of the prosecution filing a charge sheet against him soon after that 60 day period of detention, but had only applied for "regular bail".

7. At this stage, it may be mentioned that even though the petitioner had not applied for 'default bail' he did contend before the High Court that he was entitled to 'default bail' since no charge sheet had been filed against him within 60 days of his arrest during investigations. This submission was considered by the High Court but rejected, not on the ground that the petitioner had not applied for 'default bail' but on the ground that he could be detained for 90 days without a charge sheet being filed and that period of 90 days had not yet come to an end. (The period of 90 days would come to an end on or about 2 nd February, 2017).

8. To complete the narration of essential facts, it may be mentioned that a charge sheet was filed against the petitioner on 24 th January, 2017 that is after 60 days of his detention but before completion of 90 days of detention.

9. In view of the charge sheet having been filed, the modified question before us is whether the petitioner was entitled to 'default bail' with effect from 3rd or 4th January, 2017 onwards and, in any case on 11th January, 2017 when his application for "regular bail" was rejected by the Gauhati High Court.

28. We may also look at the entire issue not only from the narrow interpretational perspective but from the perspective of personal liberty. Ever since 1898, the legislative intent has been to conclude investigations within twenty-four hours. This intention has not changed for more than a century, as the marginal notes to Section 167 of the Cr.P.C. suggest. However, the Legislature has been pragmatic enough to appreciate that it is not always possible to complete investigations into an offence within twenty-four hours. Therefore initially, in the Cr.P.C. of 1898, a maximum period of 15 days was

provided for completing the investigations. Unfortunately, this limit was being violated through the subterfuge of taking advantage of Section 344 of the Cr.P.C. of 1898. The misuse was recognized in the 41 st Report of the Law Commission of India and consequently the Law Commission recommended fixing a maximum period of 60 days for completing investigations and that recommendation came to be enacted as the law in the Cr.P.C. of 1973. Subsequently, this period was also found to be insufficient for completing investigations into more serious offences and, as mentioned above, the period for completing investigations was bifurcated into 90 days for some offences and 60 days for the remaining offences.

38. This Court also dealt with the decision rendered in Sanjay Dutt 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 Mohamed Iqbal Madar Sheikh v. State of Maharashtra 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 prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for 'default bail' during the interregnum when the statutory period for filing the charge sheet or challan expires and the submission of the charge sheet or challan in court. Procedure for obtaining default bail.

Procedure for obtaining default bail

40. In the present case, it was also argued by learned counsel for the State that the petitioner did not apply for 'default bail' on or after 4th January, 2017 till 24th January, 2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11th January, 2017 in the Gauhati High Court - he made no specific application for grant of 'default bail'. However, the application for regular bail filed by the accused on 11th January, 2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore, it is not as if the petitioner did not make any application for default bail - such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion,

in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

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

50. We allow the petition and set aside the judgment and order of the High Court.

51. The companion petition, being S.L.P. (Crl.) No. 2176 of 2017 is rendered infructuous and is dismissed as such.

Hon'ble Mr. Justice Deepak Gupta:

113. In view of the above discussion, my findings are as follows

113(1). I agree with both my learned brothers that the amendment made to the Prevention of Corruption Act, 1988 by the Lokpal and Lokayuktas Act, 2013 applies to all accused charged with offences under this Act irrespective of the fact whether the action is initiated under the Lokpal and Lokayuktas Act, 2013, or any other law;

113(2). Section 167(2)(a)(i) of the Code is applicable only in cases where the accused is charged with (i) offences punishable with death and any lower sentence; (ii) offences punishable with life imprisonment and any lower sentence and (iii) offences punishable with minimum sentence of 10 years;

113(3). In all cases where the minimum sentence is less than 10 years but the maximum sentence is not death or life imprisonment then Section 167(2)(a)(ii) will apply and the accused will be entitled to grant of 'default bail' after 60 days in case charge-sheet is not filed.

113(4). The right to get this bail is an indefeasible right and this right must be exercised by the accused by offering to furnish bail.

On issues 2 to 4, I agree and concur with my learned brother Lokur J.

and with due respect I am unable to agree with learned brother Pant J.

I agree and concur with the conclusions drawn and directions given by learned

brother Lokur J. in Paras 49 to 51 of his judgment.

Hon'ble Mr. Justice Prafulla C. Pant:

72. From the above analogy, I am of the opinion that the intention of the legislature was that if an offence was punishable with imprisonment upto ten years, then it falls within the provision of Section 167(2)(a)(i) of the Code, and the permissible period for investigation is ninety days. The intention of the Legislature in extending the permissible time period from sixty days to ninety days for investigation is to include the offences in which sentence awardable is at least ten years or more. Therefore, as discussed above, though the expression "not less than ten years" used in Section 167(2)(a)(i) of the Code has created some ambiguity, the real intention of the legislature seems to include all such offences wherein an imprisonment which may extend to ten years is an awardable sentence. In other words, for offences wherein the punishment may extend to ten years imprisonment, the permissible period for filing charge sheet shall be ninety days, and only after the period of ninety days, the accused shall be entitled to bail on default for non-filing of the charge sheet. (In the present case, admittedly the charge sheet is filed within ninety days). I may further add that, since the expression "not less than ten years" has caused ambiguity in interpretation, the best course for the legislature would be to clear its intention by using the appropriate words.

Answer to question II:

73. The second issue which requires to be addressed is whether the appellant is entitled to statutory bail under Section 167(2) of the Code though he has not made any application under Section 167(2) of the Code before the Magistrate (or Special Judge) prior to the filing of the charge sheet. The record of the case reveals that the appellant was arrested on 4.11.2016 and produced before the Magistrate on 5.11.2016 and he was remanded to custody for the first time. The period of sixty days for filing charge sheet expired on 04.01.2017. The charge sheet came to be filed on 24.1.2017. Initially the appellant had applied for regular bail before the Sessions Court which came to be rejected on 20.12.2016. Thereafter he moved bail application No. 23/2017 for bail under Section 439 of the Code before the High Court of Guwahati. This bail application was disposed on 11.01.2017 which was after sixty days of arrest, but prior to filing of charge sheet. A perusal of this bail application shows that this bail application was moved under Section 439 of the Code for regular bail on merits and not as a bail claiming the statutory right under Section 167 of the Code. In none of the grounds taken in the bail application, the appellant has pleaded for default bail as a result of non filing of the charge sheet. All the grounds urged are on merits. The prayer is also for regular bail. It appears that, prior to the time of hearing, the counsel for the appellant has realised that the accused was entitled for default bail under Section 167(2) and has taken the plea in the oral arguments in the High Court that since sixty days for filing charge sheet has expired, he is entitled to bail as matter of right under Section 167(2) of the Code. The question

thus arises, whether such application on merits can be equated to be an application seeking enforcement of statutory right under Section 167(2) of the Code and whether such practice of taking such oral arguments directly before the High Court in a pending regular bail application without having taken such grounds in the application or having approached the Magistrate (or Special Court) should be entertained.

78. The law laid down as above shows that the requirement of an application claiming the statutory right under Section 167(2) of the Code is a prerequisite for the grant of bail on default. In my opinion, such application has to be made before the Magistrate for enforcement of the statutory right. In the cases under the Prevention of Corruption Act or other Acts where Special Courts are constituted by excluding the jurisdiction of the Magistrate, it has to be made before such Special Court. In the present case, for the reasons discussed, since the appellant never sought default bail before the court concerned, as such not entitled to the same.

81. I may hasten to add that in the present case, the allegations do not disclose merely an economic offence but it shows a transgression of the constitutional rights of the victims of the crime. The Chairman of the APSC has the responsibility on behalf of the State for enforcement of the Fundamental Rights of equality in matters of public employment enshrined under Articles 14 and 16 of the Constitution of India. If the allegations are found to be true, then the offence cannot merely be considered as an economic offence, but a fraud on the Constitution itself by the persons appointed to enforce it.

82. In the above circumstances, without expressing any views on the merits of the case pending before the trial court, looking into the nature of allegations, the role attributed to the appellant, the fact that further investigation regarding the offence is underway, possibility of tampering evidence and influencing witnesses, I am of the opinion that it is not a fit case for grant of bail at this stage even on merits.

19. The judgments of the Kerala High Court relied on by the Learned Senior Additional Advocate General only clarify the legal position with regard to the filing of the appeal against the order passed by a Special Judge and the principle of law laid down by Kerala High Court is in tune with the principles of law laid down by Hon'ble Apex Court in Md. Hussain's case *supra*. It is amply being made clear that the jurisdiction if exercised by the Special Court in granting or refusing of the bail, aggrieved person can approach Division Bench of the High Court.

20. It may again require a mention herein that the bail application was considered by the learned Additional Sessions Judge, Srinagar and on consideration thereof rejection with observation above quoted. The bail application has been entertained by the Sessions court notwithstanding the fact that the Government had constituted Special Court for trial etc of the cases covered by the provisions of Act, in terms of S.O. 2165 (E). In this view of the

matter, I am of the view that the plea raised in the order is to be challenged by the aggrieved person before Division Bench in terms of the Section 21 of the National Investigation Agency Act, 2008 requires to be turned down. The jurisdiction which the regular criminal court has exercised can safely be stated to have been done under Section 497 Cr. PC. It may also need a reference herein that the Special Court constituted in terms of the National Investigation Act has to try the cases where the investigation has been made by the agency which is not a case herein. The case has been investigated by the local investigating agency and it would be thus a mechanism provided under Cr. PC which is to be followed for entertaining a petition for bail, in case a person is arrested in connection with the accusation of the commission of offence under Unlawful Activities (Prevention) Act, 1967 more particularly referred in Section 43 (D). It has not been the case of investigating agency before learned Additional Sessions Judge that it had got the extension in the period of investigation under Section 43 (D) of the said Act. Section 43(D) requires 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. Proper it may be to recite herein relevant part of Section 43 (D) of the Unlawful Activities (Prevention) Act as:

"....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, extent the said period up to one hundred and eighty days.."

21. Keeping in view the principle of law laid down by the Hon'ble Apex Court in Rakesh Kumar Paul's case referred above, I am of the opinion that the learned Additional Sessions Judge, was required to examine the contention raised on behalf of the appellants herein for grant of bail by applicability of the default clause of Section 43 (D) of the Unlawful Activities (Prevention) Act 1967 which he having not done. The omission to consider same is militative of Apex Court judgment. This Court can exercise such a power conferred by Section 167 Cr. PC read with Section 43 (D) of the Unlawful Activities (Prevention) Act, while treating the appeal as a petition for grant of bail under Section 498 Cr.PC, and consider it accordingly more particularly in light of the law laid down by Hon'ble Apex Court in Rakesh Kumar Paul's case.

22. In Emperor V. Hutchinson (AIR 1931 All 356, 358: 32 Cri LJ 1271) (Merut Conspiracy Case), it had been emphasized that the powers of High Court under Section 498 Cr. PC are plenary in nature. May it be so, the power is discretionary in nature and same has to be used in fair and just manner. The power of High Court has not been restricted by the provisions in terms of which it is granted, i.e., Section 498 Cr. PC. It would be pertinent to quote Section 498 Cr. PC herein:-

"498. Power to direct admission to bail or reduction of bail.

.....the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced....."

23. Since the investigating agency has omitted to file final report in terms of Section 173 Cr. P.C within the time prescribed under Section 167(2) of Cr. P. C, the appellants whose appeal is now treated as petition for bail are held entitled to default bail. The bar created u/s 43 ULA(P) Act would not come in the way of petitioner to seek enforcement of default bail, as their further detention is not permissible. Nature of accusation or counter version relied on by the appellant need not to be gone into at this stage as the merit of the same may be seen at appropriate stage by the learned trial court in case final report is submitted before it. Accordingly, appellants are admitted to bail in case FIR No. 85/2018 of Police Station, Pantha Chowk, Srinagar subject, however, to the following conditions:

1. The appellants shall furnish bail to the tune of Rs.50,000/ (rupees fifty thousand only) with one surety in the like amount to the satisfaction of the Principal Sessions Judge, Srinagar.
2. They shall not leave the State, without permission of this Court;
24. The investigating agency is left free to approach the court if concession granted herein is required to be withdrawn on any count hereinafter.
25. Disposed of as above.