
Right of the Accused to be enlarged on Bail vis-à-vis filing of the Chargesheet

Nitin Kapoor

ABSTRACT

The principle of Bail derives its meaning from the concept of bailment which implies temporary release on security. Besides Chapter XXXIII of the Cr.p.c, there are provision other provisions also like Section 167 (2) Cr.p.c or Section 389 Cr.p.c where prisoner can be enlarged on bail. This paper is largely focussed on the indefeasible right of the accused to be released on bail as provided under Section 167 (2) Cr.p.c qua filing of chargesheet either before, at or immediately after the culmination of statutory period of 60/ 90 days with respect to the latest development. The bounden duty of the court has also been discussed when such situation arose during investigation.

Keywords: Absolute right; Indefeasible right; Statutory Bail; Section 167 (2) Crpc; filing of chargesheet.

INTRODUCTION

Bail is the temporary release of the prisoner from the legal custody upon giving security by some other person. The term “Bail” has not been defined under the Code of Criminal procedure, 1973 [hereinafter referred to as “Code”]. However, Chapter XXXIII of the code elaborately deals with the provisions of bail and bonds. The object of the bail is to ensure the accused’s presence at the trial and to fulfil the priceless treasure of personal liberty. Our Hon’ble Supreme Court of India has defined bail in *“Kamlapati v/s State of West Bengal”*¹ as ‘a technique which is evolved for effecting the synthesis of two basic concepts of human value, viz, the right of an accused to enjoy his personal freedom and the public’s interest on which a person’s release is conditioned on the surety to produce the accused person in the court to stand the trial’.

Besides Section 436 to 439 of the Code, an accused can also be enlarged on Bail under the provisions of Section 389 and 167(2) of the code. Section 389 Crpc deals with suspension of Sentence during appeal and release of accused on bail, while Section 167(2) deals with what is commonly known as “*default or compulsive bail*”. Every person released under the proviso of Section 167 (2) Crpc shall be deemed to have been released under Chapter XXXIII of the Code. Section 167 Crpc while enunciating the law on remand also affords protection to the accused against detention during inordinate delay in completion of the investigation. It provides that where investigation is not completed within the prescribed period of 60 or 90 days, as the case may be, then the accused can avail his right of default bail on the expiration of the stated period. Where investigating agency has not filed the charge-sheet within a period of 60 days or 90 days (in case where offence is punishable with death or imprisonment

¹ AIR 1979 SC 777.

for not less than 10 years), then accused becomes entitled to be released on bail. Thus, where no charge sheet is filed within the stipulated period, then accused can no longer be detained in the custody. Hence, on 61st or 91st day of remand, the right to seek bail accrues in favour of the accused.

As early as in the year 1975 in **Natwar Parida v/s State of Orissa**², the Supreme Court considered the situation where accused earns the right of being released on bail on the investigation not being completed by the police within 60 days even in serious and ghastly types of crimes. Court stated such a law as “*paradise for the criminals*”. This was the observation by the court before the amendment of 1978 and this amendment has raised the period of 60 days to 90 days. The purpose and object of release of accused person under Section 167 (2) Crpc was to instil a sense of urgency in the investigating agency to complete the investigation promptly and within the statutory time-frame³.

The right to bail under Section 167(2) proviso (a) thereto is an absolute right. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds⁴. There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf⁵.

It is pertinent to note that the filing of charge sheet after the 90th day of the custody of an accused, his accrued right under proviso of Section 167 (2) Crpc, is not lost. An order for release on bail made under the proviso to Section 167(2) is not defeated by lapse of time, the filing of charge sheet or by remand to custody under Section 309 (2)⁶. The period of 90 days or 60 days has to be computed from the date of detention as per orders of the magistrate and not from the date of arrest by the police.⁷ Consequently, the first period of 15 days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of first 15 days custody can only be judicial custody.

Whether right of accused to be released on bail on default if the charge sheet is not filed within 90 days from the date of first remand is an absolute or indefeasible right?

² AIR 1975 SC 1465.

³ Aslam babalal desai v/s State of Maharashtra, AIR 1993 SC 1.

⁴ Rajnikant Jivanlal Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi [(1989) 3 SCC 532]; Also in Aslam Babalal Desai v. State of Maharashtra (1992) 4 SCC 272.

⁵ Hussainara Khatoon v. Home Secy., State of Bihar, (1980) 1 SCC 98.

⁶ Raghubir Singh v/s State of Bihar, AIR 1987 SC 149.

⁷ Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni (1992) 3 SCC 141.

On the lapse of the period and non-filing of the charge-sheet the right of default bail becomes operative, however, to exercise the same an application before the magistrate is a must⁸. Even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted⁹. Default bail is available only during the pendency of the investigation. It is also important that the application for default bail should be filed before the filing of charge-sheet. If the accused fails to do so and charge-sheet is filed meanwhile then the right of the accused gets extinguishes. This proposition was clarified by the Hon'ble Supreme Court in the landmark judgement of "**Sanjay Dutt vs. State**"¹⁰ in the following words:

"The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filling 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 filing of the challan. The custody of the accused after the challan is 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 ceases to apply."

Thus, where the stipulated period expires, then accused is required to move the application as soon as possible, if in case charge sheet is filed before the filing of his application, then his right to be released on default bail gets extinguished. Post filing of charge-sheet the remand of accused is taken under Section 309 of the Code, therefore, the benefit under Section 167(2) Crpc cannot be re-visited.

IF NOT ALREADY AVAILED OF

The term "*If not already availed of*" as used by the Hon'ble Supreme court in Sanjay Dutt's Case was discussed later in the case of "**Uday Mohanlal Acharya v/s State of Maharashtra**"¹¹,

"If an application for bail is filed before the charge sheet is filed, the accused could be said to have availed of his right under Section 167 (2) even though the court has not considered the said application and granted him bail under Section 167 (2) Crpc and it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an

⁸ Hitendra Vishnu Thakur vs. State of Maharashtra, AIR 1994 SC 2623.

⁹ Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67.

¹⁰ AIR 1994 SCC 410.

¹¹ AIR 2001 SCC 5.

application for being released on bail and offers to abide by the terms and conditions of bail.”

FILING OF CHARGESHEET

Very recently Hon’ble Supreme Court in **“Bikramjit Singh v/s State of Punjab, 2020”**, after discussing various decisions rendered by the courts has explicitly stated that:

“The decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed.”

The Hon’ble Supreme Court¹² further stated while holding the right of default bail as a fundamental right that “We must not forget that we are dealing with the personal liberty of an accused under a statute which imposes drastic punishments. The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled.”

The right to default bail, as has been correctly held by the judgment, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled. Default bail under first proviso of Section 167(2) of the Code of Criminal Procedure is a fundamental right and not merely a statutory right, the state cannot use supplementary charge sheet to extend the deadline as provide by Section 167 Crpc, the Supreme Court ruled in the case of **Fakhrey Alam v. State of UP**¹³

The Hon’ble Supreme Court, in the matter of **M. Ravindran v. The Intelligence Officer, Directorate of Revenue Intelligence**¹⁴ has recently pronounced that *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 charge sheet or a report seeking extension of time by the prosecution before the Court; or filing of the charge sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.*

¹² Bikramjit Singh vs The State Of Punjab, 2020 (SC).

¹³ 2021

¹⁴ October 26, 2020.

CONCLUSION

Therefore, it can be stated that the indefeasible right of the accused person to be released on bail has assumed the character of absolute right. After the expiration of statutory period, an accused can move for the default bail due to lapse on the part of the police officials to complete investigation timely. Even an oral request regarding the same is sufficient. As held by the Court in current scenario, the right of default bail is a fundamental right and the right is complete on the expiry of statutory period irrespective of the fact whether charge sheet is filed or not.