U.O.I. Thr. Cbi vs Nirala Yadav@Raja Ram Yadav@Deepak ... on 30 June, 2014

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Bench: N. V. Ramana, Dipak Misra

IN THE SUPREME COURT OF INDIA

CRIMINAL APPEALLATE JURISDICTION

CRIMINAL APPEAL NO. 786 OF 2010

Union of India through C.B.I. … Appellant

Versus

Nirala Yadav @ Raja Ram Yadav
@ Deepak Yadav …Respondent

J U D G M E N T

Dipak Misra, J.

The present appeal, by special leave, is directed against the order dated 4.3.2008 passed by the learned Single Judge of the High Court of Judicature at Patna in Criminal Misc. No. 44042 of 2007 enlarging the respondent on bail solely on the ground that he was entitled to the benefit under the proviso appended to Section 167(2) CrPC of Criminal Procedure (for short "the CrPC").

The antecedent essential facts are that the respondent was arraigned as an accused in Nauhatta P.S. case No. 4/02 for the offences punishable under Sections 302, 304, 353, 323, 149, 148 and 147 of the Indian Penal Code (IPC), under Section 27 of the Arms Act and under Section 49(2)(b) of Prevention of Terrorist Activities Act (POTA) for murder of Sanjay Kumar Singh, Divisional Forest Officer. Initially the investigation was carried out by the local investigating agency and thereafter,

the Government of India, Ministry of Personnel, New Delhi, issued a notification No. 228/9/02-AVD/II dated 21.3.2002 handing over the investigation to the Central Bureau of Investigation (CBI) after obtaining the consent of the Government of Bihar.

As per the allegations of the prosecution, on 15.2.2002 the deceased Sanjay Kumar Singh, Divisional Forest Officer, Shahabad Division with Headquarter at Sasaram, was on a surprise check in village Rehal, District Rohtas along with his subordinate staff and, at that juncture, he was surrounded by a group of 25-30 unknown naxalites and was taken outside the village and when he declined to comply with the illegal demand of the naxalites for payment of rupees five lakhs for his release, he was taken inside the forest where he was shot dead. After the criminal law was set in motion on the basis of an FIR, the investigation commenced.

In course of investigation, the respondent was arrested and was sent to the judicial custody on 5.12.2006. As the charge-sheet was not filed after lapse of the statutory period of ninety days, on 14.3.2007 the respondent filed an application under Section 167(2) CrPC for release on bail on the foundation that in the absence of challan on record he was entitled to be admitted to bail after completion of ninety days from his date of arrest. On 15.3.2007, an application was filed by the CBI under Section 49(2)(b) of POTA seeking extension of time for a period of thirty days, but on that day no order was passed on that application and the learned Special Judge asked the defence to file a reply in rejoinder to the application for extension but did not pass any order on the application for grant of bail.

As the factual matrix would unfurl, charge-sheet was filed on 26.3.2007. On 3.4.2007 the learned Special Judge extended the time for filing the charge-sheet till the date of such filing, i.e., 26.3.2007 and rejected the application of the respondent. Being unsuccessful in getting admitted to bail, the accused-respondent approached the High Court in Criminal Misc. No. 44042 of 2007 and the learned single Judge who dealt with the application, after referring to the decision in Hitendra Vishnu Thakur v. State of Maharahstra[1] and placing reliance on the dictum in Uday Mohanlal Acharya v. State of Maharahstra[2], came to hold that the right had already accrued to the respondent on 14.3.2007 when he had moved the application for grant of bail and, accordingly, admitted him to bail on certain conditions.

We have heard Mr. P.K. Dey, learned counsel for the appellant and Ms. Prerna Singh, learned counsel for the respondent.

Calling in question the legal acceptability of the order, it is submitted by Mr. Day that the High Court has been totally misguided by placing reliance upon the law laid down in Harindra Vishnu Thakur (supra) without apprising itself about the Constitution Bench decision in Sanjay Dutt v. State[3] which makes the order unsustainable. It is urged by him that when the application for bail was filed on the ground that the charge-sheet was not filed within ninety days, and the said application was not considered and no order was passed by the learned trial Judge before the charge-sheet was filed, the indefeasible right that vested in an accused, got totally destroyed, but, unfortunately, the High Court has failed to appreciate the said legal principle which makes the impugned order sensitively untenable. It is his further submission that the learned single Judge has

failed to apply the correct principle on the right of "compulsive bail" inasmuch as such a right should be available on the date the bail application is taken up for consideration but not on the date of its presentation. He has commended us to the decisions in Sanjay Dutt (supra), State of M.P. v. Rustam & ors.[4], Bipin Shantilal Panchal v. State of Gujarat[5], Dinesh Dalmia v. CBI[6], Mustaq Ahmed Isak v. State of Maharashtra[7] and Pragyna Singh Thakur v. State of Maharashtra[8].

Ms. Prerna Singh, learned counsel appearing for the respondent, per contra, has contended that the controversy is squarely covered by the decision in Uday Mohanlal Acharya (supra) and as the High Court has based its decision on the same in the backdrop of the factual scenario, the order is absolutely defensible and does not suffer from any infirmity warranting interference. She would further submit that the indefeasible right available to the accused cannot be extinguished by filing an application for extension of time to file the charge-sheet after expiry of the initial period and filing the same after certain period, for if such kind of allowance is conferred, the purpose of the provision engrafted under Section 167(2) CrPC would be frustrated.

At the outset it is necessary to state that the facts are not in dispute and, therefore, we are obliged to advert to the law and adjudge whether the High Court has correctly applied the legal principles. As we notice from the impugned order the learned single Judge has referred to the decision in Hatindra Vishnu Thakur (supra). In the said case the Court had dwelled upon the import of Section 20(4) of Terrorist and Disruptive Activities (Prevention) Act, 1987 read with Section 167 CrPC and came to hold that: -

> "... we find that once the period for filing the charge-sheet has expired and either no extension under clause (bb) 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 TADA read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the court must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is 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 a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused [pic]obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of

bail on account of the prosecution's 'default'. Similarly, when a report is submitted by the public prosecutor to the Designated Court for grant of extension under clause (bb), 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. It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a 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." After so stating, the Court proceeded to observe as follows: -

"We must as already noticed reiterate that the objection to the grant of bail to an accused on account of the 'default' of the prosecution to complete the investigation and file the challan within the maximum period prescribed under clause (b) of sub-section (4) of Section 20 TADA or within the extended period as envisaged by clause (bb) has to be limited to cases where either the factual basis for invoking the 'default' clause is not available or the period for completion of investigation has been extended under clause (bb) and the like. No other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the 'default' of the prosecution." After the said decision was rendered, the interpretation of clause (bb) of sub-section (4) of Section 20 of TADA was referred to the Constitution Bench. In Sanjay Dutt (supra) the two questions that were posed by the Constitution Bench are as follows: -

"(2) The proper construction of clause (bb) of sub-section (4) of Section 20 of the TADA Act indicating the nature of right of an accused to be released on bail thereunder, on the default to complete investigation within the time allowed therein; and (3) The proper construction and ambit of sub-section (8) of Section 20 of the TADA Act indicating the scope for bail thereunder." A contention was raised before the Constitution Bench that the two-Judge Bench decision in Hitendra Vishnu Thakur (supra) read in the context of final order made therein raised some ambiguity about the meaning and effect of Section 20(4)(bb) of the TADA Act. Adverting to the interpretation of the said provision and scanning the anatomy, the larger Bench observed thus: -

"43. Section 20 of the TADA Act prescribes the modified application of the Code of Criminal Procedure indicated therein. The effect of sub-section (4) of Section 20 is to apply Section 167 of the Code of Criminal Procedure in relation to a case involving an offence punishable under the TADA Act subject to the modifications indicated therein. One of the modifications made [pic]in Section 167 of the Code by Section 20(4) of the TADA Act is to require the investigation in any offence under the TADA Act to be completed within a period of 180 days with the further proviso that the Designated Court is empowered to extend that period up to one year if it is satisfied

that it is not possible to complete the investigation within the said period of 180 days, on 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 180 days. This gives rise to the right of the accused to be released on bail on expiry of the said period of 180 days or the extended period on default to complete the investigation within the time allowed." Thereafter, the Court referred to Hitendra Vishnu Thakur (supra) wherein it has been held that the Designated Court would have "no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bond as directed by the court"; and that a 'notice' to the accused is required to be given by the Designated Court before it grants any extension under the further proviso beyond the prescribed period for completing the investigation. It is apt to state that learned counsel for the petitioner therein conceded the legal position that the right of the accused which is enforceable only upto the filing of the challan and does not survive for enforcement on the challan being filed in the court against him. It was further contended that the decision in Hitendra Vishnu Thakur (supra) could not be read to confer on the accused an indefeasible right to be released on bail under Section 20(4)(bb) once the challan has been filed if the accused continues in custody. Such a concession was given by stating that Section 167 CrPC has relevance only to the period of investigation. The said position of law was accepted by the learned Additional Solicitor General. However, it was contended by him that direction for grant of bail in Hitendra Vishnu Thakur (supra) was not in consonance with such reading of the decision and indicates that the indefeasible right of the accused to be released on bail on expiry of the time allowed for completing the investigation survives and is enforceable even after the challan has been filed, without reference to the merits of the case or the material produced in the court with the challan. Mr. Dey has drawn inspiration from paragraphs 48 and 49 of the said decision which we think should be reproduced: -

"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 CrPC 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[9]; Ram Narayan Singh v. State of Delhi[10] and A.K. Gopalan v. Government of India[11].)

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 CrPC in such a situation. We clarify the decision of the Division Bench in [pic]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 supplied] After laying down the principles, the Constitution Bench recorded its conclusions of which conclusions (2)(a) and (2)(b), being relevant for the present purpose, are reproduced below: -

"(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 Code of Criminal Procedure 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 Code of Criminal Procedure 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 ensures 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 Code of Criminal Procedure. 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 added] Thus, the decision in Hitendra Narain Thakur (supra) has been explained by the Constitution Bench and it has laid down the principles pertaining to grant of bail on default.

In Dr. Bipin Shantilal Panchal (supra) the Court was dealing with a controversy whereby the High Court had rejected the prayer for bail to the appellant who was an accused for offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. A contention was advanced that the statutory period prescribed under the proviso (a) to sub-section (2) of Section 167 CrPC providing for completion of investigation, had expired and, therefore, the accused-appellant therein should have been released on bail. The three-Judge Bench referred to the decision in Union of India v. Thamisharasi[12], reproduced a passage from Sanjay Dutt (supra) and came to hold as follows: -

> "... if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge- sheet, as pointed out in Aslam Babalal Desai v. State of Maharashtra[13].
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> [Emphasis added] In Rustam and others (supra) the two-Judge Bench was addressing to the controversy where the High Court had entertained the bail petition after the challan was filed. After stating that the controversy had been covered by the decision in Sanjay Dutt (supra) wherein Hitendra Vishnu Thakur (supra) had been explained, the Court proceeded to state as follows: -
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> "The court is required to examine the availability of the right of compulsive bail on the date it is considering the question of bail and not barely on the date of the presentation of the petition for bail." After so stating the Court proceeded to state that when the High Court entertained the petition for bail and granted it to the respondents therein, undeniably the challan stood filed in the court and, therefore, the indefeasible right for getting bail was not available.
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> In Mohammed Iqbal Madar Sheikh and others v. State of Maharshtra[14], while interpreting the proviso (a) to sub-section (2) of Section 167 CrPC in the context of TADA, the three-Judge Bench opined thus: - "It need not be pointed out or impressed that in view of a series of judgments of this Court, this right cannot be defeated by any court, if the accused concerned is prepared and does furnish bail bonds to the satisfaction of the court concerned. Any accused released on bail under proviso (a) to

Section 167(2) of the Code read with Section 20(4)(b) or Section 20(4)(bb), because of the default on the part of the investigating agency to conclude the investigation, within the period prescribed, in view of proviso (a) to Section 167(2) itself, shall be deemed to have been so released under the provisions of Chapter XXXIII of the Code. It cannot be held that an accused charged of any offence, including offences under TADA, if released on bail because of the default in completion of the [pic]investigation, then no sooner the charge-sheet is filed, the order granting bail to such accused is to be cancelled. The bail of such accused who has been released, because of the default on the part of the investigating officer to complete the investigation, can be cancelled, but not only on the ground that after the release, charge-sheet has been submitted against such accused for an offence under TADA. For cancelling the bail, the well-settled principles in respect of cancellation of bail have to be made out." Be it noted, in the said case, the accused-appellants were taken into custody on 16.1.1993 and the charge-sheet was submitted on 30.8.1993, obviously beyond the statutory period provided under Section 20(4)(b). However, the Court proceeded to opine thus: -

"But it is an admitted position that no application for bail on the said ground was made on behalf of the appellants. Unless applications had been made on behalf of the appellants, there was no question of their being released on ground of default in completion of the investigation within the statutory period. It is now settled that this right cannot be exercised after the charge-sheet has been submitted and cognizance has been taken, because in that event the remand of the accused concerned including one who is alleged to have committed an offence under TADA, is not under Section 167(2) but under other provisions of the Code. This has been specifically considered by a Constitution Bench of this Court in the case of Sanjay Dutt v. State through CBI(II)." After so stating the learned Judges reproduced a passage from Sanjay Dutt (supra) and opined that it was not open to the accused-appellants to claim bail under proviso (a) to Section 167(2) CrPC inasmuch as the charge- sheet had been submitted against them the benefit of default would not be available. Though the three-Judge Bench rejected the prayer for bail on facts, yet considering the submissions put forth at the Bar, observed as follows: -

"During hearing of the appeal, it was pointed out by the counsel appearing on behalf of the appellants that some courts in order to defeat the right of the accused to be released on bail under proviso (a) to Section 167(2) after expiry of the statutory period for completion of the investigation, keep the applications for bail pending for some days so that in the meantime, charge-sheets are submitted. Any such act on the part of any court cannot be approved. If an accused charged with any kind of offence becomes entitled to be released on bail under proviso (a) to Section 167(2), that statutory right should not be defeated by keeping the applications pending till the charge-sheets are submitted so that the right which had accrued is extinguished and defeated." [Emphasis supplied] In Uday Mohanlal Acharya (supra) the majority, after referring to the Constitution Bench decision in Sanjay Dutt's case, posed the question

about the true meaning of the expression of the following lines:-

"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 or" Answering the said question the court observed thus:- "Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being [pic]released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in State of M.P. v. Rustam setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression "if already not availed of", used by the Constitution Bench in Sanjay Dutt." [Emphasis supplied] After so stating the court referred to Makhan Singh Tarsikka v. State of Punjab[15], Ram Narayan Singh (supra) and A.K. Gopalan (supra) and proceeded to state as follows:-

"In interpreting the expression "if not availed of" in the manner in which we have just interpreted we are conscious of the fact that accused persons in several serious cases would get themselves released on bail, but that is what the law permits, and that is

what the legislature wanted and an indefeasible right to an accused flowing from any legislative provision ought not to be defeated by a court by giving a strained interpretation of the provisions of the Act. In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub- section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused." [Underlining is ours] Thereafter the Court culled out six conclusions which are necessitous to be reproduced. They are: -

"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 on the whole.

2. Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in 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 and furnishes the bail as directed by the Magistrate.

4. 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 of it forthwith, 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 the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

[pic]6. The expression "if not already availed of" used by this Court in Sanjay Dutt case3 must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub- section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same." Elaborating further, the Court held that if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished and, therefore, if an accused is entitled to be released on bail by application of the proviso to sub-section (2) of Section 167 CrPC, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the 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. The Court further proceeded to say that such an accused, 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 the law laid down by the Court in the case of Mohd. Iqbal (supra).

Before we proceed to deal with the subsequent decisions, we should pause here to deliberate. In Mohamed Iqbal Madar Sheikh (supra) it has been expressed with anguish that the Court should not keep an application filed under Section 167(2) after expiry of the statutory period pending to enable the investigation to file the charge-sheet to defeat the indefeasible right of an accused. It has been clearly stated therein that the statutory right should not be defeated by keeping the application pending so that the right which had accrued is extinguished. The aforesaid decision was rendered after pronouncement by the Constitution Bench in Sanjay Dutt's case and, in fact, it has been referred to therein.

In Uday Mohanlal Acharya (supra) the principle has been further elaborated to hightlight the ratio laid down in Sanjay Dutt's case. It has been clearly laid down that if a case is adjourned by the court granting time to the prosecution not adverting to the application filed on behalf of the accused, it would be a violation of the legislative mandate. The principle stated in Uday Mohanlal Acharya (supra) is a binding precedent on us. Mr. Dey, learned counsel appearing for the appellant, made a feeble endeavour that it is a two-Judge Bench decision and it runs contrary to the principle stated in Sanjay Dutt's case and hence, it should be treated as per incuriam. Both the facets of the submission are absolutely fallacious. It is a judgment rendered by a three-Judge Bench and not by a two-Judge

Bench simply because there is a dissenting opinion. Secondly, the judgment has not been rendered in ignorance of a binding precedent but, on the contrary, it has directly dealt with the decision in Sanjay Dutt (supra), appreciated, understood and analysed the principles stated therein and culled out the conclusions and, therefore, by no stretch of imagination it can be held to be per incuriam. Even if a two-Judge Bench or a three-Judge Bench disagrees with the view expressed in Uday Mohanlal Acharya (supra), it has to be referred to a larger Bench. As we notice, prior to the decision in Uday Mohanlal Acharya's case a three-Judge Bench in Mohamed Iqbal Madar Sheikh (supra) had stated the principle in a different way. We are disposed to think, that is the principle which the Constitution Bench in Sanjay Dutt's case has laid down. When the charge-sheet is not filed and the right has ripened earning the status of indefeasibility, it cannot be frustrated by the prosecution on some pretext or the other. The accused can avail his liberty only by filing application stating that the statutory period for filing of the challan has expired, the same has not yet been filed and an indefeasible right has accrued in his favour and further he is prepared to furnish the bail bond. Once such an application is filed, it is obligatory on the part of the court to verify from the records as well as from the public prosecutor whether the time has expired and the charge- sheet has been filed or not or whether an application for extension which is statutorily permissible, has been filed. If an application for extension is filed, it is to be dealt with as has been stated in the case of Sanjay Dutt (supra). That is the duty of the Court. This is the position of law as has been stated in Uday Mohanlal Acharya (supra).

In Ateef Nasir Mulla v. State of Maharashtra[16], the accused was arrested on 15.4.2003 and the period of ninety days for completing the investigation was to expire on 13.7.2003. On 11.7.2003 an application was moved for extension of time to complete the investigation under Section 49(2)(b) of Prevention of Terrorism Act, 2002. The Special Judge, after hearing the counsel for the accused, allowed the application and extended the period for completing the investigation till 14.8.2003 and, accordingly, the accused was remanded to custody. The order of granting extension was challenged before the High Court. On 14.7.2003, after expiry of ninety days, an application for release of accused was filed stating that the period of ninety days had expired and hence, he was entitled to bail in terms of Section 49(2)(b) read with the provisions of Section 167(2) CrPC. The charge-sheet was filed by the investigating agency on 19.7.2003 before expiration of the extended time. The learned Special Judge rejected the application for grant of bail by order dated 25.7.2003 which was affirmed by the High Court. Noting various contentions advanced at the Bar, this Court held thus:-

> "17. It was then contended on behalf of the appellant that the appellant having acquired an indefeasible right to be released on bail on the expiry of 90 days from the date of his arrest, the Special Judge was not justified in rejecting the application for grant of bail which was filed on 14-7- 2003. By then the charge-sheet had not been submitted by the police and, hence, there was no reason to continue the detention of the appellant.
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> 18. This submission overlooks the fact that by an order dated 11-7-2003 the Court had granted extension of time to the investigating agency to complete the investigation. Thus on 14-7-2003 when an application was filed for grant of bail under Section 167(2) of the Code of Criminal Procedure, [pic]there was already an

> order extending the time for completion of the investigation, and consequently the Court was empowered to remand the accused to judicial or police custody during the said extended period." The purpose of citing the aforesaid decision is that an application for grant of extension was filed prior to the expiry of ninety days and the same was granted and, therefore, the indefeasible right vested in the accused stood extinguished.

Presently, we shall refer to certain later decisions. In the case of Dinesh Dalmia (supra), which has been placed reliance upon by Mr. Dey, the CBI lodged the First Information Report against the appellant and three companies on a complaint made by the Securities and Exchange Board of India. As the appellant was away, the learned Magistrate, by an order dated 14.2.2005, issued a non-bailable warrant of arrest against him. In the meantime, after the completion of investigation a charge-sheet was submitted before the learned Magistrate in terms of sub-section (2) of Section 173 CrPC. The name of the appellant featured in the charge-sheet along with the companies. Eventually, after following the process the appellant was sent to police custody on 14.2.2006 till 24.2.2006. The accused was handed over to the police for conducting investigation till 8.3.2006. He, however, was remanded to judicial custody till 14.3.2006 by order dated 9.3.2006 on the plea that further investigation was pending. CBI prayed for and obtained orders of remand to judicial custody from the learned Magistrate on 14.3.2006, 28.3.2006, 10.4.2006 and 28.4.2006. The appellant, on expiry of sixty days from the date of his arrest, filed an application for statutory bail purported to be in terms of the proviso appended to sub-section (2) of Section 167 CrPC on the premise that no further charge-sheet in respect of the investigation under sub-section (8) of Section 173 CrPC had been filed. When the said application was pending consideration, CBI sought for his remand into judicial custody under sub- section (2) of Section 309 thereof. The application for statutory bail was rejected by the learned Magistrate basically on the ground that the accused was arrested on the basis of non-bailable warrant issued by the court after taking cognizance of the offences in the charge-sheet. In revision, the learned Sessions Judge allowed the revision placing reliance on State v. Dawood Ibrahim Kaskar[17]. The CBI moved the High Court which overturned the decision of the learned Sessions Judge. This Court took note of the fact that the charge-sheet was submitted on 24.10.2005 and the applicant was arrested only on 12.2.2006. To the contentions raised before this Court, namely, (i) the charge-sheet filed against the appellant and the cognizance taken thereupon was illegal and invalid and by reason thereof, the valuable right of the appellant to be released on bail had been taken away; and (ii) even if the charge-sheet was legal, the right of the appellant under sub-section (2) of Section 167 CrPC continued to remain available in the facts and circumstances of the case. Noting the contentions, the Court adverted to the power conferred under the statute under Section 173 CrPC and, eventually, opined as follows: -

> "24. Concededly, the investigating agency is required to complete investigation within a reasonable time. The ideal period therefor would be 24 hours, but, in some cases, it may not be practically possible to do so.

Parliament, therefore, thought it fit that remand of the accused can be sought for in the event investigation is not completed within 60 or 90 days, as the case may be. But, if the same is not done within the stipulated period, the same would not be detrimental to the accused and, thus, he, on the

expiry thereof would be entitled to apply for bail, subject to fulfilling the conditions prescribed therefor.

25. Such a right of bail although is a valuable right but the same is a conditional one; the condition precedent being pendency of the investigation. Whether an investigation in fact has remained pending and the investigating officer has submitted the charge-sheet only with a view to curtail the right of the accused would essentially be a question of fact. Such a question strictly does not arise in this case inasmuch as, according to CBI, sufficient materials are already available for prosecution of the appellant. According to it, further investigation would be inter alia necessary on certain vital points including end use of the funds.

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27. It is also not a case of the appellant that he had been arrested in course of further investigation. A warrant of arrest had already been issued against him. The learned Magistrate was conscious of the said fact while taking cognizance of the offence." Thereafter, the Court proceeded to the concept of remand as contemplated under the Code. We may profitably quote the same: -

> "38. It is a well-settled principle of interpretation of statute that it is to be read in its entirety. Construction of a statute should be made in a manner so as to give effect to all the provisions thereof. Remand of an accused is contemplated by Parliament at two stages; pre-cognizance and post-cognizance. Even in the same case, depending upon the nature of charge- sheet filed by the investigating officer in terms of Section 173 of the Code, a cognizance may be taken as against the person against whom an offence is said to have been made out and against whom no such offence has been made out even when investigation is pending. So long a charge-sheet is not filed within the meaning of sub-section (2) of Section 173 of the Code, investigation remains pending. It, however, does not preclude an investigating officer, as noticed hereinbefore, to carry on further investigation despite filing of a police report, in terms of sub-section (8) of Section 173 of the Code.

39. The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under sub-section (2) of Section 173 and further investigation contemplated under sub-section (8) thereof. Whereas only when a charge-sheet is not filed and investigation is kept pending, benefit of proviso appended to sub-section (2) of Section 167 of the Code would be available to an offender; once, however, a charge- sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of sub-section (8) of Section 173 of the Code." As the aforesaid decision has been assiduously relied upon by Mr. Dey to pyramid his submission of statutory interpretation, the right of the accused and concept of remand, we have dealt with the same in detail. The ultimate conclusion, as we perceive, is that once a charge-sheet is filed the benefit of proviso appended to sub-section (2) of Section 167 CrPC ceases and it does not revive solely because the further investigation remains pending. In the said case the Court declined to interfere as the benefit was denied to the accused as the charge-sheet was filed and cognizance had been taken on which basis a non-bailable warrant of arrest was issued.

Thus, the said decision does not render any assistance to the learned counsel for the appellant.

In Union of India v. Hassan Ali Khan and another[18], a two-Judge Bench, while adverting to the submission of the learned counsel for the Union of India pertaining to the three-Judge Bench decision in Uday Mohanlal Acharya (supra), has understood the said decision in the following manner: -

> 25. Reference was also made to the decision of a three-Judge Bench of this Court in Uday Mohanlal Acharya v. State of Maharashtra wherein the scope of Section 167(2) CrPC and the proviso thereto fell for consideration and it was the majority view that an accused had an indefeasible right to be released on bail when the investigation is not completed within the specified period and that for availing of such right the accused was only required to file an application before the Magistrate seeking release on bail alleging that no challan had been filed within the period prescribed and if he was prepared to offer bail on being directed by the Magistrate, the Magistrate was under an obligation to dispose of the said application and even if in the meantime a charge-sheet had been filed, the right to statutory bail would not be affected. It was, however, clarified that if despite the direction to furnish bail, the accused failed to do so, his right to be released on bail would stand extinguished." From the aforesaid analysis, it is graphically clear that the learned Judges laid emphasis how an accused avails the benefit of compulsive bail and what is the obligation cast on the Magistrate in law.

We may presently refer to a recent three-Judge Bench decision in Sayed Mohd. Ahmad Kazmi v. State (Government of NCT of Delhi) and others[19]. In the said case, the accused had filed an application for grant of bail on 2.6.2012 since his ninety days' period of custody was to expire on 3.6.2012 and further custody was sought for by the prosecution. The learned Magistrate, by his order dated 2.6.2012, extended the period of investigation and the custody of the appellant by another ninety days. The said order was assailed by the appellant in a revision which came for consideration before the learned Additional Sessions Judge, who, on 8.6.2012, held that it was only the Sessions Court and not the Chief Metropolitan Magistrate which had the competence to extend the judicial custody of the accused and to entertain cases of such nature. On 22.6.2012, the accused-appellant was produced before the learned Chief Judicial Magistrate for extension of his custody. On 17.7.2012 an application was filed under Section 167(2) CrPC seeking default bail as no charge-sheet had been filed within ninety days period of the appellant's custody. The said application was dismissed by the learned Magistrate. Thereafter, the matter was referred by the learned Chief Metropolitan Magistrate to the learned District and Sessions Judge, who directed that judicial custody of the accused-appellant be extended. The aforesaid order of the learned Sessions Judge was assailed before the High Court under Section 482 CrPC and the High Court stayed the operation of the order passed by the learned Additional Sessions Judge dated 28.6.2012 and, therefore, the application for grant of statutory bail could not be taken up by the learned Additional Sessions Judge till the High Court vacated the order of stay on 13.7.2012. As has been stated earlier, the accused moved an application for grant of bail under Section 167(4) and the same was listed for consideration on 17.7.2012. In the meantime, revision petition came before the learned Additional

and Sessions Judge, who allowed the application and opined that the custody of the accused was illegal. In view of the order passed by the learned Additional Sessions Judge declaring the custody of the accused to be illegal, on the same day an application under Section 167(2) CrPC was filed before the learned Chief Metropolitan Magistrate, but he, instead of hearing the application on the sad date, notified the hearing for 18.7.2012. On the adjourned date, i.e., 18.7.2012 the State filed a fresh application seeking further extension of appellant's custody and the investigation period. The learned Chief Metropolitan Magistrate directed a copy of the said application to be served on the counsel for the accused and notified the matter for hearing on 20.7.2012. On that day he took up the matter for extension of custody and, instead of considering the application, extended the time of interrogation and custody of the appellant for ninety days with retrospective effect from 2.6.2012. The aforesaid order was challenged before the learned Sessions Judge who adjourned the matter to 12.10.2012 and on 31.7.2013 the prosecution filed the charge-sheet. When the matter travelled to this Court, a question arose with regard to getting the benefit of the default bail. Be it stated, the Court was considering the provisions contained in Section 43-D of Unlawful Activities (Prevention) Act, 1967 and Section 167(2) CrPC. In that context, it observed thus: -

> "18. By virtue of the aforesaid modification to the provisions of Section 167(2) CrPC, the period of 90 days stipulated for completion of investigation and filing of charge-sheet was modified by virtue of the amended proviso, which indicated that if the investigation could not be completed within 90 days and if the court was satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for detention of the accused beyond the period of 90 days, extend the said period up to 180 days. In other words, the custody of an accused could be directed initially for a period of 90 days and, thereafter, for a further period of 90 days, in all a total of 180 days, for the purpose of filing charge-sheet. In the event the charge-sheet was not filed even within the extended [pic]period of 180 days, the conditions directing that the accused person shall be released on bail if he is prepared to do and does furnish bail, would become operative." Thereafter, the three-Judge Bench referred to the decision in Sanjay Dutt (supra), Uday Mohanlal Acharya (supra) and Bipin Shantilal Panchal (supra) and taking note of the fact situation held that: -
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> "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 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." Thereafter, the Court opined thus: -

> "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." Thus, the aforesaid decision, as we find, has placed reliance on Uday Mohanlal Acharya's case and, therefore, the principle with regard to the time and manner of availability of the proviso appended to sub-section (2) of Section 167 CrPC has been further crystallized.
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> Learned counsel for the appellant has commended us, with immense perseverance, the authority in Pragyna Singh Thakur (supra). In the said cae a contention was raised that judgment rendered by the High Court declining to enlarge the accused on bail was violative of the mandate of Articles 22(1) and 22(2) of the Constitution and also violative of the statutory provisions engrafted under Section 167(2) CrPC. In the said case, the accused was under detention from 10.10.2008 and ninety days expired on 9.1.2009 and the charge-sheet was filed on 20.1.2009. The accused-appellant filed an application under Section 167(2) CrPC read with Section 21(4) of Maharashtra Control of Organized Crime Act, 1999 (MOCA) and also under Section 439 CrPC. The said application was resisted by the prosecution on the ground that the charge-sheet was filed on 20.1.2009 which was the eighty-ninth day from the date of his remand order, i.e., 24.10.2008. The learned Special Judge rejected the application vide order dated 9.7.2009. The High Court being moved, dismissed the application vide order dated 12.3.2010. Before this Court a question arose whether the appellant was in police custody from 10.10.2008 to 22.10.2008, for the High Court had returned a finding that the accused was arrested on 23.10.2008.

This Court, on a scrutiny of the facts, held that the accused was arrested on 23.10.2008 and, accordingly, came to hold thus: -

> "49. As far as Section 167(2) of the Criminal Procedure Code is concerned this Court is of the firm opinion that no case for grant of bail has been made out under the said provision as charge-sheet was filed before the expiry of 90 days from the date of first remand. In any event, right in this regard of default bail is lost once the charge-sheet is filed. This Court finds that there is no violation of Article 22(2) of the Constitution, because on being arrested on 23-10-2008, the appellant was produced before the Chief Judicial Magistrate, Nasik on 24-10-2008 and subsequent detention in custody is pursuant to the order of remand by the Court, which orders are not [pic]being challenged, apart from the fact that Article 22(2) is not available against a court i.e. detention pursuant to an order passed by the court.
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> 51. Though this Court has come to the conclusion that the appellant has not been able to establish that she was arrested on 10-10-2008, even if it is assumed for the sake of argument that the appellant was arrested on 10-10-

2008 as claimed by her and not on 23-10-2008 as stated by the prosecution, she is not entitled to grant of default bail because this Court finds that the charge-sheet was filed within 90 days from the date of first order of remand. In other words, the relevant date of counting 90 days for filing the charge-sheet is the date of first order of the remand and not the date of arrest. This proposition has been clearly stated in Chaganti Satyanarayana v. State of A.P.[20]" To arrive at the said conclusion, reliance was also placed on Chaganti Satyanarayana (supra), CBI v. Anupan J. Kulkarni[21], State v. Mohd. Ashraft Bhat[22], State of Maharashtra v. Bharati Chandmal Varma[23] and Rustam (supra).

After so stating, the Court addressed to the entitlement of bail under Section 167(2) CrPC and, in that context, stated thus: -

> "54. There is yet another aspect of the matter. The right under Section 167(2) CrPC to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. In other words, even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost. After the filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from the Constitution Bench decision of this Court in Sanjay Dutt (2) v. State [paras 48 and 53(2)(b)]. The reasoning is to be found in paras 33 to 49." [Underlining is ours] Be it noted, to say so, the learned Judges drew support from the decisions in Rustam (supra), Bipin Shantilal Panchal (supra), Dinesh Dalmia (supra) and Mustaq Ahmed Mohammed Isak (supra). Thereafter they adverted to Uday Mohanlal Acharya's case in following terms: -

> "56. In Uday Mohanlal Acharya v. State of Maharashtra a three-Judge Bench of this Court considered the meaning of the expression "if already not availed of" used by this Court in the decision rendered in Sanjay Dutt in para 48 and held that 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. This is quite evident if one refers to para 13 of the reported decision as well as the conclusion of the Court at p. 747.
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> 57. It is well settled that when an application for default bail is filed, the merits of the matter are not to be gone into. This is quite evident from the principle laid down in Union of India v. Thamisharasi[24], SCC para 10, placita c-d.

> 58. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, before the consideration of the same and before being released on bail if charge-sheet is filed, the said right to be released on bail, can be only on merits. So far as merits are concerned the learned counsel for the appellant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all." [Emphasis added] At this juncture, it is absolutely essential to delve into what were the precise principles stated in Uday Mohanlal Acharya's case and how the two-

Judge Bench has understood the same in Pragyna Singh Thakur (supra). We have already reproduced the paragraphs in extenso from Uday Mohanlal Acharya's case and the relevant paragraphs from Pragyna Singh Thakur (supra). Pragyna Singh Thakur (supra) has drawn support from Rustam and others case to buttress the principle it has laid down though in Uday Mohanlal Acharya's case the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in paragraph 56 which have been reproduced hereinabove, as referred to paragraph 13 and the conclusions of Uday Mohanlal Acharya's case. We have already quoted from paragraph 13 and the conclusions.

The opinion expressed in paragraph 54 and 58 in Pragyna Singh Thakur (supra) which we have underlined, as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya (supra) which has been followed in Hassan Ali Khan and another (supra) and Sayed Mohd. Ahmad Kazmi. The decision in Sayed Mohd. Ahmad Kazmi's case has been rendered by a three- Judge Bench. We may hasten to state, though in Pragyna Singh Thakur's case the learned Judges have referred to Uday Mohanlal Acharya's case but as stated the principle that even if an application for bail is filed on the ground that the charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge- sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in Mustaq Ahmed Mohammed Isak's case. We are disposed to think so, as the two-Judge Bench has used the words "before consideration of the same and before being released on bail", the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya's case. The learned Judge dissented with the majority as far as interpretation of the expression "if not already availed of" by stating so:-

> "29. My learned brother has referred to the expression "if not already availed of" referred to in the judgment in Sanjay Dutt case for arriving at Conclusion 6. According to me, the expression "availed of" does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions

> referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.
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> 30. In this background, the expression "availed of" does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised." On a careful reading of the aforesaid two paragraphs, we think, the two-

Judge Bench in Pragyna Singh Thakur's case has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three-Judge Bench in Sayed Mohd. Ahmad Kazmi's case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi's case which has based on three-Judge Bench decision in Uday Mohanlal Acharys's case, we are obliged to conclude and hold the principle laid down in Paragraph 54 and 58 of Pragyna Singh Thakur's case(which have been underlined by us) do not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be a good law. Our view finds support from the decision in Union of India and others v. Arviva Industries India Limited and others[25].

Coming to the facts of the instant case, we find that prior to the date of expiry of 90 days which is the initial period for filing the charge-sheet, the prosecution neither had filed the charge-sheet nor had it filed an application for extension. Had an application for extension been filed, then the matter would have been totally different. After the accused respondent filed the application, the prosecution submitted an application seeking extension of time for filing of the charge-sheet. Mr. P.K. Dey, learned counsel for the appellant would submit that the same is permissible in view of the decision in Bipin Shantilal Panchal (supra) but on a studied scrutiny of the same we find the said decision only dealt with whether extension could be sought from time to time till the completion of period as provided in the Statute i.e., 180 days. It did not address the issue what could be the effect of not filing an application for extension prior to expiry of the period because in the factual matrix it was not necessary to do so. In the instant case, the day the accused filed the application for benefit of the default provision as engrafted under proviso to sub- Section (2) of Section 167 CrPC the Court required the accused to file a rejoinder affidavit by the time the initial period provided under the statute had expired. There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the learned Magistrate was misconceived. He was obliged on that day to deal with the application filed by the accused as required under Section 167(2) CrPC. We have no hesitation in saying that such procrastination frustrates the legislative mandate. A Court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. If we permit ourselves to say so, the

prosecution exhibited sheer negligence in not filing the application within the time which it was entitled to do so in law but made all adroit attempts to redeem the cause by its conduct.

In view of our aforesaid premised reasons we do not find any error in the order of the High Court in overturning the order refusing bail and extending the benefit to the respondent and, accordingly, the appeal fails and is hereby dismissed.

.....J. [Dipak Misra] .....J. [N. V. Ramana] New Delhi;

June 30, 2014.

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(1994) 4 SCC 602
[2] (2001) 5 SCC 453
[3] (1994) 5 SCC 410

[4] 1995 Supp (3) SCC 221
[5] (1996) 1 SCC 718
[6] (2007) 8 SCC 770
[7] (2009) 7 SCC 480
[8] (2011) 10 SCC 445
[9] 1952 SCR 395
[10] 1953 SCR 652
[11] (1966) 2 SCR 427
[12] (1995) 4 SCC 190
[13] (1992) 4 SCC 272
[14] (1996) 1 SCC 722
[15] AIR 1952 SC 27

[16] (2005) 7 SCC 29

[17] (2000) 10 SCC 438

[18] (2011) 10 SCC 235

[19] (2012) 12 SCC 1

[20] (1986) 3 SCC 141
[21] (1992) 3 SCC 141
[22] (1996) 1 SCC 432
[23] (2002) 2 SCC 121
[24] (1995) 4 SCC 190

[25] (2014) 3 SCC 159