

Arvind Kumar Saxena vs.state

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Court : Delhi

Decided On : Mar-14-2018

Appellant : Arvind Kumar Saxena

Respondent : State

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI BAIL APPLN. 2238/2017
Order reserved on :

13. h March, 2018 Date of decision :

14. h March, 2018 ARVIND KUMAR SAXENA

... Petitioner

Through Mr. Sunil Mehta, Adv. STATE versus Respondent Through Mr. Raghuwinder Varma, APP for State with SI Vinod Kumar, Narcotics Cell Crime Branch. CORAM: HON'BLE MS. JUSTICE ANU MALHOTRA ANU MALHOTRA, J.

ORDER1 The petitioner Arvind Kumar Saxena seeks the grant of default bail in terms of Section 167(2) proviso (a)(ii) of the Code of Criminal Procedure, 1973 in FIR No.83/2017 investigated by the Crime Branch in which he was arrested on 03.06.2017 for alleged possession of 250 gms. of heroine i.e. diacetylmorphine submitting to the effect that the charge-sheet in the instant case was filed only on 20.09.2017 and thus the indefeasible right of grant of default bail accrued to him during the interregnum of 19.09.2017 and 20.09.2017 when there was no charge-

sheet that had been filed by the prosecuting BAIL APPLN. 2238/2017 Page 1 of 22 agency and that the prosecution had failed to file the charge-sheet within the statutory period of 60 days from the date of arrest, which expired on 04.08.2017. The petitioner submits that he had filed the application seeking release of bail on 19.09.2017 before the learned Trial Court under Section 439 of the Criminal Procedure Code, 1973 which was fixed for 26.09.2017.

2. Vide paragraph 4 of the application under Section 439 of the Criminal Procedure Code, 1973 dated 19.09.2017, the applicant submitted that he had been arrested by the police of the Crime Branch on 03.06.2017 and had been sent to judicial custody and that he was willing to join investigation as and when called by the Investigating Officer and that nothing had been recovered from his possession and, if any, the same was planted by the police and that he had not committed any offence which is punishable under the law and that he had clean antecedents and he was not a previous convict and that he has deep roots in the society and that there was no likelihood of his fleeing away from the Court of justice and that he is willing to join investigation as and when directed by the Court and that he undertakes to furnish the sound and reliable surety for the satisfaction of the Court and he is ready to abide by all the terms and conditions if imposed upon him by the Court and sought that he be released on bail.

3. Vide an application dated 21.09.2017, the applicant sought the grant of bail submitting that he had been detained beyond the statutory period of 60 days in terms of Section 167(2) proviso (a)(ii) of the Code of Criminal Procedure, 1973 and sought that he be released on BAIL APPLN. 2238/2017 Page 2 of 22 bail and undertook to furnish the required bail bond submitting to the effect that the prosecution had failed to file any charge-sheet against him within the statutory period prescribed.

4. Vide order dated 22.09.2017, the learned Trial Court of the ASJ-02, (East), Special Judge (NDPS), Karkardooma Courts, Delhi declined the application dated 21.09.2017 as being not maintainable observing to the effect that the accused had not exercised his rights for the grant of statutory bail prior to the filing of the charge-sheet and that the said application had been filed after the filing of the

charge- sheet and after cognizance had been taken by the Court, in as much as the charge-sheet has been filed on 22.09.2017 and was thus not maintainable and was dismissed.

5. The petitioner herein contends that the offence for which he was arrested was allegedly for possession of 250 gms. of heroine which in terms of the Entry 56 Column 6 to the table under Sub-Clause 2(vii)(a) of the NDPS Act, 1985 was lesser than the commercial quantity in terms of the Notification No.SO.1055(E) dated 19.10.2001 issued by the Central Government, does not make him culpable even allegedly qua the possession of any commercial quantity of any narcotic drug and that the alleged recovery of 250 gms. of heroine fell into the intermediary quantity for the purpose of the sentence that could be imposed on him in terms of Section 21(b) of the NDPS Act, 1985, which provides as follows : - 21. Punishment for contravention in relation to manufactured drugs and preparations - Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted BAIL APPLN. 2238/2017 Page 3 of 22 possesses, thereunder, manufactures, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactuered drug shall be punishable,- (a) where .; the contravention (b) where involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees; (c) where.; 6. It was also contended thus on behalf of the petitioner that as in terms of Clause-21(b) of the NDPS Act, 1985, the possession of the narcotic manufactured drug involved a quantity lesser than the commercial quantity but greater than the smaller quantity he could be imprisoned for a term which may extend upto 10 years and with a fine of Rs.1 lakh and that thus the applicant in terms of the Section 167(2) proviso (a)(ii) of the Criminal Procedure Code, 1973 had essentially to be released on statutory default bail.

7. On behalf of the State, the application is vehemently opposed submitting initially inter alia to effect that the applicant was in possession of 250 gms. of a narcotic manufactured drug, which fell within the ambit of commercial quantity and thus the offence was punishable beyond a period of 10 years apart from imposition of fine.

8. At the outset, it is essential to observe that vide order dated 22.09.2017 the learned Trial Court has categorically observed to the effect that 250 gms of heroine allegedly recovered from the BAIL APPLN. 2238/2017 Page 4 of 22 petitioner fell in the category of intermediary category and thus punishable under Section 21(b) of the NDPS Act, 1985 which provided for punishment for a term which may extend to 10 years and a fine and thus the charge-sheet was required to be filed within 60 days and had admittedly not been filed within 60 days having been filed on 20.09.2017 with the petitioner having been arrested on 03.06.2017.

9. In the instant case, it is essential to observe that Section 2(viia) of the NDPS Act, 1985 defines commercial quantity as under : - 2. Definitions.-In this Act, unless the context otherwise requires,- viia) "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette; and thus clearly as in terms of Entry 56 to the Notification No.SO.1055(E) dated 19.10.2001 issued by the Central Government, 250 gms. of heroine is shown in Column 6, through which it is inter se implicit therefrom that the quantity of 250 gms of heroine falls within the intermediary quantity and not commercial quantity which in terms of clause 2(viia) of the NDPS Act, 1985 necessarily has to mean the quantity beyond 250 gms. of diacetylmorphine to make it fall within the category of commercial quantity and thus the alleged possession of 250 gms. heroine by the petitioner would if proved make the petitioner culpable for commission of the offence punishable u/s 21(b) of the NDPS Act, 1985 which provides as follows :-

"BAIL APPLN. 2238/2017 Page 5 of 22 21. Punishment for contravention in relation to manufactured drugs and preparations - Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,- possesses, (a) where .; the contravention (b) where involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees; (c) where.;

10. Thus the maximum imprisonment that can be imposed if the petitioner is found guilty in the instant case is a terms of rigorous imprisonment which may extend to 10 years and to a fine which may extend to Rs.1 lakh.

11. In terms of Section 167(2) proviso (a)(i) and Section 167(2) proviso (a)(ii) of the Criminal Procedure Code, 1973 which read as under : - 167. Procedure when investigation cannot be complete in twenty-four hours - (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, BAIL APPLN. 2238/2017 Page 6 of 22 and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that- (a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding,- (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]. (b) no Magistrate shall authorize detention in any custody under this section unless the accused is produced before him; (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police., qua the offence punishable under section 21(b) of the NDPS Act, 1985 the investigation has essentially to be completed within a period of 60 days from the date of the arrest of the petitioner and the investigation not being so complete within the period of 60 days, the accused BAIL APPLN. 2238/2017 Page 7 of 22 became mandatorily liable to be released on bail if he was prepared to and did furnish bail and would thus be deemed to have so been

released on bail under the provisions of Chapter-XXXIII of the Criminal Procedure Code, 1973 which prescribes for the provisions as to bail and bonds for the purposes of that Chapter of the Code of Criminal Procedure, 1973.

12. Admittedly as observed here-in-above, the charge-sheet in the instant case was filed on 22.09.2017 with the arrest of the petitioner on 03.06.2017. The verdict of the Honble Supreme Court in Rakesh Kumar Paul Vs. State of Assam (supra) 2017(9) SCALE24 categorically lays down whilst adverting to the verdict of the Honble Apex Court in Union of India Vs. Nirala Yadav (2014) 9 SCC457 and the verdict of the Honble Apex Court in Uday Mohanlal Acharya Vs. State of Maharashtra (2001) 5 SCC453 whilst also adverting to the judgment of the Constitution Bench of the Honble Supreme Court in Sanjay Dutts case 1994 5 SCC410 that if the charge-sheet has not been filed within the requisite period of 60 or 90 days as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of the default by the Investigating Agency in 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 and that if the charge-sheet has not been filed and the right of default bail has ripened into the status of an indefeasible right, it cannot be frustrated by the prosecution on any pretext and the accused can avail his liberty by filing an application stating the statutory period for filing BAIL APPLN. 2238/2017 Page 8 of 22 the charge-sheet or challan had expired and the same had not yet been filed and, therefore, the indefeasible right had accrued in his favour and further that the accused was prepared to furnish the bail bond. Paragraph 53 (2) (b) of the conclusion of the verdict of the Honble Apex Court in Sanjay Dutts case was also adverted to as under : - (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 enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The

accused, so released on bail may be arrested and committed to custody according to the provisions of the 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. which firms part of the 154th report of the Law Commission of India.

13. As laid down by the Honble Apex Court vide the verdict of the Constitution Bench in Sanjay Dutts case and in Hitendra Vishnu Thakur and Others etc. etc. Vs. State of Maharashtra and Others BAIL APPLN. 2238/2017 Page 9 of 22 (1994) 4 SCC602 whilst advertng to the verdict of the Honble Apex Court of Sanjay Dutts case 1994 5 SCC410 it was observed that the indefeasible right accrued to the accused is enforceable only prior to the filing the charge-sheet and does not survive or remain enforceable thereafter if already not availed of and that thus the indefeasible right of default bail continues till the charge-sheet or challan was filed and got extinguished thereafter. It was also observed in Rakesh Kumar Paul Vs. State of Assam (supra) by the Honble Apex Court that the practice on the part of the prosecution and of some Courts of keeping an application for default bail pending for some days so that in the meantime a charge-sheet is submitted has to be very strongly and vehemently discouraged and 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 charge-sheet or challan in Court.

14. On behalf of the State the learned APP for the State submitted that vide application dated 19.09.2017 filed by the accused i.e. the petitioner herein the applicant sought grant of bail on merits and not on the grounds of default bail for non submission of the charge- sheet within a period of 60 days from the arrest of the petitioner and thus the application filed on 19.09.2017 was rightly rejected vide order dated 22.09.2017 vide by ASJ-02, (East), Special Judge (NDPS), Karkardooma Courts, Delhi. Reliance was thus specifically placed on behalf of the petitioner on Rakesh Kumar Paul Vs. State of Assam (supra) on similar facts with specific reference to paragraphs 40, 44 BAIL APPLN. 2238/2017 Page 10 of 22 and 46 of the verdict. It is essential to reproduce paragraphs 40 to 47 & 49 of the

verdict authored by HMJ Madan B. Lokur in this case which are as under : - 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 BAIL APPLN. 2238/2017 Page 11 of 22 has been filed and whether the accused is prepared to and does furnish bail.

41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional Courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

42. In *Sunil Batra II v. Home Secretary, Delhi Administration* this Court accepted a letter, which was treated as petition, written by a prisoner in Tihar Jail, Delhi complaining of inhuman torture inflicted on another prisoner by the Jail Warder. In *Hussainara Khatoon v. State of Bihar* a number of writ petitions, some by way of a

letter, were grouped together and treated as habeas corpus petitions. In *Rubabbuddin Sheikh v. State of Gujarat* the brother of the deceased wrote a letter to the Chief Justice of India complaining of a fake encounter and subsequent disappearance of his sister-in-law. This was treated as a habeas corpus petition. In *Kishore Singh Ravinder Dev v. State of Rajasthan* the petitioners sent a telegram to a learned judge of this Court complaining of solitary confinement of prisoners. The telegram was treated as a habeas corpus petition and the concerned persons were directed to be released from solitary confinement. In *Paramjit Kaur (Mrs.) v. State of Punjab* a telegram received at the residential office of a learned judge of this Court alleging an incident of kidnapping by the police was treated as a habeas corpus petition. In *Bandhua Mukti Morcha v. Union of India* a petition addressed to a learned judge of this Court relating to the inhumane and intolerable conditions of stone quarry workers in many States and how many of them were bonded labour was treated as a writ petition on the view that the Constitution-makers deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or straight-jacket formula. In *Peoples Union for Democratic Rights v. Union of India* a letter addressed this Court concerning violation of various labour laws in the construction projects connected to the Asian Games was treated as a writ petition. In *Dr. Upendra Baxi (I) v. State of Uttar Pradesh* a letter relating to inhuman conditions in the Agra Protective Home for Women was treated as a writ petition and in *Sheela Barse v. State of Maharashtra* a letter addressed by a journalist complaining of custodial violence against woman prisoners in Bombay was treated as a writ petition. These cases are merely illustrative of the personal liberty jurisprudence of this Court and in matters the Constitution of India this Court has consistently taken the view that it is not advisable to be ritualistic and formal. However, we must make it clear that we should not be understood to suggest that procedures must always be given a go-by - that is certainly not our intention. pertaining to Article 21 of Duty of the Courts 43. This Court and other constitutional courts have also taken the view that in the matters concerning personal liberty and penal statutes, is the obligation of the court to inform the accused that he or she is entitled to free legal assistance as a

matter of right. In *Khatri v. State of Bihar* the Judicial Magistrate did not provide legal representation to the accused since they did not ask for it. It was held in *BAIL APPLN. 2238/2017* Page 13 of 22 for by this Court that this was unacceptable and that the Magistrate or the Sessions Judge before whom an accused appears must be held under an obligation to inform the accused of his or her entitlement to obtain free legal assistance at the cost of the State. In *Suk Das v. Union Territory of Arunachal Pradesh* the accused was tried and convicted without legal representation, due to his poverty. He had not applied legal representation but notwithstanding this, this Court held that the trial was vitiated and the sentence awarded was set aside, particularly since the accused was not informed of his entitlement to free legal assistance, nor was an inquiry made from him whether he wanted a lawyer to be provided at State expense. In *Rajoo @ Ramakant v. State of Madhya Pradesh* the High Court dismissed the appeal of the accused without enquiring whether he required legal assistance at the expense of the State even though he was unrepresented. Relying on *Khatri* and *Suk Das* this Court remanded his appeal to the High Court for re-hearing after giving an opportunity to the accused in *Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra* this Court relied on *Khatri* and held that in paragraph 474 of the Report as follows: legal assistance. Finally, to take it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make *BAIL APPLN. 2238/2017* Page 14 of 22 it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make to departmental proceedings. the Magistrate concerned liable 44. Strong words indeed. That being so we are of the clear opinion that adapting this principle, it would equally be the duty and responsibility of a court on coming to know that the accused person before it is entitled to default bail, to at least apprise him or her of the indefeasible right. A contrary view would diminish the respect for personal liberty, on which so

much emphasis has been laid by this Court as is evidenced by the decisions mentioned above, and also adverted to in Nirala Yadav. Application of the law to the petitioner 45. On 11th January, 2017 when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of default bail since the statutory period of 60 days for filing a charge sheet had expired, no charge sheet or challan had been filed against him (it was filed only on 24th January, 2017) and the petitioner had orally applied for default bail. Under these circumstances, the only course open to the High Court on 11th January, 2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him default conditions. Unfortunately, this was completely overlooked by the High Court. reasonable bail on 46. It was submitted that as of today, a charge sheet having been filed against the petitioner, he is not entitled to default bail but must apply for regular bail - the default bail chapter being now closed. BAIL APPLN. 2238/2017 Page 15 of 22 the We cannot agree for the simple reason that we are concerned with interregnum between 4th January, 2017 and 24th January, 2017 when no charge sheet had been filed, during which period he had availed of his indefeasible right of default bail. It would have been another matter altogether if the petitioner had not applied for default bail for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge sheet or challan has been the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for default bail during the interregnum between 4th January, 2017 and 24th January, 2017 as is evident from the decision of the High Court rendered on 11th January, 2017. On the contrary, he had availed of his right to default bail which could not have been defeated on 11th January, 2017 and which we are today compelled to acknowledge and enforce. filed, claim a resuscitation of 47. Consequently, we are of opinion that the petitioner had satisfied all the requirements of obtaining default bail which is that on 11th January, 2017 he had put in more than 60 days in custody pending investigations into an alleged offence

not punishable with imprisonment for a minimum period of 10 years, no charge sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail. BAIL APPLN. 2238/2017 Page 16 of 22 15. The concurring verdict of HMJ Deepak Gupta in this case also lays down to the effect :
- 106(23) The second issue which arises is whether the petitioner had applied for default bail or not. Admittedly, there is no such plea in the bail application, but it is also not disputed that this was the main argument at the time of hearing and this issue was specifically dealt with in the impugned order. In my opinion, once the High Court permitted the counsel for the petitioner to argue the petition on the ground of grant of default bail and no objection was raised by the counsel for the State then at this stage it cannot be urged that the petitioner never applied for default bail and is not entitled to default bail. If this objection had been raised at that stage, either by the Court or by the State, the accused could have either filed a fresh application for grant of default bail or could have prayed for default bail by adding an additional ground in the existing application much before 24.01.2017 when the charge-sheet was filed. 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. 16. Thus it cannot be overlooked in the instant case on 19.09.2017 when the petitioner sought grant of bail the charge-sheet was not filed BAIL APPLN. 2238/2017 Page 17 of 22 before the learned Trial Court and the petitioner was admittedly entitled to the grant of benefit in terms of section 167(2) proviso (a)(ii) thereof as the commission of the offence, if proved, is punishable in terms of section 21(b) of the NDPS Act, 1985 with a maximum term of rigorous imprisonment for a period of 10 years and with a fine.

17. As already observed here-in-above the application dated 19.09.2017 filed by the petitioner categorically specified that he was arrested on 03.06.2017 and was

in judicial custody and had joined the investigation as and when required and vide paragraph 12 had categorically stated that the applicant is ready and willing to join the investigation as and when directed and vide paragraph 13 & 14 categorically stated that he undertook to furnish sound and reliable surety and would abide by all terms and conditions imposed on him by the Court. This application was listed for 26.09.2017. An application was filed on 21.09.2017 by the applicant on the grounds of non compliance of the statutory requirement of submission of the charge-sheet in terms of Section 167(2) proviso (a) (ii) of the Criminal Procedure Code, 1973 i.e. on the ground of default bail which was declined on 22.09.2017 observing to the effect that the accused had not exercised his right for grant of statutory bail prior to the filing of the charge-sheet and had filed the same after filing of the charge-sheet and after cognizance was taken by the Court. It is essential to observe that as laid down in Rakesh Kumar Paul Vs. State of Assam (supra) and as categorically observed vide paragraph 43 thereof to the effect that in matters concerning personal liberty and penal statutes it is the BAIL APPLN. 2238/2017 Page 18 of 22 obligation of the Court to inform the accused that he or she is entitled to free legal assistance as a matter of right and adapting the principle laid in Mohammed Ajmal Mohammed Amir Kasab Vs. State of Maharashtra (1983) 2 SCC308 and in Khatri Vs. State of Bihar (1981) 1 SCC627 vide paragraph 44 thereof to the verdict in Rakesh Kumar Paul Vs. State of Assam (supra), it was observed to the effect that just as it is obligation of the Court to inform the accused that he or she is entitled to free legal assistance as a matter of right, this principle adapted would make it equally the duty and responsibility of a Court on coming to know that the accused person before it is entitled to default bail to at least apprise him or her of the indefeasible right and a contrary view would diminish the respect for personal liberty.

18. The observations in paragraph 111(28) and paragraph 112 (29) of the concurring judgment in Rakesh Kumar Paul Vs. State of Assam (supra) categorically spell out that the right to get default bail is a very important right and that ours is a country where millions of our countrymen are totally illiterate and are not aware of their rights and that the accused can be detained in custody so long as he does not furnish bail and that the accused is not required to file a detailed application and all he has to aver in the application is that since 60 or 90 days had

expired and charge-sheet has not been filed, he is entitled to bail and is willing to furnish bail and that this indefeasible right cannot be defeated by filing the charge-sheet after the accused has offered to furnish bail and did not have any grounds for grant of bail. Paragraph 112(29) of this verdict makes it clear that it is the duty of both the counsel whether paid counsel or legal aid BAIL APPLN. 2238/2017 Page 19 of 22 counsel to inform the accused that on the expiry of the statutory period of 60 or 90 days, the accused is entitled to default bail and the Magistrate must not encourage wrongful detention and must inform the accused of his right and in case the accused still did not want to exercise his right then he shall remain in custody and if he chooses to exercise his right and is willing to furnish bail he must be enlarged on bail.

19. It is essential to observe that the petitioner though he filed an application under Section 439 of the Criminal Procedure Code, 1973 and stated inter alia that he had been falsely implicated nevertheless stated that he was in judicial custody since 06.03.2017 and was willing to join the investigation and was willing to produce sound surety as directed by the Court. The application was admittedly filed on 19.09.2017 and was listed for 26.09.2017 and was not taken up on 19.09.2017. Paragraph 1(3) of the present petition states to the effect :-

"That on or above 20.09.2017 the learned Trial Court also brought to the notice of the prosecution that they had failed to file the charge-sheet / challan u/s 173 of the Code of Criminal Procedure, 1973 which ought to have been filed within 60 days it appears that the prosecution immediately filed charge-sheet u/s 173 of the Code of Criminal Procedure, 1973 on 20.09.2017 so that the indefeasible right to the bail of the petitioner gets defeated. It is submitted that on about 21.09.2017, the petitioner BAIL APPLN. 2238/2017 Page 20 of 22 supplemented the application of bail dated 19.09.2017 and the learned Trial Court decided the bail application vide its order dated 22.09.2017. Bail application dated 19.09.2017 and submission made on 21.09.2017 are annexed hereto and marked as Annexure-2 (Colly). 20. It is thus apparent that the contents of the application dated 19.09.2017 had essentially to be considered by the learned Trial Court and the aspect of the charge-sheet having not been filed till the said date which on completion of 60 days from the date of the arrest of the petitioner / the accused on 03.06.2017 had

to be filed by 04.08.2017 ought not to have overlooked. The period of incarceration of the petitioner from the date 19.09.2017 when he sought the grant of bail implicitly also on the ground that he was arrested on 03.06.2017 and was willing to continue to join the investigation, indicating thereby that the investigation was not complete and did not set completed till submission of the charge-sheet on 20.09.2017 cannot be overlooked and thus cannot extinguish the indefeasible right of default bail to the petitioner. The petition is thus allowed and the petitioner is thus directed to be released on bail on submission of a bail bond for a sum of Rs.50,000/- with one surety of the like amount subject to the satisfaction of the learned Trial Court and subject to the conditions that he shall not leave the country without permission of the learned Trial Court and he shall appear before the learned Trial Court as and when directed and shall submit his present address on an affidavit before the learned Trial Court. BAIL APPLN. 2238/2017 Page 21 of 22

21. Taking into account the observations in paragraph 44 of the verdict in Rakesh Kumar Paul Vs. State of Assam (supra) and the observations in paragraph 112(29) of the concurring judgment in Rakesh Kumar Paul Vs. State of Assam (supra), the Registrar General of the High Court of Delhi is requested to explore the possibility of creation of a database and software for the District Courts of Delhi for updation of data in relation to the pending remand applications during course of investigation pending before learned Trial Courts with dates of arrest, and dates by when the requisite charge-sheet is to be filed in terms of Section 167 (2) of the Code of Criminal Procedure, 1973 and the dates when the said charge-sheet has been filed, which would assist the learned Trial Courts in preservation of the rights of personal liberties of the accused appearing before them by informing the accused on coming to know that an accused person before them is entitled to the indefeasible right of default bail and may thus exercise the same if he / she is willing to furnish bail.

22. The petition is disposed of accordingly. ANU MALHOTRA, J.

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