CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI

Criminal Miscellaneous Jurisdiction
Appellate Side

CRM 1105 of 2019

The State of West Bengal

-Vs.-

Dharam Paswan

Before: Hon'ble Justice Arijit Banerjee
&
Hon'ble Justice Abhijit Gangopadhyay

For the Applicant	:	Mr. Kishore Dutta, Advocate General Mr. Aditi Sankar Chakraborty, Adv. Mr. Sirshanya Bandhopadhyay, Adv. Ms. Sriparna Das, Adv. Mr. Arka Nag, Adv.
For the Opposite Party	:	Mr. Farook M. Razak, Sr. Adv. Mr. Ananta Shaw, Adv. Mr. Subrata Karnakar, Adv. Mr. Hillol Saha Poddar, Adv. Mr. Gautam Banerjee, Adv. Mr. Saiket Chatterjee, Adv.
For the de facto-Complainant	:	Mr. Manoj Malhotra, Adv. Mr. Ravi Kumar Debey, Adv.
Heard On	:	17.02.2020, 21.02.2020, 25.02.2020 & 27.02.2020
CAV on	:	27.02.2020
Judgment On	:	15.04.2020

Arijit Banerjee, J.:-

1. This application has been filed by the State of West Bengal for cancellation of bail granted to the opposite party (OP) by the Learned Chief Judicial Magistrate (CJM), Jalpaiguri by an order dated 19 November, 2019. Although the cause title shows that this application has been filed under Section 439(2) read with Section 482 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.'), Learned Advocate General appear for the State requested us to treat the application as one only under Section 439(2) of the Cr.P.C. and we have done so. The brief facts of the case relevant for the purpose of disposing of this application are as follows.

2. One Fulkumari Pasman runs a restaurant-cum-bar called 'Golden Valley' as the license holder thereof, within Jalpaiguri Municipality. The OP is the husband of Fulkumari. On 20 August, 2019, the OP was arrested in connection with Women Police Station Jalpaiguri Case No.81 of 1991 dated 16 July, 2019 registered under Sections 370/379(B)(2)/201/188/468 and 271 of the India Penal Code, 1860 (in short, 'IPC') read with Sections 3/4/5/6 of Immoral Trafficking (Prevention) Act, 1956 and Sections 14A/14C of the Foreigners Act, 1946. The OP was remanded to police custody and then after 3 or 4 days to judicial custody.

3. It is pertinent to note that the aforesaid criminal case was registered on the basis of a written complaint lodged by one Sulaja Motey who was an employee at the said restaurant-cum-bar.

4. Two writ petitions were filed before a Learned Single Judge of this Court, one by Fulkumari Pasman (WPA No.300 of 2019) and the other by Sulaja Motey (WPA No.299 of 2019). In her writ petition, Fulkumari prayed for various reliefs including unsealing of the said restaurant-cum-bar which had been sealed by the police. In the other writ petition, Saluja contended that the written complaint was procured from her by the police under coercion and duress and she prayed for an investigation into the matter by the Criminal Investigation Department (CID) instead of the Special Investigation Team (SIT) which was conducting the investigation. By a common Judgment and Order dated 11 September, 2019 the Learned Single Judge disposed of WPA No.299 of 2019 by, inter alia, requesting the Chief Judicial Magistrate, Jalpaiguri, to record Saluja's statements under the relevant provisions of the Cr.P.C. and by directing the Additional Director General of the CID to assume charge of the investigation and to file a Report after conclusion of the investigation preferably within eight weeks from the date of communication of the order or within such reasonable time as may be thought fit by the Additional Director General, CID. The Learned Judge disposed of WPA No.300 of 2019 by making certain observations which are not material for the present purpose.

5. Being aggrieved by the aforesaid judgment and order of the Learned Single Judge, the State of West Bengal preferred two appeals and filed stay applications therein, being AST No.37 of 2019 with CAN 9442 of 2019 (*State of West Bengal & Ors. v. Fulkumari Pasman & Ors.*) and AST No.38 of 2019 with CAN 9441 of 2019 (*State of West Bengal v. Saluja Motey & Ors.*). On the said applications filed in the

said two appeals a common order dated 1 October, 2019 was passed by a Division Bench of this Court, the operative portion whereof reads as follows:

> *"In so far as the impugned order relates to WPA 299 of 2019, we order stay of operation of the direction that the Criminal Investigation Department (CID) will take over the investigation. We also direct that the Special Investigation Team which is now carrying on with the investigation may proceed with the investigation but shall not conclude the investigation or file final report before the criminal court under Section 156(3) Cr.P.C. until next date of hearing.*
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> *In so far as the appeal which arises from WPA No.300 of 2019 is concerned, we record the submission of the learned Advocate General that an application filed by the writ petitioner before the criminal court for opening the sealed premises was disallowed and that has not been challenged in any proceedings. However, we are of the view that the reasons given by the learned Single Judge in the impugned order are cogent enough to sustain the direction granted in WPA 300 of 2019 provisionally and subject to further orders in this writ appeal. Therefore, the directions contained in the impugned order of the learned Single Judge, in so far as it relates to WPA 300 of 2019 shall be given effect to by the appellants/respondents in WPA 300 of 2019 forthwith."*

6. On or about 15 November, 2019, the State of West Bengal filed an application being CAN 10845 of 2019 in one of the pending appeals seeking leave to file charge-sheet against the OP and other accused persons.

7. On 19 November, 2019, the Learned CJM, Jalpaiguri allowed the OP's application for statutory bail since 90 days had elapsed from 20 August, 2019 when the OP had been taken into custody but charge-sheet had not been filed.

8. Learned Advocate General appearing for the State of West Bengal submitted that there was no failure on the part of the Investigating Officer (I.O.) to file the charge-sheet. The charge-sheet was ready by 15 November, 2019. The same could not be filed before the Learned Trial Court only because of the restraint order dated 1 October, 2019 passed by the Division Bench of this Court. The State duly made an application before the Division Bench for modification of its earlier order by granting leave to the police to file the charge-sheet. However, in spite of best of efforts, Learned Advocates for the State could not have the application heard by the Court. The statutory right of an accused in judicial custody to be enlarged on bail upon expiry of 60 days or 90 days, as the case may be, depending on the nature of the offence that the accused is charged with, arises only if there is failure or default on the part of the I.O. to file the charge-sheet within the period stipulated in Section 167 of the Cr.P.C. That is why statutory bail is also referred to as default bail. However, in this case there was no default on the part of the I.O. Filing the charge-sheet without obtaining leave of the Division Bench would have amounted to contempt of Court. Section 167 (2) of Cr.P.C. only prescribes a procedure. Nobody has a vested right in a procedure being complied with.

9. Learned Advocate General submitted that as on the date of grant of statutory bail to the OP, the State's application for leave to file the charge-sheet was pending before the High Court. During pendency of such application, which

was filed prior to expiry of the statutory period of 90 days, the Learned Magistrate could not have granted bail to the OP. Pendency of the State's application before the High Court operated as a bar to the Learned Magistrate taking up the application for statutory bail for consideration. In this connection Learned Advocate General relied on a decision of the Hon'ble Supreme Court in the case of ***Rambeer Shokeen v. State (NCT of Delhi): (2018) 4 SCC 405***. We shall revert back to this decision later in this judgment. Relying on that judgment, Learned Advocate General submitted that upon expiry of the statutory period of 60 days or 90 days, as the case may be, no indefeasible right accrues to the accused in custody to get bail.

10. Appearing for the OP, Mr. Farook M. Razak, Learned Senior Counsel submitted that the Proviso to Section 167(2) of the Cr.P.C. is a mandate on the Court to release the accused person on bail upon expiry of the statutory period of 60 days or 90 days, as the case may be, if he is prepared to and does furnish bail. Learned Counsel referred to Paragraph 12 of the petition filed before us and submitted that investigation has still not been completed. Hence, I.O. could not have been in a position to file the charge-sheet on or about 15 November, 2019 when the State filed its application before the High Court.

11. Mr. Razak further submitted that bail granted under the Proviso to Section 167(2) of Cr.P.C. is deemed to be bail granted under the Provisions of Chapter XXXIII of Cr.P.C. i.e. under Section 437 or 439 of the Cr.P.C. The instant application is under Section 439(2) of the Cr.P.C. The State has not demonstrated that the OP has misused bail in any manner or has tampered with

evidence or has threatened any witness or has breached any condition of bail granted by the Learned Magistrate. Hence, the application is misconceived.

12. Learned Counsel further submitted that the OP was in custody for 90 days. The I.O. could have easily interrogated him. This was not done. It is futile for the State to say that the OP could not be interrogated and the investigation is, therefore, incomplete. He submitted that upon expiry of the statutory period, an indefeasible right accrues in favour of the detained accused person to be enlarged on bail and the Learned Magistrate has no option in the matter but to grant bail, unless of course, the charge-sheet has been filed by the I.O. in the meantime, in which case, the accused person has to resort to the provisions of Chapter XXXIII of the Cr.P.C. to obtain bail.

Further, the OP was in police custody for at least three days. This was enough time for the police to interrogate him. No application was made by the Investigating Authority for permission to interrogate the OP in jail custody. It was not the fault of the OP that the charge-sheet was not filed within the statutory time period.

13. In this connection Learned Counsel relied on the decision of the Hon'ble Supreme Court in the case of ***Uday Mohanlal Acharya v. State of Maharashtra: (2001) 5 SCC 453***. He also relied on the decision of the Hon'ble Supreme Court in the case of ***Achpal @ Ramswaroop & Anr. v. State of Rajasthan: AIR 2018 SC 4647*** and also in the case of ***Sayed Mohd. Ahmad Kazmi v. State (Govt. of NCT of Delhi) & Ors.: (2012) 12 SCC 1***. We shall revert back to these decisions later in this Judgment

14. Mr. Razak submitted that special statutes like Maharashtra Control of Organized Crime Act, 1999, Terrorist and Disruptive Activities (Prevention) Act, 1985 (since repealed), Narcotic Drugs and Psychotropic Substances Act, 1985, etc. have provisions for extension of time to complete investigation and correspondingly for extension of the period of detention of the accused person. The present case is not under any special statute. It is under the general law as enshrined in the provisions of the Cr.P.C. In the Cr.P.C. there is no provision for extension of time for completion of investigation and/or for extending the time period for custodial detention of the accused person. He submitted that once bail is granted, the same should not be cancelled unless a compelling reason has been shown therefor. In the present case no ground for cancellation of bail has been made out. In this connection Learned Counsel relied on a decision of the Hon'ble Supreme Court in the case of ***X v. State of Telangana & Anr.: (2018) 16 SCC 511***.

15. In reply, Learned Advocate General reiterated that the argument that on expiry of the statutory period, the accused in custody gets an automatic indefeasible right to be enlarged on bail is not in consonance with the criminal jurisprudence of our country. Investigation was complete in this case within the statutory time period. Charge-sheet could not be filed because of the restraint order of the High Court. There was no default on the part of the administration.

16. We have given our anxious consideration to the arguments advanced on behalf of the respective parties.

17. The essential facts of the case are not in dispute. The OP was taken into custody on 20.08.2019. Given the nature of the offence that the OP has been

charged with, it is also not in dispute that the statutory period of 90 days and not 60 days as mentioned in the Proviso to Section 167(2) of Cr.P.C. would apply to this case. 90 days was to expire on 19.11.2019. On 01.10.2019 an order was passed by the High Court in a writ appeal permitting the SIT to proceed with the investigation but restraining the police from filing final Report till the next date of hearing. On or about 15.11.2019 the State filed an application before the High court for leave to file the charge-sheet. Such application could not be heard at least till the date of conclusion of hearing in the present matter i.e. 27.02.2020. In the meantime, on 19.11.2019 the Learned Magistrate allowed the OP's application for statutory bail. The question is whether such order of the Learned Magistrate can be faulted.

18. Section 167 of Cr.P.C., in so far as the same is material for the present purpose, provides as follows:

> *"(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the time forward the accused to such Magistrate.*
>
> *(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a*

term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

[(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and, on 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;]"

19. The question is whether the Learned Magistrate could have or should have rejected the OP's prayer for statutory bail only because of pendency of the State's application before the High Court for modification of its order dated 1 October, 2019 by granting leave to the police authorities to file the charge-sheet. In other words, could the pendency of the State's application before the High Court be

construed as authorizing the Learned Magistrate to extend the custodial detention of the OP beyond 90 days by rejecting his prayer for statutory bail?

20. In the case of ***Uday Mohanlal Acharya*** (supra) the question that arose for consideration by the Hon'ble Supreme Court was, when can an accused be said to have availed of his right for being released on bail under the Proviso to Section 167(2) of the Cr.P.C., if a challan is not filed within the period stipulated thereunder. In the course of answering that question, the Hon'ble Court observed as follows in various paragraphs of the Judgment:

> *" The power under Section 167 is given to detain a person in custody while the police goes on with the investigation and before the Magistrate starts the enquiry. Section 167, therefore, is the provision which authorises the Magistrate permitting detention of an accused in custody and prescribing the maximum period for which such detention could be ordered. Having prescribed the maximum period, as stated above, what would be the consequences thereafter has been indicated in the proviso to sub-section (2) of Section 167. The proviso is unambiguous and clear and stipulates that the accused shall be released on bail if he is prepared to and does furnish the bail which has been termed by judicial pronouncement to be "compulsive bail" and such bail would be deemed to be a bail under Chapter 33. The right of an accused to be released on bail after expiry of the maximum period of detention provided under Section 167 can be denied only when an accused does not furnish bail, as is apparent from Explanation I to the said Section. The proviso to sub-section (2) of Section 167 is a beneficial provision for curing the mischief of indefinitely prolonging the investigation and thereby affecting the liberty of a citizen.*

.....

There cannot be any dispute that on expiry of the period indicated in the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure the accused has to be released on bail, if he is prepared to and does furnish the bail. Even though a Magistrate does not possess any jurisdiction to refuse the bail when no charge-sheet is filed after expiry of the period stipulated under the proviso to sub-section (2) of Section 167 and even though the accused may be prepared to furnish the bail required, but such furnishing of bail has to be in accordance with the order passed by the Magistrate.

The Constitution Bench in Paragraph 48 ***(Sanjay Dutt v. State through CBI: (1994) 5 SCC 410)*** *stated thus:*

"The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It

is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applied 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."

.....

A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and that right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the court has to be passed. It is also further clear that the indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in Sanjay Dutt (supra) case.

.....

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. *(Emphasis is ours)*

.....

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. Personal liberty is one of the cherished objects of the

Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. ***When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the provisions to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail.*** *(Emphasis is ours). It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed, then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only*

way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:

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 in entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.*** *(Emphasis is ours)*
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.*
6. *The expression "if not already availed of" used by this Court in Sanjay Dutt (supra) case 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."*

21. In the more recent case of ***Achpal @ Ramswaroop & Anr.*** (supra), the appellants had been in custody from 08.04.2018. Hence, the investigation in

terms of Section 167 of the Cr.P.C. had to be completed by 07.07.2018. The investigation was completed and challan under Section 173 of the Cr.P.C. was filed by the police before the concerned Judicial Magistrate on 05.07.2018. However, two days before that, an order had been passed by the High Court recording submission of the Public Prosecutor that investigation in the matter would be conducted by a Gazetted Police Officer. The investigation which led to filing of the report on 05.07.2018, was not in conformity with the statements made before the High Court, since, the report was filed by a police officer lower in rank than an ASP and who was not a Gazetted Police Officer. For this reason, the papers were returned by the Magistrate. The statutory period of 90 days expired on 07.07.2018. Immediately the accused persons applied for statutory bail. The Learned Magistrate by his order dated 09.07.2018 rejected the application observing that the Charge-sheet that was filed on 05.07.2018 was returned due to technical fault and also by observing that the effect of the High Court's order dated 03.07.2018 was extension of period within which the investigation could be completed.

Such rejection of prayer for statutory bail was challenged by the accused persons before the High Court. While rejecting the petition of the accused persons, the High Court observed that no case for grant of bail under Section 167(2) of Cr.P.C. had been made out as the time was extended by the High Court and the I.O. was afforded two months' time to file charge-sheet. It was further observed that the I.O. had produced the charge-sheet before the concerned Court prior to 90 days but the same was returned in view of the order of the High Court.

The matter being carried to the Hon'ble Apex Court, two questions were formulated for consideration. Firstly, could it be said that the investigation was complete for the purposes of Section 167(2) of the Cr.P.C. so as to deny the benefit to the accused in terms of the said provision? Secondly, whether the order of the High Court could be construed as one under which the period for completing the investigation stood extended?

22. The Hon'ble Apex Court noted the earlier decisions of that Court including the one in the case of ***Uday Mohanlal Acharya*** (supra) and also noted the recommendations of the Law Commission of India pursuant to which the new Cr.P.C., 1973 was introduced. Having done so, the Hon'ble Court held as follows:

> *"18. In the present case as on the 90th day, there were no papers or the charge-sheet in terms of Section 173 of the Code for the concerned Magistrate to assess the situation whether on merits the accused was required to be remanded to further custody. Though the charge-sheet in terms of Section 173 came to be filed on 05.07.2018, such filing not being in terms of the order passed by the High Court on 03.07.2018, the papers were returned to the Investigating Officer. Perhaps it would have been better if the Public Prosecutor had informed the High Court on 03.07.2018 itself that the period for completing the investigation was coming to a close. He could also have submitted that the papers relating to investigation be filed within the time prescribed and a call could thereafter be taken by the Superior Gazetted Officer whether the matter required further investigation in terms of Section 173(8) of the Code or not. That would have been an ideal situation. But we have to consider the actual effect of the circumstances that got unfolded.* ***The fact of the matter is that as on completion***

of 90 days of prescribed period under Section 167 of the Code there were no papers of investigation before the concerned Magistrate. The accused were thus denied of protection established by law. The issue of their custody had to be considered on merits by the concerned Magistrate and they could not be simply remanded to custody dehors such consideration. In our considered view the submission advanced by Mr. Dave, learned Advocate therefore has to be accepted. We now turn to the subsidiary issue, namely, whether the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 and Maharashtra Control of Organized Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no Court could either directly or indirectly extend such period. *In any event of the matter all that the High Court had recorded in its order dated 03.07.2018 was the submission that the investigation would be completed within two months by a Gazetted Police Officer. The order does not indicate that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission of the Public Prosecutor could not be taken to be an order granting extension. We thus reject the submissions in that behalf advanced by the Learned Counsel for the State and the complainant.*

In our considered view the accused having shown their willingness to be admitted to the benefits of bail and having filed an appropriate application, an indefeasible right did accrue in their favour." (Emphasis is ours)

23. On an analysis of the aforesaid two Judgments of the Hon'ble Supreme Court, inter alia, the following points emerge:

(i) The Magistrate can authorise detention of an accused in custody up to a maximum period of 60 days or 90 days, depending on the nature of the alleged offence. It is not in dispute that in the facts of the present case, in view of the nature of the charging sections, the OP could be detained in custody up to 90 days from the date when he was first produced before the Magistrate after being arrested.

(ii) The Magistrate has no jurisdiction to extend the period of detention beyond the statutory period mentioned in Section 167(2) of the Cr.P.C.

(iii) On the expiry of the statutory period, if challan/charge-sheet has not been filed by then, the accused person acquires an indefeasible right to be enlarged on bail so long as he expresses his willingness to furnish bail. The Magistrate has no discretion in the matter and is statutorily bound to grant bail. All he has to see is whether at the time of the application being made, charge-sheet was on record before him. If not, he has no option but to grant bail.

(iv) An accused will be said to have availed of his indefeasible right to be enlarged on statutory bail as soon as he files an application praying for such bail. Subsequent filing of the charge-sheet, even prior to

hearing or disposal of the bail application, will not defeat or adversely affect the right of the accused to obtain statutory bail. It is an entirely different matter that after being granted bail and after going though the charge-sheet and materials on record, the Magistrate may authorise re-arrest of the accused for the purpose of better investigation. However, once the right of statutory bail accrues in favour of the accused in custody and he exercises such right by filing an appropriate application expressing his willingness to furnish bail, he must be granted bail.

(v) No court can directly or indirectly extend the statutorily prescribed period within which investigation must be completed and the provisions of Cr.P.C. do not admit of any such eventuality. It would be a different thing altogether if the Court is dealing with a special statute like the Terrorist and Disruptive Activities (Prevention) Act, 1985 (since repealed) or the Maharashtra Control of Organized Crime Act, 1999 or Narcotic Drugs and Psychotropic Substances Act, 1985 which clearly empower the Court to extend the period of investigation and correspondingly, custodial detention of the accused. To that extent, those special enactments have modified the relevant provisions of Cr.P.C including Section 167 thereof. In the absence of such special provision, no Court can extend the period of investigation.

24. Applying the above principles of law to the facts of the present case, we find that on the day the OP applied for statutory bail and was granted bail, there was no charge-sheet before the Learned Magistrate. Admittedly, charge-sheet had not been filed by that date. The Learned Magistrate had no option but to

grant bail in view of the law discussed above. He cannot be faulted in any manner for having allowed the application of the OP for grant of statutory bail. An indefeasible statutory right accrued in favour of the OP. The Learned Magistrate was wholly justified in giving effect to such statutory right of the OP.

25. The argument advanced by the Learned Advocate General that there was full justification for the administration in not filing the charge-sheet within the statutory period and that there was no default on the part of the State in that regard and hence, Learned Magistrate should have denied statutory bail, cannot be accepted in view of the law discussed above. It has been clearly held by the Hon'ble Apex Court that in the absence of special provision in a special statute, no Court can directly or indirectly extend the period within which the investigation has to be completed. We are not concerned with any special statute in the present case. We are dealing with the Cr.P.C which does not contemplate extension of the period of investigation. We are conscious that by the order dated 1 October, 2019, the High Court had restrained the administration from filing chare-sheet till the next date of hearing. However, such order cannot be construed as extending the period for completion of investigation. It was for the State to approach the High Court with sufficient time in hand to have the restraint order relaxed or modified. We notice that the State approached the High Court only on 15 November, 2019 when the 90 days from the date when the OP was remanded to custody was to expire on 19 November, 2019.

26. While considering the application for statutory bail, there is no scope for application of the 'default theory' as urged by Learned Advocate General, in the sense that bail should be denied if the charge-sheet was not filed within the

statutory period for no fault of the police. Reason for non-filing of the charge-sheet within the stipulated period is irrelevant and of no consequence. Upon non-filing of the charge-sheet within the statutorily prescribed period, an absolute and indefeasible right accrues in favour of the accused person which is in consonance with the concept of personal liberty enshrined in Articles 21 & 22 of the Constitution of India.

27. Learned Advocate General heavily relied on the Hon'ble Supreme Court's decision in ***Rambeer Shokeen*** (supra). That was a case concerning the Maharashtra Control of Organized Crime Act, 1999. That is a special Act. Section 21(2) of the said Act provides as follows:

> *"(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in sub-section (2),-*
>
> *(a) the references to "fifteen days", and "sixty days", wherever they occur, shall be construed as references to "thirty days" and "ninety days", respectively;*
>
> *(b) after the proviso, the following proviso shall be inserted, namely:-*
>
> *"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period upto one hundred and eighty 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 ninety days"."*

In that case the accused had filed an application for statutory bail prior to expiry of the statutory period. Such application was not pressed. A

second application was filed after expiry of the statutory period. However, by then and prior to expiry of the statutory period, the I.O. had filed an application before the Special Court for extension of the period for completion of investigation. It is under those circumstances that the Hon'ble Supreme Court held that since the report of the Additional Public Prosecutor seeking extension of time had been filed prior to expiry of the statutory period and also prior to the second application of the accused person for statutory bail, the application for extension of time ought to have been heard first by the Special Court as the application for statutory bail could succeed only if the extension application was rejected. The facts of that case were entirely different. In the present case, we are not dealing with any special statute. The Cr.P.C does not envisage extension of time for completion of investigation nor has any such prayer been made by the administration and rightly so since such prayer would not be maintainable in view of the clear provisions of the Cr.P.C.

28. The sole ground urged by Learned Advocate General in support of the State's prayer for cancellation of statutory bail granted to the OP is that the Learned Magistrate fell in error in allowing the bail application notwithstanding that the State's application for leave to file the charge-sheet was pending as on that date before the High Court. We have already recorded our opinion that we are not impressed with this submission. No other ground has been urged for cancellation of bail granted to the OP. In this connection we may notice the following observation of the Hon'ble Supreme Court in the case of ***Dolat Ram v. State of Haryana: 1995 1 SCC 349*** which was quoted with approval by a

Three Judges Bench of the Apex Court in ***X v. State of Telangana & Anr.*** (supra):

> *"Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trail."*

None of the grounds for cancellation of bail as mentioned in the aforesaid Judgment has been urged on behalf of the State.

29. Learned Advocate General sought to rely on the principle of *actus curiae neminem gravabit*. This Latin maxim means that an act of Court shall not prejudice anybody. The principle applies when it is found that by reason of an order of a Court, which it is subsequently demonstrated should not have been passed, a party to the *lis* has suffered any loss or prejudice. In such a situation, this maxim requires that the party who has suffered the loss or prejudice, should be put back in the position in which he would have been, had the order not been passed. This is substantially

the principle of restitution. Generally this principle applies when it is shown that an order of Court that was passed earlier is erroneous or should not have been passed for some other reason and the order has caused prejudice to a party to the litigation.

30. Learned Advocate General submitted that the interim order dated 1 October, 2019 passed by the Division Bench prevented the Administration from filing the charge-sheet without the leave of Court. The State approached the Court for such leave on 15 November, 2019. However, the Court did not hear the State's application till 19 November, 2019 or even thereafter. Had the Court heard the State's application prior to 19 November, 2019 and had the Court granted leave to the State to file the charge-sheet prior to 19 November, 2019, the O.P. would not have been entitled to statutory bail. In such a case, the O.P. would have had to approach the appropriate Court for regular bail.

31. We are unable to accept this submission of Learned Advocate General. The maxim *actus curiae neminem gravabit* has no manner of application in the facts of the present case. The order dated 1 October, 2019 passed by the Division Bench of the High Court has not been demonstrated to be erroneous nor has it been shown that such order should not have been passed for some other reason. The statutory period of 90 days for custodial detention of the O.P. was due to expire on 19 November, 2019. The State approached the Division Bench at the last moment i.e. on 15 November, 2019 by applying for leave to file the charge-sheet. 16 and 17 November, 2019 were Saturday and Sunday. Due to

reasons beyond anybody's control the application of the State could not be heard prior to 19 November, 2019. Had the State been aggrieved by the Division Bench order dated 1 October, 2019, it could have and should have taken steps well in advance before expiry of the statutory period of custodial detention of the O.P. to have the order vacated or modified or set aside by a Higher Forum. Nothing of the kind was done by the State. In our considered opinion, in the facts and circumstances of the case, the State cannot rely on the maxim *actus curiae neminem gravabit.*

32. For the reasons aforestated, we are not inclined to allow this application. The application is dismissed. There will be no order as to costs.

33. Urgent Photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Arijit Banerjee, J.)

(Abhijit Gangopadhyay, J.)