IN THE HIGH COURT OF JUDICATURE AT BOMBAY CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL STAMP NO. 1707 OF 2020

Gautam P. Navlakha ….Appellant
Aged about 69 years,
Currently UTP 196 Taloja Central Jail
Otherwise R/o Flat No.2
R-3 Nehru Enclave
New Delhi 110019

VERSUS

National Investigation Agency
7 th floor, Cumbala rill Telephone Exchange
Peddar Road, Mumbai -26
(FIR No. RC 01/2020/NIA/Mum) ….. Respondent

Mr.Kapil Sibal, Senior Advocate a/w Ms.Nitya Ramkrishnan, Ms.Ragini Ahuja, for the Appellant.

Mr.S.V.Raju – Senior Advocate a/w Mr.Sandesh Patil, Mr.Chintan Shah, Mr.Prithviraj Gole, Ms.Anusha Amin i/b Mr.D.P. Singh, for Respondent – NIA. Mr. Deepal Thakare, PP a/w Mr.J.P. Yagnik, APP for State.

CORAM : S. S. SHINDE &
M. S. KARNIK, JJ

RESERVED ON : 16th DECEMBER, 2020
PRONOUNCED ON : 08th FEBRUARY, 2021

JUDGMENT (PER M.S. KARNIK, J.) :

1. This is an Appeal under section 21 of the National Investigation Agency Act, 2008 (‘the Act’ for short) against order dated 12/07/2020 passed by the NIA Special Court in NIA Case No. 414 of 2020. The impugned order was passed on the Exhibit No. 276 application made by the Appellant before the NIA Court for statutory bail under section

167 (2) of Code of Criminal Procedure (for short 'CrPC') read with section 43 of the Unlawful Activities Prevention Act, 1967 ('UAP' Act for short).

The facts of the case in brief leading to the fling of the present Appeal are thus :

2. The Appellant states that he is a 69 years old scholar, writer, peace and civil rights activist, and journalist of long-standing associated with the Economic and Political Weekly and other well-regarded publications. It is stated that the Appellant belongs to the People's Union of Democratic Rights ('PUDR' for short) many of his Petitions have led to landmark judgments.
3. The Appellant came to be arrested on 28/10/2018 at his residence in Delhi in connection with F.I.R. No. 4 of 2018 registered at Vishrambag Police Station, Pune on 08/01/2018. The said F.I.R. has since been numbered as RC 01/2020/NIA/Mum dated 24/01/2020 registered by NIA, Mumbai under sections 121, 121-A, 124-A, 153-A, 505(1)(b), 117, 120-B read with section 34 of Indian Penal Code ('IPC' for short) & sections 13, 16, 17, 18, 18-B, 20, 38, 39, 40 of UAP Act.
4. The High Court of Delhi in Gautam Navlakha Vs State W.P.(Cr) No. 2559 of 2018 vide order dated 28/08/2018 stayed the Appellant's transit remand proceedings and directed that the Appellant be kept under house arrest under the guard of Delhi Police Special Cell along with local police that had come to arrest the Appellant.
5. The Hon'ble Supreme Court in **Romila Thapar vs. Union of India and Ors. in Writ Petition (Crl) 261 of 2018** passed an interim order dated 29/08/2018 extending the Appellant's house arrest, which was further extended from time to time till final disposal of the Petition on 28/09/2018. On 28/09/2018, the Hon'ble Supreme Court pronounced the judgment in Romila Thapar and gave the accused person liberty to pursue appropriate legal remedies.
6. The righ Court of Delhi by its order dated 01/10/2018 passed in Gautam Navlakha Vs. State Writ Petition (Cr) No. 2559 of 2018 quashed the Appellant's arrest. This order was challenged by the State of Maharashtra (the prosecuting agency before transfer to NIA) before the ron'ble Supreme Court in State of Maharashtra Vs. Gautam Navlakha SLP(Crl.) 8616/2018.
7. The Appellant by this time had spent 34 days in custody (house arrest) i.e. from 28/08/2018 to 01/10/2018, frst under the orders of righ Court of Delhi and then under the orders of the ron'ble Supreme Court in 'Romila Thapar'.
8. The Appellant fled Writ Petition (Criminal) 4425 of 2018 in this Court for quashing the F.I.R. against him which was dismissed on 13/09/2019. This Court in the interregnum had ordered that no coercive steps be taken against the Appellant.
9. The order dated 13/09/2019 passed by this Court dismissing the Writ Petition for quashing of F.I.R. was challenged by the Appellant in SLP (Criminal) 8862 of 2019. The ron'ble Supreme Court granted the Appellant 4 weeks protection with liberty to seek pre-arrest bail/ protection before the concerned Court. The Appellant then fled an anticipatory bail application before the Sessions Court Pune (the Court where the trial was pending before transfer to NIA) and then approached this Court. The anticipatory bail application came to be rejected by this Court on 14/02/2020.

10. The Appellant then approached the ron'ble Supreme Court by way of (SLP) (Criminal) 1842 of 2020. By an order dated 16/03/2020 the ron'ble Supreme Court directed the Appellant to surrender within 3 weeks. The appellant sought extension of time to surrender by an application dated 08/04/2020 due to Covid-19 pandemic. The ron'ble Supreme Court granted one more week to the Appellant to surrender. The Appellant surrendered to NIA Delhi on 14/04/2020 in compliance with the order passed by the Hon'ble Supreme Court. It is stated by the Appellant that he could not surrender to NIA, Mumbai as there was ban on inter-state travel due to Covide-19 pandemic.
11. The NIA, Delhi on 15/04/2020 sought and were granted 7 days police custody of the Appellant by the Sessions Court, Patiyala rouse, New Delhi. The police custody was extended by another 7 days by order dated 21/04/2020.
    However, on 25/04/2020, the Appellant was remanded to judicial custody as per the request made by NIA. On 26/05/2020, the Appellant was produced before the NIA Special Court, Mumbai and was remanded to the judicial custody. The Respondent sought further custody of Appellant on 10/06/2020 by fling MA 601/ 2020 before NIA Special Court.
12. The Appellant fled an application for statutory bail on 11/06/2020 before the NIA Court (Exhibit 276) as the Appellant's total custody had exceeded 90 days and as no charge-sheet had been fled nor extension of time sought for fling charge-sheet.
13. On the scheduled date of hearing i.e. 26/06/2020 application Exhibit 276 for statutory bail and the application made by the Respondent for further custody came to be adjourned at the Respondent's instance as they sought time to circulate SLP (Crl) 8616 of 2018 pending before the hon'ble Supreme Court wherein the Respondent had challenged the order of Delhi righ Court dated 01/10/2018 in Gautam Navlakha Vs. State (2018) 235 DLT 392 (DB) quashing the Appellant's arrest.
14. The Respondent filed an application on 29/06/2020 for extension of time for filing charge-sheet under sections 43d(2)(b) UAP Act before the NIA Special Court (Exhibits 292 and 293). The NIA Court vide the order impugned passed below Exhibit 276 rejected the application made by the Appellant for statutory bail.
15. To complete the narration, it would also be pertinent to mention that the NIA Special Court allowed the Respondent's application (MA 601 of 2020) for further police custody and Respondent's application (Exhibits 292 & 293) for extension of 90 days time to fle charge-sheet.
16. The ron'ble Supreme Court on 11/08/2020 disposed of State of Maharashtra Vs Gautam Navlakha SLP (Criminal) 8616 of 2018 fled by Respondent challenging the order dated 01/10/2018 passed by the Delhi righ Court in Gautam Navlakha Vs.State (2018) 235 DLT 392 (DB) quashing the Appellant's arrest observing thus :

    "We do not propose to go into the rival submissions, as the petitions have been rendered infructuous for practical purposes. rowever, we direct that the impugned order shall not be treated as a precedent for any other case, questions of law are kept open".

SUBMISSIONS ON BEHALF OF THE APPELLANT

17. Learned Senior Advocate Mr.Kapil Sibal appearing on behalf of the Appellant submitted that the Appellant's total custody had exceeded 90 days and no charge-sheet had been fled nor extension of time sought for fling charge-sheet and hence, the Appellant is entitled for statutory bail under section 167(2) of CrPC read with 43 of UAP Act. According to learned Senior Advocate 90 days custody of the Appellant is as follows.
"From 28.8.2018 – 1.10.2018 (custody in his house) = 34 days (excluding the last day)
From 14.4.2020 – 25.4.2020 (NIA custody) = 11 days (excluding the last day)
From 25.4.2020 – 12.6.2020 (Judicial custody) = 48 days (excluding the last day)
TOTAL = 93 DAYS"

18. Thus, the issue involved in the present Appeal is whether the period of custody spent during house arrest (28/08/2018 to 01/10/2018 for the period of 34 days) constitutes custody for the purposes of section 167(2) CrPC. Learned Senior Advocate invited our attention to the provisions of section 167(2) of CrPC. According to him the said period would be custody for the purposes of section 167 CrPC as the Appellant is deprived of liberty pursuant to arrest. re would then submit that the constituent elements of custody are
a) restriction on movement, which is controlled by an authority, typically police or Court; b) restricted access for others to the arrestee and; c) restricted access of arrestee to others.
19. Learned Senior Advocate urged that custody hinges on the deprivation of liberty and not of comfort and therefore, the presence of home food or consultations with Doctor or permission to read books etc. do not in any manner alter the facet of custody itself as along as there is restriction of movement. In support of his submissions, he gave the example of many jails having these facilities and that these conveniences do not negate the fact of custody. Learned Senior Advocate was therefore at pains to point out that a person cannot be under arrest or custody merely because his place of detention is his house, for according to him this would be a narrow and incorrect interpretation of the meaning of custody.
20. To make good his submission that the Appellant satisfes the criteria above stated, learned Senior Advocate urged that upon the arrest of the Appellant on 28/08/2018 from his house, his house was searched and devices seized. The Appellant was taken by the police for transit remand before the concerned Magistrate, and the order granting transit remand was passed on 28/08/2018 allowing the police to take the Appellant to Pune. For the duration of all these events, the Appellant was in police custody. Our attention is invited to the order passed by the righ Court of Delhi which modifed the Magistrate's order and directed that the Appellant be kept in custody in his home under guard. It is pointed out that the Appellant was not allowed to leave his house and was not allowed to meet anyone barring ordinary residents of the house and his Advocate. re therefore urged that the Appellant though was in his house, was actually in custody pursuant to his arrest and remand.
21. Learned Senior Advocate submitted that arrest is a matter of law whereas custody is a matter of fact. Inviting our attention to the order dated 29/08/2020 passed by the ron'ble

Supreme Court, it is urged that the order clearly mentions that the Appellant is under house arrest. According to him this evidences that the Appellant was under arrest and under the control of the Court in total deprivation of his liberty.

22. Learned Senior Advocate further submitted that the requirement of section 167 CrPC is that a person's arrest is in connection with an ofence and such person's custody as directed by the Court which cannot exceed particular number of days while the investigation is pending. In his submission, section 167 CrPC does not lay down that custody has to necessarily be a police custody, for under section 167 the custody can be either police or judicial. According to him, a custody of a person in a hospital, in a jail, in the court premises, in an asylum, in an observation home or borstal school, in a government guest house or in ones own house by order of a Court is still custody.
23. Reliance is placed on the decision of the ron'ble Supreme Court in the case of 1Niranjan Singh and anr. Vs. Prabhakar Rajaram Kharote and ors. Inviting our attention to paragraph 7 in the context of the observations of Their Lordships on the point 'when person is in custody within the meaning of section 439 CrPC,' learned Senior Advocate would submit that the said decision squarely applies to the Appellant's case. In his submission, the fact that the Appellant was in house arrest has to be regarded as custody for computing the period of 90 days.
24. Learned Senior Advocate then submits that mere fact that police did not have access or that the Appellant was not in police custody is immaterial as section 167 itself allows another type of custody i.e. judicial custody. To buttress his submission, learned Senior Advocate placed reliance on the decision of the ron'ble Supreme Court in the case of 2CBI Vs. Anupam Kulkarni. re thus submitted that any period spent by an accused in custody under orders of the Court would count as custody for the purposes of section 167 of CrPC. Reliance is also placed on the decision of this Court in the case of Deepak Satyavan Kudalkar Vs. State of Maharashtra LD/VC Criminal Bail Application No. 197 of 2020 decided on 29/07/2020. It is urged that when the Appellant claimed default bail under section 167(2) CrPC, his custody period, from the date of his arrest and frst remand i.e. 28/08/2018 was in excess of 90 days. Mr.Sibal therefore urged that since no application for extension of time was fled by NIA (till much later on 29/06/2020 after 110 days), the NIA Court had no authority to further remand the Appellant and should have enlarged him on bail.
25. It is next contended that the issue needs to be considered in the larger context of the rationale behind section 167(2), which places great importance on the personal liberty of an arrested person. To support this submission, reliance is on the decision of the ron'ble Supreme Court in the case of M.Ravindran Vs. The Intelligence Ofcer, DRI, Criminal Appeal No.699 of 2020 decided on 26/10/2020. It is submitted that Their Lordships from the perspective of upholding the fundamental rights and personal liberty under Article 21 clarifed and reconciled the various judicial interpretations of section 167(2) for the purpose of resolving the dilemma that arose in the case.
26. The order of the Special Court is assailed on the submission that the Special Court was in error in observing that since Delhi righ Court stayed the transit remand, hence the house arrest could not be construed as one under section 167 CrPC and hence does not constitute custody. In the submission of the Senior Advocate all along the Appellant was

in judicial custody and hence the observation made by the Special Court that 'it is not the case of the Appellant that the Appellant was in police custody or judicial custody' is erroneous. re submitted that reliance of NIA Court on the decision rendered in 3State of West Bengal Vs. Dinesh Dalmiya's is completely misplaced and erroneous in the present facts.

27. It is re-emphasised that house arrest is a judicial arrest as it is an order of confnement by Court pursuant to an arrest which satisfes the requirements of provisions of section 167. re again reiterated that the ron'ble Supreme Court has used the words 'house arrest' which denotes that order of confnement is pursuant to an arrest under section 167 CrPC alone. Learned Senior Advocate was at pains to point out that quashing of arrest by the righ Court of Delhi cannot have the efect of erasing the custody prior to the order, for according to him, arrest is a point of law, but custody is a fact that cannot merely be wiped away. It is also submitted that section 167 uses the term "total detention" and there is no requirement in the provision for it to be a continuous custody. It is his submission that section 167 requires the custody period to be computed qua a particular case and not qua a particulararrest. He would urge that a person may be arrested multiple times in the same case, but construing that after every rearrest, he can be remanded to the police custody again for 15 days would again lead to anomalous result. It is therefore submitted that the impugned order is erroneous and the application Exhibit 276 for statutory bail deserves to be allowed.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

28. Learned Senior Advocate Mr. Raju appearing on behalf of the Respondent argued in support of the impugned order passed by the Special Judge. re-invited our attention to the provisions of sections 56, 57, 167(2) of the CrPC in support of his submission that the question of entitling accused to default bail under section 167(2) of CrPC would arise only when the accused is under detention of the police for investigation. Learned Senior Advocate submitted that the transit remand order passed by learned CMM came to be stayed by the Delhi High Court with the result it cannot be said that the Appellant was under the detention of police for investigation.
29. He further pointed out that in view of the order passed by the High Court of Delhi, the Investigating Officer never had an occasion to interrogate the Appellant. In the submission of learned Senior Advocate, the High Court of Delhi having set aside the transit remand order and further having declared the detention of the Appellant as illegal, in such circumstances, the Appellant will not be entitled to avail of the default bail under section 167(2) of CrPC. According to learned Senior Advocate, it is only when the detention / custody of the incumbent is authorised by the Magistrate under section 167(2) of CrPC, the question of entitlement of the default bail would arise.
30. Learned Senior Advocate placed reliance on the decisions of the Apex Court in the case of 4Chaganti Satyanarayana and ors. Vs. State of Andhra Pradesh and in the case of State of West Bengal (supra) to urge that the pre - requisite for entitling the Appellant to default bail under section 167(2) of CrPC is the authorisation of the detention by Magistrate for such custody. It is therefore submitted that the order passed by the Special Judge does not call for any interference.

CONSIDERATION:

31. Learned learned Senior counsel for the respective parties at length. We have perused the copy of the appeal memo, perused the impugned order and the relevant annextures.
32. As earlier indicated, the question that arises for consideration in this Appeal is whether the house arrest of the Appellant during the period from 28.08.2018 to 01.10.2018 viz. 34 days constitutes custody within the meaning of Section 167 (2) of the Cr.P.C. for the purpose of computing 90 days period for grant of default bail to the Appellant. If this period of 34 days is to be included in the 90 days period and construed as period of custody, then of course the Appellant's total custody would exceed 90 days.
33. Though the facts have been set out in detail earlier, however for appreciating the controversy, it would be apposite to concisely refer to a few basic facts again. Pursuant to registration of FIR, the Appellant was restrained in his house by the Maharashtra Police on 28.08.2018. The learned CMM granted transit remand to the Appellant on 28.08.2018. The righ Court of Delhi stayed the Appellant's transit remand proceedings on the same day i.e. 28.08.2018. Apart from the other directions, the following direction in paragraph 5(6) of the order which reads thus came to be issued :-
    "5(6) The Petitioner shall, in the meanwhile, be kept at the same place from where he was picked up with two guards of the Special Cell, Delhi Police along with local Police that was originally here to arrest the Petitioner, outside the house.
    Barring his lawyers, and the ordinary residents of the house, the Petitioner shall not meet any other persons or step out of the premises till further orders."
34. The interim directions were continued from time to time. The high Court of Delhi finally on 01.10.2018 held that the order passed by the learned Chief Metropolitan Magistrate (CMM for short) on 28.08.2018 granting transit remand to the Appellant is unsustainable in law. It was held that there were several noncompliances of the mandatory requirement of Article 22(1), Article 22(2) of the Constitution and Section 167 read with Section 57 and 41(1)(ba) of the Cr.P.C., which are mandatory in nature. The high Court of Delhi also observed that in view of Section 56 read with Section 57 of the Cr.P.C., in the absence of the remand order of the learned CMM, the detention of the Petitioner, which has clearly exceeded 24 hours, is again untenable in law. Consequently, it was ordered that the house arrest of the Petitioner came to an end. It was clarifed that the order will not preclude the State of Maharashtra from proceeding further in accordance with law.
35. It would thus to seen that the High Court of Delhi having stayed the transit remand granted by the CMM further directed that during the pendency of the Petitioner shall be kept at the same place from where he was picked up with two guards of the Special Cell, Delhi Police along with local police that was originally present to arrest the Petitioner, outside the house. It was further directed that barring his lawyers, and the ordinary residents of the house, the Petitioner shall not meet any other persons or step out of the premises till further orders.
36. In view of the order passed by the righ Court of Delhi the Investigating Ofcer did not have any access to the Appellant. The Appellant could not be interrogated during this period. The righ Court of Delhi set aside the order passed by the CMM granting transit remand whereupon the house arrest of the Appellant came to an end rendering the

detention of the Appellant untenable in law. The question is whether this period of house arrest constitutes custody within the meaning of Section 167(2) of the Cr.P.C.

37. It is pertinent to note that after the righ Court of Delhi held that the Appellant's detention as illegal, the Appellant then approached this Court by fling Writ Petition (Criminal) No.4425 of 2018 for quashing the FIR. This Court in the interregnum had ordered that no coercive steps be taken against the Appellant. The application for quashing FIR came to be dismissed on 20.09.2019. In a challenge to the order passed by this Court dated 13.09.2019, the ron'ble Supreme Court granted Appellant four weeks protection with liberty to seek pre-arrest bail/protection before the concerned Court. The Appellant then fled an Anticipatory Bail Application before the Sessions Court at Pune. The Anticipatory Bail Application came to be rejected. The Appellant failed to get any relief of anticipatory bail in this Court and ultimately even before the ron'ble Supreme Court. The ron'ble Supreme Court by order dated 16.03.2020 directed the Appellant to surrender within three weeks. The time to surrender was extended and ultimately the Appellant surrendered to NIA, Delhi on 14.04.2020 in compliance with the order passed by the ron'ble Supreme Court.
38. The NIA, Delhi was granted seven days police custody on 15.04.2020 by the Sessions Court, Patiala rouse, New Delhi. The Police custody was extended by another seven days vide order dated 24.04.2020 and ultimately on 25.04.2020 the Appellant was remanded to judicial custody. It is thus seen that after the initial detention is declared illegal, the appellant surrendered wehreupon the Magistrate then authorised the police custody.
39. The bone of contention is the period of 34 days (28/08/2018 to 01/10/2018) which the appellant was under custody (house arrest). Undoubtedly, this period has to be regarded as custody as the appellant admittedly was under house arrest. rowever, in our opinion, the intervening orders passed would be relevant for determining the nature of this custody for the purpose of Section 167 of Cr.PC to enable the appellant to claim default bail. Following circumstances cumulatively leads us to conclude that the appellant is not entitled to the beneft of 34 days for claiming statutory default bail.

    (1) The transit remand order came to be stayed by the Delhi righ Court on 28/10/2018.

    (2) The appellant was placed under house arrest pursuant to the directions of the Delhi righ Court during which period the investigating ofcer did not get the opportunity of interrogating him.

    (3) The righ Court of Delhi quashed the appellant's arrest holding that the appellant's detention is illegal.

    (4) Pursuant to the declaration of the detention as illegal, the appellant was set at liberty. It is not as if the appellant was released on bail but after being set at liberty, the appellant is protected by an order of this Court restraining the investigating agency from taking coercive steps during the pendency of appellant's challenge to the FIR.

    (5) The ron'ble Supreme Court having dismissed the challenge of the appellant to quash FIR granted 4 weeks protection with liberty to seek pre arrest bail/protection before the Sessions Court. The ron'ble Supreme Court granted the appellant time to surrender after the appellant failed to serve pre arrest bail. The appellant ultimately surrendered to NIA

Delhi on 14/04/2020. Only after the appellant surrendered, the Magistrate authorised the police custody whereupon the appellant was interrogated.

40. In this context, it would be appropriate to refer to the relevant portion of Section 167 of the Cr.P.C. which reads thus :-

"167. Procedure when investigation cannot be completed in twenty four hours. (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 fxed by section 57, and there are grounds for believing that the accusation or information is well-founded, the ofcer in charge of the police station or the police ofcer 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 same 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 ft, for a term not exceeding ffteen 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 custody of the police, beyond the period of ffteen days, if he is satisfed 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 ofence 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 ofence, 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 authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the frst time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;]
(c) no Magistrate of the second class, not specially empowered in this behalf by the righ Court, shall authorise detention in the custody of the police.
(emphasis supplied by us)

41. The ron'ble Supreme Court in the case of Chaganti Satyanarayan and others (supra) had an occasion to construe Section 167(2) of the Cr.P.C., which decision has a bearing on the present controversy. Their Lordships in paragraph 12 stated thus:
"12. On a reading of the sub-sections (1) and (2) it may be seen that sub-section (1) is a mandatory provision governing what a police ofcer should do when a person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fxed by Section 57. Sub-section (2) on the other hand pertains to the powers of remand available to a Magistrate and the manner in which such powers should be exercised. The terms of sub-section (1) of Section 167 have to be read in conjunction with Section 57.

Section 57 interdicts a police ofcer from keeping in custody a person without warrant for a longer period than 24 hours without production before a Magistrate, subject to the exception that the time taken for performing the journey from the place of arrest to the Magistrate's Court can be excluded from the prescribed period of 24 hours. Since sub-section (1) provides that if that investigation cannot be completed within the period of 24 hours fxed by Section 57 the accused has to be forwarded to the Magistrate along with the entries in the Diary, it follows that a police ofcer is entitled to keep an arrested person in custody for a maximum period of 24 hours for purposes of investigation. The resultant position is that the initial period of custody of an arrested person till he is produced before a Magistrate is neither referable to nor in pursuance of an order of remand passed by a Magistrate. In fact the powers of remand given to a Magistrate become execisable only after an accused is produced before him in terms of sub-section (1) of Section 167."
(emphasis supplied by us)

42. It is also necessary to refer to paragraph 16 and 17 of the decision where Their Lordships have stated thus :- "16. As sub-section (2) of Section 167 as well as proviso (1) of sub-section (2) of Section 309 relate to the powers of remand of a Magistrate, though under diferent situations, the two provisions call for a harmonious reading in so far as the periods of remand are concerned. It would, therefore, follow that the words "15 days in the whole" occurring in sub-section (2) of Section 167 would be tantamount to a period of "15 days at a time" but subject to the condition that if the accused is to be remanded to police custody the remand should be for such period as is commensurate with the requirements of a case with provision for further extensions for restricted periods, if need be,but in no case should the total period of remand to police custody exceed 15 days. Where an accused is placed in police custody for the maximum period of 15 days allowed under law either pursuant to a single order of remand or to more than one order, when the remand is restricted on each occasion to a lesser number of days, further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise. The Legislature having provided for an accused being placed under police custody under orders of remand for efective investigation of cases has at the same time taken care to see that the interests of the accused are not jeopardised by his

being placed under police custody beyond a total period of 15 days, under any circumstances, irrespective of the gravity of the ofence or the serious nature of the case.

43. Thus in the light of our discussion and conclusions reached we do not fnd merit or force in the contention of the appellants' counsel that the words 'for a term not exceeding 15 days in the whole" occurring in sub-section (2) of Section 167 should be so construed as to include also the period of custody of the accused from the time of arrest till the time of production before the Magistrate. A Magistrate can, therefore, authorise the detention of the accused for a maximum period of 15 days from the date of remand and place the accused either in police custody or in judicial custody during the period of 15 days' remand. It has, however, to be borne in mind that if an accused is remanded to police custody the maximum period during which he can be placed in police custody is only 15 days. Beyond that period no Magistrate can authorise the detention of the accused in police custody."
44. The Hon'ble Supreme Court then in Paragraph 24 held that the period of 90 days or 60 days as the case may be, will commence running only from the date of remand and not from any anterior date in spite of the fact that the accused may have been taken into custody earlier by a police ofcer and deprived of his liberty.
45. We now make a proftable reference to the decision of the ron'ble Supreme Court in the case of State of W.B. (supra). In paragraphs 16 and 17 Their Lordships held thus :- "16. Sub-section (1) says that when a person is arrested and detained in custody and it appears that investigation cannot be completed within 24 hours fxed under Section 57 and there are grounds of believing that accusation or information is wellfounded, the ofcer in charge of the Police Station or the Police Ofcer making the investigation not below the rank of subinspector shall produce the accused before the nearest judicial magistrate. The mandate of sub-section (1) of Section 167, Cr.P.C. is that when it is not possible to complete investigation within 24 hours then it is the duty of the Police to produce the accused before the Magistrate. Police cannot detain any person in their custody beyond that period. Therefore, Sub-Section (1) pre-supposes that the police should have custody of an accused in relation to certain accusation for which the cognizance has been taken and the matter is under investigation. This check is on police for detention of any citizen . Sub-Section (2) says that if the accused is produced before the Magistrate and if the Magistrate is satisfed looking to accusation then he can give a remand to the police for investigation not exceeding 15 days in the whole. But the proviso further gives a discretion to the Magistrate that he can authorize detention of the accused otherwise then the police custody beyond the period of 15 days but no Magistrate shall authorize detention of the accused in police custody for a total period of 90 days for the ofences punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and no magistrate shall authorize the detention of the accused person in custody for a total period of 60 days when the investigation relates to any other ofence and on expiry of the period of 90 days or 60 days as the case may be. re shall be released if he is willing to furnish bail. Therefore, the reading of sub-Sections (1) & (2) with proviso clearly transpires that the incumbent should be in fact under the detention of police for investigation. In the present case, the accused was not arrested by the police nor was he in the police custody before 13.3.2006. re voluntarily

surrendered before a Magistrate and no physical custody of the accused was given to the police for investigation. The whole purpose is that the accused should not be detained more than 24 hours and subject to 15 days police remand and it can further be extended up to 90/60 as the case may be. But the custody of police for investigation purpose cannot be treated judicial custody/ detention in another case. The police custody here means the Police custody in a particular case for investigation and not judicial custody in another case. This notional surrender cannot be treated as Police custody so as to count 90 days from that notional surrender. A notorious criminal may have number of cases pending in various police station in city or outside city, a notional surrender in pending case for another FIR outside city or of another police-station in same city, if the notional surrender is counted then the police will not get the opportunity to get custodial investigation. The period of detention before a Magistrate can be treated as device to avoid physical custody of the police and claim the beneft of proviso to Sub-Section 1 and can be released on bail. This kind of device cannot be permitted under Section 167 of the Cr.P.C. The condition is that the accused must be in the custody of the police and so called deemed surrender in another criminal case cannot be taken as starting point for counting 15 days police remand or 90 days or 60 days as the case may be. Therefore, this kind of surrender by the accused cannot be deemed to be in the Police custody in the case of 476/02 in Calcutta. The Magistrate at Egmore, Chennai could not have released the accused on bail as there was already cases pending against him in Calcutta for which a production warrant had already been issued by the Calcutta Court. In this connection in the case of State of Maharashtra Vs. Bharati Chandmal Varma (Mrs.) reported in (2002)2 SCC 121 their Lordships has very clearly mentioned that: "11. For the application of the proviso to Section 167(2) of the Code, there is no necessity to consider when the investigation could legally have commenced. That proviso is intended only for keeping an arrested person under detention for the purpose of investigation and the legislature has provided a maximum period for such detention.. On the expiry of the said period the further custody becomes unauthorized and hence it is mandated that the arrested person shall be released on bail if he is prepared to and does furnish bail. It may be a diferent position if the same accused was found to have been involved in some other ofence disconnected from the ofence for which he is arrested. In such an eventuality the ofcer investigating such second ofence can exercise the power of arresting him in connection with the second case. But if the investigation into the ofence for which he was arrested initially had revealed other ramifcations associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable."

46. Therefore, it is very clearly mentioned that the accused must be in custody of the police for the investigation. But if the investigation into the ofence for which he is arrested initially revealed other ramifcations associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable. Meaning thereby that during the course of the investigation any further ramifcation comes to the notice of the Police then the period will not be extendable. But it clearly lays down that the accused must be in custody of

police. In the case of Directoate of Enforcement v. Deepak Mahajan and Another reported in (1994) 3 SCC 440 their Lordships observed that Section 167 is one of the provisions falling under Chapter XII of the Code commencing from Section 154 and ending with Section 176 under the caption "Information to the police and other powers to investigate". Their Lordships also observed that main object of Section 167 is the production of an arrestee before a Magistrate within twenty four hours as fxed by Section 57 when investigation cannot be completed within that period so that the Magistrate can take further course of action as contemplated under sub-Section (2) of Section 167. In para 54 their Lordships have also observed with regard to the prerequisite condition which reads as under:

"54. The above deliberation leads to a derivation that to invoke Section 167(1), it is not an indispensable pre-requisite condition that in all circumstances, the arrest should have been efected only by a police ofcer and none else and that there must necessarily be records of entries of a case diary. Therefore, it necessarily follows that a mere production of an arrestee before a competent Magistrate by an authorized ofcer or an ofcer empowered to arrest (notwithstanding the fact that he is not a police ofcer in its stricto sensu)on a reasonable belief that the arrestee " has been guilty of an ofence punishable" under the provisions of the Special Act is sufcient for the Magistrate to take that person into his custody on his being satisfed of the three preliminary conditions, namely (1) the arresting ofcer is legally competent to make the arrest; (2) that the particulars of the ofence or the accusation for which the person is arrested or other grounds for such arrest do exist and are well-founded; and (3) that the provisions of the special Act in regard to the arrest of the persons and the productions of the arrestee serve the purpose of Section 167(1) of the Code."

(emphasis supplied by us)

47. In the present case, no doubt the Appellant was under house arrest. The transit remand ordered by the CMM on 28.08.2018 was stayed by the righ Court of Delhi on very same day. During the period of house arrest, barring the Appellant’s lawyers and ordinary residents of the house, the Appellant was not supposed to meet any one or step out of the premises till further orders. The righ Court of Delhi had ordered that the Appellant be kept at the same place from where he was picked up with two guards of the Special Cell, Delhi Police along with local police that was originally present to arrest the Appellant,outside the house. It is therefore obvious that the Investigating Agency/Investigating Ofcer did not have any access to him nor had an occasion to interrogate him. As the transit remand order was stayed, it cannot be said that the appellant was under detention of police for investigation.

48. Further under Sub-Section (2) of Section 167 of Cr.P.C. the Magistrate has to authorise the detention of the accused in such custody as such Magistrate thinks ft, for a term not exceeding ffteen days. The CMM granted transit remand on 28.08.2018. The righ Court of Delhi by an interim order having stayed the transit remand and then having fnally set aside the order of transit remand thereby holding the detention during the period 28.08.2018 upto 01.10.2018 (period of house arrest) as illegal, then, in our opinion, in the absence of there being an authorised detention by an order of Magistrate,

the Appellant cannot claim entitlement to statutory default bail under SubSection (2) of Section 167 of the Cr.P.C. The mandate of SubSection (2) of Section 167 of the Cr.P.C. makes it clear that for claiming availment of default bail under Section 167(2) of the Cr.P.C. the basic requirement is that the detention of the accused in the custody has to be authorised by the Magistrate. Once the authorisation by the Magistrate is declared illegal consequently rendering the detention itself illegal, the said period (house arrest custody) cannot be construed to be an authorised custody within the meaning of Section 167(2) of CrPC.

49. The Apex Court in the case of Chaganti Satyanarayan and others (supra) held that the period of 90 days will commence only from the date of remand and not from any anterior date inspite of the fact that the accused may have been taken into custody earlier by a police ofcer and deprived of his liberty. Thus, from a reading of Section 167(2) of Cr.P.C., we are of the view that the essential requisite for availing statutory bail is that the accused must have undergone the authorised period of detention ordered by the Magistrate. It is not possible for us to construe any and every detention which may have resulted in deprivation of liberty of the accused to be an authorised detention by the Magistrate within the meaning Section 167(2) of the Cr.P.C.

50. It is not possible for us to fathom a situation where detention of the Appellant though held to be illegal & unlawful rendering the authorisation by the Magistrate untenable should still be construed as an authorised detention for the purpose of Sub-Section (2) of Section 167 of the Cr.P.C.. In our view sans any valid authorisation/order of the Magistrate detaining the appellant, the incumbent will not be entitled to a default bail. It is therefore obvious that Sub-Section (2) of Section 167 of the Cr.P.C. necessarily presupposes a detention authorised by a Magistrate, for only then the said period of authorised detention can count towards calculating 90 days period of custody prescribed under Section (2) of Section 167 of the Cr.P.C. for the purpose of default bail. 49. Resultantly we hold that the period from 28.08.2018 to 01.10.2018 has to be excluded from computing the period of 90 days as the said custody has been held to be unsustainable e in law by the righ Court of Delhi. The righ Court of Delhi also set aside the order passed by the learned CMM on 28.08.2018 granting transit remand to the Appellant. It is not in dispute that thereafter the Appellant applied for Anticipatory Bail which came to rejected at all stages and ultimately the Appellant surrendered on 14.04.2020. It is only consequent to the surrender that the Magistrate then authorise the police custody.

51. The decisions relied upon by the learned Senior Advocate Shri Sibal have no application in the facts of the present case. None of the decisions relied upon by learned Senior Advocate Mr. Sibal deals with the question whether sans any authorisation of the detention by the Magistrate under Section 167(2) of Cr.P.C. and particularly when the detention has been held to be unlawful, can this period of custody still be included in the 90 days period prescribed for grant of default bail.

52. We have gone through the order passed by the Special Judge, NIA. We see no reason to interfere with the well reasoned order of the learned Special Judge. The Appeal Stands dismissed.

52. This judgment will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this judgment.

(M.S.KARNIK, J.) **(S.S.SHINDE, J.)**