

Default Bail and Charge-Sheet

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“Our faith in freedom does not rest on the foreseeable results in particular circumstances but on the belief that it will, on balance, release more forces for the good than for bad.”

Friedrich Hayek

Introduction:

Default Bail, also known as compulsive bail, is provided under Section 167(2)¹ of the Criminal Procedure Code. Section 167 of the Code while enunciating the law on remand also affords protection to accused against detention during inordinate delay in completion of investigation. It provides that, wherein the investigation is not completed within the prescribed period of 60 or 90 days, as the case may be, thereafter the accused can avail his right of default bail on the expiry of the said period. In other words, where the investigation agency has not filed a charge-sheet within a period of 60 days (or 90 days in the case of offences punishable with death or imprisonment for not less than 10 years) of the investigation then the accused becomes entitled to be released on bail. Thus, where no charge-sheet has been filed within the stipulated period the accused can no longer be detained in custody, on the expiration of such period. Hence on 61st or 91st day of remand, the right to seek default bail accrues in favour of the accused.

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1. Section 167 (2) states:

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorize the detention of the accused person 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 authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding:*
 - (i) *ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;*
 - (ii) *sixty days, where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.*

Conditions for grant of default bail :-

In *Hitendra Vishnu Thakur vs. State of Maharashtra*² Hon'ble Apex Court held that “Parliament has introduced the amendment to Section. 167(2) Cr.P.C prescribing the outer limit within which the investigation is to be completed. If the same is not completed, the accused would acquire a right to be released on bail and such release on bail shall be deemed to be under Chapter XXIII of the Code.”

Though the accused becomes entitled to be enlarged on bail, in a situation contemplated by Section 167, however it is essential that following conditions are met out:

1. Application by the accused: Though the accused becomes entitled to be released on bail where the charge-sheet has not been filed within the prescribed period of 60 or 90 days, however, in order to avail the benefit of default bail it is mandatory that the accused should file an application before the Court praying for his release on bail. The Court cannot exercise its jurisdiction and grant default bail merely on the completion of period in absence of an application by the accused. It often happens that the advocate of the accused orally apprise the court with the expiry of remand period and makes submission for grant of default bail however the mandate of Section 167 requires the advocate of the accused to formally file an application stating that since the period of remand has expired and no charge-sheet has been filed, the accused is liable to be released on bail. Default bail is an indefeasible right of the accused but in order to enjoy the same the accused is required to approach the court in the procedure prescribed. Mere expiry of the period does not suffice the requirement of the grant of default bail and the accused will not be automatically released. In other words on the lapse of the period and non-filing of the charge-sheet the right of default bail becomes operative however to exercise the same an application before the magistrate is a must. This aspect was explicitly dealt in *Hitendra Thakur case*³ wherein the Hon'ble Supreme Court observed that “*thus we find that once the period for the charge-sheet has expired and either no extension of has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted*

2. AIR 1994 SC 2623

3. *Ibid*

to bail under sub-section (4) of Section 20 read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA with section 167 of the Code, the Court must on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating prosecution agency... ”

It was further held that the Designated Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail as directed by court.

Thus, it is imperative that the accused has to move an application to realize his right of default bail. Mere oral submission of the expiry of period and non-filing of challan will frustrate his right.

2. Investigation should be pending: Filing of charge-sheet under Section 173 of the Code results into culmination of investigation. Once the charge-sheet is filed the provision of Section 167 is no longer applicable since it is a pre-cognizance stage. Therefore the accused can avail the benefit of default bail only if the charge-sheet has not been filed within the prescribed period. Default bail is available only during the pendency of the investigation. Thus it is important that the application for default bail should be filed before the filing of charge-sheet. If the accused fails to do so and charge-sheet is filed meanwhile then his right extinguishes. This proposition was clarified by the Hon'ble Supreme Court in the landmark judgement of **Sanjay Dutt vs. State**⁴ in the following words:

“The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filling of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after filing of the

challan. The custody of the accused after the challan is filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because section 167 ceases to apply.”

The Court further said, “*The indefeasible right of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The right of the accused to be released on bail after filing on the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage.”*

Thus, as soon as the period of remand expires i.e the 61st or 91st day, the accused has to move an application under Section 167(2)CrPC if the charge-sheet has not been filed. Where he fails to do so and on 62nd day charge-sheet is filed then his right extinguishes. Thereafter he cannot approach the court under Section 167(2) as that stage has been crossed. Post filing of charge-sheet the remand of accused is taken under Section 309 of the Code, therefore, the benefit under Section 167 cannot be re-visited.

In ***State vs. Mohd. Asrafat Bhat***⁵ the Hon'ble Apex Court reiterated the settled position “*such right (right of default bail) is enforceable only prior to the filing of the charge-sheet. But the accused did not avail himself of the right and charge-sheet in the meantime been filed, his right to obtain statutory bail under Section 167(2) proviso (a) or (b) has been extinguished.”*

Thus, if an accused falls short of asserting his claim to be enlarged on bail for the failure of investigating agency to file challan within time permissible by law, then the accused cannot emphasize that he had an

4. (1994) 5 SCC 410

indefeasible right to exercise at any time notwithstanding the fact that in the meantime the charge-sheet is filed.

Furthermore, where once the default bail is allowed then subsequent filing of the charge-sheet does not ipso facto result into cancellation of default bail. For the cancellation of the same the law regarding cancellation of the bail will have to be satisfied.

Hon'ble Supreme Court enunciated the above mentioned proposition in *Mohammed Iqbal Madar and others vs. State of Maharashtra*⁶ wherein the Court held, “*It cannot be held that an accused charged of any offence, including offences under TADA, if released on bail because of the default in completion of the investigation, then no sooner the charge-sheet is filed, the order granting bail to such accused is to be cancelled. The bail of such accused who has been released, because of the default on the part of the investigating officer to complete the investigation, can be cancelled, but only on the ground that after the release, charge-sheet has been submitted against such accused for an offence under TADA. For cancelling the bail, the well-settled principles in respect of cancellation of bail have to be made out.*”

Availed of:

Now after discussing the conditions it is pertinent to discuss one more aspect i.e when is accused is said to have 'availed of' his right of default. Is it when he applies or when he furnishes bond or when he is released on bail? It is important to discuss this very aspect to understand as to filing of charge-sheet in which stage bars the right of default bail. In *Sanjay Dutt case*⁷ the Court held that if the right of seeking default bail have not been already availed of prior to filing of the charge-sheet, by the accused, then this right no longer stays enforceable after filing of the chargesheet. Thereafter in *Uday Mohanlal Acharya vs State of Maharashtra*⁸ case Hon'ble Apex Court interpreted the term “availed of”. It was held that:

“Does it (availed) mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him

5. (1996)1SCC 432

6. (1996) 1 SCC 722

7. *Supra* 4

8. (2001) 5 SCC 453

released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression “availed of” to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose 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....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 arrest of the accused.”

The above interpretation have been reiterated by Supreme Court in ***Union Of India Through CBI vs. Nirala Yadav @Raja Ram Yadav@Deepak***⁹ and thus when the accused files an application for default bail within permissible time, willing and prepared to furnish bail bonds and no charge-sheet has been filed till that time, then it will be held that the accused has availed his right. Now if after this a charge-sheet is filed then the right of accused will not extinguish.

Charge-sheet and Application on same day:

Situation where application and charge-sheet is filed on the same day can it be said that the accused has availed of his right and is entitled to default bail. From the above discussed case laws it is a settled position that when accused files application and is prepared to offer bail on being

9. (2014) 9 SCC 457

directed then it is deemed that the accused has availed of his right. But the Magistrate while entertaining the application has to satisfy himself that one, the statutory period for filing of charge-sheet has expired and second, that the charge-sheet has not been filed. It has already been discussed that as soon as the charge-sheet is filed the provision of Section 167 cease to apply. The magistrate cannot ignore the charge-sheet in order to grant default bail. Where both are filed on the same day the Magistrate will not entertain the application of the bail as the stage cease to exist. In **Sanjay Dutt case**¹⁰ Court held 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...both of them should be considered together.”

This means that the application for extension will be considered, mere filing of application for bail does not make court to ignore application for extension. If an analogy is drawn from this, it can be safely held that if charge-sheet and bail applications are filed on the same day the Court cannot ignore the charge-sheet and go on to decide the application presuming absence of the charge-sheet. In fact, the Court has to consider the charge-sheet and not the bail application as by filing of the charge-sheet the stage for application of bail has expired. In this scenario however the accused has availed of his right but by filing of charge-sheet at the very same day, the application fails in satisfying all the conditions necessary for the grant of bail.

Similar contingency was discussed by Hon'ble Justice B.N Agrawal in his dissenting opinion expressed in **Uday Mohalal Acharya case**¹¹ wherein he said:

“What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? ...such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.”

10. *Supra* 4

11. *Supra* 7

Thus, even if we abide by the majority view that the accused has availed of his right by filing the application but in the given circumstance where both application and charge-sheet are filed on the same day, the dissenting opinion justifies that the stage for entertaining the application is over.

Similar situation was discussed by Hon'ble High Court of Delhi in *Sanjay Bhatia vs. State*¹² wherein the charge-sheet and application for default bail was filed on same day i.e 31.1.2014. The Court held that: “*The right under section 167 (2) of Cr.P.C to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of charge sheet...after the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits.*”

However, this is the view only when both applications and charge-sheet are filed on the same day. Once the application for bail is filed and charge-sheet has not been filed, the application needs to be disposed off without undue delay. It is not at all intended that the application is to be kept pending in order to provide opportunity to investigation agency to frustrate accused's right by filing a charge-sheet subsequently. Subsequent filing of charge-sheet has no bearing on default bail if already 'availed of'.

Thus, in order to conclude, it can be said that though liberty is the most sacrosanct right, however, to have a more cohesive society, it is required that individual liberty is regulated in the interest of all. The Constitution of India also subscribe to this idea wherein it provides that liberty can be curtailed by the procedure established by law. Rejection of default bail after filing of charge-sheet is under a well-established procedure laid down in Section 167 of the Code of Criminal Procedure, 1973.

12. *Supra* 7