REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 667 OF 2020
(@ Special Leave Petition (Crl.) No. 2933 of 2020)

BIKRAMJIT SINGH …APPELLANT

Versus

THE STATE OF PUNJAB …RESPONDENT

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. In an F.I.R dated 18.11.2018, involving Sections 302, 307, 452, 427, 341, 34 of the Indian Penal Code read with Section 25 of the Arms Act, 1959, Sections 3, 4, 5, 6 of the Explosive Substances Act, 1908 and Section 13 of the Unlawful Activities (Prevention) Act, 1967, it was stated as follows:

> "I am a resident of above address and doing the business of furniture at Nehru Complex, Amritsar. I do my religious services in the Nirankari Bhawan at Rajasansi every Sunday. Today, i.e, on 18.11.2018, Satsang was going on at Satsang Bhawan, where about 200 Satsangis were present. At about 11.30 a.m., I along with my companion Gagandeep Singh son of Balwinder Singh, resident of

> Gumtala, was doing the duty of a Security Guard on the main gate, when two young boys came there on a Pulsar Motor Cycle without number of Black shade. Out of them, one had worn Jean and Jacket and was having turban on his head and he has muffled his face with a cloth of check. He went inside and the other young boy, who was wearing Kurta, Pyjama and Jacket and had muffled his face with a handkerchief, took out a Pistol from the fold of his Pyjama and made us to stand together near the Bathroom. The young boy who had gone inside the Satsang Hall threw a Hand Grenade on the stage with his right hand. An explosion took place and the above-said young boy took out a Pistol and ran towards the gate. Both the young men ran towards Village Adliwal on their Pulsar Motor Cycle. Due to Grenade explosion, about 22 persons from the Sangat sustained serious injuries. The other persons arranged conveyance and carried the injured to IVY Hospital, Amritsar and Guru Nanak Dev Hospital, Amritsar, where Sukhdev Kumar son of Kans Raj, resident of Kohali, now resident of Mirankot, aged about 45 years, Kuldeep Singh son of Joginder Singh, resident of Bagga and Sandeep Singh son of Amarjit Singh, resident of Ward No. 7, Rajasansi died in IVY Hospital, Amritsar. The above young men by throwing a Hand Grenade on the Sangat, have injured 22 persons seriously, out of which three persons have died. Deterrent action be taken against the above-mentioned accused. I have heard my statement. It is correct."

3. Pursuant to this F.I.R, the Punjab State Police apprehended the Appellant, one Bikramjit Singh, aged 26 years, on 22.11.2018, on which date he was remanded to custody by the learned Sub-Divisional Magistrate. After 90 days in custody, which expired on 21.02.2019, an application for default bail was made to the Sub-Divisional Judicial Magistrate, Ajnala. This application was dismissed on 25.02.2019 on

the ground that the learned Sub-Divisional Judicial Magistrate had, by an order dated 13.02.2019, already extended time from 90 days to 180 days under Section 167 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") as amended by the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as "UAPA") – See Section 43-D(2). However, this Order was challenged by way of a revision petition by the Appellant and his co-accused, which revision succeeded by an order dated 25.03.2019, by which the learned Additional Sessions Judge being the Special Court set up under the National Investigation Agency Act, 2008 (hereinafter referred to as the "NIA Act") held as follows:

> "6. After hearing the Ld Counsel for revision petitioner and Ld PP for State, I am of the view that since Ld PP has not controverted the proposition of law, wherein it is provided that Ilaqa Magistrate has no jurisdiction to entertain any application for extension the period of investigation or granting bail u/s 167 (2) Cr.P.C in default of presentation of Challan u/s 45 D (2) Unlawful Activities (Prevention Act 1967) and in view of the Notification supra passed by Government of Punjab, to deal with the cases of unlawful activities act, court of session or court of Additional Session Judge, in every district has been designated to try the said cases, so the application for seeking extension of time for filing challan was not maintainable before Ilaqa magistrate.
>
> 7. Therefore, in view of the said notification as well as the case laws referred by the Ld Counsel for revision petitioner, only this court being special designated court was competent to pass an order on any application moved u/s 45(D) (2) Unlawful Activities (Prevention) Act 1967. It means, Ilaqa Magistrate was not competent to pass any order on any such application. In case the same has been

> filed and passed i.e. without its jurisdiction. So because of the said reason order passed by Ilaqa magistrate is not sustainable in the eyes of law and the same is liable to be set aside by way of acceptance of this revision petition. Accordingly this revision is allowed and order of Ilaqa magistrate dated 13.02.2019 is set aside. Trial court record along with copy of this order be sent back to the Trial Court and file of this court be consigned to record room."

4. One day later, on 26.03.2019, a charge sheet was filed before the learned Special Judge after police investigation, in which Sections 302, 307, 452, 427, 341, 34 of the Indian Penal Code read with Section 25 of the Arms Act, 1959, Sections 3, 4, 5, 6 of the Explosive Substances Act, 1908 and Sections 13, 16, 18, 18-B and 20 of the Unlawful Activities (Prevention) Act, 1967 were invoked for offences that were committed pursuant to investigation of the FIR lodged on 18.11.2018. Meanwhile, a revision petition that was filed against the order dated 25.02.2019, was dismissed by the Special Judge on 11.04.2019 who, after noticing the order dated 25.03.2019 allowing the revision petition against the order dated 13.02.2019 of the Judicial Magistrate, yet refused to grant default bail as follows:

> "10. No doubt, vide gazette notification issued by Government of Punjab on 10.06.2014, the Session Judge and first Additional Session Judge at each District Head Quarters in the State are designated as special court for the trial of offences of unlawful activities act. However, as per the local arrangement, all the cases pertaining to unlawful activities act are dealt in this court. So, being a special court, this court is competent to directly receive the challan or police report under section 173 Cr PC. Since the challan has already been presented and in the judgement

titled as Abdul Aziz PV and Other vs National Investigation Agency 2015 (1) RCR (Criminal) 239, it has been held that merely because certain facets of the matter called for further investigation, it does not deem such report anything other than a final report, revisionist are not entitled to statutory bail under section 167 (2) Cr PC.

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12. Since Challan has already been presented, so revision petitioner have lost their right for bail by way of default under section 167 (2) Cr PC. Therefore there is no reason to interfere in the order of Ilaqa Magistrate passed under section 167 (2) Cr PC so this revision petition fails and is dismissed. Consign file to the record room."

5. On the same day i.e. 11.04.2019, an application for default bail dated 08.04.2019 was also dismissed. By the impugned judgment dated 30.10.2019, the High Court, after setting out Section 167 of the Code of Criminal Procedure, 1973 and some of the provisions of the UAPA and NIA Act, then arrived at the following conclusion:

"A joint interpretation of Section 167 (2) Cr.P.C. read with Section 43 (d) UAP Act, Section 6, 13 & 22 of NIA Act would show that in case the investigation is being carried out by the State police, the Magistrate will have power under Section 167 (2) Cr.P.C. read with Section 43 (a) of UAP Act to extend the period of investigation upto 180 days and then, commit the case to the Court of Sessions as per provisions of Section 209 Cr.P.C., whereas in case the investigation is conducted by the agency under the NIA Act, the power shall be exercised by the Special Court and challan will be presented by the agency before the Special Court.

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It is not case of the petitioner that the investigation was conducted by the agency under Section 6 of the NIA Act and till committal of the case to the Court of Sessions, as

> per Section 22 (3) of NIA Act, it cannot be said that the Magistrate has no power and therefore, the order dated 25.03.2019 suffers from illegal infirmity.
>
> The arguments raised by learned senior counsel for the petitioner that the petitioner is entitled to default bail under Section 167 (2) Cr.P.C., in view of judgment of the Hon'ble Supreme Court in Sanjay Dutt's case (supra), is not available, once the challan was presented by the prosecution on 25.03.2019, as the application was filed by the petitioner on the next day i.e. 26.03.2019
>
> The Judge, Exclusive Court has recorded a well reasoned finding that mere fact that sanction has not been granted so far, is no ground to grant concession of bail, as it is rightly held that besides the offence committed under the UAP Act, the accused is also facing the trial for committing the offence under Sections 302, 307, 452, 341, 427, 34 IPC read with Section 25/54/59 of Arms Act and Sections 3, 4, 5, & 6 of Explosive Act, for which no sanction is required to prosecute the petitioner.
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> For the reasons recorded above and in view of judgment of the Hon’ble Supreme Court in Hitendra Vishnu Thakur vs. State of Maharashtra, 1994 (3) RCR (Crl.) 156, finding no merit in the present petition, the same is dismissed.”

6. Shri Colin Gonsalves, learned Senior Advocate appearing on behalf of the Appellant, referred to both the enactments as aforesaid in copious detail and stressed the fact that once the Special Court had been set up as an exclusive Court to try all offences under the UAPA, such offences being scheduled offences relatable to the NIA Act, it was the Special Court alone which had exclusive jurisdiction to extend the period of 90 days to 180 days under Section 43-D (2)(b) of the UAPA. This being the case, on an application having been made prior to the filing of the charge sheet for default bail, his contention was that the

indefeasible right to default bail arose immediately after 21.02.2019, when the 90 day period was over. An order that is passed without jurisdiction by the learned Sub-Divisional Judicial Magistrate dated 13.02.2019, had been corrected by the learned Additional Sessions Judge/Special Court *vide* the order dated 25.03.2019, as a result of which his right to default bail sprung into action before filing of the charge sheet dated 26.03.2019. He, therefore, assailed the High Court judgment on both counts – Firstly, that the exclusive jurisdiction to extend time vested only in the Special Court and not in the Ilaqa Magistrate, despite the fact that it was the State Police Agency that investigated these offences. Secondly, he also argued, relying upon a number of judgments, that the Appellant's right to default bail was not extinguished by the filing of the charge sheet dated 26.03.2019, as was incorrectly held by the High Court.

7. Smt. Jaspreet Gogia, learned Advocate who appeared on behalf of the State of Punjab, also took us through the provisions of both the aforesaid enactments. She stressed in particular Section 10 of the NIA Act, stating that nothing in the said Act would affect the powers of the State Government to investigate and prosecute any scheduled offence. She also stressed the fact that the entire investigation was done only by the State Police and not by the National Investigation Agency. This being the case, she argued that the Ilaqa Magistrate had

jurisdiction to extend time, and having so extended time on 13.02.2019, any application for default bail after the 90 day period was over i.e. after 21.02.2019 had necessarily to be dismissed. She also argued that the first application for default bail which was filed on or before 25.03.2019, had spent its force, having been dismissed, and that the application dated 08.04.2019 filed for default bail was clearly after 26.03.2019, when the charge sheet was filed and, therefore, was correctly dismissed by the order of the learned Special Judge dated 11.04.2019.

8. Having heard learned counsel for the parties, it is important at this stage to set out all the relevant provisions of the three enactments that we are directly concerned with – the Code, UAPA and NIA Act.

9. It is important to note that the expression "Court" is not defined by the Code. On the other hand, Section 6 of the Code refers to classes of Criminal Courts as follows:

> "**6. Classes of Criminal Courts.**
>
> Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:
>
> (i) Courts of Session;
>
> (ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;
>
> (iii) Judicial Magistrates of the second class; and
>
> (iv) Executive Magistrates."

The Court of Sessions is then referred to as a Court that is established by the State Government under Section 9(1) of the Code for every Sessions Division.

10. Section 26 of the Code refers to Courts by which offences are triable. We are concerned directly with Section 26(b) which states as follows:

> "**26. Courts by which offences are triable.**
>
> Subject to the other provisions of this Code,
>
> xxx xxx xxx
>
> (b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by —
>
> (i) the High Court, or
>
> (ii) any other Court by which such offence is shown in the First Schedule to be triable."

11. Section 167 of the Code makes it clear that whenever a person is arrested and detained in custody, the time for investigation relating to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, cannot ordinarily be beyond the period of 15 days, but is extendable, on the Magistrate being satisfied that adequate grounds exist for so doing, to a maximum period of 90 days – *See* first proviso (a)(i) to Section 167(2) of the Code. The said proviso goes on to state that the accused person shall be released on bail if he is prepared to and does furnish bail on expiry of the maximum period of 90 days, and every person so

released on bail be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.

12. The First Schedule to the Code then sets out at the fag end, in Part II thereof, classification of offences against other laws as follows:

THE FIRST SCHEDULE

CLASSIFICATION OF OFFENCES

II.—CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
If punishable with death, imprisonment for life, or imprisonment for more than 7 years	Cognizable	Non-bailable	Court of Session
If punishable with imprisonment for 3 years and upwards and not more than 7 years	Ditto	Ditto	Magistrate of first class
If punishable with imprisonment for less than 3 years or with fine only	Non-cognizable	Bailable	Any Magistrate

13. The UAPA deals with “unlawful activity” and “unlawful association”, and interdicts both unlawful activity and unlawful association as defined under Sections 2(o) and 2(p). It further defines what are terrorist acts, terrorist gangs and terrorists organisations under Section 2(k), 2(l) and 2(m) and proscribes each of these in offences which are than fleshed

out under its provisions. What is important from our point of view in this case is the definition of "Court" in Section 2(1)(d) of UAPA which is as follows:

> "**2. Definitions.**-(1) In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx
>
> (d) "court" means a criminal court having jurisdiction, under the Code, to try offences under this Act and includes a Special Court constituted under section 11 or under section 21 of the National Investigation Agency Act, 2008"

Equally important is the provision contained in Section 43-D(2) of UAPA, which is set out as follows:

> "**43-D. Modified application of certain provisions of the Code.**
>
> xxx xxx xxx
>
> (2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),-
>
> (a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and
>
> (b) after the proviso, the following provisos shall be inserted, namely:—
>
> "Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with 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, extend the said period up to one hundred and eighty days:
> Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.””

14. A cursory reading of these provisions would show that the offences under the UAPA under Sections 16, 17, 18, 18-A, 18-B, 19, 20, 22-B, 22-C and 23, being offences which contain maximum sentences of over 7 years, would be exclusively triable by a Court of Sessions when read with Part II of the First Schedule to the Code. It is only after the NIA Act was enacted that the definition of “Court” was extended to include Special Courts that were set up under Section 11 or Section 22 of the NIA Act.

15. When we come to the NIA Act, the Preamble of the said Act indicates the thrust of the provisions of that Act as follows:

> “An Act to constitute an investigation agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organisations and for matters connected therewith or incidental thereto.”

Under Section 2(g) “Scheduled Offence” is defined as follows:

> “**2. Definitions.**- (1) In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx

> (g) “Scheduled Offence” means an offence specified in the Schedule””

Section 2(h) defines “Special Court” as follows:

> “**2. Definitions.**- (1) In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx
>
> (h) “Special Court” means a Special Court constituted under section 11 or, as the case may be, under section 22”

16. Section 3 constitutes a National Investigation Agency which is a special agency set up for prosecution of offences under the Acts specified in the Schedule by the Central Government. It may be noted that the UAPA is Item 2 of the said Schedule. Section 10, upon which strong reliance is placed by the State, is as follows:

> “**10. Power of State Government to investigate Scheduled Offences**.—Save as otherwise provided in this Act, nothing contained in this Act shall affect the powers of the State Government to investigate and prosecute any Scheduled Offence or other offences under any law for the time being in force”

Sections 11 and 22 which speak of the power of the Central Government and the State Government respectively, to designate Courts of Sessions as Special Courts, are as follows:

> “**11. Power of Central Government to constitute Special Courts**.—
>
> (1) The Central Government shall, by notification in the Official Gazette, for the trial of Scheduled Offences, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

(2) Where any question arises as to the jurisdiction of any Special Court, it shall be referred to the Central Government whose decision in the matter shall be final.

(3) A Special Court shall be presided over by a judge to be appointed by the Central Government on the recommendation of the Chief Justice of the High Court.

(4) The Agency may make an application to the Chief Justice of the High Court for appointment of a Judge to preside over the Special Court.

(5) On receipt of an application under sub-section (4), the Chief Justice shall, as soon as possible and not later than seven days, recommend the name of a judge for being appointed to preside over the Special Court.

(6) The Central Government may, if required, appoint an additional judge or additional judges to the Special Court, on the recommendation of the Chief Justice of the High Court.

(7) A person shall not be qualified for appointment as a judge or an additional judge of a Special Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge in any State.

(8) For the removal of doubts, it is hereby provided that the attainment, by a person appointed as a judge or an additional judge of a Special Court, of the age of superannuation under the rules applicable to him in the service to which he belongs shall not affect his continuance as such judge or additional judge and the Central Government may by order direct that he shall continue as judge until a specified date or until completion of the trial of the case or cases before him as may be specified in that order.

(9) Where any additional judge or additional judges is or are appointed in a Special Court, the judge of the Special Court may, from time to time, by general or special order, in writing, provide for the distribution of business of the Special Court among all judges including himself and the additional judge or additional judges and also for the disposal of urgent business in the event of his absence or the absence of any additional judge.

22. Power of State Government to constitute Special Courts.—

(1) The State Government may constitute one or more Special Courts for the trial of offences under any or all the enactments specified in the Schedule.

(2) The provisions of this Chapter shall apply to the Special Courts constituted by the State Government under sub-section (1) and shall have effect subject to the following modifications, namely—

(i) references to "Central Government" in sections 11 and 15 shall be construed as references to State Government;

(ii) reference to "Agency" in sub-section (1) of section 13 shall be construed as a reference to the "investigation agency of the State Government";

(iii) reference to "Attorney-General for India" in sub-section (3) of section 13 shall be construed as reference to "Advocate-General of the State".

(3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is constituted by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.

(4) On and from the date when the Special Court is constituted by the State Government the trial of any offence investigated by the State Government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is constituted."

Section 13 speaks of the jurisdiction of the Special Courts as follows:

"**13. Jurisdiction of Special Courts.—**

(1) Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed.

> (2) If, having regard to the exigencies of the situation prevailing in a State if,—
>
> (a) it is not possible to have a fair, impartial or speedy trial; or
>
> (b) it is not feasible to have the trial without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor or a judge of the Special Court or any of them; or
>
> (c) it is not otherwise in the interests of justice, the Supreme Court may transfer any case pending before a Special Court to any other Special Court within that State or in any other State and the High Court may transfer any case pending before a Special Court situated in that State to any other Special Court within the State.
>
> (3) The Supreme Court or the High Court, as the case may be, may act under this section either on the application of the Central Government or a party interested and any such application shall be made by motion, which shall, except when the applicant is the Attorney-General for India, be supported by an affidavit or affirmation."

Section 14 clarifies that Special Courts may also try offences other than the scheduled offences as follows:

> "**14. Powers of Special Courts with respect to other offences.**—
>
> (1) When trying any offence, a Special Court may also try any other offence with which the accused may, under the Code be charged, at the same trial if the offence is connected with such other offence.
>
> (2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or under any other law, the Special Court may convict such person of such other offence and pass any sentence or award punishment authorised by this Act or, as the case may be, under such other law."

Section 16 is important and sets out the procedure and powers of Special Courts as follows:

> “**16. Procedure and powers of Special Courts.**—
>
> (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts.
>
> (2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of sections 263 to 265 of the Code shall, so far as may be, apply to such trial:
>
> Provided that when, in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is not desirable to try it in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to, and in relation to, a Special Court as they apply to and in relation to a Magistrate:
>
> Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding one year and with fine which may extend to five lakh rupees.
>
> (3) Subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session.
>
> (4) Subject to the other provisions of this Act, every case transferred to a Special Court under sub-section (2) of

section 13 shall be dealt with as if such case had been transferred under section 406 of the Code to such Special Court.

(5) Notwithstanding anything contained in the Code, but subject to the provisions of section 299 of the Code, a Special Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination."

17. The Scheme of the NIA Act is that offences under the enactments contained to the Schedule to the Act are now to be tried exclusively by Special Courts set up under that Act. These may be set up by the Central Government under Section 11 or by the State Government under Section 22 of the Act. On the facts of the present case, we are concerned with Section 22 as Special Courts have been set up within the State of Punjab by a notification dated 10.06.2014, which reads as follows:

"**PART III**

GOVERNMENT OF PUNJAB

DEPARTMENT OF HOME AFFAIRS AND JUSTICE

(JUDICIAL-1 BRANCH)

NOTIFICATION

The 10th June, 2014

No. S.O. 141/C.A.34/2008/S.22/2014.- In exercise of the powers conferred under sub-section(1) of section 22 of the National Investigation Agency Act, 2008 (Central Act No. 34 of 2008), and all other powers enabling him in this behalf, the Governor of Punjab, with the concurrence of Hon'ble Chief Justice of the High Court of Punjab and Haryana,

> Chandigarh, is pleased to constitute the courts of Sessions Judge and the first Additional Sessions Judge (for the area falling within their respective jurisdiction), at each district headquarter in the State, to be the Special Courts, for the trial of offences as specified in the Schedule appended to the aforesaid Act, which are investigated by the State police."

18. It will be seen that the aforesaid notification has been issued under Section 22(1) of the NIA Act. What is important to note is that under Section 22(2)(ii), reference to the Central Agency in Section 13(1) is to be construed as a reference to the investigation agency of the State Government – namely, the State police in this case. Thereafter, what is important to note is that notwithstanding anything contained in the Code, the jurisdiction conferred on a Special Court shall, until a Special Court is designated by the State Government, be exercised only by the Court of Sessions of the Division in which such offence has been committed *vide* sub-section (3) of Section 22; and by sub-section (4) of Section 22, on and from the date on which the Special Court is designated by the State Government, the trial of any offence investigated by the State Government under the provisions of the NIA Act shall stand transferred to that Court on and from the date on which it is designated.

19. Section 13(1) of the NIA Act, which again begins with a non-obstante clause which is notwithstanding anything contained in the Code, read with Section 22(2)(ii), states that every scheduled offence that is

investigated by the investigation agency of the State Government is to be tried exclusively by the Special Court within whose local jurisdiction it was committed.

20. When these provisions are read along with Section 2(1)(d) and the provisos in 43-D(2) of the UAPA, the Scheme of the two Acts, which are to be read together, becomes crystal clear. Under the first proviso in Section 43-D(2)(b), the 90 day period indicated by the first proviso to Section 167(2) of the Code can be extended up to a maximum period of 180 days if "the Court" is satisfied with the report of the public prosecutor indicating progress of investigation and specific reasons for detention of the accused beyond the period of 90 days. "The Court", when read with the extended definition contained in Section 2(1)(d) of the UAPA, now speaks of the Special Court constituted under Section 22 of the NIA Act. What becomes clear, therefore, from a reading of these provisions is that for <u>all</u> offences under the UAPA, the Special Court alone has exclusive jurisdiction to try such offences. This becomes even clearer on a reading of Section 16 of the NIA Act which makes it clear that the Special Court may take cognizance of an offence without the accused being committed to it for trial upon receipt of a complaint of facts or upon a police report of such facts. What is equally clear from a reading of Section 16(2) of the NIA Act is that even though offences may be punishable with imprisonment for a term

not exceeding 3 years, the Special Court alone is to try such offence – albeit in a summary way if it thinks it fit to do so. On a conspectus of the abovementioned provisions, Section 13 read with Section 22(2)(ii) of the NIA Act, in particular, the argument of the learned counsel appearing on behalf of the State of Punjab based on Section 10 of the said Act has no legs to stand on since the Special Court has exclusive jurisdiction over every Scheduled Offence investigated by the investigating agency of the State.

21. Before the NIA Act was enacted, offences under the UAPA were of two kinds – those with a maximum imprisonment of over 7 years, and those with a maximum imprisonment of 7 years and under. Under the Code as applicable to offences against other laws, offences having a maximum sentence of 7 years and under are triable by the Magistrate's Courts, whereas offences having a maximum sentence of above 7 years are triable by Courts of Sessions. This Scheme has been completely done away with by the 2008 Act as all scheduled offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated Court by notification issued by either the Central Government or the State Government, the fall back is upon the Court of Sessions alone. Thus, under the

aforesaid Scheme what becomes clear is that so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D(2)(b) is non-existent, "the Court" being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself. The impugned judgment in arriving at the contrary conclusion is incorrect as it has missed Section 22(2) read with Section 13 of the NIA Act. Also, the impugned judgement has missed Section 16(1) of the NIA Act which states that a Special Court may take cognizance of any offence without the accused being committed to it for trial *inter alia* upon a police report of such facts.

22. The second vexed question which arises on the facts of this case is the question of grant of default bail. It has already been seen that once the maximum period for investigation of an offence is over, under the first proviso (a) to Section 167(2), the accused shall be released on bail, this being an indefeasible right granted by the Code. The extent of this indefeasible right has been the subject matter of a number of judgments. A beginning may be made with the judgment in **Hitendra Vishnu Thakur v. State of Maharashtra** (1994) 4 SCC 602, which spoke of "default bail" under the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA") read with Section 167 of the Code as follows:

“**19.** Section 20(4) of TADA makes Section 167 of CrPC applicable in relation to case involving an offence punishable under TADA, subject to the modifications specified therein…while clause (*b*) provided that reference in sub-section (2) of Section 167 to ‘15 days’, ‘90 days’ and ‘60 days’ wherever they occur shall be construed as reference to ‘60 days’, ‘one year’ and ‘one year’ respectively. This section was amended in 1993 by the Amendment Act 43 of 1993 with effect from 22-5-1993 and the period of ‘one year’ and ‘one year’ in clause (*b*) was reduced to ‘180 days’ and ‘180 days’ respectively, by modification of sub-section (2) of Section 167. After clause (*b*) of sub-section (4) of Section 20 of TADA, another clause (*bb*) was inserted which reads:

“(*bb*) in sub-section (2), 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 one hundred and eighty days, the Designated Court shall extend the said period up to one year, 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 one hundred and eighty days; and’ ”

20. …Sub-section (2) of Section 167 of the Code lays down that the Magistrate to whom the accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that section. The proviso to sub-section (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate *shall* release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure…Section 167 read with Section 20(4) of TADA, thus, strictly speaking is not a provision for “grant of bail” but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-

sheet, if necessary, in the court. The proviso to Section 167(2) of the Code read with Section 20(4)(*b*) of TADA, therefore, creates an indefeasible right in an accused person on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail under proviso (*a*) of Section 167(2) of the Code read with Section 20(4) of TADA is generally termed as an "order-on-default" as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (*b*) of sub-section (4) of Section 20 read with the proviso to sub-section (2) of Section 167 of CrPC an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 CrPC. An obligation, in such a case, is cast upon the court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (*bb*) of Section 20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. (*Hussainara Khatoon case* [*Hussainara Khatoon* v. *Home Secy., State of Bihar*, (1980) 1 SCC 98 : 1980 SCC (Cri) 40 : AIR 1979 SC 1369]). This legal position has been very ably stated in *Aslam Babalal Desai* v. *State of Maharashtra* [(1992) 4 SCC 272 : 1992 SCC (Cri) 870 : AIR 1993 SC 1] where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in *Rajnikant Jivanlal Patel* v. *Intelligence Officer, Narcotic Control Bureau, New Delhi* [(1989) 3 SCC 532 : 1989 SCC (Cri) 612 : AIR 1990 SC 71] wherein it was held that : (SCC p. 288, para 9)

> "The right to bail under Section 167(2) proviso (*a*) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds."

21. Thus, we find that once the period for filing the charge-sheet has expired and either no extension under clause (*bb*) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court *shall* release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the court must release the accused on bail *on its own motion* even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating/prosecuting agency and once such an application is made, the court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (*bb*) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It

> would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's ‘default’… No other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the ‘default’ of the prosecution.”

23. In the Constitution Bench judgment in **Sanjay Dutt v. State through CBI** (1994) 5 SCC 410, one of the questions to be decided by the Constitution Bench was the correct interpretation of Section 20(4)(bb) of TADA indicating the nature of right of an accused to be released on default bail. The enigmatic expression “if already not availed of” is contained in paragraphs 48 of the aforesaid judgment as follows:

> “**48.** We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(*bb*) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a

prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(*bb*), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of *habeas corpus* on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See *Naranjan Singh Nathawan* v. *State of Punjab* [1952 SCR 395 : AIR 1952 SC 106 : 1952 Cri LJ 656] ; *Ram Narayan Singh* v. *State of Delhi* [1953 SCR 652 : AIR 1953 SC 277 : 1953 Cri LJ 1113] and *A.K. Gopalan* v. *Government of India* [(1966) 2 SCR 427 : AIR 1966 SC 816 : 1966 Cri LJ 602] .)

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53. As a result of the above discussion, our answers to the three questions of law referred for our decision are as under:

xxx xxx xxx

(2)(*b*) The "indefeasible right" of the accused to be released on bail in accordance with Section 20(4)(*bb*) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case

> may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage." [Emphasis Supplied]

24. The question as to whether default bail can be granted once a charge sheet is filed was authoritatively dealt with in a decision of a Three-Judge Bench of this Court in **Uday Mohanlal Acharya v. State of Maharashtra** (2001) 5 SCC 453. The majority judgment of G.B. Pattanaik, J. reviewed the decisions of this Court and in particular the enigmatic expression "if already not availed of" in **Sanjay Dutt** (supra). The Court then held:

> "**13.**…The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate

had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in *State of M.P.* v. *Rustam* [1995 Supp (3) SCC 221 : 1995 SCC (Cri) 830] setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression "if already not availed of", used by the Constitution Bench in *Sanjay Dutt* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433]…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 proviso 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…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:

xxx xxx xxx

> *3*. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.
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> xxx xxx xxx
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> *6*. The expression "if not already availed of" used by this Court in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] 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."
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> [Emphasis Supplied]

B.N. Agrawal J. dissented, holding:

> "**29.** My learned brother has referred to the expression "if not already availed of" referred to in the judgment in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] for arriving at Conclusion 6. According to me, the expression "availed of" does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (*a*)(*ii*) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail

> bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.
>
> **30.** In this background, the expression "availed of" does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."

25. The law laid down by the majority judgment in this case was however not followed in **Pragya Singh Thakur v. State of Maharashtra** (2011) 10 SCC 445. This hiccup in the law was then cleared by the judgment in **Union of India v. Nirala Yadav** (2014) 9 SCC 457, which exhaustively discussed the entire case law on the subject. In this judgment, a Two-Judge Bench of this Court referred to all the relevant authorities on the subject including the majority judgment of **Uday Mohanlal Acharya** (supra) and then concluded:

> "**44.** At this juncture, it is absolutely essential to delve into what were the precise principles stated in *Uday Mohanlal Acharya case* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] and how the two-Judge Bench has understood the same in *Pragyna Singh Thakur* [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] . We have already reproduced the paragraphs in extenso from *Uday Mohanlal Acharya case* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] and the relevant paragraphs from *Pragyna Singh Thakur* [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] . *Pragyna Singh Thakur* [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] has drawn support from *Rustam* [1995 Supp (3) SCC 221 : 1995 SCC (Cri) 830] case to buttress the principle it has

laid down though in *Uday Mohanlal Acharya case* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in para 56 which has been reproduced hereinabove, has referred to para 13 and the conclusions of *Uday Mohanlal Acharya case* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] . We have already quoted from para 13 and the conclusions.

45. The opinion expressed in paras 54 and 58 in *Pragyna Singh Thakur* [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] which we have emphasised, as it seems to us, runs counter to the principles stated in *Uday Mohanlal Acharya* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] which has been followed in *Hassan Ali Khan* [(2011) 10 SCC 235 : (2012) 1 SCC (Cri) 256] and *Sayed Mohd. Ahmad Kazmi* [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] . The decision in *Sayed Mohd. Ahmad Kazmi case* [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] has been rendered by a three-Judge Bench. We may hasten to state, though in *Pragyna Singh Thakur case* [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] the learned Judges have referred to *Uday Mohanlal Acharya case* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] but have stated the principle that even if an application for bail is filed on the ground that the charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if the charge-sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in *Mustaq Ahmed Mohammed Isak case* [(2009) 7 SCC 480 : (2009) 3 SCC (Cri) 449] . We are disposed to think so, as the two-Judge Bench has used the words “before consideration of the same and before being released on bail”, the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

46. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in *Uday Mohanlal Acharya case* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] .

The learned Judge dissented with the majority as far as interpretation of the expression “if not already availed of” by stating so: (SCC p. 481, paras 29-30)

> “*29*. My learned Brother has referred to the expression ‘if not already availed of’ referred to in the judgment in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] for arriving at Conclusion 6. According to me, the expression ‘availed of’ does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (*a*)(*ii*) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.
>
> *30*. In this background, the expression ‘availed of’ does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised.”

On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in *Pragyna Singh Thakur case* [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three-Judge Bench in *Sayed Mohd. Ahmad Kazmi case* [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] . Keeping in view the principle stated in *Sayed Mohd. Ahmad Kazmi case* [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] which is based on three-Judge Bench decision in *Uday Mohanlal Acharya*

> *case* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] , we are obliged to conclude and hold that the principle laid down in paras 54 and 58 of *Pragyna Singh Thakur case* [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] (which has been emphasised by us: *see* paras 42 and 43 above) does not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be good law. Our view finds support from the decision in *Union of India* v. *Arviva Industries India Ltd.* [(2014) 3 SCC 159].”

26. Also, in **Syed Mohd. Ahmad Kazmi v. State (Govt. of NCT of Delhi)** (2012) 12 SCC 1, Section 43-D of the UAPA came up for consideration before the Court, in particular the proviso which extends the period for investigation beyond 90 days up to a period of 180 days. An application for default bail had been made on 17.07.2012, as no charge sheet was filed within a period of 90 days of the appellant’s custody. The charge sheet in the aforesaid case was filed thereafter on 31.07.2012. Despite the fact that this application was not taken up for hearing before the filing of the charge sheet, this Court held that this since an application for default bail had been filed prior to the filing of the charge sheet the “indefeasible right” spoken of earlier had sprung into action, as a result of which default bail had to be granted. The Court held:

> “**25.** Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General Mr Raval. There is no

denying the fact that on 17-7-2012, when CR No. 86 of 2012 was allowed by the Additional Sessions Judge and the custody of the appellant was held to be illegal and an application under Section 167(2) CrPC was made on behalf of the appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of the appellant for a further period of 90 days with retrospective effect from 2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the appellant on the expiry of 90 days from the date when the appellant was taken into custody. Such right, as has been commented upon by this Court in *Sanjay Dutt* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] and the other cases cited by the learned Additional Solicitor General, could only be distinguished (*sic* extinguished) once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before the charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.

26. The circumstances in this case, however, are different in that the appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.

27. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the appellant acquired the right for grant of statutory bail on 17-7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application

for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise."

27. In a fairly recent judgment reported as **Rakesh Kumar Paul v. State of Assam** (2017) 15 SCC 67, a Three-Judge Bench of this Court referred to the earlier decisions of this Court and went one step further. It was held by the majority judgment of Madan B. Lokur, J. and Deepak Gupta, J. that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted. This was stated in Lokur, J.'s judgment as follows:

> "**37.** This Court had occasion to review the entire case law on the subject in *Union of India* v. *Nirala Yadav* [*Union of India* v. *Nirala Yadav*, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212] . In that decision, reference was made to *Uday Mohanlal Acharya* v. *State of Maharashtra* [*Uday Mohanlal Acharya* v. *State of Maharashtra*, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows: (*Nirala Yadav case* [*Union of India* v. *Nirala Yadav*, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212] , SCC p. 472, para 24)
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> > "'*13*. (*3*) On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.' (*Uday Mohanlal case* [*Uday Mohanlal Acharya* v. *State of Maharashtra*, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] , SCC p. 473, para 13)"

38. This Court also dealt with the decision rendered in *Sanjay Dutt* [*Sanjay Dutt* v. *State*, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] and noted that the principle laid down by the Constitution Bench is to the effect that if the charge-sheet is not filed and the right for “default bail” has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge-sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to *Mohd. Iqbal Madar Sheikh* v. *State of Maharashtra* [*Mohd. Iqbal Madar Sheikh* v. *State of Maharashtra*, (1996) 1 SCC 722 : 1996 SCC (Cri) 202] wherein it was observed that some courts keep the application for “default bail” pending for some days so that in the meantime a charge-sheet is submitted. While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for “default bail” during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court.

Procedure for obtaining default bail

40. In the present case, it was also argued by the learned counsel for the State that the petitioner did not apply for “default bail” on or after 4-1-2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge-sheet. Strictly speaking, this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court — he made no specific application for grant of “default bail”. However, the application for regular

bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge-sheet having expired and that perhaps no charge-sheet had in fact being filed. In any event, this issue was argued by the learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail — such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for "default bail" or an oral application for "default bail" is of no consequence. The court concerned must deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge-sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

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

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Application of the law to the petitioner

45. On 11-1-2017 [*Rakesh Kumar Paul* v. *State of Assam*, 2017 SCC OnLine Gau 573] when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of "default bail" since the statutory period of 60 days for filing a charge-sheet had expired, no charge-sheet or challan had been filed against him (it was filed only on 24-1-2017) and the petitioner had

orally applied for "default bail". Under these circumstances, the only course open to the High Court on 11-1-2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him "default bail" on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.

46. It was submitted that as of today, a charge-sheet having been filed against the petitioner, he is not entitled to "default bail" but must apply for regular bail — the "default bail" chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4-1-2017 and 24-1-2017 when no charge-sheet had been filed, during which period he had availed of his indefeasible right of "default bail". It would have been another matter altogether if the petitioner had not applied for "default bail" for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge-sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for "default bail" during the interregnum between 4-1-2017 and 24-1-2017 as is evident from the decision of the High Court rendered on 11-1-2017 [*Rakesh Kumar Paul* v. *State of Assam*, 2017 SCC OnLine Gau 573] . On the contrary, he had availed of his right to "default bail" which could not have been defeated on 11-1-2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of the opinion that the petitioner had satisfied all the requirements of obtaining "default bail" which is that on 11-1-2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge-sheet had been filed against

him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.

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49. The petitioner is held entitled to the grant of "default bail" on the facts and in the circumstances of this case. The trial Judge should release the petitioner on "default bail" on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case."

28. Deepak Gupta, J. in his concurring opinion agreed with Lokur, J. as follows:

"**82.** The right to get "default bail" is a very important right. Ours is a country where millions of our countrymen are totally illiterate and not aware of their rights. A Constitution Bench of this Court in *Sanjay Dutt* [*Sanjay Dutt* v. *State*, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] has held that the accused must apply for grant of "default bail". As far as Section 167 of the Code is concerned, Explanation I to Section 167 provides that notwithstanding the expiry of the period specified (i.e. 60 days or 90 days, as the case may be), the accused can be detained in custody so long as he does not furnish bail. Explanation I to Section 167 of the Code reads as follows:

"*Explanation I*.—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in para (*a*), the accused shall be detained in custody so long as he does not furnish bail."

This would, in my opinion, mean that even though the period had expired, the accused would be deemed to be in legal custody till he does not furnish bail. The requirement is of furnishing of bail. The accused does not have to make out any grounds for grant of bail. He does not have to file a detailed application. All he has to aver in the application is that since 60/90 days have expired and charge-sheet has not been filed, he is entitled to bail and is willing to furnish bail. This indefeasible right cannot be defeated by filing the charge-sheet after the accused has offered to furnish bail.

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86. I agree and concur with the conclusions drawn and directions given by learned Brother Lokur, J. in paras 49 to 51 of his judgment."

P.C. Pant, J., however, dissented holding:

"**113.** The law laid down as above shows that the requirement of an application claiming the statutory right under Section 167(2) of the Code is a prerequisite for the grant of bail on default. In my opinion, such application has to be made before the Magistrate for enforcement of the statutory right. In the cases under the Prevention of Corruption Act or other Acts where Special Courts are constituted by excluding the jurisdiction of the Magistrate, it has to be made before such Special Court. In the present case, for the reasons discussed, since the appellant never sought default bail before the court concerned, as such is not entitled to the same."

A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose

of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.

29. On the facts of the present case, the High Court was wholly incorrect in stating that once the challan was presented by the prosecution on 25.03.2019 as an application was filed by the Appellant on 26.03.2019, the Appellant is not entitled to default bail. First and foremost, the High Court has got the dates all wrong. The application that was made for default bail was made on or before 25.02.2019 and not 26.03.2019. The charge sheet was filed on 26.03.2019 and not 25.03.2019. The fact that this application was wrongly dismissed on 25.02.2019 would make no difference and ought to have been corrected in revision. The sole ground for dismissing the application was that the time of 90 days had already been extended by the learned Sub-Divisional Judicial Magistrate, Ajnala by his order dated 13.02.2019. This Order was correctly set aside by the Special Court by its judgment dated 25.03.2019, holding that under the UAPA read with the NIA Act, the Special Court alone had jurisdiction to extend time to 180 days under the first proviso in Section 43-D(2)(b). The fact that the Appellant filed

yet another application for default bail on 08.04.2019, would not mean that this application would wipe out the effect of the earlier application that had been wrongly decided. We must not forget that we are dealing with the personal liberty of an accused under a statute which imposes drastic punishments. The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled. This being the case, we set aside the judgment of the High Court. The Appellant will now be entitled to be released on “default bail” under Section 167(2) of the Code, as amended by Section 43-D of the UAPA. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds, and upon arrest or re-arrest, the petitioner is entitled to petition for the grant of regular bail which application should be considered on its own merit. We also make it clear that this judgement will have no impact on the arrest of the petitioner in any other case.

30. The appeal is, accordingly, allowed, and the impugned judgement of the High Court is set aside.

………………………. J.
(R.F. Nariman)

………………………. J.
(Navin Sinha)

………………………. J.
(K.M. Joseph)

New Delhi.
October 12, 2020.