IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

LD/VC/CRIMINAL BAIL APPLICATION NO. 522 OF 2020

Kapil Wadhawan]
Age : 46 years, Occ. Business,]
(currently in judicial custody at Taloja)]
Having residence at]
13th 14th 15th and 16th floor,]
D.B. Breeze, Khar (West),]
Mumbai - 400052] ...Applicant

Versus

1. Central Bureau of Investigation]
CBI, EOU-1, Camp Office, 10 th Floor,]
CBI Office, Bandra Kurla Complex]
Mumbai.]
2. State of Maharashtra] ...Respondents

……..

WITH

LD/VC/CRIMINAL BAIL APPLICATION NO. 523 OF 2020

Dheeraj Wadhawan]
Age : 42 years, Occ. Business,]
(currently in judicial custody at Taloja)]
Having residence at]
13th 14th 15th and 16th floor,]
D.B. Breeze, Khar (West),]
Mumbai - 400052] ...Applicant

Versus

1. Central Bureau of Investigation]
CBI, EOU-1, Camp Office, 10th Floor,]
CBI Office, Bandra Kurla Complex]
Mumbai.]
2. State of Maharashtra] ...Respondents

Mr. Amit Desai, Senior Advocate a/w. Gopalakrishna Shenoy, Ashwin Thool, Rohan Dakshini, Ms. Pooja Kothari, Prakhar Parekh, Aakanksha Saxena, Ms. Janaki Garde i/b. M/s. Rashmikant & Partners, for the Applicant in LD/VC/BA. NO. 522/2020.

Dr. Abhishek Manu Singhvi, Senior Advocate a/w. Gopalakrishna Shenoy, Ashwin Thool, Rohan Dakshini, Ms. Pooja Kothari, Prakhar Parekh, Ms. Aakanksha Saxena, Ms. Janaki Garde i/b. M/s. Rashmikant & Partners, for the Applicant in LD/VC/BA. NO. 523/2020.

Mr. Anil Singh, ASG a/w. H.S. Venegavkar, Shreeram Shirsat, for Respondent No.1-CBI.

Mrs. P.P. Shinde, APP, for Respondent No.2 – State.

CORAM : SARANG V. KOTWAL, J.

RESERVED ON : 23.10.2020
PRONOUNCED ON : 04.11.2020

ORDER:

1 Both these Applications are disposed of by this common order because they arise out of the same subject matter and both these Applications challenge the same order dated 31.7.2020 passed by the Special Judge (CBI) at Greater Bombay in Bail Applications CBI No.844/2020 & 845/2020. For the sake of convenience, the Applicants in both these Applications, are referred to by their names in the following discussion.

2 The Applicants are seeking directions for their release on bail in connection with F.I.R. R.C. No.219/2020/E0004 dated 7.3.2020 registered with Central Bureau of Investigation, EO-I, Delhi. The Applications are not on merits of the matter, but, on the ground that the report under Section 173 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') was not filed within the time

stipulated under Section 167 of Cr.P.C.. According to the Applicants that gave rise to their indefeasible rights and, therefore, they are entitled to be released on bail. The Applicants had filed similar Bail Applications before the learned Special Judge. The Applicant Kapil had preferred Bail Application CBI No.844/2020 and the Applicant Dheeraj had preferred Bail Application CBI No.845/2020 before the learned Special Judge. Both these Applications were rejected by a common order dated 31.7.2020.

3 After the report under Section 173 of Cr.P.C. was filed before the learned Special Judge, the matter was transferred to the Court of Additional Chief Metropolitan Magistrate, in the circumstances which shall be discussed later. The Applicants had also preferred separate Applications for bail on similar grounds before the Additional Chief Metropolitan Magistrate. Those Applications were also rejected. However, those Bail Applications are subject matters of separate Applications i.e. Bail Application (Stamp) Nos.1924/2020 & 1925/2020, which were also argued along with present Applications.

4 Heard Shri Amit Desai, learned Senior Counsel for the

Applicant in LD/VC/BA NO. 522/2020, Dr. Abhishek Manu Singhvi, learned Senior Counsel for the Applicant in LD/VC/BA NO. 523/2020, Shri Anil Singh, learned Additional Solicitor General for Respondent No.1-CBI and Smt P.P. Shinde, learned APP for Respondent No.2 – State.

BRIEF FACTS

5 The brief facts leading to filing of these Applications are as follows :

i. The FIR was lodged on 7.3.2020 for commission of offences punishable under Section 120-B read with Section 420 of Indian Penal Code and under Sections 7, 12, 13(2) read with 13(1)(d) of the Prevention of Corruption Act (for short, 'PC Act').

ii. On 26.4.2020, both the Applicants were arrested and were produced before the learned Special Judge, CBI on 27.4.2020 when they were remanded to the custody of the Respondent No.1. They were remanded to the judicial custody on 10.5.2020. It is a common ground that 60 days period for the purpose of Section 167(2) of Cr.P.C. expired on 25.6.2020.

iii. On 25.6.2020, the investigating agency filed a report under Section 173 of Cr.P.C.. The main issue raised in these Applications

is as to whether that report satisfies the requirements of Section 173(2) as well as Section 173(5) of Cr.P.C., and if it does not, then, it would not be proper compliance of Section 173 of Cr.P.C.. Consequently, the indefeasible right of the Applicants for getting released on bail arises immediately from 26.6.2020 onwards.

iv. The main line of argument was that the report was not accompanied by statements of the witnesses and other documents. Therefore, it was an incomplete report. The other documents and statements of witnesses were filed in the Registry of the Sessions Court on 9.7.2020.

v. Shri Amit Desai, learned Senior Counsel raised one more issue in this connection. According to him, the purported report under Section 173 was not placed before the learned Special Judge and it was merely presented in the Registry. According to Shri Amit Desai this was also in violation of the provisions of law and, therefore, no report was presented on 25.6.2020 in the eyes of law.

vi. It is case of the Applicants that on 30.6.2020, they filed default bail applications before the learned Special Judge. The FIR and the report mentioned provisions of the PC Act as one of the co-accused Rana Kapoor was a Public Servant. However, the requisite

sanction under the PC Act was not obtained and placed along with the report. The learned Special Judge, therefore, did not take cognizance of the offence and instead remitted the matter to the Court of Chief Metropolitan Magistrate vide his order dated 17.7.2020.

vii. Even 90 days period after first remand of the Applicants got over on 25.7.2020. According to the Applicants there was no report under Section 173 of Cr.P.C. signifying completion of the investigation and, therefore, they preferred Default Bail Applications No.82/2020 and 83/2020 before the Additional Chief Metropolitan Magistrate.

viii. The Respondent resisted the Applications in both the Courts i.e. Special Court for CBI at Greater Bombay and the Additional Chief Metropolitan Magistrate's Court. The learned Special Judge rejected the Applications for default bail vide his order dated 31.7.2020; and the learned Additional Chief Metropolitan Magistrate rejected the Applications vide order dated 24.8.2020.

ix. The Applicants have sought default bail and have challenged the order of the learned Special Judge by approaching this Court by way of the present Applications filed on 12.8.2020.

6 Another important issue raised in these Applications is that Section 409 of I.P.C. was applied as a subterfuge as, according to the learned Counsel for the Applicants, the Respondent No.1 wanted to wriggle out of their difficulty of not filing the report under Section 173 of Cr.P.C. within 60 days.

7 In view of the above broad features of these Applications, it is necessary to refer to the report filed on 25.6.2020 in the Court of Special Judge for CBI for Greater Bombay. The said report is titled as "FINAL REPORT(Under Section 173 Cr.P.C.)".

8 Column No.4 of the report mentions Section 120-B read with 420 of IPC and Sections 7, 12, 13(2) read with 13(1)(d) of the PC Act. Both the learned Senior Counsel emphasized the fact that in column No.4, Section 409 of IPC is not mentioned.

9 Column No.11 gives particulars of the accused persons charge-sheeted. They are as follows :

Accused No.1	:-	M/s. Deewan Housing Finance Corporation Limited [for short, 'DHFL'], through its Directors.
Accused No.2	:-	Kapil Rajesh Wadhawan.
Accused No.3	:-	Dheeraj Rajesh Wadhawan.

Accused No.4	:-	M/s. Belief Realtors Private Limited (for short, 'BRPL'), through its Directors.
Accused No.5	:-	M/s. RKW Developers Private Limited (for short, 'RKW Developers'), through its Directors.
Accused No.6	:-	M/s. DOIT Urban Ventures (India) Private Limited (for short, 'DOIT'), through its Directors.
Accused No.7	:-	Ms. Roshini Kapoor D/o. Rana Kapoor.
Accused No.8	:-	Mr. Rana Kapoor S/o. Late Raj Kishore Kapoor.

. In describing the Sections applied against each of these accused, Section 409 of IPC is mentioned.

10 Brief allegations in the report are as follows:

(a) During the period 2018-19, Shri Rana Kapoor, the Promoter Director and the then CEO of M/s. Yes Bank Limited (for short, 'Yes Bank') entered into a criminal conspiracy with the Applicant Kapil, who was the Promoter Director of DHFL and others for extending financial assistance to DHFL by Yes Bank in lieu of substantial undue benefit to himself and his family members through the Companies held by them.

(b) Between April to June, 2018, Yes Bank invested Rs.3700/- Crores in the short-term debentures of DHFL. Simultaneously the Applicant Kapil paid a kickback of Rs.600/- Crores to Shri Rana

Kapoor and his family members in the garb of builder loan of Rs.600/- Crores given by DHFL to DOIT, which was controlled by family members of Shri Rana Kapoor. The said loan was sanctioned on the basis of mortgage of a sub-standard property of very meager value.

(c) Yes Bank sanctioned a loan of Rs.750/- Crores which was deposited in the account of BRPL, which was a group company of DHFL Group controlled by both the Applicants. Rs.118 Crores paid to Yes Bank as processing fees and rest of the amount was transferred to the Group Companies controlled by the Applicant – Dheeraj and from those accounts the amount of Rs.632/- Crores was transferred in the account of RKW Developers and then to the account of M/s. KYTA Advisors Private Limited owned and controlled by the accused. Thus, the loan of Rs.750 Crores sanctioned to BRPL was not utilized for the SRA project which was undertaken by BRPL and for which the amount was sanctioned.

. These were the basic allegations apart from other allegations. The report gives details of sanctioning, disbursing and utilization of such loan amounts. It also narrates as to how there was irregularity in sanctioning the loans and how the mortgaged

property was not sufficient to cover the loan.

11 The learned Special Judge considered the issues raised before him. He also took into consideration the report filed by the Respondent under Section 173 of Cr.P.C. and he rejected both the Applications before him for default bail preferred by both the Applicants. The learned Judge considered various judgments cited before him. Those judgments were also cited before me and they will be discussed at the appropriate place in this order.

12 The learned Special Judge in Paragraph-23 of his order held thus:

> "23. Thus, in view of above discussion non accompanying the documents and statements of witnesses with the chargesheet which was filed on 25.06.2020 did not anyway is a incomplete chargesheet for the purpose of consideration of default bail. Accordingly, no grounds are made out or no right is existed to grant default bail to the accused/applicants."

. The learned Judge also considered the alternative submission of the CBI that since the charge-sheet contained offence punishable under Section 409 read with 120-B of IPC which was punishable with imprisonment for life, prescribed period to file the charge-sheet was 90 days which was to get over

on 25.7.2020. Before that day, the entire set of documents was already filed. In Paragraph-32 of his order, the learned Special Judge held that the offence of criminal breach of trust was in respect of the victims or aggrieved persons who were the public at large, who had deposited money in Yes Bank or DHFL or were having shares; and, therefore, the offence under Section 409 read with 120-B was also made out. Hence, in any case, 90 days period was available for the CBI to file their charge-sheet.

13 On this reasoning the Applicants' Applications were rejected.

SUBMISSIONS ON BEHALF OF THE APPLICANTS

14 Both the learned Senior Counsel emphatically submitted that the report, purportedly filed on 25.6.2020, was not a complete report as contemplated under Section 173(2) read with Section 173(5) of Cr.P.C..

15 Shri Amit Desai submitted that the report anyway was not placed before the learned Special Judge on 25.6.2020, and it was filed in the Registry. This is not the proper compliance of requirement for filing the report under Section 173 of Cr.P.C. Both

the learned Senior Counsel submitted that in the 4th Column of the report, Section 409 of IPC is not mentioned. The Section is added only by way of subterfuge in an attempt to deprive the Applicants from being released on bail. It was submitted that even otherwise Section 409 of IPC is not attracted. Shri Amit Desai submitted that Paragraphs-49 and 50 of the report itself suggest that the investigation was not completed. They read thus:

> "**49.** That investigation of this case was affected due to situation arising out of spread of pandemic COVID-19 and consequent nationwide lockdown imposed thereupon. Therefore, the investigation is required to be kept open with respect to valuation of the collateral properties offered by M/s DOIT Urban Ventures India Private limited to obtain Rs 600 crores loan from DHFL and further the explanation of the M/s DOIT Urban Ventures India Private limited for the purpose of the loan has to be ascertained.
>
> **50.** That further investigation is also required to reveal the role of officials of YES Bank and DHFL etc. The remaining FIR named accused could not be examined due to situation arising due to spread of pandemic Covid 19. Accused Rana Kapoor is currently under Judicial custody in ED Mumbai case at Taloja Prison, Mumbai. Therefore, further investigation in this case under section 173(8) of Cr. PC is continuing and a supplementary charge sheet will be filed after carrying out investigation on remaining aspects."

16 Both the learned Senior Counsel relied on many judgments in support of their submissions. Some important judgments relied on by them and the relevant questions decided by those judgments are as follows :

16.1 The right accrued to the accused under Section 167 of Cr.P.C. is an indefeasible right. It flows from Article 21 of the Constitution of India. The gravity of the offence is immaterial. If there are possible views, then, the one leaning in favour of the accused has to be accepted. Such rights cannot be defeated by any subterfuge or any technical arguments. In support of these principles, the learned Senior Counsel relied on the following judgments:

[i] **Bikramjit Singh Vs. State of Punjab**[1]
[ii] **Rakesh Kumar Paul Vs. State of Assam**[2]
[iii] **Achpal @ Ramswaroop and another Vs. State of Rajasthan**[3]
[iv] **Aslam Babalal Desai Vs. State of Maharashtra**[4]

16.2 The charge-sheet without statement of witnesses and other documents is not a complete report as envisaged under Section 173 of Cr.P.C..

1 Judgment dt.12.10.2020 in Criminal Appeal No.667/2020 (Hon'ble Supreme Court)
2 (2017) 15 SCC 67
3 (2019) 14 SCC 599
4 (1992) 4 SCC 272

[i] **Satya Narain Musadi Vs. State of Bihar**[5].

[ii] **K. Veeraswami Vs. Union of India & Ors.**[6]

[iii] **Sidhartha Vashisht alia Manu Sharma Vs. State (NCT of Delhi)**[7]

. Both the learned Senior Counsel made submissions that the Hon'ble Supreme Court in a subsequent judgment in the case of **Narendra Kumar Amin Vs. Central Bureau of Investigation & Ors.**[8] considered **K. Veeraswami**'s case (supra), but, **Narendra Kumar Amin**'s case (supra) is not binding as it is in direct conflict with the ratio of **K. Veeraswami'**s case (supra), which is a Constitution Bench judgment.

. Shri Amit Desai also relied on many other judgments to elaborate what can be termed as a complete report. One such judgment is of a learned Single Judge of this Court in the case of **Sunil Vasantrao Phulbande Vs. State of Maharashtra**[9]**.**

16.3 According to the learned Senior Counsel there was direct conflict between **K. Veeraswami**'s judgment (supra) and **Narendra Kumar Amin**'s judgment(supra), and, therefore, **K. Veeraswami**'s judgment (supra), being a Constitution Bench

5 (1980) 3 SCC 152
6 (1991) 3 SCC 655
7 (2010) 6 SCC 1
8 (2015) 3 SCC 417
9 (2002) 3 Mh.L.J. 689

judgment must prevail. In support of this submission, following judgments were relied on:

[i] **Sundeep Kumar Bafna Vs. State of Maharashtra & Ors.**[10]
[ii] **Dr. Shah Faesal Vs. Union of India & Anr.**[11]

17 In addition to these submissions, Dr. Singhvi made following submissions:

17.1 Statutory bail is a vital liberty linked with indefeasible rights and the Court has to see through the direct and indirect subterfuges and such method should be eliminated to give effect to the right accrued to the accused in the letter and spirit. In the present case, such an attempt is made by the investigating agency by invoking Section 409 of IPC illegally to claim that the period for filing of the report is 90 days and not 60 days. The concept of statutory bail, its evolution and purpose should not be forgotten. Emphasis is on personal liberty guaranteed under Article 21 of the Constitution of India. Accused can exercise his indefeasible right by making oral or written application. No subterfuge should be allowed to frustrate the indefeasible right accrued to the accused. Strict construction of the provision must lean in favour of the

10 (2014)16 SCC 623
11 2020 SCC OnLine 263

accused. The seriousness or gravity of the offence is immaterial. The legislative history of Section 167 of Cr.P.C. shows that in today's times with technological advancement, the investigating agencies are required to complete the investigation at the earliest and not later than the statutory period provided under Section 167 of Cr.P.C..

17.2 Dr. Singhvi submitted that the subterfuge used by the investigating agency is obvious in the present case. In the FIR, there was neither any mention nor any ingredient was shown concerning Section 409 of IPC. Before filing of the report, remand was obtained on eight occasions and on none of these dates the ingredients of Section 409 of IPC are mentioned. In the entire report from Paragraph-1 to 50, there was no mention of Section 409 of IPC, but, only in Paragraph-51 there is a vague reference to that section without specifying how it is attracted. He submitted that in the facts of the case there cannot be application of Section 409 of IPC. In this case, as per the allegations, Yes Bank has given loan to DHFL, then, DHFL becomes owner of that amount and DHFL cannot misappropriate its own amount. Same consideration applies to the loan given by DHFL to DOIT. In both these

transactions the ingredient of conversion after entrustment is absent. In support of these submissions regarding Section 409 of IPC, Dr. Singhvi relied on following judgments :

[i] **Velji Raghavji Patel Vs. State of Maharashtra[12].**
[ii] **CBI Vs. Duncans Agro Industries Ltd.[13].**

17.3 Dr. singhvi further submitted that it was duty of the investigating officer to keep the Court informed about the escalation of any offence to a higher degree and, therefore, the Investigating Officer was duty bound to inform the Court as to how the offence escalated to Section 409 of IPC in this case. In support of this submission, Dr. Singhvi relied on the judgment in the case of **Sahyantan Chatterjee Vs. State of West Bengal[14]** and **Sathyamoorthy Vs. SP[15]**

17.4 Dr. Singhvi also contended that Sections 409 and 420 are mutually irreconcilable and he relied on few judgments of different High Courts in support of this proposition.

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12 (1965) 2 SCR 429
13 (1996) 5 SCC 591
14 2016 SCC OnLine Cal 4573
15 2016 SCC OnLine Mad 13376

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.1

18 Learned ASG Shri Anil Singh opposed these applications. He submitted that the Hon'ble Supreme Court in **Narendra Kumar Amin**'s case (supra) has concluded the issue and this Court cannot go beyond the interpretation of the Hon'ble Supreme Court in **Narendra Kumar Amin**'s case (supra). He submitted that there was no conflict between **K. Veeraswami**'s judgment (supra) and **Narendra Kumar Amin**'s judgment(supra). He submitted that all the required ingredients of the report as defined under Section 2(r) read with Section 173(2) of Cr.P.C. are elaborately mentioned in the report filed before the Special Court. The report is filed in time and hence the Applicants right for default bail never arose.

19 Learned ASG relied on the case of **Central Board of Dawoodi Bohra Community and another Vs. State of Maharashtra and another**[16] to contend that the ruling making specific reference to an earlier binding precedent may or may not be correct but cannot be said to be *per incuriam.* He submitted that in the case of **Satya Narain Musadi** (supra), the facts were totally different and the

16 (2005) 2 SCC 673

judgment does not relate to default bail. He, therefore, submitted that no case is made out by the Applicants for grant of any relief in these Applications.

REASONING

20 Before referring to the facts of this case, it is necessary to refer to the judgments cited by the learned Counsel for the Applicants regarding nature of right in favour of the accused under Section 167 of Cr.P.C.. The Hon'ble Supreme Court in many cases has explained the scope of such right. The leading judgments in this behalf are already cited by the learned Counsel for the Applicants which are referred hereinabove.

21 In a latest judgment in the case of **Bikramjit Singh** (supra), the Hon'ble Supreme Court has observed that the right to default bail is not a mere statutory right 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.

22 In **Rakesh Kumar Paul**'s case (supra), the Hon'ble Supreme Court has considered the history behind enactment of Section 167 of Cr.P.C.. A reference was made to the 41st Report of the Law Commission of India. The Law Commission in that report has observed that before the amendment, Code of Criminal Procedure, 1898 provided maximum period of 15 days for completion of investigation. Many times it was not possible to complete the investigation within that period and, therefore, there was a tendency to file a preliminary or incomplete report. The Magistrate purporting to act under Section 344 of that Code adjourned the proceedings and remanded the accused to custody. The Law Commission felt need to clarify the law in this respect. It was opined that use of Section 344 of that Code for remand beyond the statutory period could lead to serious abuse; as an arrested accused could be kept in custody indefinitely in this manner while the investigation could go on in a leisurely manner. The Law Commission found that 15 days period was too short and there was a need to extend it further. Thereafter Section 167 of Cr.P.C. has undergone a change and in the new Code of Criminal Procedure, 1973, the outer limit of 60 days was provided under proviso to sub-

section (2) of Section 167. In the year 1978, for serious offences punishable with minimum imprisonment for not less than ten years and for offences punishable with death or imprisonment for life, the period of 90 days was provided under the said proviso.

23 In **Rakeshkumar Paul's** case (supra), the Hon'ble Supreme Court observed in Paragraph-29, that, in addition to giving adequate time to complete the investigations, the legislature had put a premium on personal liberty and the legislature had felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It was for this reason and also to hold the investigating agency accountable that time-limits have been laid down by the legislature.

. It was observed in Paragraphs-38 & 39 that the indefeasible right accrued to the accused cannot be frustrated by the prosecution on any pretext; and that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for default bail.

. The Hon'ble Supreme Court observed in Paragraph-40 of the said judgment that, in matters of personal liberty, the Courts

should not be too technical and must lean in favour of personal liberty and the Court can even consider an oral application for default bail because in the matters of personal liberty and Article 21 of the Constitution, it was not always advisable to be formalistic or technical.

. Paragraph-59 of the same judgment, which is part of the concurring view, mentions that right of personal liberty is not only a legal right but it is a human right, which is inherent in every citizen of any civilized society. Article 21 only recognizes this right. Sections 57 and 167 can be read to be procedure established by law which curtails this right.

24 In **Achpal @ Ramswaroop**'s case (supra), the report was filed by the police officer lower in rank than an Additional Superintendent of Police. That was not in accordance with the directions mentioned in the High Court order in that case and, therefore, the papers were returned by the Magistrate before expiry of 90th day of detention. Thus, on expiry of 90th day, no report under Section 173 of Cr.P.C. was on record with the Magistrate. Immediately after expiry of 90 days, the accused filed application for bail under Section 167(2) of Cr.P.c. In those circumstances, the

Hon'ble Supreme Court granted bail to the accused.

25 In addition to these judgments relied on by the learned Senior Counsel for the Applicants, there are two other leading judgments on this subject. Those are **Uday Mohanlal Acharya Vs. State of Maharashtra**[17] and **Hitendra Vishnu Thakur and others Vs. State of Maharashtra and others**[18]**.**

26 In Paragraph-5 of **Uday Acharya**'s case (supra), the Hon'ble Supreme Court has explained the scheme of Cr.P.C. right from the time of arrest of the accused till filing of the police report under Section 173 of Cr.P.C. and various stages of granting remands.

27 **Uday Acharya**'s case (supra) lays down that if the indefeasible right has accrued in favour of the accused and if he files an application for bail and is prepared to offer bail on being directed, it has to be held that the accused had availed of his indefeasible rights; though the Court had not considered said application.

28 **Hitendra Vishnu Thakur**'s case (supra) lays down that

17 (2001) 5 SCC 453

18 (1994) 4 SCC 602

factors like gravity of the case, seriousness of the offence or character of the offender are immaterial while considering grant of default bail. This judgment also lays down in Paragraph-20 that one more obligation was cast on the Court and that was to inform the accused of his right of being released on bail and to enable him to make an application in that behalf if such right has accrued in his favour.

29 All these judgments emphasize the importance of various aspects in consideration of grant of default bail. Keeping these observations in mind, it is necessary to find whether the indefeasible right has accrued in favour of the Applicants in this case or whether it did not arise at all, because of filing of the report on 25.6.2020.

SCHEME OF CR.P.C.

30 Before entering into further discussion, it is necessary to refer to the scheme of Cr.P.C. which gives rise to such indefeasible right. As mentioned earlier, it is also explained in **Uday Acharya**'s case (supra). When a person is arrested without warrant, Section 56 casts a duty on the police officer to take the person before a

Magistrate having jurisdiction in the case or before the officer in-charge of a police station. Section 57 provides that such person cannot be detained in custody for more than 24 hours. In other words, he has to be produced before the Magistrate within 24 hours from his arrest exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

31 After this stage, the next provision is under Section 167 of Cr.P.C.. Since this Section is pivot of all arguments in these applications, it would be advantageous to reproduce relevant portion of that Section. Sub-section (2) of Section 167 Cr.P.C. is important, which reads thus :

> "**167**. Procedure when investigation cannot be completed in twenty-four hours -
> (1) xxxx
> (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:
> Provided that-
> (a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of

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

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

(ii) sixty days, where the investigation relates to any other offence, and, on 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 to released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

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

Explanation II.-- If any question arises whether an accused person was produced before the

> Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.
>
> Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution."

32 Thus, the Magistrate gets power to remand the accused during pendency of the investigation only upto the outer limit mentioned in the proviso to sub-section (2) of Section 167 of Cr.P.C.. If during that period the investigation is not completed and the report is not filed, the indefeasible right mentioned in all the above judgments accrues in favour of the accused. But, if such report under Section 173 of Cr.P.C. is filed before such right is exercised, then the Magistrate can take cognizance of the offence upon such police report by exercising his powers under Section 190 of Cr.P.C.; and can remand the accused to further custody under other provisions of Cr.P.C. as mentioned hereinafter. The accused can also be detained in custody under this Section if he does not furnish bail as specified in Explanation I of the proviso to sub-section (2) of Section 167 of Cr.P.C.

33 The next provision enabling the Magistrate to grant remand is under sub-clauses (a) & (b) of Section 209 of Cr.P.C..

34 The next provision is under Section 309 of Cr.P.C. which enables the Court to remand the accused in custody.

35 Thus, there is a common thread running through these provisions which enables the appropriate Courts to remand the accused to custody. This chain is broken if the report is not filed within the stipulated period under Section 167 of Cr.P.C.

36 The question arises that if the report is not filed and the accused is not prepared and does not furnish bail under proviso to Section 167(2), then whether the Court can remand such accused to custody. The difficulty also arises in this situation if the police report is filed within time but cognizance is not taken immediately then whether the Court has right to remand the accused to further custody.

37 These situations are noted and explained by the Hon'ble Supreme Court in the case of **Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and others**[19]**.** This case is important because some facts related to this case are similar to the present case. In

19 (2013) 3 SCC 77

that case, the accused was a Minister and there were allegations of misappropriation of amounts meant for development of slums. The Petitioner in that case was arrested on 11.3.2012. Charge-sheet against four other accused was filed on 25.4.2012 and supplementary charge-sheet against that Petitioner was filed on 1.6.2012. However, sanction to prosecute the Petitioner was not obtained as a result whereof, no cognizance was taken of the offence. Therefore, it was argued on behalf of the Petitioner that the remand orders were illegal. Incidentally, one of the offences alleged was under Section 409 of IPC.

38 The Hon'ble Supreme Court considered the question that, though cognizance was not taken by the Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the P.C. Act, but, whether in this situation Court can remand the accused to further custody after the period specified in Section 167 of Cr.P.C. was over. Answering this question, the Hon'ble Supreme Court in Paragraph-18 observed thus:

> "**18.** None of the said cases detract from the position that once a charge-sheet is filed within the stipulated

time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Code of Criminal Procedure is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Code of Criminal Procedure, it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Code of Criminal Procedure. The scheme of the Code of Criminal Procedure is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) Code of Criminal Procedure, the Magistrate is vested with authority to remand the accused to custody, both police custody and/or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 of Code of Criminal Procedure. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court."

. In my opinion, this case squarely covers the facts and some questions raised in these applications.

Whether the report filed on 25.6.2020 fulfills the requirements of Section 173 of Cr.P.C.

39 'Police report' is defined under Section 2(r) of Cr.P.C. thus :

> "**2.** Definitions. – In this Code, unless the context otherwise requires, -
>
> **(r)** "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173."

40 Sub-section (2) of Section 173 reads thus :

> "**173.** Report of police officer on completion of investigation -
> (1) xxxx
>
> (**2**) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-
> (a) the names of the parties;
> (b) the nature of the information;
> (c) the names of the persons who appear to be acquainted with the circumstances of the case;
> (d) whether any offence appears to have been committed and, if so, by whom;
> (e) whether the accused has been arrested;
> (f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under 2[sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB] or section 376E of the Indian Penal Code (45 of 1860).]

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given."

41 Sub-section (5) of Section 173 is also important in the context of the present case, which reads thus:

"**173.** Report of police officer on completion of investigation -

xxxx

xxxx

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

42 Section 190 of Cr.P.C. enables the Magistrate to take cognizance of the offence upon a police report of such facts which

again is relatable to the police report mentioned under sub-section (2) of Section 173 of Cr.P.C. The question is whether the documents and the statements mentioned under sub-section (5) of Section 173 of Cr.P.C. have to be part of the report under Section 173(2) to make it a complete report.

43 Section 2(r) of Cr.P.C. refers only to sub-section (2) of Section 173 and makes no reference to sub-section (5) of Section 173 of Cr.P.C.. The police report mentioned in Section 190(1)(b) makes a reference to a police report which is defined under Section 2(r) and it necessarily has to be a report under Section 173(2). In none of these Sections, there is a reference to Section 173(5). Therefore, plain reading of these provisions means that if all the requirements of sub-section (2) of Section 173 of Cr.P.C. are satisfied, then, it would be a police report as envisaged under Section 2(r) of Cr.P.C.. In the present case, if the report filed on 25.6.2020 is perused all the requirements of Section 173(2) are clearly satisfied. Along with the report the index of the witnesses and the documents was also tendered. There were 33 witnesses mentioned in the index and in another list 57 documents were mentioned. Thus, all the requisite information listed in sub-clauses

(a) to (g) of Section 173(2)(i) of Cr.P.C. was mentioned. Hence, on the 60th day the requirement of filing a report under Section 173 of Cr.P.C. was completed and, therefore, no right accrued in favour of the accused.

44 The contention of the Applicants is that sub-section (5) of Section 173 is an integral part of sub-section (2) of Section 173 of Cr.P.C. because it mentions the word “shall” in context of the duty cast on the police officer to forward to the Magistrate along with the report all the documents and statements of witnesses. However, bare reading of the aforementioned provisions does not show that the report is incomplete without the statements and documents mentioned in Section 173(5) of Cr.P.C.. Sub-section (5) of Section 173 of Cr.P.C. enjoins the duty on the police officer to forward all documents and statements recorded under Section 161 of Cr.P.C.. Thus, even this sub-section indicates that the report is separate and the documents and statements of witnesses are separate.

45 Section 173(5) is relatable to Section 207 of Cr.P.C., which reads thus :

"**207**. Supply to the accused of copy of police report and other documents -

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:—

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

. Here the police report is separately mentioned from the statements of witnesses and other documents. The compliance of Section 173(5) is necessary because that enables the Court to furnish all these copies to the accused which is his right.

46 In this background of the provisions of Cr.P.C., the judgments relied on by both sides will have to be considered.

47 Both sides have presented diametrically opposite views before me in regard to the question whether the documents and statements recorded under Section 161 of Cr.P.C. must form part of the police report mentioned under Section 173(2) and if they are not tendered along with the report then whether such report could be termed as a complete report. The submission of the Applicants is that filing of such an incomplete report without documents and statements does not satisfy the requirements of Section 167 of Cr.P.C. and, therefore, the Applicants are entitled to be released on bail.

48 On the other hand, learned ASG has submitted that it is not a requirement of law, that, the report mentioned under Section

173(2) of Cr.P.C. is complete only when it is accompanied with other documents and statements of witnesses when the report is filed.

49 In this context, learned Senior Counsel for the Applicants have relied on the judgments of **K. Veeraswami** (supra), **Satya Narain Musadi** (supra) and **Manu Sharma** (supra).

50 On the other hand, learned ASG relied on the judgments of **Narendra Kumar Amin** (supra) and **Central Bureau of Investigation Vs. R.S. Pai and others**[20]

51 First of these judgments is **Satya Narain Musadi** (supra). The question before the Court was whether a Court taking cognizance of any offence punishable under the Essential Commodities Act, 1955 upon a police report was precluded from looking into the complaint or First Information Report filed before the Court or that it had to keep itself exclusively confined to the report submitted by the police. This question was raised in light of the provisions of Section 11 of the Essential Commodities Act. While answering this question, the Hon'ble Supreme Court discussed the provisions of Sections 173(2) and 173(5) of Cr.P.C.

20 (2002) 5 SCC 82

Relevant discussion in Paragraph-10 of the said judgment is thus :

> "….. In fact, the report under Section 173(2) purports to be an opinion of the investigating officer that as far as he is concerned he has been able to procure sufficient evidence for the trial of the accused by the Court and when he states in the report not only the names of the accused, but names of the witnesses, the nature of the offence and a request that the case be tried, there is compliance with Section 173(2). The report as envisaged by Section 173(2) has to be accompanied as required by sub-section (5) by all the documents and statements of the witnesses therein mentioned. One cannot divorce the details which the report must contain as required by sub-section (5) from its accompaniments which are required to be submitted under sub-section (5). The whole of it is submitted as a report to the Court. But even if a narrow construction is adopted that the police report can only be what is prescribed in Section 173(2) there would be sufficient compliance if what is required to be mentioned by the statute has been set down in the report. To say that all the details of the offence must be set out in the report under Section 173(2) submitted by the police officer would be expecting him to do something more than what the Parliament has expected him to set out therein…."

. Thus, this judgment mentions that according to Section 173(5), all the documents and statements of the witnesses should be the accompaniments of the report under Section 173(2) of Cr.P.C. Significantly, the Hon'ble Supreme Court in this judgment has further observed that, "even if a narrow construction is adopted that the police report can only be what is prescribed in Section 173(2)

there would be sufficient compliance if what is required to be mentioned by the statute has been set down in the report."

. From this observation, it clearly shows that this judgment takes into account the possibility that the report is submitted without the accompanying documents and statements of witnesses and yet it could be sufficient compliance of the requirements of law.

52 Both the learned Counsel laid great emphasis on the case of **K. Veeraswami**'s case (supra) to submit that it was a judgment of a Constitution Bench of the Hon'ble Supreme Court and, therefore, must prevail over all other judgments.

. In **K. Veeraswami**'s case (supra), the Hon'ble Supreme Court was considering the case of disproportionate assets under the Prevention of Corruption Act, 1947. Various facets of the case were considered in this judgment. One of the contentions raised before the Hon'ble Supreme Court was whether it was incumbent on the investigating officer to call for explanation from an accused in such cases. In Paragraph-75, the Hon'ble Supreme court has observed that expecting the investigating officer to give an opportunity to the accused and call upon him to account for the excess of the assets

over the known sources of income and then decide whether the accounting is satisfactory or not would be elevating the Investigating Officer to the position of an enquiry officer or a judge. The Investigating Officer is not holding an enquiry against the conduct of the public servant or determining the disputed issues regarding disproportionate assets. The investigating officer just collects material from all sides and prepares a report which he files in the Court as charge-sheet.

. In Paragraph-76, the Constitution Bench then considered the case of **Satya Narain Musadi** (supra). It was observed thus:

> " As observed by this Court in Satya Narain Musadi v. State of Bihar, (1980) 3 SCC 152, that the statutory requirement of the report under Section 173(2) would be complied with if the various details prescribed therein are included in the report. This report is an intimation to the magistrate that upon investigation into a cognizable offence the Investigating Officer has been able to procure sufficient evidence for the court to inquire into the offence and the necessary information is being sent to the court. In fact, the report under Section 173(2) purports to be an opinion of the investigating Officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the court. The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175(5). Nothing more need be stated in the report of the Investigating Officer. It is also not necessary that all the details of the offence must be stated. The details of the offence

> are required to be proved to bring home the guilt to the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence."

. In Paragraph-77, the Constitution Bench observed that in that particular case the charge-sheet contained all the requirements of Section 173(2). the details of properties and pecuniary resources of the accused were set out in clear terms and, therefore, nothing more was required to be stated in the charge-sheet as it was fully in accordance with the terms of Section 173(2) of Cr.P.C..

. Thus, even in this case the Constitution Bench has held that if the necessary requirements of Section 173(2) were fulfilled that was sufficient compliance of the requirement of law.

. In **Manu Sharma**'s case (supra), in Paragraph-207, the Hon'ble Supreme Court has reiterated what Section 173(5) contemplates.

53 In any case, the Hon'ble Supreme Court in the case of **Narendra Kumar Amin** (supra) has considered and interpreted **K. Veeraswami**'s case (supra). Paragraph-15 of this judgment, discusses **K. Veeraswami**'s case (supra) as follows :

> "**15.** The observation made at para 76 of the Constitution Bench judgment of this Court in the case of K. Veeraswamy Vs. Union of India, (1991) 3 SCC 655 that the report is complete if it is accompanied by all documents and statement of witnesses as required Under Section 173(5) of Code of Criminal Procedure cannot be construed as the statement of law, since it was not made in the context of the police report Under Section 2(r) read with Section 173(2), (5) and (8) of Code of Criminal Procedure. On the contrary, the three Judge Bench of this Court in the decision in Central Bureau of Investigation v. R.S. Pai, (2002) 5 SCC 82, after referring to the earlier judgment of the coordinate Bench in Narayan Rao Vs. State of A.P., AIR 1957 SC 737 categorically held that the word "shall" used in Sub-section (5) cannot be interpreted as mandatory, but directory. The said statement of law is made after considering the provisions of Section 2(r) read with Section 173(5) and (8) of Code of Criminal Procedure. Therefore, filing of police report containing the particulars as mentioned Under Section 173(2) amounted to completion of filing of the report before the learned ACJM, cognizance is taken and registered the same. The contention of the Appellant that the police report filed in this case is not as per the legal requirement Under Section 173(2) & (5) of Code of Criminal Procedure which entitled him for default bail is rightly rejected by the High Court and does not call for any interference by this Court."

54 Both the learned Senior Counsel for the Applicants vehemently submitted that **Narendra Kumar Amin**'s case (supra) was per incuriam as it was in direct conflict with the Constitution Bench judgment in **K. Veeraswami**'s case (supra).

55 Learned Senior Counsel submitted that the High Court is obliged to ignore the judgment of the Hon'ble Supreme Court, which in turn, had ignored the judgment of earlier Bench of the Supreme Court. According to the learned Counsel in this case **K. Veeraswami**'s case (supra) was binding and **Narendra Kumar Amin**'s case (supra) has to be ignored. In any case, according to the learned Counsel the Constitution Bench judgment must prevail over the Bench of two Hon'ble Judges. Both the learned Senior Counsel for the Applicants in support of this submission relied on the case of **Dr. Shah Faesal** (supra). In Paragraph-30 of the said judgment, the Hon'ble Supreme Court referred to Halsbury's Laws of England and reproduced the rule of per incuriam, which is as follows :

> "**30**. …… A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of a coordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords."

. In Paragraph-33 of the said judgment, another judgment of the Hon'ble Supreme Court in the case of **Sundeep Kumar Bafna** (supra) was referred to and paragraph-19 from said judgment was

reproduced as follows:

> "**19**. It cannot be overemphasized that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a coequal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta."

56 The learned ASG on the other hand countered this submission by relying on the judgment of the Hon'ble Supreme Court in the case of **Central Board of Dawoodi Bohra Community** (supra). In Paragraph-7 of the said judgment, the Hon'ble Supreme Court has in clear terms mentioned thus :

> "**7**. ….. Per incuriam means a decision rendered by ignorance of a previous binding decision such as a decision of its own or of a Court of co-ordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. A ruling making a specific reference to an earlier binding precedent may or may not be correct but cannot be said to be per incuriam. ….."

57 Considering the clear observations of the Hon'ble Supreme Court in the case of **Central Board of Dawoodi Bohra Community** (supra), **Narendra Kumar Amin**'s case (supra) cannot be said to be a per incuriam judgment. In any case, a High Court cannot term interpretation of a Supreme Court judgment by another Bench of the Supreme Court, as wrong interpretation. The High Court cannot venture into making such observations. That would be judicial indiscipline. **Narendra Kumar Amin**'s case (supra) does not ignore **K. Veeraswami**'s judgment (supra), but, it specifically interprets it.

58 Shri Amit Desai relied on a few judgments of different High Courts including this Court to emphasize what would constitute a complete police report. However, in view of the above discussion, it is not necessary to refer to all these judgments.

59 Shri Amit Desai relied on the judgment of a learned Single Judge of this Court in the case of **Sunil Phulbande** (supra). It was a case involving seizure of Ganja. The C.A. report was not forming part of the charge-sheet/report. It was held that, it could

not be termed as a charge-sheet/report under Section 173 of Cr.P.C. and the default bail was granted in that case. The Court, in that case, had observed that without the C.A. report, it was not possible to decide whether the seized substance was Ganja or not. The Chemical Analyzer's report was the foundation on which the Magistrate could have taken cognizance of the offence. Since the C.A. report was not submitted along with the charge-sheet, it could not be determined whether the provisions of the Narcotic Drugs and Psychotropic Substances Act were attracted or not and, therefore, the Magistrate Could not have taken cognizance. In that context, the Court observed that the charge-sheet which was submitted was not a charge-sheet / report as contemplated under Section 173(5) of Cr.P.C. This judgment is directly related to the facts arising in that case. It is obvious that without the C.A. report it was not possible to conclude that the seized substance was covered under the NDPS Act. Therefore, the Court did observe that without the C.A. report, the report was incomplete. Such is not the position in the present case. All the required ingredients of the offences are clearly set out in the report. In fact, this judgment was explained by another Single Judge of this Court in the case of

Rafael Palafox Garcia Vs. Union of India and another[21] In that case, the contraband was tested at the spot by field test kit and the test had answered positive for pseudo ephedrine and in that case the learned Single Judge observed that in **Sunil Phulbande**'s case (supra), there was no reference to any test kit report. The crucial question was whether the material produced before the Court was sufficient to take cognizance.

60 While concluding discussion on this topic, it would be appropriate to refer to one more judgment of the Hon'ble Supreme Court in this connection in the case of **R.S. Pai** (supra). In Paragraph-7 of that judgment it was observed that considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof and which the prosecution proposes to rely, the word "shall" used in sub-section (5) cannot be interpreted as mandatory, but, as a directory. This judgment was referred to in **Narendra Kumar Amin**'s case (supra).

61 Thus, the summary of this discussion is that **Narendra Kumar Amin**'s case (supra) holds the field in this regard. As held by

21 2009 Cr.L.J. 446

that judgment, if the report filed before the Court satisfies all the requirements of Section 173(2) then it is sufficient compliance of filing a report. It is not absolutely necessary to file all the documents and the statements of witnesses recorded under Section 161 of Cr.P.C. for the purposes of filing of the report under Section 173(2) of Cr.P.C. within the stipulated period specified under Section 167 of Cr.P.C.

62 In the present case, the report filed on 25.6.2020 mentions the names of the parties, nature of information, names of the persons who appeared to be acquainted with the circumstances of the case as mentioned in the index, the offence which appears to have been committed by each of the accused, whether the accused have been arrested, whether they were released on bail etc.. All the necessary information mentioned in Section 173(2) of Cr.P.C. is given in the report which is filed before the Court. It, therefore, does not matter that two trunks of documents were subsequently filed in the Registry of the Court.

Whether it is necessary to file the application by handing it over to the Magistrate or it can be filed in the Registry.

63 Shri Amit Desai raised one more technical point in this case by contending that the report was not filed by producing it before the learned Special Judge. According to Shri Desai this was not proper presentation of the report.

. Learned ASG pointed out that this point was never raised before the learned Special Judge or even in the pleadings in the present applications. However, since I am dealing with the question of personal liberty and since the Hon'ble Supreme Court in many judgments has observed that the Court cannot be too technical in this regard, I am considering this question as well.

64 Since Shri Amit Desai raised this question, I directed both the parties to put on affidavit their versions in this regard. The investigating officer filed his affidavit on 23.10.2020. Paragraphs-2 & 3 mention the facts which transpired on that day, as follows :

> "2. That it is humbly submitted that being the Investigating Officer of the aforesaid case, I along with the Public Prosecutor (CBI) Shri Ashok Bagoria went to the Court Room of Court no. 49 who was also having charge of Court Room No 47 (which

is designated court for Economic Offences in Mumbai) to file the Charge Sheet in the instance case on 25.6.2020 in morning. We informed the court that CBI wants to submit the Charge Sheet. The Shiresdar of the court then informed us that as per the procedure laid down, the Charge Sheet will have to be filed at the registration counter set up outside the court building. Accordingly, the Charge Sheet has been filed in the Registry of the City Civil and Sessions Court, Greater Mumbai.

3. That after reaching the Registration Counter of the City Civil and Sessions Court, we were once again queried by the concerned registration clerk before filing Charge Sheet in this case that whether the concerned court has been informed or not. After knowing that concerned court has been informed, the said clerk accepted the Charge Sheet and the same was taken on record for the further proceedings as per the Covid-19 protocol. It was also informed that all the records of the City Civil and Sessions Court were kept for the 72 Hours mandated quarantine period as per the practice observed in the City Civil and Sessions Court during the lock down period. It was also informed that after completion of the prescribed quarantine period the charge sheet will be sent to the office of the Registrar and further the Office of the Registrar will call for the scrutiny of the documents."

65 On the other hand, affidavit dated 23.10.2020 was filed on behalf of the Applicants. Paragraph-3 of that affidavit reads thus:

"**3.** In this regard, the following record of the Hon'ble Sessions Court being relevant, is set out hereunder:

a. The officially published roster of the Hon'ble Sessions Court vide circular dated 17th June 2020 for the period from 19th June 2020 to 30th June 2020 which discloses that (i) His Honour Judge S. U. Wadgaokar was not presiding as per the assignment on 25th June 2020; (ii) the hours of judicial working of the Hon'ble Court were from 11 am to 2 pm A copy of the said roster obtained from the website of the Hon'ble Sessions Court alongwith the circular dated 17th June 2020 is annexed herelo as Exhibit "A".

b. The certified copy of the purported chargesheet obtained by the Advocates for the Applicant on which the notings made on the docket page disclose that:

(i) On 25th June 2020, a token no.13 was allotted by the registry of the Hon'ble Sessions Court for physical filing in the registry;

(ii) On 1st July 2020, it is noted that "pursuant to dirctions of H. H. P. J. Shri M. W. Chandwani telephonic instructions were obtained from HHJ Shri S U Wadgaonkar and pursuant to His Honour's directions accepted/received subject to verification on 09-07-2020";

(iii) On 9th July 2020, the case had been “assigned to H. H. Judge Shri 47", which noting has been signed by the Hon'ble Principal Judge.

A copy of the said certified copy of the purported chargesheet is annexed hereto as Exhibit “B””

66 Shri Amit Desai contended that the Hon’ble Supreme Court in the case of **S. Kasi Vs. State through the Inspector of Police**

Samaynallur Police Station, Madurai District[22] has observed that irrespective of the lock-down, the statutory duty cast on the investigating agency to complete the investigation and file report has to be followed. Time to file charge-sheet was not extended by any order of the Hon'ble Court. The Hon'ble Supreme Court in this case had referred to the order of a Single Judge of Madras High Court in **Settu Vs. State Represented by Inspector of Police**[23]**.** Shri Amit Desai contended that in Settu's case (supra), there is a reference that nothing stopped the investigating agency from formally presenting the final report before the stipulated date and getting the initial of the jurisdictional Magistrate. Shri Desai, therefore, contended that it is requirement of law that the report has to be presented before the Court and not in the Registry.

67 I am unable to agree with the contention raised by Shri Amit Desai. In **S. Kasi**'s case (supra) the Hon'ble Supreme Court has referred the **Settu's** case (supra) only in the context of the time to file charge-sheet. This particular question as to whether it has to be actually presented before the Magistrate and whether his

22 2020 SCC OnLine SC 529

23 2020 SCC OnLine Mad 1026 [Madras High Court]

signatures are required to be obtained, was not considered in **S. Kasi**'s case (supra).

68 Cr.P.C. itself does not provide that the report under Section 173(2) has to be produced before the Magistrate alone and that it cannot be presented in the Registry.

69 The object behind all these provisions is that the investigation should be completed at the earliest and not later in point of time of the period stipulated under Section 167 of Cr.P.C.. Thus, if the report under Section 173(2) is presented in the Registry that signifies conclusion of the investigation. There is no requirement of law that it has has to be handed over to the Magistrate himself. The learned Senior Counsel did not point out any specific provision or Rule in that behalf to show that such report has to be handed over to the Magistrate alone. In the present case, the investigating officer has taken proper steps to produce the papers in the Registry on the 60th day and it was accepted in the Registry. In any case, if the bail application for default bail is preferred, the Court is required to be informed whether such report is already filed or not. The default bail application cannot be

decided without answering this question. Therefore, if the Court finds that the report was filed before filing of the default bail application, right for default bail does not arise.

Whether Section 409 of IPC is made out and whether, therefore, time to file the report was 90 days.

70 In view of the above discussion, I have already held that proper report under Section 173(2) of Cr.P.C. was filed on the 60th day. Therefore, it is not really necessary to consider whether time to file the report was 90 days or 60 days. One more argument of the Applicants was that a mere report without the documents and statements of witnesses was filed on the 60th day and the documents were filed subsequently on 9.7.2020. This amounts to subterfuge. As the investigating agency wanted to play it safe, they invoked Section 409 of IPC to stretch the period for filing of the report from 60 days to 90 days.

71 Dr.Singhvi submitted that such subterfuge was not permissible. He submitted that on eight occasions before 25.6.2020, when the Applicants were remanded to the custody by the learned Special Judge, not even on single occasion the ingredients of Section 409 of IPC were mentioned. In Paragraphs-1

to 50 of the report, there is no mention of Section 409. In Paragraph-51 of the report, Section 409 is merely mentioned without specifying its ingredients. Dr. Singhvi submitted that from the entire material in the report ingredients of Section 409 are not made out. He submitted that it is the duty of the investigating officer to keep the Judge informed about escalation of the offence to higher degree and in the present case in none of the remand reports, there was any mention of escalation of offence to Section 409 of IPC. He submitted that the offences under Sections 420 and 409 of IPC cannot be applied together. They are mutually exclusive. In the report itself in Column No.4, there is no mention of Section 409 of IPC.

72 Dr. Singhvi relied on the judgment of a learned Single Judge of the High Court of Gujarat in the case of **Dipal Jayesh Shukla & Another Vs. State of Gujarat & another**[24] as also on the judgment of a learned Single Judge of the Punjab and Haryana High Court in the case of **Raj Kumar Vs. State of Haryana and others**[25]**.** He relied on the judgment of High Court of Madras in the case of **Sathyamoorthy**

24 2018 SCC OnLine Guj 668 (Gujarat High Court)

25 2014 SCC OnLine P & H 2420 (Punjab and Haryana High Court)

Vs. The Superintendent of Police, Thanjavur District, Thanjavur & others[26] to contend that during the course of investigation if commission of a serious offence comes to light it was open to the police to file alteration report. He relied on the order of a Single Judge of the Calcutta High Court in the case of **Sayantan Chatterjee Vs. The State of West Bengal and another**[27]**,** wherein it was observed that it was the duty of the investigating officer to inform the learned Magistrate of the subsequent developments of investigation to justify the action of proceeding against any person for higher penal section during investigation of the case.

73 As far as the contention that Section 409 of IPC is not made out in the present case is concerned, it is necessary to reproduce Sections 405 & 409 of IPC.

> "**405.** Criminal breach of trust:- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the

26 2016 SCC OnLine Mad 13376 (High Court of Madras at Madurai)

27 2016 SCC OnLine Cal 4573 (High Court of Calcutta)

> discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".
> *Explanation 1 – xxxx*
> *Explanation 2 – xxxx"*
>
> **409**. Criminal breach of trust by public servant, or by banker, merchant or agent.-- Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

74 Dr. Singhvi in support of his contention that there was no entrustment and hence no breach of trust, relied on the judgment of the Hon'ble Supreme Court in the case of **Velji Raghavji Patel Vs. State of Maharashtra**[28] and in the case of **Central Bureau of Investigation, SPE, SIU(X), New Delhi Vs. Duncans Agro Industries Ltd. Calcutta**[29]. In both the judgments, the meaning of 'entrustment' is mentioned. In **Duncans Agro Industries'**s case (supra), it was observed that in relation to Section 405 of IPC defining 'criminal breach of trust', the ownership of the property entrusted in respect of which the offence is committed must be in some person other

28 AIR 1965 SC 1433

29 (1996) 5 SCC 591

than the accused and the latter must hold it on account of some person or in some way for his benefit.

75 Dr. Singhvi contended that Yes Bank gave loan to DHFL. Then DHFL gets complete dominance over the property. The amount was given as a loan. Therefore, there could not be any criminal breach of trust committed by either of the accused. Similarly when amount was given by DHFL to Rana Kapoor's concerns even there was no criminal breach of trust. Both these entities and accused had no grievance against each other and hence no offence of Section 409 of IPC is made out.

76 I completely disagree with these submissions. The allegations are not pertaining to criminal breach of trust committed by either of the accused in respect of each others' property. The prosecution case is that public money which was deposited by the depositors with Yes Bank was used for committing this offence, for personal gain and for causing loss to the bank and its depositors. This offence was committed pursuant to the conspiracy among all the accused. The real victims were the depositors and shareholders; particularly of Yes Bank. That amount was not

utilized for getting profit for Yes Bank, but, it was used for personal gain of the accused. Thus, clearly offence of Section 409 of IPC is made out. The ingredients of this offence are clearly borne out in the report filed before the Special Court. Therefore, it does not matter whether the remand reports prior to 25.6.2020 mention that particular offence. Though it is true that in Column No.4 of the report, Section 409 is not mentioned, but, when particulars of the accused are mentioned in Column No.11, Section 409 is mentioned in the list of offences committed by each of the accused.

77 Whether Sections 420 and 409 of IPC are attracted in one case depends on the facts of that case. These offences can be committed at different stages by different accused against different victims. Therefore, in a given case, it is possible that both these Sections are applicable.

78 I am also not impressed by the submission that the investigating officer has not specifically mentioned Section 409 in Column No.4 of the report or in the previous stages of remand Section 409 of IPC was not mentioned. The provisions of Cr.P.C. give wide powers to the Court. The Court has to apply its mind at

every stage, for example, when the accused is produced for remand, when the report under Section 173 is filed, when cognizance is taken, when charges are framed etc.. On every such occasion, the Court is not bound by the submissions made either by the investigating agency or the accused before the Court. The Court has to arrive at its own conclusion as to what offence is made out from the material available and placed before it. Court can, of course, consider submissions of both sides but, the Court's powers in that behalf are wide. Therefore, when a question is to be decided as to whether the report was filed within 90 days, but, not within 60 days then the Court can certainly look into the material to reach its own conclusion as to whether the offence is relatable to period of 90 days. The Court's powers are not curtailed in any manner to arrive at its own conclusion. In this case, this question does not arise because the report was filed on 60th day, but, since it was argued before me that Section 409 of IPC was invoked just as a subterfuge to stretch the period of filing of the report to 90 days, it was necessary to observe that the Court had sufficient power to examine whether the period for filing the report was 90 days or 60 days.

79 On every occasion, the remand was obtained from the Special Court till the report was filed on 25.6.2020. Therefore, the Special Court was the proper Court where report under Section 173(2) of Cr.P.C. could be filed. Subsequently, due to absence of sanction, the case was transferred to the Magistrate's Court. That will not not make any difference because that was a proper order passed at proper stage by the learned Special Judge. In view of **Suresh Kumar Jain**'s case (supra), this course of action was perfectly legal.

80 Based on the above discussion, following are my conclusions:

[i] Right to default bail for non-filing the police report within the stipulated period provided under Section 167 of Cr.P.C. is an indefeasible right which flows from Article 21 of the Constitution of India.

[ii] Such indefeasible right cannot be defeated by any subterfuge. The Courts cannot be too technical while entertaining application for bail for not filing the police report within the stipulated period under Section 167 of Cr.P.C.

[iii] The report filed on 25.6.2020 by the investigating agency

before the learned Special Judge for CBI at Greater Mumbai complied with all the requirements of law and hence was a proper report, filed within the period specified under Section 167 of Cr.P.C.

[iv] Not filing of the documents and statements of witnesses along with the report on 25.6.2020 does not make that report an incomplete report.

[v] Filing of the report in the Registry is not illegal.

[vi] Ingredients of Section 409 of IPC are present in the report and, therefore, the investigating agency could have filed the report before 90 days were over.

[vii] The learned Special Judge for CBI was a proper Court where the report could have been filed on 25.6.2020.

[viii] The learned Special Judge for CBI and thereafter the learned Magistrate were competent to remand the Applicants to custody even before taking cognizance of the offence.

[ix] Since requisite report under Section 173 of Cr.P.C. was filed within time, the right to seek default bail never accrued in favour of the Applicants.

81 In view of the above discussion and conclusions, the reliefs claimed in the applications cannot be granted. Hence, the applications are dismissed.

(SARANG V. KOTWAL, J.)

Deshmane (PS)

Pradeepkumar P. Deshmane

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