

SYNOPSIS AND LIST OF DATES AND EVENTS

The present Petition for Special Leave to Appeal is from a judgment and order rejecting the Petitioner's appeal under Section 21 of the National Investigation Agency Act, 2008 ("NIA Act"), passed by the Bombay High Court on 08.02.2021 in Criminal Appeal Stamp No. 1707 of 2020 ("**Impugned Order**").

Vide the Impugned Order, the Bombay High Court upheld the order dated 12.07.2020 of the Special Judge, NIA dismissing the Petitioner's application for default bail under Section 167(2) Code of Criminal Procedure ("Cr.P.C") read with Section 43(D)(2) of the Unlawful Activities Prevention Act ("UAPA"), despite the Petitioner spending more than 90 days in custody. The main question that arises in the present petition is whether a period of 34 days when the Petitioner was in custody by way of house arrest pursuant to orders of the Delhi High Court and this Hon'ble Court modifying transit remand order dated 28.08.2018 of the Chief Metropolitan Magistrate, Saket Courts, New Delhi, would count as custody for the purpose of default bail under Section 167(2) Cr.P.C. The Petitioner was in custody under house arrest for a period of 34 days under the transit remand order (as modified by the Delhi High Court and this Hon'ble Court) between 28.08.2018-01.10.2018 (excluding the last day). He was subsequently in police custody for 11 days between 14.04.2020-25.04.2020 (excluding the last day) and was in judicial custody for 46 days between 25.04.2020-10.06.2020, at which point he completed 90 days in custody and acquired an indefeasible right to default bail u/S. 167(2) Cr.P.C. He applied

for default bail on 11.06.2020, by which time it is an admitted position that no charge-sheet was filed by the investigative agency nor any extension of time for filing charge-sheet sought by the Public Prosecutor.

The Petitioner is a 69-year-old scholar, writer, peace and civil rights activist and a journalist of long standing associated with the Economic and Political Weekly and other well-regarded publications. He was arrested from his residence in New Delhi on 28.08.2018 by the Maharashtra Police in connection with FIR no. 4/2018 registered at Vishrambaug P.S. Pune u/S. 153-A, 505(1)(b), 117, 120-B read with Section 34 of the Indian Penal Code ("IPC") and Sections 13, 16, 17, 18, 18B, 20, 38 and 40 of the UAPA. He was produced before the Chief Metropolitan Magistrate, South East District, Saket in the post lunch session, who granted transit remand for producing the Petitioner before the Special Court, Shivaji Nagar, Pune on or before 30.08.2020.

The Delhi High Court, seized of a challenge to the arrest and transit remand, passed an interim order on the same day i.e. 28.08.2018 modifying the nature of custody to house arrest, and restrained the Petitioner from stepping out and placed the police in guard. This Hon'ble continued the same terms of custody from time to time, and also by its final order of 28.09.2018 in **Romila Thapar v. Union of India (2018) 10 SCC 753**. These were judicial orders placing him in a state of duress, and the law had taken control of his person. Consequently, the Petitioner spent 34 days in judicial custody (up to 01.10.2018) pursuant to his arrest and remand by the Chief Metropolitan Magistrate, Saket, New Delhi.

On 01.10.2018, the Delhi High Court, in Writ Petition (Crl.) No. 2559 of 2018 titled **Gautam Navlakha v State (NCT of Delhi) & Ors.**, held the arrest and transit remand as plainly illegal. However, the arrest was not declared “non est” and remained a fact. Custody ordered by the High Court for one day and by the Supreme Court for 33 days remained actually and factually in operation until 01.10.2018 and was never declared non est, nor could it be.

Subsequently, the Petitioner moved the Bombay High Court for quashing of the F.I.R. against him, and later also applied for anticipatory bail. He went through several rounds of litigation as described in detail below. Throughout the pendency of these petitions, he was granted interim protection from arrest by various courts, including this Hon’ble Court. Finally, the Petitioner filed SLP(Crl.) 1842 of 2020 titled **Gautam Navlakha v. State of Maharashtra** challenging the Bombay High Court’s order dated 14.02.2020 in Anticipatory Bail Application No. 2461/2019 declining to grant anticipatory bail to the Petitioner. This Hon’ble Court directed the Petitioner to surrender within 3 weeks by order dated 16.03.2020 in SLP(Crl.):1842 of 2020. This was extended by 1 week in view of the Covid-19 pandemic by order dated 08.04.2020.

By this time, the investigation into the case had been transferred to the National Investigation Agency (“NIA”) on 24.01.2020. Consequently, Petitioner surrendered before NIA, Delhi on 14.04.2020 as Covid was raging in the country, and complete lockdown and cessation of all travel had been ordered by the Central Government. He was remanded to 7 days’ police

custody by the Sessions Court, Patiala House by order dated 15.04.2020. This was extended by a further 7 days by order dated 21.04.2020.

The Sessions Court, Patiala House granted judicial custody of the Petitioner on 25.04.2020. His judicial custody continued to be extended from time to time. He was in judicial custody in Delhi until 25.05.2020, whereafter he was shifted to Mumbai by the NIA on 26.05.2020 and remanded to judicial custody by the Special Judge, NIA, Mumbai on the same day.

Right to default bail arises: The NIA sought further custody of the Petitioner in MA No. 601/2020 before the NIA Special Court in Mumbai on 10.06.2020, which was granted. On 11.06.2020, the Petitioner filed an application for default bail before the NIA Special Court, Mumbai as his total custody had exceeded 90 days, and no chargesheet had been filed, nor extension of time for filing chargesheet sought by the NIA. Details of the Petitioner's custody are set out below:

Dates	Details	No. of days
28.08.2018- 01.10.2018 (excluding the last day)	Custody pursuant to transit remand granted by Chief Metropolitan Magistrate on 28.08.2020, modified by orders of the Delhi High Court and this Hon'ble Court	34 days
14.04.2020- 25.04.2020 (excluding the last day)	NIA custody	11 days

25.4.2020 – 12.6.2020 (excluding the last day)	Judicial custody	48 days
TOTAL CUSTODY (up to 12.06.2020)	93 days	

Infirmities in the Impugned Order: The Impugned Order suffers from serious errors, which are set out below:

First, the Impugned Order wrongly holds that, pursuant to the orders of the Delhi High Court in W.P.(Crl.) 2559 of 2018 titled **Gautam Navlakha v. State (NCT of Delhi)** dated 28.08.2018 and 01.10.2018, first staying and subsequently setting aside the Petitioner's transit remand order dated 28.08.2018 by the Chief Metropolitan Magistrate, Saket Courts, New Delhi, there was in effect no detention pursuant to an order of the Magistrate, which is an essential pre-requisite under Section 167 Cr.P.C. This is based on a wholly misconceived and dangerous reading of the judgment dated 01.10.2018 of the Delhi High Court in **Gautam Navlakha v. State (NCT of Delhi)** and an acceptance of the NIA's contention that the arrest, remand and detention of the Petitioner had become 'non est'. The Delhi High Court merely set aside the transit remand order on *inter alia* grounds of procedural infirmities as "wrongful" and "illegal", and did not declare the arrest/detention of the Petitioner 'non-est'. Arrest is a matter of law, but custody is a matter of

fact that cannot be wiped away. Hence, the effect of the Delhi High Court's order cannot be read as wiping out the custody of the Petitioner. The arrest of the Petitioner was in fact, and continues to be, a reality that led to a 34-day restraint upon his liberty.

It is respectfully submitted that this Hon'ble Court has understood the word 'Custody' in **Niranjan Singh v. Prabhakar Kharote (1980) 2 SCC 559** as "a state of duress" imposed by police action or a judicial order:

"7. When is a person in custody, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person..."

8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions..."

(emphasis supplied)

In light of the primary understanding of custody set out in **Niranjan Prabhakar Kharote (Supra)**, it is pertinent to note that Section 167(2) is concerned with total period of detention and in calculating such total period any custody under orders of the Court cannot be excluded. Therefore, 34 days house arrest spent by the Petitioner as authorised first by the Hon'ble Delhi

High Court and then by this Hon'ble Court must be included within the meaning of custody u/s 167(2) CrPC for computation of 90 days.

The occasion for the Delhi High Court and Supreme Court in this case to direct house arrest arose wholly and solely because of the arrest by Pune Police and the transit remand granted by the Magistrate. Where a superior court (in this case the Delhi High Court and this Hon'ble Court) with inherent, statutory and constituent powers is seized of the correctness of a remand order passed by a magistrate under S.167 CrPC, and modifies it, the superior court's order does not cease to be relatable to S.167 CrPC and become de hors that section. It remains custody pending investigation of the FIR in which the police had made the arrest. Investigation was never stayed in this case.

It is also patently absurd to hold that a Magistrate can remand to "such custody as he thinks fit" under S.167 (2) but that any modification of the remand order by superior courts will cease to render such detention as "custody" within the meaning of Section 167 Cr.P.C.

Further, the reasoning of the Impugned Order is pernicious in the extreme, as it effectively holds that an illegal arrest/detention should operate in favour of the prosecution, and not the accused when computing the period of detention for the purpose of default bail. It is a settled principle of law that in case of any ambiguity re the interpretation of any criminal statute, the benefit of such ambiguity must be given to the accused and not the prosecution/investigating agency. This Hon'ble Court has reiterated the principle in the specific context of remand u/s. 167

Cr.P.C. in **M. Ravindran v. Director, Revenue Intelligence**
SLP (CrI.) No. 2333 of 2020:

"32. Therefore, as mentioned supra, Section 167(2) is integrally linked to the constitutional commitment under Article 21 promising protection of life and personal liberty against unlawful and arbitrary detention, and must be interpreted in a manner which serves this purpose...

35. Additionally, it is well settled that in case of any ambiguity in the construction of a penal statute, the Courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantial penal statutes but also in the case of procedures providing for the curtailment of liberty of the accused."

(emphasis supplied)

Finally, under the mandate of Article 21, no one can be deprived of their personal liberty except by "procedure established by law". The judgment in **M. Ravindran (supra)** makes it clear that the original order of transit remand against the Petitioner under Section 167 CrPC was the 'procedure established by law' that enabled even the Delhi High Court and this Hon'ble Court to extend the custody by way of a 'house arrest.' Section 167 was the 'procedure established by law' to deprive the Petitioner of his liberty during investigation and nothing else.

Second, the Impugned Order, while admitting that the Petitioner spent 34 days in custody pursuant to judicial orders, has held that the same did not constitute "custody" under Section 167 Cr.P.C, as the investigating agency did not get the opportunity to interrogate him during this period.

It is pertinent to note that it is not as if the investigating agency did not get an opportunity to carry out custodial interrogation of the Petitioner. The record clearly shows that the

Petitioner was in police/NIA custody for a period of 11 days subsequent to his surrender (between 14.04.2020-25.04.2020), at which point the NIA had the opportunity to carry out custodial interrogation. It is nobody's case that the Petitioner's detention for 34 days between 28.08.2018-01.10.2018 was police custody, and not judicial custody.

Further, the Impugned Order effectively holds that "custody" under Section 167 Cr.P.C. is contingent upon the degree of access that the police enjoy to the accused during such custody. This is a complete misreading of Section 167 Cr.P.C. whereby the Magistrate, and consequently superior courts, may remand to such custody as they think fit. This may be custody in a hospital (see **CBI v Anupam Kulkarni (1992) 3 SCC 141**), or at any other secure place, and the words of the provision do not exclude any form of such restraint that a court may order as judicial custody nor make it contingent upon the ability of the police to interrogate a person remanded to such custody. There is nothing in law to rule out "house arrest" upon the orders of a superior court from being treated as custody.

• The rationale that the Investigating Officer did not get the opportunity to interrogate the accused is no grounds at all. It is a settled principle that the right of the investigating agency to investigate and submit a charge-sheet cannot be placed on a higher pedestal than the right of the accused to default bail under Section 167(2) Cr.P.C., as it concerns their right to liberty under Article 21. This Hon'ble Court has observed in **S. Kasi v. State through the Inspector of Police Samaynallur Police Station Madurai District Crl. Appeal No. 452 of 2020**:

"The right of prosecution to carry on investigation and submit a charge sheet is not akin to right of liberty of a person enshrined under Article 21 and reflected in other statutes including Section 167, Cr.P.C."

Third, the Impugned Order bases its reasoning on an incorrect appreciation of the judgment of this Hon'ble Court in **Chaganti Satyanarayana Rao v. State of A.P. (1986) 3 SCC 141**, the purport of which is that in computing the period of 60 or 90 days under S.167 (2) CrPC, the period in police custody after the arrest and before production before a Magistrate, is to be excluded. The High Court has wrongly relied on this judgment to conclude that "any and every detention which may have resulted in deprivation of liberty of the accused" would not constitute an "authorised detention", and the Petitioner was consequently not entitled to default bail.

The ratio of **Chaganti Satyanarayana Rao (supra)** supports the Petitioner by distinguishing between arrest, which is an executive act of detention, and custody ordered thereafter by a judicial order, and holding that it is the period of custody by judicial order that should be counted for computing the period of 60 or 90 days under Section 167(2) CrPC. Section 167 itself makes it clear that in computing the total period of 60 or 90 days under Section 167, what must be counted is the time spent in 'police custody' after arrest and production and 'judicial custody'. In the present case, the Petitioner's 34-day house arrest took place **after** his arrest by the Pune Police on 20.08.2018 and subsequent **remand** by the Chief Metropolitan Magistrate, Saket Courts, on the same day. Therefore, the 34 days of house arrest was in the nature of 'judicial custody' envisaged under Section

167 pursuant to the original order of transit remand by the Magistrate, and there is no question of any portion of this 34-day period being relatable to the time before the Petitioner was produced before the Chief Metropolitan Magistrate. There is nothing in **Chaganti Satyanarayana Rao (Supra)** that disturbs this understanding of 'judicial custody' for the purposes of computing the total time spent in custody.

Fourth, the Bombay High Court has wrongly held that only the period of custody after the Petitioner's surrender before NIA, Delhi on 14.04.2020 and subsequent production before a Magistrate can be counted for the purpose of default bail, relying on the fact that, prior to his surrender, the Petitioner had sought anticipatory bail. The Bombay High Court upholds the order of the Special NIA Court on this point, wherein it was held that if house arrest ordered by the High Court and this Hon'ble Court is custody then the entire period thereafter should have been custody and so the Petitioner would have moved for regular bail and not anticipatory bail. That fact that he moved for anticipatory bail means that the house arrest is not custody.

This reasoning is totally flawed and is based on an incorrect reading of Section 167 Cr.P.C. It is not in dispute that the Petitioner was arrested by the Pune Police on 28.08.2018 in connection with FIR 4/2018 at P.S. Vishrambagh, Pune and was produced before the Chief Metropolitan Magistrate, who granted transit remand. Thus, the key ingredients of S. 167 Cr.P.C., namely, **arrest and remand by a Magistrate** stood satisfied. The order of the Chief Metropolitan Magistrate detaining the Petitioner subsequently stood subsumed in orders of the Delhi

High Court and this Hon'ble Court placing the Petitioner under house arrest.

The Petitioner moved for anticipatory bail when he was a free man and was anticipating arrest in the same FIR where the Pune police had earlier arrested him. Intervening spells of freedom will not wipe out the period actually spent in custody after arrest during the course of investigation. The investigation was never stayed. The Petitioner only won his personal liberty and was released from judicial custody, and became a free man after the transit remand order was quashed on 01.10.2018, which means that until such time his custody was under Section 167. Equally, he could have been enlarged on bail on 01.10.2018 instead of quashing of the transit remand order. But the effect of either of these orders would have been the same, i.e., his custody under Section 167 would have ended. To say that he necessarily had to be enlarged on bail to show that the original custody was under Section 167 CrPC is absurd.

The following examples will amplify the point.

Example (a) An arrest is made and police custody is granted for 10 days, but bail is granted after 5 days. Bail is cancelled after 2 more days and accused is re-arrested. Can he be remanded to a further 15 days police custody? No, since limit upon police custody "of 15 days in the whole" will apply.

Example (b) Accused is arrested and Magistrate remands him to judicial custody. After a month of judicial custody the arrest is declared illegal and he is released. Upon the orders of the High Court CBI takes over investigation, re-arrests him. Will

the CBI be entitled to ask that the one month spent in custody earlier should be wiped out?

~~Example~~ (c) Accused is arrested and is remanded to judicial custody. He moves for quashing of FIR and succeeds in the High Court and is released after 30 days in judicial custody. The Supreme Court overturns the High Court's order of quashing and restores the case upon which he is rearrested in the same case. Will the 30 days spent in custody be wiped out? Of course not.

Fifth, the Impugned Order places mistaken reliance on the judgment of this Hon'ble Court in **State of W.B. v. Dinesh Dalmia (2007) 5 SCC 773** in support of the proposition that the Petitioner's house arrest did not constitute detention under Section 167 Cr.P.C., and upholds the flawed reasoning of the NIA Special Court that for Section 167 to apply, an accused must actually be "under the detention of the police for investigation".

This Hon'ble Court had in fact observed in **Dinesh Dalmia (Supra)** that an accused must be arrested and under custody of police for the purpose of investigation for it to constitute police custody u/s 167 and suo motu voluntary surrender cannot qualify as being Police Custody. The issue was not of custody per se but police custody and that too in case of suo motu surrender and not arrest. In the Petitioner's case, there was no surrender but an arrest and further it has never been the Petitioner's case that he was in Police Custody during the relevant 34-day period. Consequently, the decision in **Dinesh Dalmia (Supra)** does not apply as it is clearly distinguishable on facts.

Further, in the present case, there was a formal arrest, which satisfies the provisions of S. 167, which comes into operation

upon arrest. If anything, **Dalmia (Supra)** favours the Petitioner, as it states that there isn't even any necessity for investigation to have commenced for proceedings u/S. 167 to begin. The important aspect is the arrest (**Para 16 of Dalmia**) and in the present case the Petitioner's custody in his home was pursuant to an arrest and therefore u/s 167.

It is also pertinent to note that although the house arrest was Judicial Custody there was a brief period of time when the Petitioner was in the custody of the police. The police arrested him, his house was searched and the police seized his devices. Moreover, the police produced him before a Magistrate. During these events the Petitioner was in police custody pursuant to his arrest, and to that extent too the present case satisfies the holding in **Dalmia (Supra)**.

The fact that later this Hon'ble Court and the Delhi High Court cut short or paused police custody does not imply that it was not custody at all. Such a reading would be anomalous and the entire scheme of the Cr.P.C. will have to be changed if custody other than police custody is not recognized. This is also wholly contrary to the reading of S. 167 which expressly provides for custody other than police custody.

All the facts and reasons stated hereinabove make it clear beyond cavil that the Impugned Order is misconceived and bad in law, and is liable to be set aside. Hence, this petition.

LIST OF DATES & EVENTS

Date	Event
31.12.2017	A group of eminent persons including retired Judges P.B. Sawant and Korse Patil hosted the

	Elgaar Parishad in Pune to commemorate the Bhima Koregaon anniversary.
01.01.2018	An armed unlawful assembly led by one Milind Ekbote and Sambhaji Bhide attacked a Dalit procession that was proceeding to Bhima Koregaon to pay their respects.
08.01.2018	One Tushar Damgude, a follower of Sambhaji Bhide registered FIR 4/2018 against 6 persons at Vishrambagh P.S. Pune u/s 153-A, 505(1)(b), 117 and 34 IPC. The FIR referred to a Maoist influence on the event. This is the FIR in which subsequently sections of the Unlawful Activities (Prevention) Amendment Act, 2012 ("UAPA") were added and the Petitioner was also added as an accused. A true typed translated copy of FIR No.04 of 2018 dated 08.01.2018 registered at Vishrambaug Police Station, Pune, Maharashtra is annexed hereto as Annexure P-1 at pages 57 to 64.
06.03.2018	Pune police added Section 120B IPC in FIR no. 04/2018. A true typed translated copy of the letter of the Assistant Commissioner of Police, Pune dated 06.03.2018 adding Section 120B IPC in FIR no. 04/2018 is annexed hereto as Annexure P-2 at pages 65 to 68.
17.04.2018	Pune police raided the premises of 6 persons in connection with FIR no. 4/2018.
17.05.2018	Sections 13, 16, 17, 18, 18B, 20, 38 and 40 of

	UAPA added in FIR No. 04/2018. A true typed copy of the letter of the Assistant Commissioner of Police, Pune dated 17.05.2018 adding various sections of UAPA in FIR no. 04/2018 is annexed hereto as Annexure P-3 at pages 69 to 73.
06.06.2018	Pune police arrested 5 individuals under FIR no. 4/2018.
04.07.2018	Pune police leaked a letter containing the Petitioner's name but make no effort to interrogate him.
22.08.2019	The Petitioner's name is added to FIR no. 4/18 <i>"after revelation of their involvement with the banned organisation...."</i>
28.08.2018	The Petitioner is arrested from his residence in Delhi in FIR no. 4/18 registered at Vishrambag P.S. and produced before Chief Metropolitan Magistrate, Saket Courts, New Delhi, who orders transit remand of the Petitioner. A true copy of the transit remand order dated 28.08.2018 passed by the Commissioner/SE/ District Court, Saket in FIR No. 04/2018 is annexed hereto as Annexure P-4 at pages 74 to 76.
28.08.2018	A Habeas Corpus Petition Crl. W.P. No. 2559 of 2018 is filed on behalf of the Petitioner in the Delhi High Court. The Delhi High Court directed that the Petitioner will not be moved from Delhi till further orders and puts the Petitioner under house arrest. A true copy of the order dated

	28.08.2018 passed by the High Court of Delhi at New Delhi in W. P. (Crl.) No. 2559 of 2018 is annexed herewith as Annexure P-5 at pages 77 to 79.
29.08.2018	Five eminent historians and academics filed a PIL bearing Crl. W.P. D. No. 32319 of 2018 titled " <i>Romila Thapar & Ors. v Union of India & Ors.</i> " before this Hon'ble Court against the arrests that took place on 28.08.2018. This Hon'ble Court extended the interim protection granted to the Petitioner by the Delhi High Court to all others arrested on the previous day. A true copy of the order dated 29.08.2020 passed by this Hon'ble Court in W. P. Criminal Diary No. 32319 of 2018 is annexed herewith as Annexure P-6 at pages 80 to 81.
29.08.2018- 28.09.2018	This Hon'ble Court by way of interim orders extends the Petitioner's house arrest. A true copy of the order dated 06.09.2018 passed by this Hon'ble Court in W. P. Criminal Diary No. 32319 of 2018 is annexed herewith as Annexure P-7 at pages 82 to 83. A true copy of the order dated 12.09.2018 passed by this Hon'ble Court in W. P. Criminal Diary No. 32319 of 2018 is annexed herewith as Annexure P-8 at pages 84 to 85. A true copy of the order dated 17.09.2018 passed by this Hon'ble Court in W. P. Criminal Diary No. 32319 of 2018 is annexed herewith as Annexure

	P-9 at pages 86 to 87. A true copy of the order dated 19.09.2018 passed by this Hon'ble Court in W. P. Criminal Diary No. 32319 of 2018 is annexed herewith as Annexure P-10 at pages 88 to 89. A true copy of the order dated 20.09.2018 passed by this Hon'ble Court in W. P. Criminal No. 260 of 2018 (Diary No. 32319 of 2018) is annexed herewith as Annexure P-11 at pages 90 to 91.
28.09.2018	This Hon'ble Court disposed of the PIL titled "<i>Romila Thapar & Ors. v Union of India & Ors</i>" by a majority of 2:1 declining to order a Court monitored SIT. The Court stated that it was too early to comment on the merits of this case. This Court extended the Petitioner's house arrest for 4 weeks to enable the Petitioner to pursue appropriate remedies. A true copy of the final judgment and order dated 28.09.2018 passed by this Hon'ble Court in W. P. Criminal No. 260 of 2018 (Diary No. 32319 of 2018) is annexed herewith as Annexure P-12 at pages 92 to 140.
01.10.2018	The High Court of Delhi quashed the Petitioner's arrest. A true copy of the Judgment dated 01.10.2018 passed by the High Court of Delhi at New Delhi in Writ Petition (Crl.) No. 2559 of 2018 titled <i>Gautam Navlakha v State (NCT of Delhi) & Ors.</i>, is annexed hereto as Annexure P-13 at pages 141 to 152.

28.08.2018-01.10.2018	The Petitioner has spent 34 days in custody i.e. house arrest, first under the order of the Delhi High Court (1 day) and subsequently under the orders of this Hon'ble Court (33 days).
03.10.2018	The State of Maharashtra filed SLP (Crl.) 8616 of 2018 in this Hon'ble Court challenging judgment dated 01.10.2018 passed by the Hon'ble Delhi High Court in Writ Petition (Crl.) No. 2559 of 2018 .
05.10.2018	The Petitioner filed Writ Petition (Crl.) 4425 of 2018 in the Bombay High Court for quashing the present FIR against him. The High Court protected him from arrest during the pendency of that petition.
15.11.2018	State of Maharashtra submitted a charge sheet against the Petitioner's co-accused in the present case.
21.02.2019	State of Maharashtra submitted a supplementary charge sheet against the Petitioner's co-accused.
13.09.2019	The Bombay Court dismissed Writ Petition (Crl.) 4425 of 2018 filed by the Petitioner seeking quashing and extended the interim protection by 3 weeks.
15.10.2019	This Hon'ble Court in SLP (Crl.) No. 8862 of 2019 challenging dismissal of the quashing petition granted the Petitioner 4 weeks protection from arrest and liberty to apply for regular/ pre arrest bail. A true copy of order dated 15.10.2019

	passed by this Hon'ble Court's in SLP (Crl.) No. 8862 of 2019 is annexed hereto Annexure P-14 at pages 153 to 154 .
25.10.2019	The Petitioner filed anticipatory bail application bearing ABA No. 2389 of 2019 in the Bombay High Court.
04.11.2019	The Bombay High Court in ABA No. 2389 of 2019 gave Petitioner liberty to apply to Sessions Court, which was directed to proceed expeditiously. A true copy of order dated 04.11.2019 passed by the High Court of Judicature at Bombay in ABA No. 2389 of 2019 is annexed herewith as Annexure P-15 at pages 155 to 156 .
05.11.2019	The Petitioner filed ABA No. 5420 of 2019 in Sessions Court seeking anticipatory bail but when the matter came up for hearing it was adjourned to 07.11.2019.
07.11.2019	The Sessions Court reserved its order in ABA No. 5420/2019 and granted interim protection from arrest to the Petitioner.
12.11.2019	The Sessions Court dismissed the Petitioner's ABA No. 5420/2019. A true copy of the order dated 12.11.2019 passed by the Addl. Sessions Judge, Pune in Crl. Bail Application No. 5420/2019 is annexed hereto as Annexure P-16 at pages 157 to 180 .
13.11.2019	The next day, the Petitioner applied for

	anticipatory bail before the Hon'ble Bombay High Court by way of ABA No. 2461/2019.
15.11.2019	Interim protection was granted to the Petitioner pending the hearing in the ABA No.2461/2019.
18.12.2019	The Bombay High Court reserved its order in ABA No.2461/2019.
24.01.2020	Investigation into FIR 4/2018 P.S. Vishrambaug was transferred to the National Investigation Agency. NIA registered FIR No. RC-01/2020/NIA/Mum at P.S. NIA, Mumbai. A true copy of FIR dated 24.01.2020 bearing FIR No. RC-01/2020/NIA/Mum registered at P.S. NIA, Mumbai is annexed herewith as Annexure P-17 at pages 181 to 185.
14.02.2020	The Bombay High Court passed its order in ABA No. 2461/2019, declining to grant anticipatory bail to the Petitioner. The High Court also granted the Petitioner protection from arrest for 4 weeks from the date of its order, to enable him to approach this Hon'ble Court. A true copy of the order dated 14.02.2020 passed by the High Court of Judicature at Bombay in Criminal Anticipatory Bail Application No. 2461/2019 is annexed herewith as Annexure P-18 at pages 186 to 250.
25.02.2020	The Petitioner filed a special leave petition bearing SLP (Crl.) No. 1842 of 2020 challenging the order dated 14.02.2020 of the Bombay High

	Court in ABA No. 2461/2019.
16.03.2020	This Hon'ble Court directed the Petitioner to surrender within three weeks. A true copy of the order dated 16.03.2020 passed by this Hon'ble Court in SLP (Crl.) No. 1842 of 2020 is annexed herewith as Annexure P-19 at pages 251 to 252.
08.04.2020	The Petitioner sought extension of time to surrender in view of the Covid-19 pandemic. This Hon'ble Court granted the Petitioner one more week to surrender vide its order in M.A. No. 914 of 2020 in SLP (Crl.) 1842 of 2020. A true copy of the order dated 08.04.2020 passed by this Hon'ble Court in M.A. No. 914 of 2020 in SLP (Crl.) 1842 of 2020 is annexed herewith as Annexure P-20 at pages 253 to 254.
14.04.2020	The Petitioner surrendered before NIA, Delhi in compliance with the order of this Hon'ble Court.
15.04.2020	NIA, Delhi sought and was granted 7 days' police custody of the Petitioner by the Sessions Court, Patiala House, New Delhi. A true copy of the order dated 15.04.2020 passed by the Additional District Judge-04, New Delhi in RC-01/2020 NIA/MUM remanding the Petitioner to police custody is annexed herewith as Annexure P-21 at pages 255 to 258.
21.04.2020	Police custody of the Petitioner was extended by a further 7 days by the Sessions Court, Patiala House, New Delhi. A true copy of the order dated

	21.04.2020 passed by the Additional District Judge, Patiala House Courts in RC-01/2020/NIA/MUM remanding the Petitioner to police custody is annexed herewith as Annexure P-22 at pages 259 to 261.
25.04.2020	Before the expiry of the Petitioner's police custody, the Petitioner was remanded to judicial custody at the asking of the NIA.
22.05.2020	The Petitioner filed Bail Application No. 986 of 2020 before the Delhi High Court seeking interim bail on medical grounds. The Delhi High Court was pleased to issue notice, and listed the matter for further consideration on 27.05.2020.
26.05.2020	The Petitioner is transferred to Mumbai and produced before NIA Spl. Court and is remanded to judicial custody.
27.05.2020	The Delhi High Court sought clarifications and records from the NIA regarding the Petitioner being moved to Mumbai during the pendency of the bail application.
02.06.2020	The NIA preferred an appeal being SLP (Crl.) No. 2643 of 2020 before this Hon'ble Court against the order dated 27.05.2020 of the Delhi High Court in Bail Application No. 986 of 2020. This Hon'ble Court issued notice and stayed the proceedings before the Delhi High Court. A true copy of order dated 02.06.2020 passed by this Hon'ble Court in SLP (Crl.) No. 2643 of 2020 is

	annexed herewith as Annexure P-23 at pages 262 to NIL .
10.06.2020	The NIA sought further custody of the Petitioner in Mumbai vide MA 601/2020.
11.06.2020	The Petitioner filed application for default bail before the NIA Special Court, Mumbai as his custody had exceeded 90 days and no chargesheet had been filed, nor extension of time for filing chargesheet sought. Details of the Petitioner's custody are as under: 34 days in house arrest from 28.8.2018-1.10.2018 (excluding the last day) 11 days in NIA custody from 15.4.2020-25.4.2020 (excluding the last day) 48 days in Judicial custody from 25.4.2020-12.06.2020 (excluding the last day) Total (as of 12.06.2020): 93 days A true typed copy of the Petitioner's application for default bail dated 11.06.2020 filed before Court of Special Judge & Addl. Sessions Judge, Mumbai in NIA Special Case No. 414 of 2020 is annexed hereto as Annexure P-24 at pages 263 to 268.
29.06.2020	NIA filed an application for extension of time for filing charge sheet u/S 43 d (2)(b) UAPA in the NIA Spl. Court.
06.07.2020	This Hon'ble Court set aside the order dated 27.05.2020 of the Delhi High Court in Bail

	Application No. 986 of 2020, and granted the Petitioner liberty to apply before the competent court at Bombay. A true copy of order dated 06.07.2020 passed by this Hon'ble Court in SLP (Crl.) No. 2643 of 2020 is annexed herewith as Annexure P-25 at pages 269 to 272.
12.07.2020	The NIA Special Court rejects the Petitioner's application for default bail. A true copy of order dated 12.07.2020 passed by the Court of Special Judge for NIA at Bombay rejecting Petitioner's default bail in NIA Special Case No. 414 of 2020 is annexed herewith as Annexure P-26 at pages 273 to 283.
11.08.2020	This Hon'ble Court disposed of SLP (Crl.) 8616 of 2018, holding that the matter had been rendered infructuous, and keeping the questions raised therein open. This Hon'ble Court also directed that the judgment dated 01.10.2018 passed by the Hon'ble Delhi High Court in Writ Petition (Crl.) No. 2559 of 2018 shall not be treated as a precedent for any other case. A true copy of judgment dated 11.08.2020 passed by this Hon'ble Court in SLP (Crl.) No. 8616 of 2020 is annexed herewith as Annexure P-27 at pages 284 to 286.
27.08.2020	The Petitioner preferred an appeal being Criminal Appeal Stamp No. 1707 of 2020 before the Bombay High Court challenging the order dated

	12.07.2020 of the NIA Special Court rejecting the Petitioner's application for default bail. A true typed copy of Criminal Appeal Stamp No. 1707 of 2020 preferred by the Petitioner before the High Court of Judicature at Mumbai is annexed herewith as Annexure P-28 at pages 287 to 298 .
14.09.2020	The NIA filed its counter-affidavit in Criminal Appeal Stamp No. 1707 of 2020. A true copy of the NIA's counter-affidavit dated 14.09.2020 filed before High Court of Judicature at Mumbai in Criminal Appeal Stamp No. 1707 of 2020 is annexed herewith as Annexure P-29 at pages 299 to 322 .
09.10.2020	NIA filed chargesheet against <i>inter alia</i> the Petitioner before NIA Special Court, Mumbai.
08.02.2021	The Bombay High Court passed the Impugned Order, affirming the order of the NIA Special Judge dismissing the Petitioner's bail application.
18.02.2021	Hence, this petition.

21. appeal st 1707.20.doc

Urmila Ingale

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL STAMP NO. 1707 OF 2020

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

....Appellant

Vs.

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

..... Respondent

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

Mr.S.V.Raju - Senior Advocate a/w Mr.Sandesh Patil, Mr.Chintan
Shah, Mr.Prithviraj Gole, Ms.Anusha Amin i/b Mr.D.P. Singh, for
Respondent - NIA.

Mr. Deepal Thakare, PP a/w Mr.J.P. Yagnik, APP for State.

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

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

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

21. appeal st 1707.20.doc

This is an Appeal under section 21 of the National Investigation Agency Act, 2008 ('the Act' for short) against order dated 12/07/2020 passed by the NIA Special Court in NIA Case No. 414 of 2020. The impugned order was passed on the Exhibit No. 276 application made by the Appellant before the NIA Court for statutory bail under section 167 (2) of Code of Criminal Procedure (for short 'CrPC') read with section 43 of the Unlawful Activities Prevention Act, 1967 ('UAP' Act for short).

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

2. The Appellant states that he is a 69 years old scholar, writer, peace and civil rights activist and journalist of long standing associated with the Economic and Political Weekly and other well regarded publications. It is stated that the Appellant belongs to the People's Union of Democratic Rights ('PUDR' for short) many of his Petitions have led to landmark judgments.

3. The Appellant came to be arrested on 28/10/2018 at his residence in Delhi in connection with F.I.R. No. 4 of 2018 registered at Vishrambag Police Station, Pune on 08/01/2018.

The said F.I.R. has since been numbered as RC 01/2020/NIA/Mum dated 24/01/2020 registered by NIA, Mumbai under sections 121, 121-A, 124-A, 153-A, 505(1)(b), 117, 120-B read with section 34 of Indian Penal Code ('IPC' for short) & sections 13, 16, 17, 18, 18-B, 20, 38, 39, 40 of UAP Act.

4. The High Court of Delhi in **Gautam Navlakha Vs State** W.P.(Cr) No. 2559 of 2018 vide order dated 28/08/2018 stayed the Appellant's transit remand proceedings and directed that the Appellant be kept under house arrest under guard of Delhi Police Special Cell along with local police that had come to arrest the Appellant.

5. The Hon'ble Supreme Court in **Romila Thapar vs. Union of India and ors. in Writ Petition (Crl) 261 of 2018** passed an interim order dated 29/08/2018 extending the Appellant's house arrest, which was further extended from time to time till final disposal of the Petition on 28/09/2018. On 28/09/2018, the Hon'ble Supreme Court pronounced the judgment in Romila Thapar and gave the accused persons liberty to pursue appropriate legal remedies.

6. The High Court of Delhi by its order dated 01/10/2018 passed in Gautam Navlakha Vs. State Writ Petition (Cr) No. 2559 of 2018 quashed the Appellant's arrest. This order was challenged by the State of Maharashtra (the prosecuting agency before transfer to NIA) before the Hon'ble Supreme Court in State of Maharashtra Vs. Gautam Navlakha SLP(CrL.) 8616/2018.

7. The Appellant by this time had spent 34 days in custody (house arrest) i.e. from 28/08/2018 to 01/10/2018, first under the orders of High Court of Delhi and then under the orders of the Hon'ble Supreme Court in 'Romila Thapar'.

8. The Appellant filed Writ Petition (Criminal) 4425 of 2018 in this Court for quashing the F.I.R. against him which was dismissed on 13/09/2019. This Court in the interregnum had ordered that no coercive steps be taken against the Appellant.

9. The order dated 13/09/2019 passed by this Court dismissing the Writ Petition for quashing of F.I.R. was challenged by the Appellant in SLP (Criminal) 8862 of 2019. The Hon'ble Supreme Court granted the Appellant 4 weeks protection with liberty to seek pre-arrest bail/ protection before the concerned

21. appeal st 1707.20.doc

Court. The Appellant then filed an anticipatory bail application before the Sessions Court Pune (the Court where the trial was pending before transfer to NIA) and then approached this Court. The anticipatory bail application came to be rejected by this Court on 14/02/2020.

10. The Appellant then approached the Hon'ble Supreme Court by way of (SLP) (Criminal) 1842 of 2020. By an order dated 16/03/2020 the Hon'ble Supreme Court directed the Appellant to surrender within 3 weeks. The appellant sought extension of time to surrender by an application dated 08/04/2020 due to Covid-19 pandemic. The Hon'ble Supreme Court granted one more week to the Appellant to surrender. The Appellant surrendered to NIA Delhi on 14/04/2020 in compliance with the order passed by the Hon'ble Supreme Court. It is stated by the Appellant that he could not surrender to NIA, Mumbai as there was ban on inter- state travel due to Covide-19 pandemic.

11. The NIA, Delhi on 15/04/2020 sought and were granted 7 days police custody of the Appellant by the Sessions Court, Patiyala House, New Delhi. The police custody was extended by another 7 days by order dated 21/04/2020.

21. appeal st 1707.20.doc

However, on 25/04/2020, the Appellant was remanded to judicial custody as per the request made by NIA. On 26/05/2020, the Appellant was produced before the NIA Special Court, Mumbai and was remanded to the judicial custody. The Respondent sought further custody of Appellant on 10/06/2020 by filing MA 601/ 2020 before NIA Special Court.

12. The Appellant filed an application for statutory bail on 11/06/2020 before the NIA Court (Exhibit 276) as the Appellant's total custody had exceeded 90 days and as no charge-sheet had been filed nor extension of time sought for filing charge-sheet.

13. On the scheduled date of hearing i.e. 26/06/2020 application Exhibit 276 for statutory bail and the application made by the Respondent for further custody came to be adjourned at the Respondent's instance as they sought time to circulate SLP (CrI) 8616 of 2018 pending before the Hon'ble Supreme Court wherein the Respondent had challenged the order of Delhi High Court dated 01/10/2018 in Gautam Navlakha Vs. State (2018) 235 DLT 392 (DB) quashing the Appellant's arrest.

14. The Respondent filed an application on 29/06/2020

21. appeal st 1707.20.doc

for extension of time for filing charge-sheet under sections 43d(2)(b) UAP Act before the NIA Special Court (Exhibits 292 and 293). The NIA Court vide the order impugned passed below Exhibit 276 rejected the application made by the Appellant for statutory bail.

15. To complete the narration, it would also be pertinent to mention that the NIA Special Court allowed the Respondent's application (MA 601 of 2020) for further police custody and Respondent's application (Exhibits 292 & 293) for extension of 90 days time to file charge-sheet.

16. The Hon'ble Supreme Court on 11/08/2020 disposed of State of Maharashtra Vs Gautam Navlakha SLP (Criminal) 8616 of 2018 filed by Respondent challenging the order dated 01/10/2018 passed by the Delhi High Court in Gautam Navlakha Vs.State (2018) 235 DLT 392 (DB) quashing the Appellant's arrest observing thus :

"We do not propose to go into the rival submissions, as the petitions have been rendered infructuous for practical purposes.

However, we direct that the impugned order shall not be treated as a precedent for any other case, questions of law are kept

open."

SUBMISSIONS ON BEHALF OF THE APPELLANT

17. Learned Senior Advocate Mr.Kapil Sibal appearing on behalf of the Appellant submitted that the Appellant's total custody had exceeded 90 days and no charge-sheet had been filed nor extension of time sought for filing charge-sheet and hence, the Appellant is entitled for statutory bail under section 167(2) of CrPC read with 43 of UAP Act. According to learned Senior Advocate 90 days custody of the Appellant is as follows.

"From 28.8.2018 - 1.10.2018 (custody in his house) = **34 days**
(excluding the last day)

From 14.4.2020 - 25.4.2020 (NIA custody) = **11 days** (excluding
the last day)

From 25.4.2020 - 12.6.2020 (Judicial custody) = **48 days**
(excluding the last day)

TOTAL = 93 DAYS"

18. Thus, the issue involved in the present Appeal is whether the period of custody spent during house arrest (28/08/2018 to 01/10/2018 for the period of 34 days) constitutes custody for the purposes of section 167(2) CrPC. Learned Senior Advocate invited our attention to the provisions of section 167(2)

21. appeal st 1707.20.doc

of CrPC. According to him the said period would be custody for the purposes of section 167 CrPC as the Appellant is deprived of liberty pursuant to arrest. He would then submit that the constituent elements of custody are

- a) restriction on movement, which is controlled by an authority, typically police or Court;
- b) restricted access for others to the arrestee and;
- c) restricted access of arrestee to others.

19. Learned Senior Advocate urged that custody hinges on the deprivation of liberty and not of comfort and therefore, the presence of home food or consultations with Doctor or permission to read books etc. do not in any manner alter the facet of custody itself as long as there is restriction of movement. In support of his submissions, he gave the example of many jails having these facilities and that these conveniences do not negate the fact of custody. Learned Senior Advocate was therefore at pains to point out that a person cannot be under arrest or custody merely because his place of detention is his house, for according to him this would be a narrow and incorrect interpretation of the meaning of custody.

20. To make good his submission that the Appellant

21. appeal st 1707.20.doc

satisfies the criteria above stated, learned Senior Advocate urged that upon the arrest of the Appellant on 28/08/2018 from his house, his house was searched and devices seized. The Appellant was taken by the police for transit remand before the concerned Magistrate, and the order granting transit remand was passed on 28/08/2018 allowing the police to take the Appellant to Pune. For the duration of all these events, the Appellant was in police custody. Our attention is invited to the order passed by the High Court of Delhi which modified the Magistrate's order and directed that the Appellant be kept in custody in his home under guard. It is pointed out that the Appellant was not allowed to leave his house and was not allowed to meet anyone barring ordinary residents of the house and his Advocate. He therefore urged that the Appellant though was in his house, was actually in custody pursuant to his arrest and remand.

21. Learned Senior Advocate submitted that arrest is a matter of law whereas custody is a matter of fact. Inviting our attention to the order dated 29/08/2020 passed by the Hon'ble Supreme Court, it is urged that the order clearly mentions that the Appellant is under house arrest. According to him this evidences that the Appellant was under arrest and under the control of the Court in total deprivation of his liberty.

21. appeal st 1707.20.doc

22. Learned Senior Advocate further submitted that the requirement of section 167 CrPC is that a person's arrest is in connection with an offence and such person's custody as directed by the Court which cannot exceed particular number of days while the investigation is pending. In his submission, section 167 CrPC does not lay down that custody has to necessarily be a police custody, for under section 167 the custody can be either police or judicial. According to him, a custody of a person in a hospital, in a jail, in the court premises, in an asylum, in an observation home or borstal school, in a government guest house or in ones own house by order of a Court is still custody.

23. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **'Niranjan Singh and anr. Vs. Prabhakar Rajaram Kharote and ors.** Inviting our attention to paragraph 7 in the context of the observations of Their Lordships on the point 'when person is in custody within the meaning of section 439 CrPC,' learned Senior Advocate would submit that the said decision squarely applies to the Appellant's case. In his submission, the fact that the Appellant was in house arrest has to be regarded as custody for computing the period of

1 1980(2) SCC 559

90 days.

24. Learned Senior Advocate then submits that mere fact that police did not have access or that the Appellant was not in police custody is immaterial as section 167 itself allows another type of custody i.e. judicial custody. To buttress his submission, learned Senior Advocate placed reliance on the decision of the Hon'ble Supreme Court in the case of ²**CBI Vs. Anupam Kulkarni**. He thus submitted that any period spent by an accused in custody under orders of the Court would count as custody for the purposes of section 167 of CrPC. Reliance is also placed on the decision of this Court in the case of **Deepak Satyavan Kudalkar Vs. State of Maharashtra** LD/VC Criminal Bail Application No. 197 of 2020 decided on 29/07/2020. It is urged that when the Appellant claimed default bail under section 167(2) CrPC, his custody period, from the date of his arrest and first remand i.e. 28/08/2018 was in excess of 90 days. Mr.Sibal therefore urged that since no application for extension of time was filed by NIA (till much later on 29/06/2020 after 110 days), the NIA Court had no authority to further remand the Appellant and should have enlarged him on bail.

² (1992) 3 SCC 141

25. It is next contended that the issue needs to be considered in the larger context of the rationale behind section 167(2), which places great importance on the personal liberty of an arrested person. To support this submission, reliance is on the decision of the Hon'ble Supreme Court in the case of **M.Ravindran Vs. The Intelligence Officer, DRI**, Criminal Appeal No.699 of 2020 decided on 26/10/2020. It is submitted that Their Lordships from the perspective of upholding the fundamental rights and personal liberty under Article 21 clarified and reconciled the various judicial interpretations of section 167(2) for the purpose of resolving the dilemma that arose in the case.

26. The order of the Special Court is assailed on the submission that the Special Court was in error in observing that since Delhi High Court stayed the transit remand, hence the house arrest could not be construed as one under section 167 CrPC and hence does not constitute custody. In the submission of the Senior Advocate all along the Appellant was in judicial custody and hence the observation made by the Special Court that 'it is not the case of the Appellant that the Appellant was in police custody or judicial custody' is erroneous. He submitted

21. appeal st 1707.20.doc

that reliance of NIA Court on the decision rendered in ³**State of West Bengal Vs. Dinesh Dalmiya's** is completely misplaced and erroneous in the present facts.

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

3 (2007) 5 SCC 773

21. appeal st 1707.20.doc

anomalous result. It is therefore submitted that the impugned order is erroneous and the application Exhibit 276 for statutory bail deserves to be allowed.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

28. Learned Senior Advocate Mr. Raju appearing on behalf of the Respondent argued in support of the impugned order passed by the Special Judge. He invited our attention to the provisions of sections 56, 57, 167(2) of the CrPC in support of his submission that the question of entitling accused to default bail under section 167(2) of CrPC would arise only when the accused is under detention of the police for investigation. Learned Senior Advocate submitted that the transit remand order passed by learned CMM came to be stayed by the Delhi High Court with the result it cannot be said that the Appellant was under the detention of police for investigation.

29. He further pointed out that in view of the order passed by the High Court of Delhi, the Investigating Officer never had an occasion to interrogate the Appellant. In the submission of learned Senior Advocate, the High Court of Delhi having set aside the transit remand order and further having declared the

21. appeal st 1707.20.doc

detention of the Appellant as illegal, in such circumstances, the Appellant will not be entitled to avail of the default bail under section 167(2) of CrPC. According to learned Senior Advocate, it is only when the detention / custody of the incumbent is authorised by the Magistrate under section 167(2) of CrPC, the question of entitlement of the default bail would arise.

30. Learned Senior Advocate placed reliance on the decisions of the Apex Court in the case of ⁴**Chaganti Satyanarayana and ors. Vs. State of Andhra Pradesh** and in the case of **State of West Bengal** (*supra*) to urge that the pre - requisite for entitling the Appellant to default bail under section 167(2) of CrPC is the authorisation of the detention by Magistrate for such custody. It is therefore submitted that the order passed by the Special Judge does not call for any interference.

CONSIDERATION

31. Heard learned Senior counsel for the respective parties at length. We have perused the copy of the appeal memo, perused the impugned order and the relevant annexures.

⁴ (1986) 3 Supreme Court Cases 141

32. As earlier indicated, the question that arises for consideration in this Appeal is whether the house arrest of the Appellant during the period from 28.08.2018 to 01.10.2018 viz. 34 days constitutes custody within the meaning of Section 167 (2) of the Cr.P.C. for the purpose of computing 90 days period for grant of default bail to the Appellant. If this period of 34 days is to be included in the 90 days period and construed as period of custody, then of course the Appellant's total custody would exceed 90 days.

33. Though the facts have been set out in detail earlier, however for appreciating the controversy, it would be apposite to concisely refer to a few basic facts again. Pursuant to registration of FIR, the Appellant was restrained in his house by the Maharashtra Police on 28.08.2018. The learned CMM granted transit remand to the Appellant on 28.08.2018. The High Court of Delhi stayed the Appellant's transit remand proceedings on the same day i.e. 28.08.2018. Apart from the other directions, the following direction in paragraph 5(6) of the order which reads thus came to be issued :-

"5(6) The Petitioner shall, in the meanwhile, be kept at the same place from where he was picked up with two guards of the Special Cell, Delhi Police along with local Police that was originally here to arrest the Petitioner, outside the house.

21. appeal st 1707.20.doc

Barring his lawyers, and the ordinary residents of the house, the Petitioner shall not meet any other persons or step out of the premises till further orders."

34. The interim directions were continued from time to time. The High Court of Delhi finally on 01.10.2018 held that the order passed by the learned Chief Metropolitan Magistrate (CMM for short) on 28.08.2018 granting transit remand to the Appellant is unsustainable in law. It was held that there were several non-compliances of the mandatory requirement of Article 22(1), Article 22(2) of the Constitution and Section 167 read with Section 57 and 41(1)(ba) of the Cr.P.C., which are mandatory in nature. The High Court of Delhi also observed that in view of Section 56 read with Section 57 of the Cr.P.C., in the absence of the remand order of the learned CMM, the detention of the Petitioner, which has clearly exceeded 24 hours, is again untenable in law. Consequently, it was ordered that the house arrest of the Petitioner came to an end. It was clarified that the order will not preclude the State of Maharashtra from proceeding further in accordance with law.

35. It would thus be seen that the High Court of Delhi having stayed the transit remand granted by the CMM further directed that during the pendency of the Petition the Petitioner

21. appeal st 1707.20.doc

shall be kept at the same place from where he was picked up with two guards of the Special Cell, Delhi Police along with local police that was originally present to arrest the Petitioner, outside the house. It was further directed that barring his lawyers, and the ordinary residents of the house, the Petitioner shall not meet any other persons or step out of the premises till further orders.

36. In view of the order passed by the High Court of Delhi the Investigating Officer did not have any access to the Appellant. The Appellant could not be interrogated during this period. The High Court of Delhi set aside the order passed by the CMM granting transit remand whereupon the house arrest of the Appellant came to an end rendering the detention of the Appellant untenable in law. The question is whether this period of house arrest constitutes custody within the meaning of Section 167(2) of the Cr.P.C.

37. It is pertinent to note that after the High Court of Delhi held that the Appellant's detention as illegal, the Appellant then approached this Court by filing Writ Petition (Criminal) No.4425 of 2018 for quashing the FIR. This Court in the interregnum had ordered that no coercive steps be taken against the Appellant. The application for quashing FIR came to be

21. appeal st 1707.20.doc

dismissed on 20.09.2019. In a challenge to the order passed by this Court dated 13.09.2019, the Hon'ble Supreme Court granted Appellant four weeks protection with liberty to seek pre-arrest bail/protection before the concerned Court. The Appellant then filed an Anticipatory Bail Application before the Sessions Court at Pune. The Anticipatory Bail Application came to be rejected. The Appellant failed to get any relief of anticipatory bail in this Court and ultimately even before the Hon'ble Supreme Court. The Hon'ble Supreme Court by order dated 16.03.2020 directed the Appellant to surrender within three weeks. The time to surrender was extended and ultimately the Appellant surrendered to NIA, Delhi on 14.04.2020 in compliance with the order passed by the Hon'ble Supreme Court.

38. The NIA, Delhi was granted seven days police custody on 15.04.2020 by the Sessions Court, Patiala House, New Delhi. The Police custody was extended by another seven days vide order dated 24.04.2020 and ultimately on 25.04.2020 the Appellant was remanded to judicial custody. It is thus seen that after the initial detention is declared illegal, the appellant surrendered whereupon the Magistrate then authorised the police custody.

39. The bone of contention is the period of 34 days (28/08/2018 to 01/10/2018) which the appellant was under custody (house arrest). Undoubtedly, this period has to be regarded as custody as the appellant admittedly was under house arrest. However, in our opinion, the intervening orders passed would be relevant for determining the nature of this custody for the purpose of Section 167 of Cr.PC to enable the appellant to claim default bail. Following circumstances cumulatively leads us to conclude that the appellant is not entitled to the benefit of 34 days for claiming statutory default bail.

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

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

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

(4) Pursuant to the declaration of the detention as illegal, the appellant was set at liberty. It is not as if the appellant

was released on bail but after being set at liberty, the appellant is protected by an order of this Court restraining the investigating agency from taking coercive steps during the pendency of appellant's challenge to the FIR.

(5) The Hon'ble Supreme Court having dismissed the challenge of the appellant to quash FIR granted 4 weeks protection with liberty to seek pre arrest bail/protection before the Sessions Court. The Hon'ble Supreme Court granted the appellant time to surrender after the appellant failed to serve pre arrest bail. The appellant ultimately surrendered to NIA Delhi on 14/04/2020. Only after the appellant surrendered, the Magistrate authorised the police custody whereupon the appellant was interrogated.

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

"167. Procedure when investigation cannot be completed in twenty four hours.

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by section 57, and there are grounds for believing that the accusation or information is well- founded, the officer in charge of the police station or the

21. appeal st 1707.20.doc

police officer making the investigation, if he is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks 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 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

21. appeal st 1707.20.doc

deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the 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.

(emphasis supplied by us)

41. The Hon'ble Supreme Court in the case of **Chaganti Satyanarayan and others** (*supra*) had an occasion to construe Section 167(2) of the Cr.P.C., which decision has a bearing on the present controversy. Their Lordships in paragraph 12 stated thus:

"12. On a reading of the sub-sections (1) and (2) it may be seen that sub-section (1) is a mandatory provision governing what a police officer should do when a person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fixed by Section 57. Sub-section (2) on the other hand pertains to the powers of remand available to a Magistrate and the manner in which such powers should be exercised. The terms of sub-section (1) of Section 167 have to be read in conjunction with Section 57.

21. appeal st 1707.20.doc

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

(emphasis supplied by us)

42. It is also necessary to refer to paragraph 16 and 17 of the decision where Their Lordships have stated thus :-

"16. As sub-section (2) of Section 167 as well as proviso (1) of sub-section (2) of Section 309 relate to the powers of remand of a Magistrate, though under different situations, the two provisions call for a harmonious reading in so far as the periods of remand are concerned. It would, therefore, follow that the words "15 days in the whole" occurring in sub-section (2) of Section 167 would be tantamount to a period of "15 days at a time" but subject to the condition that if the accused is to be remanded to police custody the remand should be for such period as is commensurate with the requirements of a case with provision for further extensions for restricted periods, if need be.

21. appeal st 1707.20.doc

but in no case should the total period of remand to police custody exceed 15 days. Where an accused is placed in police custody for the maximum period of 15 days allowed under law either pursuant to a single order of remand or to more than one order, when the remand is restricted on each occasion to a lesser number of days, further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise. The Legislature having provided for an accused being placed under police custody under orders of remand for effective investigation of cases has at the same time taken care to see that the interests of the accused are not jeopardised by his being placed under police custody beyond a total period of 15 days, under any circumstances, irrespective of the gravity of the offence or the serious nature of the case.

(emphasis supplied by us)

17. Thus in the light of our discussion and conclusions reached we do not find merit or force in the contention of the appellants' counsel that the words 'for a term not exceeding 15 days in the whole' occurring in sub-section (2) of Section 167 should be so construed as to include also the period of custody of the accused from the time of arrest till the time of production before the Magistrate. A Magistrate can, therefore, authorise the detention of the accused for a maximum period of 15 days from the date of remand and place the accused either in police custody or in judicial custody during the period of 15 days' remand. It has, however, to be borne in mind that if an accused is remanded to police custody the maximum period during which he can be placed in police custody is only 15 days. Beyond that period no Magistrate can authorise the detention of the accused in police custody."

(emphasis supplied by us)

21. appeal st 1707.20.doc

43. The Hon'ble Supreme Court then in Paragraph 24 held that the period of 90 days or 60 days as the case may be, will commence running only from the date of remand and not from any anterior date in spite of the fact that the accused may have been taken into custody earlier by a police officer and deprived of his liberty.

44. We now make a profitable reference to the decision of the Hon'ble Supreme Court in the case of **State of W.B. (supra)**. In paragraphs 16 and 17 Their Lordships held thus :-

"16. Sub-section (1) says that when a person is arrested and detained in custody and it appears that investigation cannot be completed within 24 hours fixed under Section 57 and there are grounds of believing that accusation or information is well-founded, the officer in charge of the Police Station or the Police Officer making the investigation not below the rank of sub-inspector shall produce the accused before the nearest judicial magistrate. The mandate of sub-section (1) of Section 167, Cr.P.C. is that when it is not possible to complete investigation within 24 hours then it is the duty of the Police to produce the accused before the Magistrate. Police cannot detain any person in their custody beyond that period. Therefore, Sub-Section (1) pre-supposes that the police should have custody of an accused in relation to certain accusation for which the cognizance has been taken and the matter is under investigation. This check is on police for detention of any citizen. Sub-Section (2) says that if the accused is produced before the Magistrate and if the Magistrate is satisfied looking to accusation then he can give a

21. appeal st 1707.20.doc

remand to the police for investigation not exceeding 15 days in the whole. But the proviso further gives a discretion to the Magistrate that he can authorize detention of the accused otherwise than the police custody beyond the period of 15 days but no Magistrate shall authorize detention of the accused in police custody for a total period of 90 days for the offences punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and no magistrate shall authorize the detention of the accused person in custody for a total period of 60 days when the investigation relates to any other offence and on expiry of the period of 90 days or 60 days as the case may be. He shall be released if he is willing to furnish bail. Therefore, the reading of sub-Sections (1) & (2) with proviso clearly transpires that the incumbent should be in fact under the detention of police for investigation. In the present case, the accused was not arrested by the police nor was he in the police custody before 13.3.2006. He voluntarily surrendered before a Magistrate and no physical custody of the accused was given to the police for investigation. The whole purpose is that the accused should not be detained more than 24 hours and subject to 15 days police remand and it can further be extended up to 90/60 as the case may be. But the custody of police for investigation purpose cannot be treated judicial custody/ detention in another case. The police custody here means the Police custody in a particular case for investigation and not judicial custody in another case. This notional surrender cannot be treated as Police custody so as to count 90 days from that notional surrender. A notorious criminal may have number of cases pending in various police station in city or outside city, a notional surrender in pending case for another FIR outside city or of another police-station in same city, if the notional surrender is counted then the police will not get the opportunity to get custodial investigation. The period of detention before a

21. appeal st 1707.20.doc

Magistrate can be treated as device to avoid physical custody of the police and claim the benefit of proviso to Sub-Section 1 and can be released on bail. This kind of device cannot be permitted under Section 167 of the Cr.P.C. The condition is that the accused must be in the custody of the police and so called deemed surrender in another criminal case cannot be taken as starting point for counting 15 days police remand or 90 days or 60 days as the case may be. Therefore, this kind of surrender by the accused cannot be deemed to be in the Police custody in the case of 476/02 in Calcutta. The Magistrate at Egmore, Chennai could not have released the accused on bail as there was already cases pending against him in Calcutta for which a production warrant had already been issued by the Calcutta Court. In this connection in the case of State of Maharashtra Vs. Bharati Chandmal Varma (Mrs.) reported in (2002)2 SCC 121 their Lordships has very clearly mentioned that:

"11. For the application of the proviso to Section 167(2) of the Code, there is no necessity to consider when the investigation could legally have commenced. That proviso is intended only for keeping an arrested person under detention for the purpose of investigation and the legislature has provided a maximum period for such detention.. On the expiry of the said period the further custody becomes unauthorized and hence it is mandated that the arrested person shall be released on bail if he is prepared to and does furnish bail. It may be a different position if the same accused was found to have been involved in some other offence disconnected from the offence for which he is arrested. In such an eventuality the officer investigating such second offence can exercise the power of arresting him in connection with the second case. But if the investigation into the offence for which he was arrested initially had revealed other ramifications associated therewith, any further

21. appeal st 1707.20.doc

investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable."

17. Therefore, it is very clearly mentioned that the accused must be in custody of the police for the investigation. But if the investigation into the offence for which he is arrested initially revealed other ramifications associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable. Meaning thereby that during the course of the investigation any further ramification comes to the notice of the Police then the period will not be extendable. But it clearly lays down that the accused must be in custody of police. In the case of Directorate of Enforcement v. Deepak Mahajan and Another reported in (1994) 3 SCC 440 their Lordships observed that Section 167 is one of the provisions falling under Chapter XII of the Code commencing from Section 154 and ending with Section 176 under the caption "Information to the police and other powers to investigate". Their Lordships also observed that main object of Section 167 is the production of an arrestee before a Magistrate within twenty four hours as fixed by Section 57 when investigation cannot be completed within that period so that the Magistrate can take further course of action as contemplated under sub-Section (2) of Section 167. In para 54 their Lordships have also observed with regard to the pre-requisite condition which reads as under:

"54. The above deliberation leads to a derivation that to invoke Section 167(1), it is not an indispensable pre-requisite condition that in all circumstances, the arrest should have been effected only by a police officer and none else and that

21. appeal st 1707.20.doc

there must necessarily be records of entries of a case diary. Therefore, it necessarily follows that a mere production of an arrestee before a competent Magistrate by an authorized officer or an officer empowered to arrest (notwithstanding the fact that he is not a police officer in its stricto sensu) on a reasonable belief that the arrestee "has been guilty of an offence punishable" under the provisions of the Special Act is sufficient for the Magistrate to take that person into his custody on his being satisfied of the three preliminary conditions, namely (1) the arresting officer is legally competent to make the arrest; (2) that the particulars of the offence or the accusation for which the person is arrested or other grounds for such arrest do exist and are well-founded; and (3) that the provisions of the special Act in regard to the arrest of the persons and the productions of the arrestee serve the purpose of Section 167(1) of the Code."

(emphasis supplied by us)

45.

In the present case, no doubt the Appellant was under house arrest. The transit remand ordered by the CMM on 28.08.2018 was stayed by the High Court of Delhi on very same day. During the period of house arrest, barring the Appellant's lawyers and ordinary residents of the house, the Appellant was not supposed to meet any one or step out of the premises till further orders. The High Court of Delhi had ordered that the Appellant be kept at the same place from where he was picked up with two guards of the Special Cell, Delhi Police along with local police that was originally present to arrest the Appellant,

21. appeal st 1707.20.doc

outside the house. It is therefore obvious that the Investigating Agency/Investigating Officer did not have any access to him nor had an occasion to interrogate him. As the transit remand order was stayed, it cannot be said that the appellant was under detention of police for investigation.

46. Further under Sub-Section (2) of Section 167 of Cr.P.C. the Magistrate has to authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days. The CMM granted transit remand on 28.08.2018. The High Court of Delhi by an interim order having stayed the transit remand and then having finally set aside the order of transit remand thereby holding the detention during the period 28.08.2018 upto 01.10.2018 (period of house arrest) as illegal, then, in our opinion, in the absence of there being an authorised detention by an order of Magistrate, the Appellant cannot claim entitlement to statutory default bail under Sub-Section (2) of Section 167 of the Cr.P.C. The mandate of Sub-Section (2) of Section 167 of the Cr.P.C. makes it clear that for claiming availment of default bail under Section 167(2) of the Cr.P.C. the basic requirement is that the detention of the accused in the custody has to be authorised by the Magistrate. Once the authorisation by the Magistrate is declared illegal consequently

21. appeal st 1707.20.doc

rendering the detention itself illegal, the said period (house arrest custody) cannot be construed to be an authorised custody within the meaning of Section 167(2) of CrPC.

47.

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

48.

It is not possible for us to fathom a situation where detention of the Appellant though held to be illegal & unlawful rendering the authorisation by the Magistrate untenable should still be construed as an authorised detention for the purpose of

21. appeal st 1707.20.doc

Sub-Section (2) of Section 167 of the Cr.P.C.. In our view sans any valid authorisation/order of the Magistrate detaining the appellant, the incumbent will not be entitled to a default bail. It is therefore obvious that Sub-Section (2) of Section 167 of the Cr.P.C. necessarily presupposes a detention authorised by a Magistrate, for only then the said period of authorised detention can count towards calculating 90 days period of custody prescribed under Section (2) of Section 167 of the Cr.P.C. for the purpose of default bail.

49.

Resultantly we hold that the period from 28.08.2018 to 01.10.2018 has to be excluded from computing the period of 90 days as the said custody has been held to be unsustainable in law by the High Court of Delhi. The High Court of Delhi also set aside the order passed by the learned CMM on 28.08.2018 granting transit remand to the Appellant. It is not in dispute that thereafter the Appellant applied for Anticipatory Bail which came to rejected at all stages and ultimately the Appellant surrendered on 14.04.2020. It is only consequent to the surrender that the Magistrate then authorise the police custody.

21. appeal st 1707.20.doc

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

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

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

(M.S.KARNIK, J.)

(S.S.SHINDE, J.)

IN THE SUPREME COURT OF INDIA

Order XXII Rule 2(1)(A)

CRIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CRIMINAL) NO. OF 2021

(Against the Impugned Final Judgment and Order dated
08.02.2021 passed by the High Court of Judicature at Bombay in
Criminal Appeal Stamp No. 1707 of 2020)

IN THE MATTER OF:-

Position of Parties	Before the Trial Court	Before the High Court	Before this Court
Gautam Navlakha S/o Pratap Singh Navlakha, Age 69 yrs., R/o Flat No. 2, R-3, Nehru Enclave, New Delhi-110019 (Currently UTP 196 at Taloja Central Jail)	Accused	Appellant	Petitioner

VERSUS

National Investigation Agency, 7 th Floor, Cumballa Hill Telephone Exchange, Peddar Road, Mumbai, Maharashtra-400026	Prosecutor	Respondent	Respondent

To,
The Hon'ble Chief Justice

And his companion Justices
of the Hon'ble Supreme Court of India.

The humble Petition
of the Petitioner above named

MOST RESPECTFULLY SHEWETH

1. This Special Leave Petition ("SLP") challenges the final Judgment and Order dated 08.02.2021 passed by the High Court of Judicature at Bombay in Criminal Appeal Stamp No. 1707 of 2020 ("Impugned Order"). Vide the Impugned Order, the Bombay High Court dismissed the Petitioner's appeal under Section 21 of the National Investigation Agency Act ("NIA Act") and upheld the order dated 12.07.2020 of the Special Judge, NIA dismissing the Petitioner's application for default bail under Section 167(2) Code of Criminal Procedure ("Cr.P.C") read with Section 43(D)(2) of the Unlawful Activities Prevention Act ("UAPA").

1A. It is hereby clarified that the full name of the Petitioner "Gautam Navlakha" herein is "Gautam P. Navlakha". "Gautam P. Navlakha" referred to in the Impugned Order is the same person as the present Petitioner Gautam Navlakha.

2. QUESTIONS OF LAW:

That, the present Special Leave Petition raises the following substantial questions of law which need adjudication by this Hon'ble Court:

A. Whether the High Court has wrongly held that the factum of the 34 day judicial custody of the Petitioner pursuant to the transit remand granted by the Chief Metropolitan Magistrate, Saket Courts Delhi on 28.08.2018, and subsequently by orders of this Hon'ble Court and the Delhi High Court stood wiped out pursuant to the order of the Delhi High Court dated 01.10.2018 in W.P.(Crl.) 2559 of 2018 titled Gautam

Navlakha v. State (NCT of Delhi) quashing the Petitioner's transit remand?

- B. Whether the High Court has erred in holding that the judicial custody (by way of house arrest) of 34 days of the Petitioner pursuant to orders of this Hon'ble Court and the Delhi High Court did not amount to "custody" for the purpose of computing the 90 day period entitling the Petitioner to default bail u/S. 167(2) Cr.P.C?
- C. Whether the High Court has wrongly held that "house arrest" pursuant to judicial orders does not amount to custody u/S. 167(2) Cr.P.C. as the investigating agency did not interrogate the Petitioner during such period?
- D. Whether or not the Petitioners' custody was occasioned only after the Pune Police arrested him in connection with FIR No.4/2018 Vishrambaugh, for the purposes of investigation?
- E. Whether or not 'arrest' is a matter of law, but 'custody' a matter of fact?
- F. Whether or not the only 'procedure established by law' to deprive the Petitioner of his liberty available in any proceeding was Section 167 CrPC read with Articles 21/22 of the Constitution, and therefore, all that this Hon'ble Court and the Delhi High Court did was modify the orders of custody of the Magistrate?
- G. Whether or not the judgment of this Hon'ble Court in **M. Ravindran v. Director, Revenue Intelligence SLP (Crl.) No. 2333 of 2020** inextricably ties any

remand u/S. 167 Cr.P.C. to the constitutional principle of 'procedure established by law' under Article 21/22?

- H. Whether the High Court has wrongly held that the detention of the Petitioner by a Magistrate could only have commenced subsequent to his surrender before NIA, Delhi on 14.04.2020 and not after his arrest and remand on 28.08.2018?
- I. Whether the reliance placed by the Bombay High Court on **Chaganti Satyanarayana Rao v. State of A.P. (1986) 3 SCC 141** in rejecting the Petitioners' bail is misconceived as the ratio of the judgment merely states that the period under Section 167 Cr.P.C. begins not after arrest but after production before a Magistrate, which in fact bolsters the Petitioners' case as he was arrested and produced before a Magistrate on 28.08.2018 itself?
- J. Whether the High Court has erred in not granting Petitioner default bail despite him having spent over ninety days in custody as on date of his application before NIA Special Court (11.06.2020), Mumbai and the NIA not having filed chargesheet/sought extension of time for filing chargesheet, when an indefeasible right to bail accrued in favour of the Petitioner under Section 167 (2) Cr. P.C.?
- K. Whether the Bombay High Court erred in accepting the argument that since the Petitioner subsequently applied for anticipatory bail, his initial custody could not have been under Section 167 Cr.P.C.? Whether a requirement of continuous custody can be wrongly

imported into the statute when the Legislature did not provide for it, and that too to the detriment of the accused?

- L. Whether or not the scheme of S.167 Cr.P.C. is only concerned with the total period of custody, which may be at one go or with breaks, and the total period of custody cannot exceed 90 days without a charge-sheet filed or extension of time sought for filing chargesheet, and that there is no qualification that this total should be continuous custody?
- M. Whether or not a provision in favour of liberty must be strictly construed towards that objective and no condition that militates against liberty should be read into it?

3. DECLARATION IN TERMS OF RULE 2(2)

The Petitioner states that no other petition seeking leave to appeal has been filed by him against the impugned order before this Hon'ble Court.

4. DECLARATION IN TERMS OF RULE 4

The Annexures produced along with the SLP are true copies of the pleadings/documents that formed part of the records of the case in the court below against whose order leave to appeal is being sought in this petition.

5. GROUNDS

Being aggrieved by and dissatisfied with the impugned order of the High Court of Judicature at Bombay, the Petitioner is filing the instant Special Leave Petition, on *inter alia* the following grounds:

- A. FOR THAT the Petitioner had spent over 90 days in custody (93 days) as on 12.06.2020 when his application for default bail was heard by the NIA Spl. Court, Mumbai. He had spent 34 days in judicial custody pursuant to the orders of the Delhi High Court and the Hon'ble Supreme Court between 28.08.2018-01.10.2018 (excluding the last day), 14 days in police custody in Delhi between 14.04.2020-25.04.2020 (excluding the last day) and 48 days in judicial custody in Delhi and Mumbai pursuant to the orders of the Sessions Court, Patiala House, Delhi and NIA Spl. Court, Mumbai between 25.04.2020-12.06.2020 (excluding the last day).
- B. FOR THAT the Petitioner is entitled to default bail under Section 167(2) Cr.P.C. after 90 days in case no chargesheet was filed/no extension of time for filing chargesheet sought, neither of which was done before Petitioner filed application for default bail before the NIA Special Court, Mumbai.
- C. FOR THAT custody is a matter of fact, and not of law and that the Bombay High Court has erred by not considering that there was a 34-day restraint on the Petitioner's liberty between 28.08.2020-01.10.2020 (excluding last day) on account of "house arrest"/judicial custody imposed on him by order of the Delhi High Court, which was subsequently extended from time to time by orders of this Hon'ble Court.
- D. FOR THAT the word "custody" under Section 167 Cr.P.C. has been interpreted in the Impunged Order as

not covering "house arrest" ordered by the Delhi High Court and this Hon'ble Court, which is in conflict with the judgment of this Hon'ble Court in **Niranjan Singh v. Prabhakar Kharote (1980) 2 SCC 559**, wherein it was held that "custody" is a state of duress imposed by police action or judicial order, and which expressly holds that "custody" includes a situation wherein one is "under the control of the court having been remanded by judicial order".

- E. FOR THAT the Impugned Order has ignored the fact that the Petitioner's 34-day detention between 28.08.2018-01.10.2018 satisfies the twin requirements of arrest and remand u/S. 167 Cr.P.C. The Petitioner was arrested from his residence on 28.08.2018 in connection with FIR No. 4/2018 and transit remand was granted by the Chief Metropolitan Magistrate, Saket on the same day. Subsequent proceedings in the Delhi High Court, wherein the remand was stayed and then quashed, cannot be read as having wiped out the fact that the two essential pre-requisites of Section 167 Cr.P.C., namely arrest and remand, were met in the Petitioner's case.
- F. FOR THAT the order of the Delhi High Court in W.P.(Crl.) 2559 of 2018 titled **Gautam Navlakha v. State (NCT of Delhi)** has been misinterpreted by the Bombay High Court as having quashed the Petitioner's arrest and effectively declared it 'non-est', whereas the Delhi High Court had merely set aside the transit

remand order on *inter alia* grounds of procedural infirmities as “wrongful” and “illegal”.

- G. FOR THAT the scheme of Section 167(2) Cr.P.C. concerns total period of custody (both police and judicial), and in calculating such period, orders of a Court detaining the Petitioner under “house arrest” cannot be excluded.
- H. FOR THAT the Impugned Order erroneously holds that the Petitioner’s 34-day “house arrest” did not constitute “authorised custody” u/S. 167 Cr.P.C. as the investigating agency did not get an opportunity to interrogate him. This is in direct conflict with the principles set out in the judgment of this Hon’ble Court in **S. Kasi v. State through the Inspector of Police Samaynallur Police Station Madurai District Crl. Appeal No. 452 of 2020** wherein this Hon’ble Court has held that the right of the investigating agency to investigate/file charge-sheet is on a lower pedestal than the right to liberty under Article 21, which includes the right to default bail under Section 167(2) Cr.P.C.
- I. FOR THAT the Impugned Order effectively holds that an illegal arrest/detention should operate in favour of the prosecution and not the accused while computing the period of detention for the purpose of default bail u/S. 167 Cr.P.C. This is against settled law that any ambiguity concerning the interpretation of a criminal statute must operate in favour of the accused and not the prosecution/investigation agency (see **M.**

Ravindran v. Director, Revenue Intelligence SLP (Crl.) No. 2333 of 2020, Para 35).

- J. FOR THAT the Impugned Order wrongly holds that custody pursuant to orders of "house arrest" of the Delhi High Court and this Hon'ble Court is not relatable to Section 167 Cr.P.C., whereas it is a settled position of law that when a superior court with inherent, statutory and constituent powers is seized of the correctness of a remand order passed by a Magistrate under S.167 CrPC, and modifies it, the superior court's order does not cease to be relatable to S.167 CrPC and become de hors that section, and remains custody pending investigation into the FIR in which the police has made the arrest.
- K. FOR THAT the Impugned Order is contrary to the judgment of this Hon'ble Court in **CBI v. Dinesh Dalmia (2007) 8 SCC 770** that clearly holds that the right to default bail under Section 167(2) Cr.P.C. at the pre-cognizance stage is available while investigation into the FIR remains pending, and no chargesheet has been filed, both of which conditions have been satisfied in the Petitioner's case.
- L. FOR THAT the Impugned Order has incorrectly applied the judgment of this Hon'ble Court in **Chaganti Satyanarayana Rao v. State of A.P. (1986) 3 SCC 141** to conclude that "house arrest" is not tantamount to custody u/S. 167 Cr.P.C. The ratio in **Chaganti Satyanarayana Rao (supra)** actually supports the Petitioner's case as it distinguishes

between arrest, which is an executive act of detention, and custody ordered thereafter by a judicial order, and holding that it is the period of custody by judicial order that should be counted for computing the period of 60 or 90 days under Section 167(2) CrPC. In this case, the 34 days spent by the Petitioner was evidently custody pursuant to judicial order, consequently, **Chaganti Satyanarayana Rao (supra)** does not in any way provide any justification for discounting the Petitioner's 34-day house arrest while computing time period for default bail.

- M. FOR THAT the Impugned Order has impliedly upheld the flawed reasoning of the NIA Spl. Court that for Section 167 Cr.P.C. to apply, the accused must actually be under the detention of the police for investigation. This is based on a complete misreading of the judgment of this Hon'ble Court in **State of W.B. v. Dinesh Dalmia (2007) 5 SCC 773**, which has no application to the Petitioner's case, being completely distinguishable on facts.
- N. FOR THAT there will be a grave violation of the Petitioner's Right to Life and Personal Liberty under Article 21 of the Constitution of India if the Petitioner is not granted default bail u/S. 167(2) Cr.P.C.
- O. FOR THAT the impugned order is otherwise bad in law and on facts.
- P. Any other ground that the Petitioner may take with the leave of this Hon'ble Court.

6. GROUND FOR INTERIM RELIEF

The Petitioner is not seeking any interim relief at this stage but reserves the right to move an appropriate application at a later stage with the leave of this Hon'ble Court.

7. MAIN PRAYER

In the circumstances set forth above, it is therefore, most respectfully prayed that this Hon'ble Court may be pleased to:

- a. Grant special leave to appeal from the Impugned Final Judgment & Order dated 08.02.2021 passed by the High Court of Judicature at Bombay in Criminal Appeal Stamp No. 1707 of 2020 titled *Gautam Navlakha v. National Investigation Agency*, and
- b. Pass any other or further orders as may be deemed fit and proper in the interest of justice.

8. PRAYER FOR INTERIM RELIEF

The Petitioner is not seeking any interim relief at this stage but reserves the right to move an appropriate application at a later stage with the leave of this Hon'ble Court.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER SHALL AS IS DUTY BOUND EVER PRAY.

Settled by:

Nitya Ramakrishnan, Adv.

Drawn by:

Warisha Farasat, Adv.

Shourya Dasgupta, Adv.

Place: New Delhi

Date: 18.02.2021

Filed By:



(Shadan Farasat)

Advocate for the Petitioner