Before Sandeep Moudgil, J.

JUDGEBIR SINGH @JAJBIR SINGH SAMRA @ JASBIR AND OTHERS—*Appellants*

versus

NATIONAL INVESTIGATION AGENCY, NEW DELHI—*Respondent*

CRA-D No. 47 of 2021

April 26, 2022

Code of Criminal Procedure, 1973— S. 167(2) — Unlawful Activities (Prevention)Act, 1967— S. 43(D)— Plea for bail under S.167(2)Cr.P.C.filed on 14.12.2020 on account of non- filing of challan— Challan presented to Court on 15.11.2019— Due sanction from competent authority under Explosives Substances Act as granted in 10.11.2020 also submitted to Court— Thus as on 14.12.2020 it cannot be said that challan was incomplete or without any sanction under Explosives Substances Act —Hence, no grant of default bail.

Held, that no doubt, on perusal of the judgments on which reliance has been placed by the counsel for the appellants, there is a right which accrue to an accused for grant of default bail in case of non-submission of challan before the competent Court within stipulated time under statute. A plea has been taken that without the sanction of the competent authority, a challan having been presented, the same would not be a proper challan, rather it is no challan in the eyes of law. The said plea on the first blush may appear to be attractive but when seen in the light of the legal position as held in Gursewak Singh's case (supra) as reproduced above as also in the facts and circumstances of the present case, the said plea as has been raised would be misplaced.

Further held, that The facts as are apparent from records would indicate that challan has been presented to the Court of Sub Divisional Judicial Magistrate, Ajnala, on 15.11.2019 and due sanction from the competent authority under the Explosive Substances Act as granted on 10.11.2020 was also submitted to the Court. It would not be out of way to mention here that till the presentation of the challan before the said Court on 15.11.2019, no decision had been taken by the Central Government that these cases warranted investigation by NIA and there was no reason for the same. This, we say in the light of the fact that the

Bomb Disposal Squad, PAP Jalandhar, Punjab, which had seized two hand grenades, disposed them off and extracted material of these hand grenades was forwarded to FSL, Mohali for forensic examination/expert opinion. This opinion came on 29.11.2019, according to which these hand grenades were made by Pakistan Armed Forces containing Pentaerythritol Tetranitrate, which is a high explosive. No doubt, it did not bear any marking on its body but the conclusion of the experts pointed out towards not only national but international ramifications also. It is in pursuance to this report of the experts of FSL, Mohali, that Union of India stepped in and a decision was taken by it that these cases warrant investigation by NIA. It is thereafter that an order was passed on 20.01.2020 leading to re-registration of the original cases and taking over of the investigation of these cases by NIA on 20.02.2020. In the light of the above, it cannot be said that at the time of submission of the report under Section 173 Cr.P.C., sanction of competent authority was not available along with the challan.

(Para 7)

Further held, that in the light of the above facts, the plea of the counsel for the appellants cannot be accepted as the sanction dated 10.11.2020 under the Explosives Act was very much available at the time of filing of the application under Section 167 (2) Cr.P.C. We need to add here that the application for bail under Section 167 (2) Cr.P.C. was preferred only on 14.12.2020 and not prior thereto. Since on the date of exercise of the right as conferred under Section 167 (2) Cr.P.C. by way of moving an application on 14.12.2020 by the appellant, for default bail, it cannot be said that the challan was incomplete or without any sanction under the Explosive Substances Act.

(Para 8)

Bhanu Pratap Singh, Advocate, *for the appellants.*

Sukhdeep Singh Sandhu, Advocate, for the respondent.

AUGUSTINE GEORGE MASIH, J.

(1) This appeal has been preferred challenging the order dated 17.12.2020 passed by the Special Judge, NIA, Punjab, S.A.S. Nagar (Mohali), whereby an application for grant of default bail under Section 167 (2) of the Code of Criminal Procedure (hereinafter referred to as 'the Cr.P.C.') read with Section 43 (D) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'the UAP Act'), in NIA Case No.RC.07/2020/NIA/DLI dated 22.02.2020, stands

dismissed.

(2) The basic contention of learned counsel for the appellants is that the maximum period which could have been claimed by the prosecution for submitting a complete report under Section 173 Cr.P.C. thereby enabling the Court to take cognizance of the offence i.e. 180 days having already lapsed, with there being no sanction under Section 45 of the UAP Act or under Section 7 of Explosive Substances Act, the appellants would be entitled to the benefit of Section 167 (2) Cr.P.C. read with Section 43-D of the UAP Act as incomplete charge-sheet has been filed by Punjab Police on 15.11.2019. He contends that it being an incomplete report, the Court cannot take cognizance of any offence and thus the impugned order passed by the learned trial Court cannot sustain and deserves to be set aside holding the appellants entitled to grant ofdefault bail under Section 167 (2) Cr.P.C. Counsel for the appellants has placed reliance upon the judgment of this Court in ***Satish Kumar*** *versus* ***State of Punjab and another***[1], where a Division Bench of this Court has concluded that the right to default bail is not merely a statutory right but is a part of the procedure established by law under Article 21 of the Constitution of India and, therefore, the same is indefeasible right of grant of bail under Section 167 (2) Cr.P.C. Reliance has also been placed upon the judgments of Hon'ble Supreme Court in Criminal Appeal No.319 of 2021 (arising out of SLP (Crl.) No.6181/2020) titled as ***Fakhrey Alam*** *versus* ***The State of Uttar Pradesh,*** decided on 15.03.2021 as also in Criminal Appeal No.699 of 2020 (Arising out of S.L.P. (Criminal) No.2333 of 2020) ***M. Ravindran*** *versus* ***The Intelligence Officer, Directorate of Revenue Intelligence,*** decided on 26.10.2020. Counsel for the appellants, on this basis, submits that the appellants are entitled to be released on bail.

(3) On the other hand, learned counsel for the National Investigating Agency (hereinafter referred to as 'the NIA'), submits that in the present case, challan was presented on 15.11.2019. Prior to the submission of the challan, sanction under the Explosive Substances Act was granted on 10.11.2020. On the date of filing of the challan, sufficient material was available and finding a *prima facie* case, the challan was initially presented before the Sub Divisional Judicial Magistrate, Ajnala, which was thereafter committed and the cognizance on the charge-sheet was taken by the Additional District and Sessions Judge, Amritsar (Special Court).

[1] 2021 (3) R.C.R. (Crl.) 115 (DB)

During investigation, two hand grenades which were seized were disposed off by Bomb Disposal Squad, PAP, Jalandhar, Punjab. These extracted material of the hand grenades was forwarded to the Forensic Science Laboratory, Mohali, for forensic examination and expert opinion, which was obtained on 29.11.2019. Expert opined that these hand grenades were manufactured by the Pakistani Armed Forces, however, it does not bear any marking on its body. The extracted yellow colouredsubstance is Pentaerythritol Tetranitrate (PETN), which is highly explosive. Since the offence under the UAP Act is a schedule offence under NIA Act, seeing the gravity of the offence which had national and international ramifications, it was decided by the Central Government that these cases warrant investigation by the NIA. As per the directions of Government of India, Ministry of Home Affairs issued vide order dated 20.01.2020, investigation was taken over by NIA of FIR No.75 dated 31.05.2019 at Police Station Tarsikka by re-registering case as RC-03/2020/NIA/DLI under Sections 13 and 17 of UAP Act and Section 21 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1885 on 22.01.2020. The NIA took over the investigation of the case in question qua FIR No.90 dated 02.06.2019, Police Station Raja Sansi, Amritsar (Rural) by re-registering case as RC-07/2020/NIA/DLI dated 22.02.2020 under Sections 4 and 5 of the Explosive Substances Act and Sections 17, 18, 18B and 20 of UPA Act read with Section 120B of the Indian Penal Code. Sanction under the Explosive Substances Act had been granted by the competent authority on 10.11.2020 and the charge-sheet had already been filed well within time on 15.11.2019 by the Punjab Police and further investigation is in progress by NIA.

(4) Learned counsel for the respondent has submitted that on the date of submission of the charge-sheet/report under Section 173 Cr.P.C., decision had not yet been taken by the Central Government for entrusting the investigation to the NIA under the NIA Act. He, therefore, contends that it cannot be said that there was no proper sanction at the time, when the application under Section 167 (2) Cr.P.C. was filed by the appellants on 14.12.2020. Counsel contends that the sanction under the UAP Act has also been submitted to the Court on 06.01.2021. Emphasis has also been placed upon Section 43 (D) of UAP Act to contend that there is no absolute right under Section 167 (2) Cr.P.C. as it is the discretion of the Court on perusalof the reports made under Section 173 Cr.P.C. to come to an opinion that there are reasonable grounds to contemplate that the accusation against such person is *prima facie* true. Prayer has thus been made for dismissal of

the present appeal.

(5) We have heard the submissions made by the counsel for the parties and with their able assistance, have gone through the pleadings as also the judgments on which reliance has been placed by the counsel.

(6) We have dealt with the right of an accused for grant of default bail under Section 167 (2) Cr.P.C. in similar facts as involved in the case in hand i.e. *CRA-D No.415 of 2021* titled as ***Gursewak Singh*** *versus* ***State of Punjab,*** pronounced today, where it has been held in paras 11 and 12 as follows:-

> 11. The judgments of the Hon'ble Supreme Court on which reliance has been placed by the counsel for the appellant are cases where the accused had exercised his right under Section 167 (2) Cr.P.C. prior to the submission of the challan before the competent authority/Court. The proposition, therefore, as laid down in those judgments cannot be disputed. The basic judgment on which the counsel for the appellant has placed reliance is that of Bikramjit Singh's case (supra), where the Hon'ble Supreme Court had referred to the various judgments which have been passed by the Hon'ble Supreme Court and thereafter proceeded to decide the said case on the basis of the facts and circumstances of the case. What has been concluded by the Hon'ble Supreme Court in the said judgment finds mention in para 28 thereof, which reads as follows:-
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> "28. XXXX XXXX XXXX
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> XXXX XXXX XXXX
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> A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days(which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to themaximum period of 180 days, default bail, being an indefeasible right of the accused under the

first proviso to Section 167(2), kicks in and must be granted."

This judgment has been referred to in the subsequent judgment passed by the Hon'ble Supreme Court in Naser Bin Abu Bakar Yafai's case (supra), where reference was made to the judgment of a three Judge Bench in **M. Ravindran Versus The Intelligence Officer, Directorate of Revenue Intelligence 2021 (2) SCC 485**, wherein while dealing with Section 167 (2) Cr.P.C., the Hon'ble Supreme Court had concluded as follows:-

"25. Therefore, in conclusion:

Once the accused files an application for bail under the proviso to Section 167(2) he is deemed to have "availed of" or enforced his right to be released on default bail, accruing after expiry of the stipulated time-limit for investigation. Thus, if the accused applies for bail under Section 167(2) CrPC read with Section 36-A(4), NDPS Act upon expiry of 180 days or the extended period, as the case maybe, the court must release him on bail forthwith without any unnecessary delay after getting necessary information from the Public Prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail incase of default by the investigating agency.

The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher court.

However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, additional complaintor a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be,

though the accused may still be released on bail under other provisions of the CrPC.

Notwithstanding the order of default bail passed by the court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the court, his continued detention in custody is valid."

12. These judgments have received approval of the Hon'ble Supreme Court and a perusal thereof would show that an accused is entitled to the benefit of Section 167 (2) Cr.P.C. provided he had applied for default bail and has exercised his right when it accrued to him. In case the accused fails to apply for release on default bail and subsequently a charge-sheet, additional complaint or a report seeking extension of time is submitted in Court, the right of default bail would be extinguished. This obviously mean that the report submitted under Section 173 Cr.P.C. to the competent Court having jurisdiction to try the said offence had proper approval from the competent Government/authority as mandated under the statutory provisions on the date when the application for grant of default bail has been submitted. In this situation, the right which might have been available to an accused earlier would stand extinguished the moment the challan is complete with required sanction(s)."

(7) No doubt, on perusal of the judgments on which reliance has been placed by the counsel for the appellants, there is a right which accrue to an accused for grant of default bail in case of non-submission of challan before the competent Court within stipulated time under statute. A plea has been taken that without the sanction of the competent authority, a challan having been presented, the same would not be a proper challan, rather it is no challan in the eyes of law. The said plea on the first blush may appear to be attractive but when seen in the light of the legal position as held in Gursewak Singh's case (supra) as reproduced above as also in the facts and circumstances of the present case, the said plea as has been raised would be misplaced.

The facts as are apparent from records would indicate that

challan has been presented to the Court of Sub Divisional Judicial Magistrate, Ajnala, on 15.11.2019 and due sanction from the competent authority under the Explosive Substances Act as granted on 10.11.2020 was also submitted to the Court. It would not be out of way to mention here that till the presentation of the challan before the said Court on 15.11.2019, no decision had been taken by the Central Government that these cases warranted investigation by NIA and there was no reason for the same. This, we say in the light of the fact that the Bomb Disposal Squad, PAP Jalandhar, Punjab, which had seized two hand grenades, disposed them off and extracted material of these hand grenades was forwarded to FSL, Mohali for forensic examination/expert opinion. This opinion came on 29.11.2019, according to which these hand grenades were made by Pakistan Armed Forces containing Pentaerythritol Tetranitrate, which is a high explosive. No doubt, it did not bear any marking on its body but the conclusion of the experts pointed out towards not only national but international ramifications also. It is in pursuance to this report of the experts of FSL, Mohali, that Union of India stepped in and a decision was taken by it that these cases warrant investigation by NIA. It is thereafter that an order was passed on 20.01.2020 leading to re-registration of the original cases and taking over of the investigation of these cases by NIA on 20.02.2020. In the light of the above, it cannot be said that at the time of submission of the report under Section 173 Cr.P.C., sanction of competent authority was not available along with the challan.

(8) In the light of the above facts, the plea of the counsel for the appellants cannot be accepted as the sanction dated 10.11.2020 under the Explosives Act was very much available at the time of filing of the application under Section 167 (2) Cr.P.C. We need to add here that the application for bail under Section 167 (2) Cr.P.C. was preferred only on 14.12.2020 and not prior thereto. Since on the date of exercise of the right as conferred under Section 167 (2) Cr.P.C. by way of moving an application on 14.12.2020 by the appellant, for default bail, it cannot be said that the challan was incomplete or without any sanction under the Explosive Substances Act.

(9) Thus finding no merit in the present appeal, the same stands dismissed.

(10) In the light of the dismissal of the appeal, CRM No.20607 of 2021 stands disposed of as infructuous.

Ritambhra Rishi