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## Fundamental Right & Right of Default Bail of Life and current challenges

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### Abstract

Bail is a rule and jail is an exception. Much importance has been attached to the right to life and personal liberty provided under article 21 of the constitution. This article provides that “No person shall be deprived of his right to life and personal liberty except according to the procedure established by law.”<sup>2</sup> When any person is arrested for committing any offence, he may be released on bail either as a matter of right or as a matter of rule. The accused has right to be released on bail if he has committed bailable offence and he can be granted bail in non-bailable offence on the discretion of the court if he complies with the conditions imposed by the court.<sup>3</sup> Apart from the right to bail in bailable and non-bailable cases, the accused has right to default bail. Right to default bail is not a mere statutory right but a fundamental right under article 21 of the Constitution if the conditions provided under the proviso of section 167 (2) are fulfilled.<sup>4</sup> The mechanism regarding default bail under section 167(2) of Cr.p.c. is discussed in this paper.

### Introduction

Amongst all the fundamental rights provided by the Constitution, the right to life and personal liberty is having a great significance. Highest priority has been given to the right to life by providing under Article 21 of the Constitution that no person shall be deprived of his right to life and liberty except according to the procedure established by law and the procedure by which the liberty of any person can be taken away is provided in the Code of Criminal Procedure, 1973. Section 41 provides that any person can be arrested by a police officer without warrant and without the order of a Magistrate if who commits the cognizable offence in the presence of the police officer or against whom the information has been received that he has committed an offence which punishable with imprisonment for more than 7 years, however, any person can be arrested by the police officer for the commission of non-cognizable offence when the person on demand

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<sup>2</sup> Article 21 of the constitution.

<sup>3</sup> Section 436 and 437 of Code of Criminal Procedure, 1973.

<sup>4</sup>Hon'ble S.C. in *Bikramjit Singh v. State of Punjab*, 2020

by the police officer refused to give his name and residence or if he gives false information regarding his name and residence. When any person as mentioned above is arrested may be released on bail by the order of the Magistrate if the offence is bailable or on the such conditions as may be imposed by the court if the offence is non-bailable one but not punishable with life or imprisonment for life except in certain circumstances. The accused has also right to default bail if the investigation has not completed within the time mentioned under section 167 of Cr.p.c.<sup>5</sup>

## 1. Default Bail

The term default bail is nowhere defined in the code, however, reference can be taken from the term bail. According to the Black's law dictionary, the term bail means release of a person on fulfilling some conditions imposed upon him by the authority. Default bail is the release of the person accused of any offence due to default of the investigating agency in completion of the investigation within time however no time limit has been given for completion of investigation except under section 173 (1A) in which it is provided that the investigation in relation to rape of child may be completed within three months when the information of the offence was recorded. What is provided in the code is only that every investigation shall be completed without unnecessary delay<sup>6</sup>. Section 57 provides that any person who is arrested without warrant cannot be detained custody beyond the period of 24 hours except with the order of the Magistrate under section 167<sup>7</sup>. Section 167 provides that when the investigation can't be completed within 24 hours and the person arrested is forwarded by the police to the Magistrate, the Magistrate may authorize his detention if necessary either in police custody or in judicial custody but not exceeding the period of 90 days when the offence punishable with life or life imprisonment or imprisonment less than 10 years and not exceeding 60 days in any other offence. If the investigation is not completed within 90 or 60 days respectively, the right of default bail in favour of the accused arises.

### 1.1 Provision regarding Default Bail

The provision regarding default bail has been given under the proviso (a) of section 167(2). The proviso (a) to section 167 (2) provides that the Magistrate may authorize the detention of the accused person otherwise than the police custody beyond the period of 15 days but not exceeding the period of :

- (a) 90 days where the investigation relates to an offence punishable with life, imprisonment for life or imprisonment for more than 10 years.
- (b) 60 days where the investigation relates to any other matter.

<sup>5</sup> Section 57, Code of Criminal Procedure, 1973

<sup>6</sup> Section 17 (1), Code of Criminal Procedure, 1973

<sup>7</sup> Section 167, Code of Criminal Procedure, 1973.

If on the expiry of the period of 90 or 60 days, the investigation has not been completed then the accused shall be released on bail if the accused is ready to furnish bail, however, the court can impose such conditions while granting bail as the court deems necessary.

## **2. Where Default Bail shall lie**

Although the offences may be triable by different courts but as per the provisions of section 190 of Cr.p.c., no court except the Magistrate of 1<sup>st</sup> class and of IIInd class specially empowered shall take cognizance of the offence. After taking cognizance of offence either on any complaint or police report or suomoto, the court finds that the offence is such which is exclusively triable by the Court of Session, the court shall commit the case to such court. As it is the court of Magistrate of 1<sup>st</sup> class and of IIInd class specially empowered who shall take cognizance of the offence and exercise all the powers to remand the accused in police or judicial custody during the pendency of investigation, these courts have only the power to grant default bail under section 167 (2) proviso (a).

## **3. When the accused can avail his right to default bail**

When any person is arrested without warrant, police is bound to produce him before the Magistrate if the investigation is not completed within 24 hours<sup>8</sup> and further to complete the investigation without unnecessary delay<sup>9</sup>. Although no time limit has been prescribed in the code with in which the investigation is required to be completed except the cases relating to child rape as per the provision of section 173 (1A), however, it is provided under the proviso (a) of section 167 (2) Cr.p.c. that if investigation is not completed within 90 or 60 days as the case may be, the accused person shall be released on bail if he prepared and does furnish the bail. It is therefore the date of completion of period of 90 days or 60 days as the case may be when the right of default bail accrues in favour of the accused.

Although on plain reading of the provision of section 167, it is clear that the accused has fundamental right to be released on bail after the completion of period of 90 days or 60 days in default of non-completion of investigation but in some situations the problem arises as to whether the right has accrued in favour of the accused or not. Firstly when the investigation the investigation report comes after the expiry of 60 days or 90 days as the case may be but on the same day when the accused files an application for grant of default bail. In such a situation, the right of the accused shall not extinguish. Once the right has accrued, an indefeasible right accrues and submitting the investigation report by the investigating agency will not debar the accused from availing his right of default bail.

<sup>8</sup> Section 57, Code of Criminal Procedure, 1973

<sup>9</sup> Section 173 (1), Code of Criminal Procedure, 1973.

Another problem arises when the though the right of default bail has accrued in favour of the accused but he does not apply for the same. In such a situation it is made clear under section 167<sup>10</sup> that the accused shall not be released from the detention so long as he does not furnish the bail, however, no written application is necessary and oral submission would be sufficient for availing the right under section 167<sup>11</sup>.

The problem also arises when the accused person diligently avails his right of default bail and files an application regarding the same but the application has been rejected and the accused files the application before the appellate court and during the pendency of application, the charge sheet has been filled, then whether the accused shall loss his right or not. In this situation the accused shall not his right of default bail<sup>12</sup> because the petition to appellate court is nothing but the continuation of the proceeding before the superior court.

### 3.1 Computation of period

The bench of three judges of R. F. Aariman, Navin Sinha and K.M. Joseph justices in the case of Bikramjitsingh<sup>13</sup> has held that right default bail is not merely a statutory right but it is a part of the procedure under the Code of Criminal Procedure. Article 21 of the Constitution provides that no person shall be deprived of his right to personal liberty except according to the procedure established by law. It is therefore a fundamental right of the accused to be released on bail once the conditions of the proviso of section 167 (2) are fulfilled and the accused person must not be detained in prison after the expiry of period of 60 days or 90 days as the case may be.

### 3.2 Commencement of period

Section 167 (2) of Cr.p.c. provides that when any accused person is forwarded before the Magistrate, the Magistrate may authorize his detention in police custody for maximum period of 15 days and in judicial custody for a period of 90 days or 60 days including the period of police custody. But one important question here is when the period of 90 or 60 days commences. The question in this regard was decided by Bombay High Court in the criminal appeal of **Gautam Navlakha vs. NIA, Maharashtra**<sup>14</sup>. In brief the appellant was a civil right activist and journalist in Delhi. The appellant was arrested at his residence at Delhi by the police of Pune in under an FIR registered on 08.01.2018 under section 121, 121-A, 124-A, 153-A, 505 (1) (b), 117, 120-B and section 34 of IPC and sections 13, 16, 17, 18, 18-B, 20, 38, 40 of UAP Act. The appellant was produced before the court of Chief Metropolitan Magistrate in Delhi and the court granted two days transit remand to the police. The appellant filed writ petition of Habeas Corpus before Delhi High Court and the High court stayed the appellant's transit remand and ordered for house arrest of the appellant on 28.08.2018.

<sup>10</sup>Explanation I to section 167 (2), Code of Criminal Procedure, 1973

<sup>11</sup>Rakesh Kr. Paul vs. State of Assam, 2017, S.C.

<sup>12</sup>Rakesh Kr. Paul vs. State of Assam, 2017, SC.

<sup>13</sup>Bikramjit Singh vs. State of Punjab, SC, 2020

<sup>14</sup> AIR, 2021, Bombay High Court,

on next day while deciding the writ petition in RomilaThapar vs. Union Of India, Hon'ble Supreme Court extended the house arrest under the guard of Delhi police and police that came to arrest the appellant up to 28.09.2018 when the petition was finally disposed and by pronouncing its judgment gave the appellant to take necessary steps for appropriate legal remedies. The appellant spent 34 days in house arrest. The appellant filed writ petition for quashing the FIR registered in Pune against him on 13.09.2019 in Delhi High Court but the petition was dismissed. The appellant came before the Apex court through Special Leave to Appeal and the appeal was allowed by the court and granted 4 weeks protection from arrest with the right to file anticipatory bail etc to proper court. The appellant filed anticipatory bail application before the session court of pune which was rejected on 14.02.2020. The appellant then approached before the Hon'ble Supreme Court and the court directed him to surrender within 3 weeks time which was later on extended to 4 weeks before the NIA, Mumbai. The appellant contended that he can't travel due to Covid-19 pandemic and surrendered before NIA Delhi in compliance with order of Apex court on 15.04.2020. The appellant was remanded to police custody for 7 days which expired on 21.04.2020 and thereafter in judicial custody by the NIA Special court Mumbai on 25.04.2020. The charge sheet was not filed up to 11.06.2020. On next day, the appellant applied for default bail as per the provisions of section 167 (2). The learned senior counsel on behalf of the appellant contended that the period of 34 days when the appellant was in house arrest should be counted while computing the period of 90 days because the house arrest was with the order of the court and should be considered as judicial custody. The Special court rejected the application stating that the term custody means the custody (police or judicial) authorized by the order of the court in which the investigating officer shall have full access to the accused for interrogation. Therefore the said period of 90 days can't be included while computing the period. The order of special court was also upheld by the High court of Mumbai.

#### 4. Judicial Approach

The Apex court has from time to time through its judgment has provided protection to various rights of the accused and declared the right of accused for default bail as fundamental right.

In **Rakesh Kumar Paul vs. State of Assam**<sup>15</sup>, the Apex court held that the right to default bail is an absolute and indefeasible right of the accused. In the present case, the accused was charged for an offence under section 13 (1) of Prevention of Corruption Act. The said offence was punishable for the punishment which is not less than 4 years but which may extend to 10 years. The charge sheet was not filled within 60 days and even after the expiry of 60 days. The accused filled an application for default bail which was rejected on the ground that the accused may be sentenced with the imprisonment up to 10 years, therefore the time period for filling the charge sheet may be extended up to 90 days. The decision of lower court was upheld by appellate courts also against which the accused/petitioner came before the Apex court through special leave to appeal. The Apex court viewed that the accused has fulfilled the requirements for default bail under section 167 (2)

<sup>15</sup> AIR, 2017, S.C.



Cr.p.c. The stated that the period of 90 days detention is for the offences which are punishable with life or imprisonment for life or imprisonment for more than 10 years. The offences which not punishable with less than 10 years imprisonment has an absolute right to be released on bail in default of investigation being not completed within 60 days.

in an another important case Delhi High Court also passed and order in favour of the accused/petitioner in the case of **Arvind Kumar Saxena vs. State**<sup>16</sup> stating that where the investigation is not completed within 90 days and the charge sheet is not submitted even on the date of filling the application for default bail, the accused can't be denied of his indefeasible right for default bail.

In its landmark judgment in criminal appeal of **Bikramjit Singh vs. State of Punjab**<sup>17</sup> decided on October 10, 2020, Apex court declared the right to default bail as the fundamental right of the accused. In this case the appellant/accused was arrested for commission of offence under section 302, 07, 452, 427, 341 and 34 of IPC and section 25 of Arms Act, section 3,4,5,6 of Explosive substances Act and section 13 of Unlawful Activities Prevention Act, 1967 and remanded to custody 22.11.2018. The period of 90 days for filling the charge sheet was expired on 21.02.2019. An application for default bail was made before the court of Sub-Divisional Judicial Magistrate but the same was dismissed on 25.02.2019 stating that the Learned Magistrate has extended the time for filling the challan from 90 days to 180 days under section 167 of Cr.p.c. as amended by the UAPA, 1967 according to the provisions of which the charge sheet can be filled within 180 days. Against the dismissal order the appellant filed revision on 25.03.2019 and on next day the charge sheet was filled on 26.03.2019. Considering the dates for filling the revision and charge sheet, the appellate court also dismissed the petition against the order of which the Special Leave to appeal was filed by the appellant. While deciding the matter the Apex court held that the Unlawful Activities Prevention Act is a special Act and only the Court of Session or Additional Session Judge has the jurisdiction to try the offence including the power to extend the time period of investigation from 90 days to 180 days. The magistrate has no such power in this act. Further the Revisional court was wrong in stating that once the charge sheet has been filled, the application for default bail can't be allowed although the right has accrued in favour of the accused. The Apex court held that once the conditions of proviso of section 167 (2) are fulfilled, the right of the accused becomes fundamental and the same can't be defeated by subsequent filling of charge sheet but before making the application.

Another landmark judgment of the Hon'ble Supreme Court making the provision under section 167 (2) is in the matter of **Fakhrey Alam vs. State of U.P.**<sup>18</sup> In this case an FIR was registered under section 420, 467, 468, 471 and 120-B of IPC, section 3, 25, 30 of Arms Act and section 18 of UAPA act, 1967. The appellant was arrested on 08.03.2017 and detained in the custody. The learned Chief Judicial Magistrate before the

<sup>16</sup> AIR, 2018, Delhi High Court

<sup>17</sup> AIR, 2020, S.C.

<sup>18</sup> AIR, 2021, S.C.

expiration of period of 90 days granted a total period of 180 days for filling the charge sheet in both IPC and UAP Act which expired on 07.09.2017. Although the charge sheet for the offences under IPC was filled on 04.09.2017 but the challan under UAPA Act was not filled within 180 days period. The appellant filed an application for default bail under the proviso (a) of section 167 (2) but the same was rejected by the Court of Chief Judicial Magistrate on the ground that the challan under UAPA Act is only a supplementary challan and main charge sheet has already been filled. The revision petition was also dismissed by the High Court and the appellant came before the Apex court through special leave to appeal. The Apex court while deciding the appeal held that it has already been decided in *Bikramjit Case*<sup>19</sup> that the right to default bail under the proviso (a) of section 167 (2) is not merely a statutory right but a fundamental right. The Apex court further stated that the Court of Magistrate has no power to grant the period of 180 days for filling the charge sheet because the Magistrate has no jurisdiction on the matters under UAPA Act. Only the special courts have power in this act. Therefore the appellant is entitled to default bail under section 167 (2) proviso (a) of Cr.p.c.

## Conclusion

It is a fundamental right that no person shall be deprived of his right to life and liberty except according to the procedure established by the law. The procedure by which the liberty of any person can be taken away is provided in substantive criminal law and criminal procedure laws which provide that if any person commits crime he shall be arrested and detain in custody for trial. At one side where the law authorize the police to arrest and detain the accused person in custody, at other side it is also provided that if the investigating agency fails to submit its report within the time prescribed under the proviso (a) of section 167 (2) of Cr.p.c. It is established fundamental right of the accused person that he will not suffer due to the failure of investigating agency to perform its duty in time. Hon'ble Supreme Court in various landmark judgments granted and protected the right of default bail of the accused. Right not to be detained in custody without sufficient reason is statutory as well as fundamental right that will always be protected by law and the Court. That the accused of any offence shall be subject to imprisonment if he has been once declared as culprit of the offence vide granting the sentence and therefore, until he has been declared so there shall be no use to put him in the custody un-necessarily and side by side he is to be rendered with so much liberty to contest his defense before the court for which he has to hire a sufficient Advocacy for himself. In the daily practice in the courts of law as well, the court if the Accused irrespective of the culpability of the accused if he satisfies the court with respect to the terms and conditions for granting the bail and of the bail bonds off-course, the court of law grants the bail to the accused since it shall be fruitless to the legislature, to the society and to the nation collectively to bar on fundamental Right to life, of the accused, since if he is guilty he shall be put into the imprisonment conclusively.

<sup>19</sup>*Bikaramjit Singh Vs. State of Punjab*, AIR, 2020. S.C.