A UDAY MOHANLAL ACHARYA

v.

STATE OF MAHARASHTRA

MARCH, 29, 2001

B [G.B. PATTANAIK, U.C. BANERJEE AND B.N. AGRAWAL, JJ.]

Code of Criminal Procedure, 1973 :

Section 167(2), Proviso—Detention of an accused—Maximum period—
C *Prescription of—Challan not filed within the stipulated time—Consequence of—Held, an indefeasible right to be released on bail accrues to the accused—Such indefeasible right not surviving or remaining enforceable on the challan being filed, if already not availed of—Expression 'if already not availed of'—Meaning of—Held, an accused can be said to have availed of his indefeasible right if he is prepared to and furnish the bail, as directed by the Magistrate—*
D *Filing of challan at this stage will not take away the indefeasible right of the accused—However, if the accused is unable to furnish bail, as directed by the Magistrate, he cannot be, held to have availed of his indefeasible right—During such period if challan is filed, the indefeasible right of the accused would stand extinguished—Sections 56, 57, 154, 167, 173, 209(b), 309(2), 436,*
E *437(5), 439—Constitution of India, 1950—Articles 21, 22(2)—Maharashtra Protection of Interest of Depositors (Financial Establishment) Act, 1999—Sections 3, 13, 14—Indian Penal Code, 1860—Sections 406, 420—Terrorist and Disruptive Activities Act—Section 20(4)(b).*

F **Respondent-State filed a complaint in the Court of Special Judge for prosecution of appellant for the offences under Sections 406 and 420 of the Indian Penal Code read with Section 3 of the Maharashtra Protection of Interest of Depositors (Financial Establishment) Act, 1999. Appellant surrendered before the Special Judge and was remanded to judicial custody. No challan was filed within the statutory period of sixty days. On the very**
G **next day of the completion of the period of sixty days, an application for being released on bail was filed on behalf of the appellant alleging that non-filing of challan within 60 days entitled him to be released on bail under proviso to Section 167(2) of the Code of Criminal Procedure, 1973. The said application was rejected by the Special Judge on the same day on the ground that the provisions of Section 167(2) of the Code of Criminal**
H **Procedure had no application to cases pertaining to the Maharashtra**

Protection of Interest of Depositors (Financial Establishment) Act. Thereafter, appellant preferred a Criminal Application before the High Court which was placed for hearing before a Division Bench. The Division Bench adjourned the matter for conclusion of the arguments. In the meanwhile, challan was filed before the Special Judge. The Division Bench of the High Court held that proviso to Section 167(2) of the Code of Criminal Procedure was applicable even to cases filed for prosecution of an accused for offences under the Maharashtra Protection of Interest of Depositors (Financial Establishment) Act. However, as challan had already been filed, the prayer for bail was rejected. Hence the present appeal.

On behalf of the appellant, it was contended that the legislative mandate conferring right on the accused to be released on bail on the expiry of the period contemplated under Proviso to sub-section (2) of Section 167 Cr.P.C. could not be nullified by keeping the matter pending for passing of an order, allowing the prosecution to file a charge sheet; that the expression 'shall be released on bail' in the said Proviso not only conferred indefeasible right on the accused but also cast duty on the Magistrate since the Magistrate would not be entitled to remand the accused any further, that if an accused had not made any application for being released on bail, notwithstanding the fact, that charge sheet had not been filed within the stipulated period, he would not be entitled to file the same after filing of the challan; that if the accused had filed the application for bail and was prepared to offer and furnish the bail, then subsequent filing of challan would not take away the accrued right of the accused merely because the Magistrate or any other Court had not passed the order, or the accused had not been factually released; and that the passing of an order of bail under Proviso to sub-Section (2) of Section 167 was merely a clerical act of the concerned Magistrate or the Court in implementation of the legislative mandate.

On behalf of the State, it was contended that the indefeasible right accruing to the accused remained enforceable from the time of default till the filing of the challan and did not survive or remain enforceable on the challan being filed; that once a challan was filed, the provisions of Section 167 would have no application and the custody of the accused thereafter was under the orders of the Magistrate where the case was pending; that unless the provision of Section 167 was so construed the hard core criminals would be allowed to be released on bail even if a challan was filed just

A the next day after the completion of the time provided under the Act, and such an interpretation would not sub-serve the interest of the society at large.

Allowing the appeal, the Court

B Held : (Per Pattanaik, J. for himself and Banerjee, J.)

1.1. Under the proviso to sub-Section (2) of Section 167 Cr.P.C., a Magistrate before whom an accused is produced may authorise detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable C with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the ac- D cused is entitled to be released on bail, if he is prepared to and furnish the bail, as directed by the Magistrate. That indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of. [899-F-G]

E *Hitendra Vishnu Thakur & Ors.* v. *State of Maharashtra & Ors.*, [1994] 4 SCC 602; *State through CBI* v. *Mohd. Ashraft Bhat and Another*, [1996] 1 SCC 432; *Dr. Bipin Shantilal Panchal* v. *State of Gujarat*, [1996] 1 SCC 718; *Mohamed Iqbal Madar Sheikh and Others* v. *State of Maharashtra*, [1996] 1 SCC 722 and *Abdul Latif Abdul Wahab Sheikh* v. *B.K. Jha and Another*, F [1987] 2 SCC 22, relied on.

Union of India v. *Thamisharasi & Ors.*, [1995] 4 SCC 190, referred to.

1.2. On expiry of the period specified in paragraph (a) of proviso to sub-Section (2) of Section 167 Cr.P.C. if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be G held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same. To interpret the expression 'availed of' to mean actually being released on bail after furnishing the necessary bail required would defeat the very H purpose of the proviso to Section 167(2) Cr.P.C. and further would make

an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. [895-G-H] A B

Sanjay Dutt v. *State through C.B.I. Bombay (II),* [1994] 5 SCC 410, clarified.

State of M.P. v. *Rustam and Others.,* [1995] Supp. 3 SCC 221, impliedly overruled. C

Babubhai Parshottamdas Patel v. *State of Gujarat,* (1982) Crl.L.J. 284, referred to.

1.3. If the application for consideration of an order of being released on bail under Section 167(2) of the Code of Criminal Procedure is posted before the Court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can be only in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. [898-E-F] D E

A.K. Gopalan v. *The Govt. of India,* [1966] 2 SCR 427, approved. F

Makhan Singh Tarsikka v. *State of Punjab,* [1952] SCR 368 and *Ram Narayan Singh* v. *The State of Delhi and Ors.,* [1953] SCR 652, held inapplicable.

1.4. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in the proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. In such a case, where the accused is unable to furnish bail, as directed by the Magistrate, the continued custody of the accused will not G H

A be unauthorised. Therefore, if during that period the investigation is complete and charge sheet is filed then the so called indefeasible right of the accused would stand extinguished. [900-C]

Per Agrawal, J. (Partly dissenting)

B 1.1. The present case, where the prosecution was for an offence under the Maharashtra Protection of Interest of Depositors (Financial Establishment) Act, 1999 being a case of first impression, the Court concerned was of *bona fide* opinion that the provisions of Section 167(2) Cr.P.C. were not applicable. That view of the Special Judge was reversed C by the High Court, but before it could fully apply its mind, the challan was filed. In this background, the right of the accused to be enlarged on bail under proviso to Section 167(2) of the Code cannot be said to have been 'availed of' in the present case. [910-H]

1.2. Framers of the Code conceived and desired that after expiry of D the period prescribed in proviso to Section 167(2) Cr.P.C., an accused has to be released on bail if no challan is filed because after the expiry of the statutory period prescribed therein, there is no power in Magistrate to remand for further custody. However, by the time the court is considering the exercise of the said right if a challan is filed then the question of grant of E bail has to be considered only with reference to merits of the case under the provisions of the Code relating to grant of bail after filing of the challan. The expression 'availed of' does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If challan is filed before that, then there is no question of enforcing the right, howsoever valuable or F indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised. [905-C; 910-C]

Sanjay Dutt v. *State through CBI Bombay (II)*, [1994] 5 SCC 410, relied on.

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Hitendra Vishnu Thakur & Ors. v. *State of Maharashtra & Ors.*, [1994] 4 SCC 602, referred to.

1.3. If the writ petition filed either under Article 32 or Article 226 of the Constitution, as the case may be, for issuance of a writ of habeas H corpus on the ground that accused was under custody without a valid

order of remand has to be dismissed if during the pendency of such petition a valid order of remand has been passed by the court concerned then the right of an accused claiming relief on the ground that he has a statutory right under proviso to Section 167(2) Cr.P.C. cannot be put on a higher footing than the constitutional right. [907-G-H]

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***Naranjan Singh Nathawan & Ors.* v. *State of Punjab*, AIR (1952) SC 106; *Ram Narayan Singh* v. *The State of Delhi & Ors.*, AIR (1953) SC 277 and *A.K. Gopalan* v. *Government of India*, AIR (1966) SC 816, relied on.**

1.4. In case the court concerned has adopted any dilatory tactics or an attitude to defeat the right of the accused to be released on bail on the ground of default, the accused should immediately move the superior court for appropriate direction. But if the delay is *bona fide* and unintentional and in the meantime challan is filed then such a petition has to be dismissed and it cannot be said that the accused has already availed of the right accruing under proviso to Section 167 of the Code. [910-D-E]

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 394 of 2001.

From the Judgment and Order dated 4.9.2000 of the Bombay High Court in Crl.A. No. 2701 of 2000.

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K.T.S. Tulsi, Ashok M. Saroagi, Subhash Jha, Vijay Kumar, Ms. Sangeeta Kumar, Sanjay Maan and Ms. Kamlesh Jain for the Appellant.

P. Janardhan, Addl. General and S.V. Deshpande for the Respondent.

The Judgments of the Court were delivered by

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PATTANAIK, J. Leave granted.

In this Appeal by grant of Special Leave the question that arises for consideration is when can an accused be said to have availed of his indefeasible right for being released on bail under the Proviso to Section 167(2) of the Code of Criminal Procedure, if a challan is not filed within the period stipulated thereunder. In the case in hand, the accused after surrendering himself in the Court was remanded to judicial custody by order of the Magistrate on 17.6.2000. A case has been instituted against him under Sections 406 and 420 of the Indian Penal Code read with Maharashtra Protection of Interest of Depositors (Financial Establishment) Act, 1999 (for

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A short "MPID Act"). The period of 60 days for filing of charge sheet was completed on 16.8.2000. On the next day i.e. 17.8.2000, an application for being released on bail was filed before the Magistrate alleging that non-filing of challan within 60 days entitles the accused to be released on bail under proviso to Section 167(2) of the Code of Criminal Procedure. The Magistrate
B rejected the prayer on the same day on a conclusion that the provisions of Section 167 (2) Cr.P.C. has no application to cases pertaining to MPID Act. The accused, therefore, preferred a Criminal Application before the Bombay High Court. A learned Single Judge after hearing the contentions raised by the accused and by the State referred the matter to the Division Bench on 23rd August, 2000 and the matter was listed before a Division Bench on 29th
C August, 2000. On that date the Division Bench adjourned the matter for argument to 31st August, 2000 and in the meanwhile a charge sheet was filed before the Trial Judge on 30th August, 2000. The Division Bench of Bombay High Court, on examination of the relevant provisions of the MPID Act, more particularly, Sections 13 and 14 thereof, and relying upon the judgment of
D this Court in *Union of India* v. *Thamisharasi & Ors.*, [1995] 4 Supreme Court Cases 190, *Hitendra Thakur & Ors.* v. *The State of Maharashtra,* [1994] 4 Supreme Court Cases, 602 as well as the Constitution Bench decision in *Sanjay Dutt* v. *State through C.B.I. Bombay (II),* [1994] 5 Supreme Court Cases 410, came to hold that there is no interdiction in the Maharashtra Act of 1999 against the applicability of section 167(2) proviso of the Criminal
E Procedure Code and, therefore, an accused arrested for commission of an offence under Section 3 of the MPID Act is entitled to claim release on bail on expiry of total period specified in Section 167 if the challan is not filed within that period. Having held so, on the entertainability of the claim of the accused invoking provisions of Section 167 of Criminal Procedure Code the
F High Court ultimately refused to grant relief on the ground that by the time the application for bail before the Division Bench came to be considered on 31st August, 2000, a charge sheet had been filed before the Magistrate on 30th August, 2000 and, therefore, the so called enforceable right did not survive or remain enforceable. In coming to the aforesaid conclusion, the
G High Court relied upon the Constitution Bench decision of this Court in *Sanjay Dutt's* case (supra) as well as the case of *State of M.P.* v. *Rustom & Ors.*, [1995] Supp. 3 Supreme Court Cases, 221, and further held that the full Bench decision of Gujarat High Court in *Babubhai Patel's* case (1982) Crl. L.J. 284, is contrary to the decision of the Supreme Court in *Rustom's* case (supra). On dismissal of an application filed by the accused the present appeal
H has been preferred to this Court.

Mr. K.T.S. Tulsi, learned senior counsel appearing for the accused/ appellant contended that the legislative mandate conferring right on the accused to be released on bail on the expiry of the period contemplated under the Proviso to sub-section (2) of Section 167, if the accused is prepared to furnish bail, cannot be nullified by taking recourse to subterfuge and keeping the matter pending for passing of an order, allowing the prosecution to file a charge sheet. According to Mr. Tulsi, the expression "shall be released on bail" in the Proviso to sub-section (2) of Section 167 not only confers indefeasible right on the accused but also casts duty/obligation on the Magistrate, since the Magistrate will not be entitled to remand the accused any further. In this view of the matter, if an accused files an application on the expiry of the period contemplated under the Proviso to sub-section (2) of Section 167 and offers to furnish the bail on being ordered and by the date of filing of the application no charge sheet had been filed by the prosecution then the accused has to be released on bail and the right conferred upon him under the aforesaid provision of the Code must be enforced and subsequent filing of charge sheet will not alter the position. Mr. Tulsi further contended that in paragraph 48 of the judgment in *Sanjay Dutt's* case (supra), when it has been indicated "The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of". would obviously mean, if application for being released on bail had not been made before the filing of challan. In other words, according to Mr. Tulsi if an accused had not made any application for being released on bail, notwithstanding the fact, that charge sheet had not been filed within the stipulated period he will not be entitled to file the same after filing of the challan, but if the accused has filed the application for bail and was prepared to offer and furnish the bail, as required by the Court, then subsequent filing of challan will not take away the accrued right of the accused merely because the Magistrate or any other Court had not passed the order, or the accused had not been factually released. According to Mr. Tulsi if the observations of this Court in *Sanjay Dutt's* case (supra) is interpreted in the manner, as it has been interpreted by the High Court in the impugned judgment then the prosecution can always frustrate the right of the accused accrued in his favour under the Mandates of the Statute by several dialectic tactics or even in contingency, like, absence of the Presiding Officer of the Court or non-availability of the Court to take up application of bail and passing orders thereon. Mr. Tulsi contends that the passing of an order of bail under Proviso to sub-section (2) of Section 167 is merely a clerical act of the concerned

A Magistrate or the Court in implementation of the Legislative Mandate, and at that stage, no adjudication is required to be made and in this view of the Matter the provisions of the Code should be so construed so as not to frustrate the Legislative Mandate but it must be so construed which should be in aid of fulfilling the intention of the legislature. This being the position, Mr. Tulsi contends that the impugned order is wholly erroneous and should be set aside.

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Mr. Janardhan, learned Additional Advocate General, appearing for the State of Maharashtra, on the other hand contended, that in several decisions of this Court including the Constitution Bench decision in *Sanjay Dutt's* case C (supra) it has been unequivocally held that so called indefeasible right accruing to the accused remains enforceable from the time of default till the filing of the challan and does not survive or remain enforceable on the challan being filed. According to Mr. Janardhan, if an accused has not been released on bail and by the time the Court finally considers the application and passes D an order and accused furnishes the bail, challan is filed then the right of being released stands extinguished since once a challan is filed the provisions of Section 167 will have no application and the custody of the accused thereafter is under the orders of the Magistrate where the case is pending. According to the learned counsel for the State, unless the provisions of Section 167 is so construed then hardcore criminals will be allowed to be released on bail E even if a challan is filed just the next day after the completion of the time provided under the Act, and such an interpretation would not subserve the interest of the society at large. Mr. Janardhan further contended, that the dictum of the Constitution Bench in *Sanjay Dutt's* case (supra) has been re-affirmed by a subsequent judgment of the Court in *Rustom's* case (supra) as F well as by a three judge Bench judgment in *Mohammed Iqbal Madar Sheikh & Ors.* v. *State of Maharashtra*, [1996] 1 Supreme Court Cases 722, and therefore the question no longer remains *res integra* and the High Court was fully justified in rejecting the application of the accused.

Before examining the correctness of the rival submissions and find out G as to when the right accrues to the accused for being released on bail under the Proviso to sub-section (2) of Section 167 and when that right gets extinguished, it will be appropriate to notice the very scheme of the Code. Under Section 56 of the Code of Criminal Procedure it is the bounden duty of the police officer arresting a person to produce before a Magistrate having H jurisdiction without unnecessary delay. Under Section 57 of the Code there

is an embargo on the police officer to detain in custody a person arrested beyond 24 hours excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. The object behind the aforesaid two provisions which are required to be read together is that the accused should be brought before a Magistrate without much delay and that the Magistrate will have succinct of the matter within 24 hours. The aforesaid provision in fact is in consonance with the constitutional mandate engrafted under Article 22(2). The continuance of detention for the purpose of investigation beyond 24 hours has to be authorised by the Magistrate from time to time and without such special order from the Magistrate the detention may be illegal. Under Criminal Procedure Code of 1878 a Magistrate was not entitled to allow detention of an accused in custody for a term exceeding 15 days on the whole. It was also found that the investigation could not ordinarily be completed within 15 days. The Law Commission, therefore, suggested that an accused could be denied to remain in custody for more than 60 days which got engrafted in Section 167 of the present Code (Criminal Procedure Code 1973). The Legislature, however, felt that a drastic change was called for to alter the tardy pace of investigation and, therefore, by Criminal Procedure Code (Amendment) Act, 1978, (Act 45 of 1978) Proviso (a) to sub-section 2 of Section 167 has been added. Under the amended provision, therefore a Magistrate is empowered to authorise detention of the accused in custody, pending investigation for an aggregate period of 90 days in cases where the investigation relate to offence punishable with death, imprisonment for life or imprisonment for not less than 10 years or more and in other cases the period of 60 days has been kept. The extended period of 90 days was brought into Criminal Procedure Code by amendment as it was found that in several cases of serious nature it was not possible to conclude the investigation. This provision of Section 167 is in fact supplementary to Section 57, in consonance with the principle that the accused is entitled to demand that justice is not delayed. The object of requiring the accused to be produced before a Magistrate is to enable the Magistrate to that remand is necessary and also to enable the accused to make a representation which he may wish to make. The power under Section 167 is given to detain a person in custody while the police goes on with the investigation and before the Magistrate starts the enquiry. Section 167, therefore, is the provision which authorises the Magistrate permitting detention of an accused in custody and prescribing the maximum period for which such detention could be ordered. Having prescribed the maximum period, as stated above, what would be the consequences thereafter has been indicated in the Proviso to sub-section 2 of

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A Section 167. The Proviso is unambiguous and clear and stipulates that the *accused shall be released on bail if he is prepared to and does furnish the bail* which has been termed by judicial pronouncement to be 'compulsive bail' and such bail would be deemed to be a bail under Chapter XXXIII. The right of an accused to be released on bail after expiry of the maximum period of detention provided under Section 167 can be denied only when an accused B does not furnish bail, as is apparent from Explanation I to the said Section. Proviso to sub-section 2 of Section 167 is a beneficial provision for curing the mischief of indefinitely prolonging the investigation and thereby affecting the liberty of a citizen Section 167 occurs in Chapter XII dealing with the powers of the police to investigate in criminal offence which starts with C lodging of information in cognizable cases under Section 154, and ultimately culminating in submission of report on completion of investigation under Section 173. Soon after completion of investigation the officer in charge of Police Station has to forward to the Magistrate, empowered to take cognizance of the offence, a report in the prescribed form and once such report D is filed before the Magistrate which is commonly termed as "challan" then the custody of the accused is no longer required to be dealt with under Section 167 of the Code, but under Section 209. On submission of Challan under Section 173 in a case instituted on a police report or otherwise, when it appears to the Magistrate that offence is exclusively triable by the Court of Session, the moment the accused is brought before the Magistrate or he E himself appears then the Magistrate commits the case to the Court of Session and subject to the provisions of the Code relating to bail, remand the accused to custody until such commitment has been made. The procedure for commitment to the Court of Sessions, as provided in Section 209 of the present Code is radically different from the commitment proceedings under the 1898 F Code. No enquiry is contemplated by the Magistrate under the present Scheme. All that the Magistrate is required to do is, to grant copies, preparing the records, notify the public prosecutor and formally commit the case to the Court of Sessions. Section 209(b) provides that the Magistrate shall remand the accused to custody subject to the provisions of the Code relating to bail, necessarily, therefore, subject to the provisions in Sections 436, 437 and 439. G Thus, under clause (b) of Section 209 the committing Magistrate has the power to remand the accused to custody during and until the conclusion of the trial, subject to the provisions relating to bail. When the committing Magistrate passes an order of commitment and the accused, at that stage is found to be on bail, the committing Magistrate has the power to cancel the H bail and commit him to custody, if he consider it necessary to do so. But such

a cancellation would be in accordance with sub-section (5) Section 437 of the Code and there must be proper grounds for cancellation and not that the Magistrate would cancel the bail *ipso facto* on challan being filed and accused being produced for the purpose of passing an order of committal. Any order a Magistrate passes under Section 209(b) to remand an accused to custody would also obviously be subject to the provisions of the Code relating to bail. In a case where the committing Magistrate while passing an order of committal remands the accused to custody in exercise of power under Section 209(b), the power of the learned Sessions Judge under sub-section (2) of Section 309 is not whittled down in any manner at any time after commencement of trial, but ordinarily if the committing Magistrate has already passed an order remanding the accused to custody while passing an order of commitment no further order is required to be passed by the Sessions Judge in exercise of power under sub-section (2) of Section 309. Bearing in mind the aforesaid scheme in the Code of Criminal Procedure we would now examine the point in issue.

There cannot be any dispute that on expiry of the period indicated in the proviso to sub-section (2) of Section 167 of the Code of criminal Procedure the accused has to be released on bail, if he is prepared to and does furnish the bail. Even though a Magistrate does not possess any jurisdiction to refuse bail when no charge sheet is filed after expiry of the period stipulated under the proviso to sub-section (2) of Section 167 and even though the accused may be prepared to furnish the bail required, but such furnishing of bail has to be in accordance with the order passed by the Magistrate. In other words, without an order of the Magistrate the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 cannot be given effect to and there lies the rub. The grievance of the accused is that for a variety of reasons the Magistrate or even the superior Court would refuse to pass an order releasing the accused on bail, notwithstanding the pre-conditions required under the proviso are satisfied and then when the accused moves the High Court or the Supreme Court during the interregnum the police files a challan. It was also contended by Mr. Tulsi that a Public Prosecutor may take adjournment from the Court when the bail application was being moved and then would persuade the investigating agency to file a challan and then contend that the Court would not be entitled to release the accused on bail under the proviso to sub-section (2) of Section 167, and in that situation not only the positive command of the legislature is flouted but also an unauthorised period of custody is being legalised and this would be an

A infraction of the constitutional provision within the meaning of Article 22. In *Hitendra Vishnu Thakur* v. *State of Maharashtra*, [1994] 4 Supreme Court Cases 602, two learned Judge of this Court construed the provisions of Section 167 of the Code of Criminal Procedure Code read with sub-section 4 of Section 20 of TADA. After examining in detail the object behind the B enactment of Section 167 of the Code of Criminal Procedure and the object of the Parliament introducing the proviso to sub-section (2) of Section 167 prescribing the outer limit within which the investigation must be completed the Court expressed that the proviso to sub-section (2) of Section 167 read with Section 20(4)(b) of TADA creates an indefeasible right in an accused person on account of the default by the Investigating Agency in the C completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail and such order is generally termed as an "order on default". The Court also held that an obligation is cast upon the Court to inform the accused of his right of being released on bail and enable him to make an application D in that behalf. It was also further held that the accused would be entitled to move an application for being admitted on bail and the Designated Court shall release him on bail if the accused seeks to be so released and furnishes the requisite bail. The Court declined to agree with the contention of the accused that the Magistrate must release the accused on bail on its own motion even without any application from an accused person on E his offering to furnish bail.

In *Sanjay Dutt's* case (supra) the Constitution Bench examined this question also alongwith some other questions and the Constitution Bench explained the meaning of the expression "indefeasible right" of the accused F made in *Hitendra Vishnu Thakur* (supra). It appears that the counsel for the accused in *Sanjay Dutt's* case conceded before the Court that indefeasible right for grant of bail on expiry of the initial period of 180 days for completing the investigation or the extended period prescribed by Section 20 (4)(bb), as held in *Hitendra Vishnu Thakur*, (supra) is a right of the accused which is enforceable only upto the filing of the challan and does not survive G for enforcement on the challan being filed in the Court against him. In fact Mr. Sibbal, learned senior counsel appearing for the accused had submitted, that the decision of the Division Bench in *Hitendra Vishnu Thakur* cannot be read to confer on the accused an indefeasible right to be released on bail under this provision once the challan has been filed if the accused continues H in custody. The Constitution Bench in paragraph 48 stated thus :

"The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See *Naranjan Singh Nathawan* v. *State of Punjab*, [1952] SCR 395, *Ram Narayan Singh* v. *State of Delhi*, [1953] SCR 652 and *A.K. Gopalan* v. *Government of India*, [1966] 2 SCR 427."

The Court then answered in paragraph 53 as under :

"(2)(a) - Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the Code of Criminal Procedure and this is how the requirement of notice to the accused before granting extension beyond the prescribed

A period of 180 days in accordance with the further proviso to clause (bb) of sub-section (4) of Section 20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in *Hitendra Vishnu Thakur*. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

(2)(b) - The "indefeasible right" of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in *Hitendra Vishnu Thakur* is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage."

In *State through CBI* v. *Mohd. Ashraft Bhat and Another*, [1996] 1 Supreme Court Cases 432, The Presiding Officer of the Designated Court granted bail to the accused on a finding that the prosecution had failed to submit the police report within the period prescribed. This Court set aside the order on a conclusion that on the date the Designated Court granted bail to the respondent/accused, the prosecution had already submitted the Police Report and, therefore, as held by the Constitution Bench in *Sanjay Dutt* (supra) the right of the accused stood extinguished.

In *Dr. Bipin Shantilal Panchal v. State of Gujarat*, [1996] 1 Supreme Court Cases 718, a three Judge Bench decision, this Court referred to the

proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure and held that though the aforesaid provisions would apply to an accused under NDPS Act, but since charge sheet had already been filed and the accused is in custody on the basis of orders of remand passed under other provisions of the Code the so called indefeasible right of the accused must be held to have been extinguished, as was held by the Constitution Bench in *Sanjay Dutt* (supra). The Court observed thus :

> "Therefore, if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet, as pointed out in *Aslam Babalal Desai* v. *State of Maharashtra*."

In this case, the accused had not made application for enforcement of his right accruing under proviso to Section 167(2) of the Code. But raised the contention only in the Supreme Court. This Court, therefore, formulated the question thus - Whether the accused who was entitled to be released on bail under proviso to sub-section (2) of Section 167 of the Code, *not having made an application when such right had accrued*, can exercise that right at a later stage of the proceeding, and answered in the negative.

> In yet another case *Mohamed Iqbal Madar Sheikh and Others* v. *State of Maharashtra*, [1996] 1 Supreme Court Cases 722, three Judge Bench considered again proviso (a) to sub-section (2) of Section 167 of the Code and it was held :

> "It need not be pointed out or impressed that in view of a series of judgments of this Court, this right cannot be defeated by any court, if the accused concerned is prepared and does furnish bail bonds to the satisfaction of the court concerned. Any accused released on bail under proviso (a) to Section 167(2) of the Code read with Section 20(4)(b) or Section 20(4)(bb), because of the default on the part of the investigating agency to conclude the investigation, within the period prescribed, in view of proviso (a) to Section 167(2) itself, shall be deemed to have been so released under the provisions of Chapter

A XXXIII of the Code. It cannot be held that an accused charged of any offence, including offences under TADA, if released on bail because of the default in completion of the investigation, then no sooner the charge-sheet is filed, the order granting bail to such accused is to be cancelled. The bail of such accused who has been released, because of the default on the part of the investigating officer to complete the B investigation, can be cancelled, but not only on the ground that after the release, charge-sheet has been submitted against such accused for an offence under TADA. For cancelling the bail, the well-settled principles in respect of cancellation of bail have to be made out. In this connection, reference may be made to the case of *Aslam Babalal* C *Desai* v. *State of Maharashtra*. The majority judgment has held that in view of deeming provision under proviso (a) to Section 167(2), the order granting bail shall be deemed to be one under Section 437(1) or sub-section (2) or Section 439(1) and that order can be cancelled, when a case for cancellation is made out under Sections 437(5) and D 439(2) of the Code. But for that, the sole ground should not be that after the release of such accused the charge-sheet has been submitted. The same view was expressed by this Court in the case of *Raghubir Singh* v. *State of Bihar*."

In that particular case even though charge-sheet had not been submitted E within the prescribed period and was submitted later and the Court observed that the accused had become entitled to be released on bail under the proviso (a) to sub-section (2) of Section 167 of the Code, *but since no application for bail on the said ground had been made by the accused and the charge-sheet in the meantime, having been filed and cognisance having been taken,* F *the said right cannot be exercised.* In paragraph 12 of the said judgment, however, an observation has been made by this Court to the effect

> "If an accused charged with any kind of offence becomes entitled to be released on bail under proviso (a) to Section 167 (2), that statutory right should not be defeated by keeping the applications pending till G the charge-sheets are submitted so that the right which had accrued is extinguished and defeated."

The Court further came to the conclusion that the accused/appellants have forfeited their right to be released on bail under proviso (a) to Section 167(2) as they are in custody on the basis of orders for remand passed under H other provisions of the Code.

In *State of M.P.* v. *Rustam and Others*, [1995] Supp. 3 Supreme Court Cases 221, this Court set aside the order of the High Court where the High Court has released the accused on bail,charge-sheet not having been filed within the period stipulated in Section 167(2) of the Code of Criminal Procedure, as by the time the High Court entertained the bail application challan had already been filed, this Court had observed that the Court is required to examine the availability of the right to compulsive bail on the date it is considering the question of bail and not barely on the date of presentation of the petition for bail. This Court came to the conclusion "on the date when the High Court entertained the petition for bail and granted it to the accused/ respondent, undeniably the challan stood filed in Court and then the right as such was not available. A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and that right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the Court has to be passed. It is also further clear that that indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in *Sanjay Dutt'*case (supra). The crucial question that arises for consideration, therefore, is what is a true meaning of the expression 'if already not availed of' ? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression 'availed of' to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a

A challan has been filed or not. If the expression 'availed of' is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature have given its mandate it would be the bounden duty of the Court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression 'if not availed of' in a manner which is capable of being abused by the prosecution. Two Judge Bench decision of this Court in *State of M.P.* v. *Rustam & Ors.* (supra) setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression 'if already not availed of', used by the Constitution Bench in *Sanjay Dutt* (supra). We would be failing in our duty, if we do not notice the decisions mentioned by the Constitution Bench in *Sanjay Dutt's* case, which decisions according to the learned counsel, appearing for the State, clinches the issue. In *Makhan Singh Tarsikka* v. *State of Punjab*, [1952] S.C.R. 368, an order of detention had been assailed in a petition filed under Article 32, on the ground that the period of detention could not be indicated in the initial order itself, as under the provisions of Preventive Detention Act, 1950, it is only when the Advisory Board reports that there is sufficient cause for detention, the appropriate Government may confirm the detention order and continue the detention of the detenu for such period, as it thinks fit. On a construction of the relevant provisions of the Preventive Detention Act, as it stood then, this Court accepted the contention and came to hold that the fixing of the period of detention in the initial order was contrary to the scheme of the Act and cannot be sustained. We fail to understand as to how this decision is of any assistance for arriving at a just conclusion on the issue, which we are faced in the present case. The next decision is the case of *Ram Narayan Singh* v. *The State of Delhi and Ors.*, [1953] S.C.R. 652. In this case on a habeas corpus petition being filed under Article 32, the Court was examining the legality of the detention on the date, the Court was considering the matter. From the facts of the case, it transpires that there was no material to establish that there was a valid order of remand of the accused. The Court, therefore,

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held that even if the earlier order of remand may be held to be a valid one, but the same having expired and no longer being in force and there being no valid order of remand, the detention was invalid. It is in this context, observation has been made that in a question of habeas corpus, lawfulness or otherwise, custody of the person concerned will have to be examined with reference to the date of the return and not with reference to the institution of the proceedings. There cannot be any dispute with the aforesaid proposition, but in the case in hand, the consequences of default on the part of the investigating officer in not filing the charge-sheet within the prescribed period have been indicated in the provisions of the statute itself and the language is of mandatory character, namely the accused shall be released on bail. In view of the aforesaid language of the proviso to sub-section (2) of Section 167 and in view of the expression used in *Sanjay Dutt's* case to the effect "if not availed of', the aforesaid decision will be of no assistance. The third decision referred to in *Sanjay Dutt's* case is case of *A.K. Gopalan* v. *The Govt. of India*, [1966] 2 S.C.R. 427. This was also a case for issuance of a writ of habeas corpus, filed under Article 32. In this case the Constitution Bench observed - "It is well settled that in dealing with a petition for habeas corpus, the Court has to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between *the date of the application* and *the date of hearing*." In that case, the detenu was detained by orders passed on March 4, 1965 and the earlier order of detention passed on 29th December, 1964 was no longer in force, when the detenu filed the application in the Supreme Court. The Court, therefore observed that it is not necessary to consider the validity of the detention order made on 29th Decemi..r, 1964 and the Court is only concerned with the validity of the order of detention dated 4th March, 1965. The observations made by the Court and the principles enunciated referred to earlier would support our conclusion that the rights whether accrued or not to an accused, will have to be considered on the date, he filed the application for bail and not with reference to any later point of time. In *Abdul Latif Abdul Wahab Sheikh* v. *B.K. Jha and Another*, [1987] 2 SCC 22, final order of detention had been assailed, this Court had observed that in a habeas Corpus proceeding it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with, before the date of hearing and, therefore, the detention should be upheld. The aforesaid observation had been made when there was no Advisory Board in existence to whom a reference could be made and whose report could be obtained, as required by the Constitution. Further the representation filed by the detenu

had not been disposed of within the stipulated period, but an argument had been advanced that by the date of hearing of the petition the representation had been disposed of. This Court did not accept the plea of the State and interfered with the order of detention. In interpreting the expression 'if not availed of' in the manner in which we have just interpreted we are conscious of the fact that accused persons in several serious cases would get themselves released on bail, but that is what the law permits, and that is what the legislature wanted and an indefeasible right to an accused flowing from any legislative provision ought not to be defeated by a Court by giving a strained interpretation of the provisions of the Act. In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail, that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the Statute Book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the Court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished object of the Indian Constitution and deprivation of the same can be only in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody upto a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of challan by the Investigating Agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in the proviso to sub-section (2) of section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the

accused offers to furnish the bail, and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the Court then the right of the accused on being released on bail cannot be frustrated on the oft chance of Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so called indefeasible right of the accused on failure on the part of the prosecution to file challan within the specified period and the interest of the society, at large, in lawfully preventing an accused for being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows :

1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days in the whole.

2. Under the proviso to aforesaid sub-section (2) of section 167, the Magistrate may authorise detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnish the bail, as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the Investigating Agency in completion of the investigation within the specified period, the Magistrate/Court must dispose

A it of forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the Investigating Agency in completing the investigation within the period stipulated.

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5. If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section 2 of Section 167, the continued custody of the accused even beyond the specified C period in paragraph (a) will not be unauthorised, and therefore, if during that period the investigation is complete and charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression 'if not already available of' used by this Court in *Sanjay Dutt's* case (supra) must be understood to mean when the accused files D an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered E the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression 'availed of' if charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, F necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not G stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of H remand to custody subject to the provisions of the Code relating to bail

and subject to the provisions of cancellation of bail, already granted in accordance with law laid down by this Court in the case of *Mohd. Iqbal* v. *State of Maharashtra* (supra).

Having indicated the position of law, as above and applying the same to the facts and circumstances of the present case, it appears that the prescribed period under paragraph (a) of the proviso to sub-section (2) of Section 167 expired on 16.8.2000 and the accused filed an application for being released on bail and offered to furnish the bail on 17.8.2000. The Magistrate, however, erroneously refused the bail prayer on the ground that the proviso to sub-section (2) of Section 167 has no application to case pertaining to MPID Act. The accused then moved the High Court. While the matter was pending before the Division Bench of the High Court, the learned Public Prosecutor took an adjournment and the case was posted to 31st August, 2000 and just the day before the charge-sheet was filed on 30th August, 2000 and thus the indefeasible right of the accused stood frustrated and the High Court refused to release the accused on bail on a conclusion that the accused cannot be said to have availed of his indefeasible right, as held in *Sanjay Dutt's* case (supra) since, he has not yet been released on bail. But in view of our conclusion as to when an accused can be said to have availed of his right, in the case in hand, it has to be held that the accused availed of his right on 17th August, 2000 by filing an application for being released on bail and offering therein to furnish the bail in question. This being the position, the High Court was in error in refusing that right of the accused for being released on bail. We, therefore, direct that the accused should be released on bail on such terms and conditions to the satisfaction of the learned Magistrate, and further the Magistrate would be entitled to deal with the accused in accordance with law and observations made by us in this judgment, since the charge-sheet has already been filed.

In accordance with the majority view, appeal stands allowed.

B.N. AGRAWAL, J. I have perused the judgment of my learned Brother Pattanaik,J., for whom I have the highest regard and while agreeing with him with respect to conclusion nos. 1 to 5, I find myself unable to agree on conclusion no. 6, enumerated hereunder, upon which alone decision of this appeal is dependent, and observations and direction connected therewith:-

> "The expression 'if not already availed of' used by this Court in *Sanjay Dutt* v. *State through CBI Bombay*, (II), (1994) 5 SCC 410, must be understood to mean when the accused files an application and

A is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the
B Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

There was mushroom growth of financial establishments in the State of Maharashtra in the recent past. The sole object of these establishments was
C of grabbing money received as deposits from public, mostly middle class and poor on the promises of unprecedented highly attractive rates of interest or rewards and without any obligation to refund the deposit to the investors on maturity or without any provision for ensuring rendering of the services in kind in return, as assured. Many of these financial establishments had
D defaulted to return the deposits on maturity or to pay interest or render the services in kind, in return, as assured to the public. As such deposits run into crores of rupees it had resulted in great public resentment and uproar, creating law and order problem in the State of Maharashtra, specially in the city like Mumbai. With a view to curb such unscrupulous activities of such financial establishments in the State of Maharashtra, it was found expedient to make
E suitable special legislation in public interest and accordingly Maharashtra Protection of Interest of Depositors (In Financial Establishment) Act, 1999 (hereinafter referred to as 'the MPID Act') was enacted by the Maharashtra Legislature, Section 3 whereof provided that any financial establishment, which fraudulently defaults any repayment of deposit on maturity along
F with any benefit in the form of interest, bonus, profit or in any other form as promised or fraudulently fails to render service as assured against the deposit, every person including the promoter, partner, director, manager or any other person or an employee responsible for the management of or conducting of the business or affairs of such financial establishment shall, on conviction, be punished with imprisonment for a term which may extend to
G six years and with fine which may extend to one lac of rupees and such financial establishment also shall be liable to a fine which may extend to one lac of rupees.

The respondent-State of Maharashtra filed a complaint in the Court of
H the Special Judge, Greater Bombay, bearing C.R. No. 36 of 1999 for

prosecution of the appellant for the offences under Sections 406 and 420 of the Indian Penal Code read with Section 3 of the MPID Act alleging therein that the appellant was carrying on business as a sole proprietor under the name and style of M/s. C.U. Marketing, C.U. Bhawan, S.V. Road, Andheri (W), Mumbai, during the course of which he collected about Rs. 450 crores from around 29000 depositors under a scheme floated by him promising thereunder to return the same on maturity together with highly attractive rates of interest, but failed to refund the same.

The appellant surrendered before the Special Judge and was remanded to judicial custody by order dated 17.6.2000. The period of sixty days as contemplated by proviso to Section 167(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') was completed on 16.8.2000. On the next day, i.e., 17.8.2000 an application for being released on bail was filed on behalf of the appellant before the Special Judge alleging that no challan had been filed within the statutory period of sixty days and as such he was entitled to be released on bail under proviso to Section 167(2) of the Code. The said application was rejected by the Special Judge on the same day saying that the provisions of Section 167(2) of the Code were not applicable to the case on hand as the prosecution was for an offence under Section 3 of the MPID Act as well to which the provisions of Section 167(2) of the Code had no application. Thereafter the appellant preferred an application before the Bombay High Court which was placed for hearing before a Division Bench on 29.8.2000 on which date argument on behalf of the appellant was concluded and the case was adjourned to 31.8.2000 for hearing learned Additional Advocate General representing the State. In the meantime, challan was filed before the Special Judge on 30.8.2000. The High Court by its judgment dated 4.9.2000 came to the conclusion that proviso to Section 167(2) of the Code was applicable even to cases filed for prosecution of an accused for offences under MPID Act, but as the challan had already been filed, in view of the Constitution Bench judgment of this Court in the case of *Sanjay Dutt*, it was not possible to consider the prayer for bail made on behalf of the accused on the ground of non submission of challan within the period prescribed under proviso to Section 167(2) of the Code. The High Court also placed reliance upon other judgments of this Court.

In order to appreciate the point in issue, it would be useful to refer to the provisions of Section 167(2) of the Code which run thus:-

"S.167(2).- The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that -

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

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

(ii) *sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail,* and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

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

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

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention."

[Emphasis added]

It is settled by series of judgments of this Court in the last 25 years that framers of the Code conceived and desired that after expiry of the period prescribed in proviso to Section 167(2) of the Code, an accused has to be released on bail if no challan is filed because after the expiry of the statutory period prescribed therein, there is no power in Magistrate to remand for further custody, but the same proviso prescribes in clause (a)(ii) that 'the accused person shall be released on bail if he is prepared to and does furnish bail'. To be released on bail because of the default of submission of challan within the statutory period is a valuable right of the accused, but the framers of the Code have prescribed a condition in that very proviso referred to above that this right to be released on bail can be exercised only on furnishing of bail. Clause (a)(ii) of proviso to Section 167(2) of the Code not only says that the accused 'is prepared to', but also says that the 'accused does furnish bail' and Explanation I to Section 167(2) of the Code clearly mandates that "notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail". Just to test the scheme of the said provision, can it be conceived that if the accused is prepared to furnish bail but does not furnish the same, even in that eventuality the court concerned shall direct his release from custody only on the ground that the statutory period of filing the challan has expired? Therefore, in my view, for release from custody both the conditions aforesaid, read with the Explanation referred to above, must be fulfilled.

The next question to be considered is as to what will happen in a case where before any order directing release on bail is passed or before the bail bonds are furnished a challan is filed? It is well settled that once challan is filed, no sooner the court concerned applied its mind, cognizance shall be deemed to have been taken. Thereafter the power to remand the accused is under other provisions of the Code, including sub-section (2) of Section 309 thereof. A Constitution Bench of this Court in the case of *Sanjay Dutt* while considering correctness of Division Bench decision of this Court in the case of *Hitendra Vishnu Thakur & Ors.* v. *State of Maharashtra & Ors.*, [1994] 4 SCC 602, laid down the law in paragraphs 48 and 49 of the judgment which

read thus:-

"48. *We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C. ceases to apply.* The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. *It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order.* (See *Naranjan Singh Nathawan* v. *State of Punjab*, AIR (1952) SC 106; *Ram Narayan Singh* v. *State of Delhi*, AIR (1953) SC 277 and *A.K. Gopalan* v. *Government of India*, AIR (1966) SC 816)".

[Emphasis added]

"49. *This is the nature and extent of the right of the accused to be released on bail* under Section 20(4)(bb) of the TADA Act read with Section 167 Cr.P.C. in such a situation. *We clarify the decision of the Division Bench in Hitendra Vishnu Thakur, accordingly, and if it gives a different indication because of the final order made therein, we regret our inability to subscribe to that view*".

[Emphasis added]

On a bare perusal of law enunciated above, it would be clear that the Constitution Bench considered and in unequivocal terms disapproved the ratio of decision in the case of *Hitendra Vishnu Thakur* wherein it was laid down by a Division Bench of this Court that if for any reason the right of the accused to be released on bail under proviso to Section 167(2) of the Code has been denied then it can be exercised at a later stage even if challan is filed after expiry of the statutory period prescribed.

The Constitution Bench in the aforesaid judgment has clearly laid down that the indefeasible right of the accused "is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, *'if not already availed of'*. [Emphasis added]. It has further laid down that custody of the accused after challan has been filed is not governed by the provisions of Section 167 of the Code, but different provisions of the Code. The right of the accused cannot be enforced after the challan is filed 'since it is extinguished the moment challan is filed'. The case of *Sanjay Dutt* also referred to the views expressed by the three earlier Constitution Benches of this Court in connection with writ of habeas corpus on the ground that there was no valid order of remand passed by the court concerned. It has reiterated that a petition seeking writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused has to be dismissed if on the date of the *return of the rule* the custody or detention is on the basis of a valid order. [Emphasis added].

If the writ petition filed either under Article 32 or Article 226 of the Constitution, as the case may be, for issuance of a writ of habeas corpus on the ground that accused was under custody without a valid order of remand has to be dismissed if during the pendency of such a petition a valid order of remand has been passed by the court concerned then the right of an accused claiming relief on the ground that he has a statutory right under proviso to Section 167(2) cannot be put on a higher footing than the

A constitutional right.

Out of the three Constitution Bench decisions of this Court referred to above and relied upon in the case of *Sanjay Dutt*, in the case of *Naranjan Singh Nathawan & Ors.* v. *State of Punjab*, AIR (1952) SC 106, Patanjali Sastri, C.J., as he then was, speaking for himself, M.C.Mahajan, B.K. B Mukherjea, S.R. Das and Chandrasekhara Aiyar, JJ., while considering an application for issuance of writ of habeas corpus whereby order of detention issued under Section 3 of the Preventive Detention Act, 1950 was challenged, laid down the law at page 108 as follows:-

> C "This is undoubtedly true and this Court had occasion in the recent case of *Makhan Singh* v. *State of Punjab*, Petn. No. 308 of 1951: AIR 39 (1952) S.C.27, to observe 'it cannot too often be emphasised that before a person is deprived of his personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person D affected'.
>
> This proposition, however, applied with equal force to cases of preventive detention before the commencement of the Constitution, and it is difficult to see what difference the Constitution makes in regard to the position. Indeed, the position is now made more clear E by the express provisions of S.13 of the Act which provides that a detention order may at any time be revoked or modified and that such revocation shall not bar the making of a fresh detention order under S.3 against the same person. *Once it is conceded that in habeas corpus proceedings the Court is to have regard to the legality or* F *otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold,* in the absence of proof of bad faith, *that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order* wherever possible which is free from defects and duly complies with the requirements of the law in G that behalf."
>
> [Emphasis added]

In another Constitution Bench decision of this Court in the case of *Ram Narayan Singh* v. *The State of Delhi & Ors.*, AIR (1953) SC 277, reliance H whereupon has also been placed in *Sanjay Dutt's* case, again while consid-

ering a petition for issuance of writ of habeas corpus, Patanjali Sastri, C.J. as he then was, noticed with approval, the law already laid down in the case of *Naranjan Singh* (supra) and observed at page 278 thus:- A

> "It has been held by this Court that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention *at the time of the return and not with reference to the institution of the proceedings.*" B
>
> [Emphasis added]

Similarly, again the Constitution Bench in its dictum in the famous case of *A.K. Gopalan* v. *Government of India*, AIR (1966) SC 816, was considering an application under Article 32 of the Constitution of India for issuance of a writ of habeas corpus challenging an order of detention issued under the Defence of India Rules wherein Wanchoo,J., speaking for himself and on behalf of P.B.Gajendragadkar, C.J., M. Hidayatullah, R.S. Bachawat & V. Ramawami,JJ., laid down the law that in dealing with a petition for habeas corpus the Court has to see whether after the filing of the writ and before the date of hearing there was any intervening factor, meaning thereby that if on the date of filing of the writ a person was under detention without there being any valid order, but if on the date of hearing a person was in detention under a valid order, merely because the detention on the date of the filing of the petition was invalid, the same cannot be a ground for issuance of writ of habeas corpus. C D E

It is true that the right of an accused to be released on bail for default in submission of challan is a valuable and indefeasible right, but by the time the court is considering the exercise of the said right if a challan is filed then the question of grant of bail has to be considered only with reference to merits of the case under the provisions of the Code relating to grant of bail after filing of the challan which view is consistent with the view expressed by different Constitution Benches of this Court in several decades in connection with the issuance of writ of habeas corpus as well as for grant of bail. F G

My learned Brother has referred to the expression 'if not already availed of' referred to in the judgment in *Sanjay Dutt's* case for arriving at conclusion no. 6. According to me, the expression 'availed of ' does not mean mere filing of application for bail expressing therein willingness of the accused to furnish bail bond. What will happen if on the 61st day an H

A application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment challan is filed.

In this background, the expression 'availed of' does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised.

In case the court concerned has adopted any dilatory tactics or an attitude to defeat the right of the accused to be released on bail on the ground of default, the accused should immediately move the superior court for appropriate direction. But if the delay is *bona fide* and unintentional and in the meantime challan is filed then in view of the aforesaid judgments of this Court, such a petition has to be dismissed and it cannot be said that the accused has already availed of the right accruing under proviso to Section 167 of the Code. It need not be repeated that the right accruing under proviso to Section 167(2) of the Code on the expiry of the statutory period of sixty days cannot be said to have been *availed of* by mere making of an application for bail expressing therein willingness to furnish bail, but on furnishing bail bond as required under clause (a)(ii) of proviso read with Explanation I to Section 167(2) of the Code. If because of any *bona fide* view or procedure adopted by the court concerned some delay is caused and in the meantime challan is filed, the Court has no power to direct release under proviso to Section 167(2) of the Code.

The present case, where the prosecution was for an offence under the MPID Act, being a case of first impression, the Court concerned was of *bona fide* opinion that the provisions of Section 167(2) of the Code were not applicable. That view of the Special Judge was reversed by the High Court, but before it could fully apply its mind, the challan was filed. In this background, I am clearly of the opinion that the right of the accused to be

enlarged on bail under proviso to Section 167(2) of the Code cannot be said to have been 'availed of' in the present case. A

This being the position, I have no option but to hold that the High Court has not committed any error in passing the impugned order so as to be interfered with by this Court.

B

Accordingly, the appeal is dismissed.

M.P. Appeal allowed.