

CONUNDRUM AROUND THE RIGHT TO DEFAULT BAIL UNDER SECTION 167

Anushka Satya and Nishant Kumar***

ABSTRACT

This research paper seeks to thoroughly analyse an accused person's right to default bail conferred by Section 167 of the Code of Criminal Procedure, 1973 (hereinafter, "CrPC"). The paper examines the remarkable importance of this right to ensure the indispensable rights of an accused person, one of them being the 'right to life and liberty'. Further on, the paper seeks to analyse two contentious areas under this theme. Firstly, the paper scrutinises the interpretation of the phrase 'availed of' with regard to the computation of the statutory period of custody, only after which the right to default bail becomes activated. Secondly, the paper investigates the method of cancellation of the right to default bail. Additionally, the paper has also undertaken an evaluation of the interaction between the default bail provision under Section 167 and special legislations, especially the Unlawful Activities (Prevention) Act, 1967 (hereinafter, "UAPA"). The paper

*Anushka Satya is a student at the National Law University, Delhi. The author may be reached at anushka.satya21@nludelhi.ac.in.

**Nishant Kumar is a student at the Hidayatullah National Law University, Raipur. The author may be reached at nishant.212409@hnlu.ac.in.

examines the hurdles faced in claiming default bail upon an arrest under UAPA.

The paper notes the inability of criminal justice system to efficiently comply with the provisions at hand and to avail the accused of his right to default bail. This non-compliance contributes to severe violations of the crucial rights of the arrestees. The paper makes the remark that major constraints to the exercise of default bail stem from ambiguities. Given the immense and instrumental role of default bail in securing an accused person's liberty, the paper submits that it is imperative to make appropriate amendments to the current laws so as to make the law less stringent and compliance more efficacious. Lastly, the paper attempts to offer certain suggestions that can help in structuring the way forward.

I. INTRODUCTION

The structure of criminal justice administration places credence on the fundamental right to life and liberty of an individual enshrined by Article 21¹ of the Constitution of India. Consequently, the CrPC,² which is designed in a manner to give effect to the constitutional principles, includes provisions for bail which assist in securing the liberty of accused persons. Provisions of bail span across various Sections of the CrPC. There exist different kinds of bail. Some of these include bail for bailable offences under Section 436,³ bail for non-

¹The Constitution of India 1950, art 21.

²The Code of Criminal Procedure 1973.

³The Code of Criminal Procedure 1973, s 436.

bailable offences under Section 439,⁴ anticipatory bail under Section 438,⁵ bail for an acquitted person under Section 437,⁶ bail for a convicted person under Section 389,⁷ and default bail.

Default bail is availed when the accused person becomes eligible for it after meeting the set requirements. The provision of default bail is embodied in Sections 167⁸ and 436A⁹ of the CrPC. Default bail is also known by the name ‘compulsory bail’, as the grant of bail upon meeting the eligibility requirements is indispensable, or ‘statutory bail’, as the bail is granted by virtue of a statutory provision. The ambit of this research paper stays confined to the right to default bail under Section 167.

The right to claim default bail under Section 167 is deemed to be an infeasible right.¹⁰ This was established in the case of *Suresh Kumar Bhikamchand Jain v. State of Maharashtra*.¹¹ The Apex Court held that in case the investigation is not completed within the prescribed custody period, the Magistrate shall order the release of the accused by complying with the requirements of default bail under Section 167(2) and that any detention of the accused beyond the prescribed period without the chargesheet being filed would be considered an illegal act.

In the case of *Uday Mohan Acharya v. State of Maharashtra*,¹² the Supreme Court observed in Paragraph 17.1 that, “*The history of the enactment of Section 167(2) CrPC and the safeguard of ‘default bail’ contained in the proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard*

⁴The Code of Criminal Procedure 1973, s 439.

⁵The Code of Criminal Procedure 1973, s 438.

⁶The Code of Criminal Procedure 1973, s 437.

⁷The Code of Criminal Procedure 1973, s 389.

⁸The Code of Criminal Procedure 1973, s 167.

⁹The Code of Criminal Procedure 1973, s 436A.

¹⁰*Suresh Kumar Bhikamchand Jain v State of Maharashtra* (2013) 3 SCC 77.

¹¹*ibid.*

¹²*Uday Mohan Acharya v State of Maharashtra* (2001) 5 SCC 453.

that no person shall be detained except in accordance with the rule of law."¹³

The Supreme Court amplified the significance of the right to default bail in its observations in the case of *S Kasi v State*.¹⁴ In this case, the accused was in custody and the police failed to file chargesheet within the stipulated time-frame. Upon the accused person's application for the grant of default bail, the Madras High Court¹⁵ dismissed the application, reasoning that since during the custody period, there was the imposition of lockdown due to the pandemic, the existing law and the social reality was akin to the proclamation of Emergency. Thus, the non-filing of the chargesheet upon the lapse of time cannot avail the accused the right to default bail as the circumstances were *unprecedented*. However, the Supreme Court in this case differed from the High Court ruling. The Court held that even in the so-called *emergency* scenario, the right to default bail cannot be suspended as the same is deemed to be inherently linked with Article 21 of the Constitution, a right which cannot be superseded even after the proclamation of emergency.

In light of the above, this paper seeks to underline the integral and crucial role of adequate preservation of one's right to life and personal liberty. The paper has sought reference to an array of judgements that contribute towards establishing the same. Then the paper intends to analyse certain themes under the arena of default bail that have remained confounded. One of these conundrums is the interpretation of the phrase *availed of* which has been marred with confusion. The paper seeks to clarify the interpretation of the phrase according to the contemporary standing. Secondly, the paper evaluates the system of cancellation of the right to default bail, while staying mindful of the task of preservation of the right to liberty of individuals. The paper

¹³*Uday Mohan Acharya v State of Maharashtra* (2001) 5 SCC 453, p 17.1.

¹⁴*S Kasi v State* (2021) 12 SCC 1.

¹⁵*S Kasi v State* 2020 SCC OnLine Mad 1244.

analyses the conditions that the courts have laid down for a legitimate cancellation of the right. Towards the end, the paper has also analysed the interaction between the default bail provision under Section 167 as well as some special legislations, especially the UAPA. The paper concludes that the drafting of the provisions of these legislations and their stringent nature make the granting of default bail a herculean task.

II. CUSTODY OF AN ACCUSED UNDER SECTION 167

A. Description of Section 167

The title of Section 167 of the CrPC reads as ‘Procedure when investigation cannot be completed within twenty-four hours.’¹⁶ Section 167(1) lays down the requirements that are to be met by the Police while requesting custody for an accused person who has been arrested for 24 hours already.

Section 167(2) stipulates the procedure to be followed by the Magistrate when faced with a request for custody of an arrested person. The Section uses key terms like *may*, *time to time*, and *term not exceeding fifteen days*, etc. Clear interpretation of Section 167(2) has been discussed thoroughly in the case of *Chaganti Satyanarayan v. State of Andhra Pradesh*,¹⁷ which has been further relied upon by the case of *CBI v. Anupam Kulkarni*.¹⁸ In the two judgements, the Apex Court has clarified that police custody can be provided for a restricted period of fifteen days only. Any extension of police custody beyond this fifteen-day period is prohibited. However, a request for an extension of custody beyond the fifteen-day period may be granted only in the form of Judicial custody. Later, the Apex Court in the case of *Gautam Navlakha v. National Investigative Agency*¹⁹ established that a request for extension of custody beyond the first fifteen days of

¹⁶The Code of Criminal Procedure 1973, s 167.

¹⁷*Chhaganti Satyanarayan v State of Andhra Pradesh* (1986) 3 SCC 141.

¹⁸*CBI v Anupam Kulkarni* (1992) 3 SCC 141.

¹⁹*Gautam Navlakha v National Investigative Agency* 2021 SCC Online SC 382.

police custody may also be accepted as house arrest. The Delhi High Court placed the accused under home arrest in the Gautam Navlakha case, and the Supreme Court viewed this as a kind of incarceration. Accordingly, as a result of the Supreme Court's ruling in the Gautam Navlakha case, Section 167 allows for the custody of an accused person to take place in one of three ways: police custody, judicial custody, or house arrest. However, the extension of custody past the initial fifteen days can only take place under judicial custody or house arrest.

Furthermore, Section 167(2) states that in case the offence charged is punishable by death, life imprisonment, or an imprisonment term not less than ten years,²⁰ then the custody can be extended up to ninety days, after the completion of the first fifteen days of detainment. On the other hand, when the offence which an accused person is charged with carries any other punishment, the maximum extension apart from the first fifteen days period can be sixty days. As per the analysis above, this extended custody can either be judicial custody or house arrest.

The phrase *imprisonment not less than ten years* has been interpreted in the case of *Rakesh Kumar Paul v. State of Assam*²¹ to mean any imprisonment period till ten years, excluding cases of ten years of imprisonment. In this judgement by excluding sentences up to ten years, the Apex Court underlines the significance accorded to securing the right to life and liberty of a greater number of accused persons by reducing the chances of extension of detainment of an accused from ninety days to sixty days period.

In the cases of *Chaganti Satyanarayan* and *Anupam Kulkarni*, the Courts have highlighted that the power of Magistrate to assent to the police's request for custody under Section 167(2) is discretionary in nature. This is inferred from the usage of the term *may* in the provision. Thus, the magistrate is not bound to agree to every request for extension

²⁰The Code of Criminal Procedure 1973, s 167.

²¹*Rakesh Kumar Paul v State of Assam* (2017) 15 SCC 67.

in custody or remand of the accused by the police. It is only when the magistrate satisfies himself with the reasons for the prayer for remand that the prayer be accepted.²² Moreover, the cases have clarified the phrase *time to time* to mean that the police can request the extension of custody of the accused in parts until the custody adds up to the maximum limit prescribed by the Section.

Section 167(2)(ii) brings forth the concept of default bail by stating that upon the lapse of the sixty-day or ninety-day custody period, be it various periods of segregated custody or custody in one run, the non-completion of the investigation by the police would lead to the eligibility of the accused person to apply for default bail. The provision adds a caveat that the accused must be able to furnish the bail surety as the default bail under this Section is to be deemed equivalent to bail under Chapter XXXIII of the Code.

As per Section 173,²³ the police file a chargesheet or challan or final report when the investigation of the case gets complete. Hence, if upon the lapse of the sixty or ninety-day period,²⁴ the police fail to file the chargesheet, then the accused gets empowered to exercise the right to default bail.

B. Calculation of the custody period

Considering that the activation of an accused person's right to default bail is contingent upon the lapse of the custody period, computation of the custody period assumes prime importance. One popular question of law in this regard is about the determination of dates that should form the upper and lower limits for the calculation of the custody period. For instance, one view posits that the date of grant of the accused person's remand shall be considered to be the beginning reference. This means that the period is to be calculated from the day the custody of the

²²*Manubhai Ratilbhai Patel v State of Gujarat* (2013) 1 SCC 314.

²³The Code of Criminal Procedure 1973, s 173.

²⁴The Code of Criminal Procedure 1973, s 167.

accused person is granted by the Magistrate and from there the sixtieth or the ninetieth day would make the accused person eligible to claim the bail.

While the other view propounds that the date of arrest of the accused shall be considered to be the lower limit for commencing the calculation. In this view, there have been numerous obstacles that have been detected. For instance, the arrest of a person is followed by a twenty-four-hour detainment with the police without any judicial scrutiny. If the custody period is to be calculated from the date of arrest, that would be tantamount to the magistrate authorising the initial twenty-four-hour police detainment as well. This would lead to the magistrate taking unnecessary and unmeasured liability.

This was realised by the Apex Court in the case of *Chaganti Satyanarayan* as the court held that the total period of sixty or ninety days has to be calculated from the date of grant of the remand order and not the date of arrest.²⁵ This was further corroborated in the case of *CBI v. Anupam Kulkarni*.

There is another view on the calculation of the custody period stating that the date of filing of the chargesheet shall be exclusive to the custody period. This view has been held by the Supreme Court in the case of *M Ravindran v. The Intelligence Officer*,²⁶ placing reliance on *Ravi Prakash Singh v. State of Bihar*.²⁷

Thereby, depending upon the method of determination of calculation of custody period, the right of the accused to claim default bail can also get impacted. For instance, the date when the accused person's right to default bail arises is contingent upon whether the date of remand or the date of arrest is taken as the reference point for the calculation of the

²⁵*Chhaganti Satyanarayan v State of Andhra Pradesh* (1986) 3 SCC 14, p. 25.

²⁶*M Ravindran v The Intelligence Officer* (2021) 2 SCC 485.

²⁷*Ravi Prakash Singh v State of Bihar* (2015) 3 SCC 340.

custody period, or whether the date of filing of chargesheet is excluded in the calculation.

Even though this question of law has been dealt with by a range of cases, yet the judicial stance remains unsettled and non-concrete. The judicial position in *Chaganti Satyanarayan* and *Anupam Kulkarni* is quite contrary to that in *Ravi Prakash*, *Ravindran*, and *State of MP v. Rustom* cases. The conundrum arises because the judges in the *M Ravindran* case failed to comply with the principle of precedent as the case of *Chaganti Satyanarayan* is the oldest one in this regard. The *Ravindran* case went contradictory to the ratio by *Chaganti Satyanarayan* even when the bench size of the former was not bigger than that of the latter to be able to overrule the precedent.

In light of the above conundrum on the issue of computation of the custody period, which is crucial to determine an accused person's right to claim default bail under Section 167, the Supreme Court in *Enforcement Directorate, Government of India v. Kapil Wadhwa*²⁸ directed a larger bench of the Supreme Court to quell the conflicting views and to establish an authoritative opinion which can be uniformly applicable. Consequently, the Supreme Court judge-bench ruled that for the computation of the custody period, the date of remand by magistrate authorities must be accounted for. Thus, the current standing is in compliance with the position taken by *Chaganti Satyanarayan case*.

On the other hand, the position is fairly settled with respect to whether to include Government Holidays while computing the period for filing of chargesheet under Section 167. In the Supreme Court case of *CBI v. Nazir Ahmed Sheikh*,²⁹ the court held that the holidays will be included

²⁸*Enforcement Directorate, Government of India v Kapil Wadhwa* Criminal Appeal Nos 701-702 of 2020.

²⁹*CBI v Nazir Ahmed Sheikh* (1996) 2 SCC 367.

while calculating the statutory custody period as provisions of Section 10 of the General Clauses Act³⁰ do not apply.

This paper submits that the inclusion of the arrest date in the computation period, as was suggested in some of the cases, is not a viable option because the Magistrate cannot be expected to take responsibility for the condition of the accused even before the accused is produced before him. Additionally, the purpose of the twenty-four-hour gap between the arrest of the accused and his mandatory production before the magistrate is to allow the Police to investigate the accused without any obstructions, while there exists an array of rights with the accused for protection from any harassment. Hence, the position taken by the Apex court in the case of *Kapil Wadhwa* occurs as the most compatible in order to balance the sanctity and investigation procedure and protection of the accused person's liberty.

C. The ambiguity around the interpretation of 'availed of'

It is understood in the legal fraternity that an accused can be granted bail upon the *default* of the police to file the chargesheet duly within the prescribed time period. Hence, when no chargesheet is filed and the custody period specified lapses, if the accused person is capable and prepared to furnish the bail, default bail shall be provided. The case of *Hitendra Vishnu Thakur v. State of Maharashtra*³¹ interpreted the provision to uphold this view. The case observed that upon the filing of the chargesheet, the right gets extinguished as Section 167 spans only till the stage of investigation, which gets complete with the filing of the chargesheet.

³⁰The General Clauses Act 1897, s 10.

³¹*Hitendra Vishnu Thakur v State of Maharashtra* (1994) 4 SCC 602.

However, the case of *Sanjay Dutt v. State*³² ruled slightly differently, though majorly relying upon the *Hitendra Thakur* judgement. The Apex Court in the *Sanjay Dutt* case held that the accused can be awarded default bail even after the filing of the chargesheet, provided that the bail has already been *availed of*³³ and that the accused is capable of furnishing the bail.

The judgements in both the *Hitendra Thakur* case and the *Sanjay Dutt* case deal majorly with special legislation. They identify an additional requirement to be met in case of special legislation, in order to claim default bail. According to the Justices, upon the accused person's application for default bail, the public prosecutor can exercise an opportunity of objecting to the application. For this objection to be considered valid, there is a mandatory requirement for a notice to be issued to the accused person. The two judgements hold that the mere appearance of the accused in the court hearing, where this objection is to be decided upon, suffices the requirement of *notice*, and that the notice need not be a written notice. This is severely unfair to the rights of the accused person who is not allowed an adequate opportunity to defend himself before his right to default bail is snatched away.

Furthermore, the interpretation of *availed of* as used in the *Sanjay Dutt* case was attempted to be clarified in the case of *Uday Mohan Acharya v. State of Maharashtra*.³⁴ The Apex Court holds that *availed of* means the accused person merely has to file an application for bail before the Magistrate, bringing forth that no chargesheet has been filed within the specified period and that he is ready to furnish the bail. The Magistrate must forthwith dispose of the bail application, after considering the veracity of the accused person's claims in the application. Hereby, even when the filing of the bail application by the accused is followed by the

³²*Sanjay Dutt v State* (1994) 5 SCC 410.

³³*ibid.*

³⁴*Uday Mohan Acharya v State of Maharashtra* (2001) 5 SCC 453.

filing of the challan or chargesheet, which is preceded by the grant of the bail, the right to default bail cannot be extinguished.

A similar factual matrix was witnessed in the *Uday* case. In this case, the accused applied for default bail upon completion of the custody period with no chargesheet filed. However, the lower court erroneously rejected the bail application, forcing the accused to appeal to the higher court. In the meantime, the police filed the chargesheet. The Apex Court clarified that when the accused filed the application for bail, the accused had *availed of* the right. After that, if the chargesheet is filed by the Police, the same does not affect the bail as it has already been *availed of*. In order to be *availed of* the default bail, there are two conditions to be met. Firstly, the accused must apply for bail before filing the chargesheet. Secondly, the accused has to show his readiness to furnish bail. Moreover, filing a chargesheet after the fulfilment of the above two conditions will not jeopardize the default bail.

The *Uday* case also attempts to resolve the apparent conflict between its interpretation of *availed of* and the *Explanation* proviso to Section 167. The court observes that upon the filing of the bail application by fulfilling the required conditions, the default bail becomes indefeasible by any subsequent filing of the bail. This means that the accused person's right to default bail cannot be defeated merely because the prosecution files a chargesheet before the furnishing of bail bond, as long as the bail is furnished within the time specified by the Magistrate.

The protection of liberty and rights of an accused was further strengthened in the case of *Nirala Yadav v. Union of India*³⁵ when the court held that once the accused 'accrues' his indefeasible right to default bail by 'availing' it, the magistrate before whom the application for bail has been filed is obliged to consider the application on the same day, *forthwith*, without any unnecessary delay or adjournment. The

³⁵*Nirala Yadav v Union of India* (2014) 9 SCC 457.

case of *Bikramjit Singh v. State of Punjab*³⁶ establishes that the application for default bail when it falls in the accused person's favour, may be made in any form, be it oral or written.

This right was further liberalised in the case of *M Ravindran v Intelligence Officer*.³⁷ The Court held that when the right to default bail has been *accrued* with all the requirements met, the right becomes infeasible, that is, the bail remains unaffected by either pendency of the bail application, or subsequent filing of the chargesheet or additional complaint or any objection by Public Prosecutor. The reasoning offered by the judgement is that the legislative intent behind the principle of default bail is to ensure that the accused person is not made to anguish more than he already has due to the *delay* caused by the state machinery. This is different from the ratio in *Hitendra* and *Sanjay Dutt* cases which held that upon any objection by the Public Prosecutor, extension in custody may be awarded by the Magistrate even beyond the statutory custody limit. The overruling of this aspect of the *Sanjay Dutt* judgement by M Ravindran seems to be problematic as the former had a larger judge-bench than the latter.

In the recent case of *Amarjeet Sharma v. Serious Fraud Investigation Office*,³⁸ the Delhi High Court held that mere illegality or irregularity in the remand order by the Magistrate cannot make the accused eligible for claiming default bail. The same can happen only with the failure to file the chargesheet within the specified statutory limit.

In another recent case of *C. Parthasarthy v. Director of Enforcement*,³⁹ the Telangana High Court held that the police or investigative agencies are ordained not only with filing the chargesheet but also with ensuring that the chargesheet contains complete investigation. Thereby, the court holds that by filing an incomplete chargesheet, the right to default

³⁶*Bikramjit Singh v State of Punjab* 2018 SCC OnLine SC 2756.

³⁷*M Ravindran v Intelligence Officer* (2021) 2 SCC 485.

³⁸*Amarjeet Sharma v Serious Fraud Investigation Office* 2022 SCC OnLine Del 3633.

³⁹*C Parthasarthy v Director of Enforcement* 2022 SCC OnLine TS 1075.

bail cannot be circumvented. The High Court, in this case, placed reliance upon a Bombay High Court judgement in *Sharadchandra Vinayak Dongre v state of Maharashtra*.⁴⁰

III. CANCELLATION OF DEFAULT BAIL

Another significant issue other than the granting of default bail, is to determine the cancellation of the bail. The initial position of law was that as soon as the chargesheet is filed by the police or investigative agency, this becomes a ground for cancellation of the default bail, thereby committing the accused to custody. However, the stance was clarified in the Supreme Court case of *Raghubir Singh v. State of Bihar*,⁴¹ in which it was held that mere filing of challan during the time the accused is free by virtue of bail, cannot cause the cancellation of default bail. Section 167(2) stipulates that the default bail shall be similar to bail under Chapter XXXIII of the Code. Hence, just like for bail under Section 437⁴² or Section 439,⁴³ provisions of Section 437(2), (5), and Section 439 are applicable, the mere filing of a chargesheet cannot be taken as sufficient for cancelling default bail under Section 167(2). The court further held that a valid ground for cancellation of default bail under Section 167 is the same as grounds for cancellation of any bail. This line of judicial reasoning was repeated in the case of *Bashir v. State of Haryana*.⁴⁴ The Supreme Court bench held that the mere filing of a chargesheet cannot lead to committing a person out on bail.

This paper submits that the reasoning for such an order by the Apex Court is three-fold. Firstly, cancellation of bail merely upon the filing of a chargesheet would amount to mockery of the freedoms of an individual as the investigative agencies can always delay the

⁴⁰*Sharadchandra Vinayak Dongre v state of Maharashtra* 1991 SCCOnline Bom 81.

⁴¹*Raghubir Singh v State of Bihar* (1986) 4 SCC 481.

⁴²The Code of Criminal Procedure 1973, s 437.

⁴³The Code of Criminal Procedure 1973, s 439.

⁴⁴*Bashir v State of Haryana* (1997) 4 SCC 410.

investigation process beyond the completion of the custody period, and with the filing of challan, they can curtail the liberty of the accused.

Secondly, the grant of default bail is a judicial act that cannot be overruled by an executive act, in this case, the police's filing of a chargesheet. Rather, a judicial act of grant of bail can be set aside only with a judicial act, which is the court's application of discretion into determining whether the case meets the factors to opt for the concerned cancellation.

Thirdly, default bail under Section 167 is similar to bail under Chapter XXXIII of the CrPC. Hence, provisions for cancellation of any bail under Chapter XXXIII will be applicable for cancelling default bail as well.

As per the case of *Jagjeet Singh v. Ashish Mishra*,⁴⁵ bail under Chapter XXXIII of the CrPC can be cancelled based on the merits of the case. This includes factors like the degree of cooperation by the accused in the investigation, commission of an additional offence by the accused upon his release, revelation of some novel piece of information with the filing of the chargesheet which aggravates the gravity of the offence, among other determinants.

A recent case of *State through CBI v. T. Gangi Reddy @ Yerra Gnagi Reddy*⁴⁶ further corroborates the principle that for cancellation of default bail, merits of the case have to be looked into, rather than the fact that a chargesheet has been subsequently presented.

The paper submits that since the provision of bail is with the intention to preserve the right to liberty of an accused person, the same cannot be revoked without complying with the *procedure established by law*. It is for this reason that several landmark judgements have reiterated the stance on the cancellation of bail. The same shall be applicable even

⁴⁵*Jagjeet Singh v Ashish Mishra* (2022) 9 SCC 321.

⁴⁶*State through CBI v T Gangi Reddy @ Yerra Gnagi Reddy* SLP (Crl) No. 9573/2022.

in the case of cancellation of default bail, as default bail is to be deemed as equivalent to bail under Chapter XXXIII of the CrPC.

IV. THE PLAYING OUT OF DEFAULT BAIL IN SPECIAL LEGISLATIONS

The procedural element of criminal offences is contained in the CrPC. However, for certain offences that carry graver intensity, specific special legislations have been enacted. These include the UAPA,⁴⁷ Terrorist and Disruptive Activities (Prevention) Act (hereinafter, “TADA”),⁴⁸ Prevention of Money Laundering Act (hereinafter, “PMLA”).⁴⁹

The procedure for dealing with an accused person charged with an offence under the special legislation is more severe than it is in the CrPC. Thereby, the provision for the grant of default bail in special legislation is more strenuous than it is in CrPC.

The accruing of the right to default bail is toilsome primarily because of two reasons. Firstly, the custody period, after the completion of which the right is accrued, is elongated in case of special legislation. For instance, in TADA, Section 20(4) (bb)⁵⁰ stipulates that the period of custody can be extended up to 180 days, provided that certain requirements are duly met. Similarly in the case of offences under UAPA, even as Section 43D⁵¹ of the Act stipulates that Section 167 of the CrPC shall be applicable to the legislation in the same manner, Section 43D(2) states that the expressions *fifteen days*, *ninety days* and *sixty days*, wherever they occur, shall be construed to refer to *thirty days*, *ninety days* and *ninety days* respectively.

⁴⁷The Unlawful Activities (Prevention) Amendment Act 2019.

⁴⁸Terrorist and Disruptive Activities (Prevention) Act 1987.

⁴⁹Prevention of Money Laundering Act 2019.

⁵⁰Terrorist and Disruptive Activities (Prevention) Act 1987, s 20 (4) (bb).

⁵¹The Unlawful Activities (Prevention) Act 1967, s 43D.

Secondly, many of the special legislations carry a caveat to the fructification of the right to default bail. For instance, the proviso of Section 43D(2) stipulates a caveat to the default bail provision given in Section 43D(2). The exception presents a scenario where the detention of the accused person can be extended up to one-eighty days. This can happen upon fulfilment of two conditions. One, the Public Prosecutor has to convince the Magistrate that the completion of the investigation and the filing of the police report under Section 173 was near to impossible, despite progress in the investigation. Two, the Public Prosecutor has to delineate the reasons for the detention of the accused person beyond the statutory limit. That is to say, the Court has to be convinced that the investigation cannot be carried forward without physical presence of the accused person.

Furthermore, Section 45 of PMLA,⁵² lays down the test of *twin condition* that is required to be satisfied for bail to be granted. First and first, the Public Prosecutor must be given the chance to contest the request for default bail. Second, in response to such objection, the court must be persuaded that there are good reasons to believe that the defendant is innocent of the charge and will not commit another crime while out on bail.

Such conditions levied upon by special legislations make the already constrained right to default bail even more restrictive to be accrued. These legislations are contributing towards broadening the chasm the accused person and his quest for liberty.⁵³

⁵²Prevention of Money Laundering Act 2002, s 45.

⁵³Prachi Bharadwaj, 'Right to Default Bail Under The First Proviso To Section 167(2) CrPC Not A Mere Statutory Right But A Fundamental Right' (*SCC Online*, 14 October 2020) <<https://www.sconline.com/blog/post/2020/10/14/sc-right-to-default-bail-under-the-first-proviso-to-section-1672-crpc-not-a-mere-statutory-right-but-a-fundamental-right/>> accessed 16 February 2023.

There are certain contemporary developments that are reflective of the judiciary's inclination towards preserving right to liberty of individuals.

In the case of *Union of India v. K. A Najeed*,⁵⁴ the Supreme Court has emphasised that Article 21 of the Constitution includes under its ambit the right to justice and speedy trial as well. The apex court held that even though there are restrictions imposed by provisions of special legislations like Section 43D(5) of UAPA, such restrictions do not exclude the court's exercise of constitutional powers to grant bail to the accused and thereby preserve his liberty.

This paper submits that the harsh restrictions on the granting of the default bail imposed by special legislations are unnecessary hurdles on the right to life and personal liberty of an individual. Even as the special legislations engage with more severe offences, the same does not provide for curtailing the room for the exercise of liberty of an accused person. It is in this spirit that this paper seeks to support the reasoning offered by the case of *M Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence*,⁵⁵ in which a three-judge bench of the Supreme Court made an array of significant observations, aiming to preserve the liberty of accused persons arrested under special legislations like UAPA. In this case, the Supreme Court explicitly held that the accused person's right to default bail cannot get curtailed by the prosecution filing chargesheet before the furnishing of the bail or before fulfilling the conditions of the bail. However, the case has no precedential value as the size of the judge bench is smaller than *Sanjay Dutt* and *Hitendra Thakur* cases.

Apart from the above, in case of default bail in special legislations, there is a unique provision by way of which the public prosecutor is given an opportunity to make objections to the accused person's

⁵⁴*Union of India v KA Najeed* (2021) 3 SCC 731.

⁵⁵*M Ravindran v Intelligence Officer, Directorate of Revenue Intelligence* (2021) 2 SCC 485.

application for the grant of default bail. The law, as it stands, does not mandate the appearance of the accused person on the date of such a hearing. This paper submits that this is in grave violation of the tenets of natural justice and that the accused shall be given an opportunity to make a representation for himself.

V. CONCLUSION

This paper intends to submit that even as the judiciary has, time and again, recognised the instrumental role of default bail in ensuring liberty and justice to accused persons, the right is not bereft of obstacles.

Firstly, the conundrum of the inclusive and exclusive dates in the computation of the statutory custody period for becoming eligible for default bail is an issue of much gravity. The judicial stance remains unsettled. There is an enormous need for judicial clarification in this regard. The Apex Court's directive in the *Kapil Wadhwa* case is a step on the right path. This paper propounds the stance resorted to by the court in the *Kapil Wadhwa* case, wherein it has been held that the date for the grant of remand by the magistrate shall be accounted for while computing the period of custody.

Secondly, the interpretation of *availed of* as clarified by the cases of *Hitendra Thakur*, *Sanjay Dutt*, and *Uday Mohan Acharya* is restrictive in nature as it offers enough room for the police to curtail the right. Even as the *Ravindran* case has attempted to bring the right to default bail more on lines to its legislative intent, the effort remains less effective as the cases do not have precedential value. The court should formulate a bench bigger than the one in the *Sanjay Dutt* case in order to widen the ambits of the right and liberalise it.

Lastly, the right to default bail remains quite defunct in cases of special legislation. This is due to the provisions that seek to interpret the right in a highly stringent fashion. Such provisions can be amended to lessen

the limits of the custody period to give life to the right to default bail in cases dealing with special legislation. One such amendment that is required to be brought in is to allow equal representation to the accused person in all the stages of the hearing for the grant of default bail. Apart from this, the need for the twin test to be fulfilled before the grant of default bail seems unnecessary and a judicial review of the same is needed.