

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**Crl. Misc. No. M-14150 of 2015
Date of decision : 07.05.2015**

Sanjiv Kumar @ Banti

..... Petitioner

versus

State of Punjab

... Respondents

CORAM:- HON'BLE MS. JUSTICE ANITA CHAUDHRY

Present: Mr. D.N. Ganeriwala, Advocate
for the petitioner.

Mr. Deep Singh, Addl. AG, Punjab.

ANITA CHAUDHRY, J.

Petitioner Sanjiv Kumar @ Banti seeks regular bail in case FIR No.89 dated 24.09.2014, registered under Section 22 of the NDPS Act at Police Station Tappa, District Barnala.

The petitioner was arrested on 24.09.2014. The period of 180 days to file the challan lapsed on 23.03.2015. Before expiry of 180 days, the Investigating Agency has filed an application under Section 36-A(4) of the NDPS Act (Annexure P-2), seeking extension of time but the same was not decided before expiry of 180 days. The petitioner moved application on 24.03.2015 seeking bail. The application under Section 36-A(4) and the application under Section 167(2) Cr.P.C. were disposed of on 16.04.2015. Application for extension of time was allowed while the bail application was dismissed.

The petitioner seeks concession of bail claiming that an indefeasible right had accrued to him on expiry of 180 days which could not be defeated by pendency of the application under Section 36-A (4) of the Act which was not allowed prior to the expiry of 180 days.

It was also contended that the extension granted could not operate retrospectively as per the ratio of the Hon'ble Apex Court. It was urged that the Magistrate was obliged to deal with the application under Section 167(2) Cr.P.C. on the day when it was filed and that right was not lost because the application for extension of time was pending.

On the other hand, the submission made on behalf of State was that the extension granted by the Court would relate back to the date of application and there were compelling reasons as to why the challan could not be filed.

I have considered the submissions of the petitioner and the State counsel. The prosecution agency had sought extension of time under the statute by moving an application under Section 36A(4) of the NDPS Act.

In ***Hardeep Singh Vs. State of Punjab, CRM-M-17260-2014, decided on 29.5.2014***, taking into consideration the judgment of Hon'ble the Apex Court in ***Sanjay Kumar Kedia @ Sanjay Kedia Vs. Intelligence Officer, Narcotic Control Bureau and another, 2009 (17) SCC 631***, besides the provisions of under Section 36 A (4) of the NDPS Act and Section 167 (2) Cr.P.C., held: -

*"I have considered the ratio of the judgment in case **Sanjay Kedia (supra)** on the basis of which the prosecution had moved an application in the shape of report under Section 36 A (4) of the NDPS Act. It has been held in the said judgment that in case the investigation is not completed within 180 days the Court is empowered to authorize detention for a period upto one year provided following conditions are specified: -*

- i) report of the Public Prosecutor indicating the progress of investigation;*
- ii) specific and compelling reasons for seeking detention of the accused beyond 180 days should be mentioned; and*
- iii) notice should have been issued to the accused.*

In the present case, I am of the opinion that Public Prosecutor had taken abundant caution to present application well in time i.e., on 10.4.2014 but the said application having not been allowed after notice to the accused within 180 days, an indefeasible right had accrued to the petitioner when he moved an application on 15.4.2014. The said right could not have been defeated by delaying a decision on the application for extension of time to present challan and to permit detention beyond 180 days or by delaying the decision on the application

under Section 167 (2) Cr.P.C. filed by the petitioner on 15.4.2014 for 3.5.1014. Indefeasible right accrued to the petitioner could not have been defeated. The petitioner, thus, has got a right to be released on bail.

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Before parting with it may be observed that as the petitioner has been able to get the benefit of default of the prosecution agency and also the delay caused in decision of the application under Section 36 A (4) of the NDPS Act, I am of the considered opinion that whenever any application under Section 36 A (4) of the NDPS Act, is filed by the prosecution agency seeking authorization of the detenu as accused in custody beyond the period of 180 days, said application should be decided expeditiously.”

In *Kaka Singh Vs. State of Punjab, CRM-M-22760-2014, decided on 12.8.2014*, taking into consideration the judgment reported in *Union of India through CBI Vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav , 2014 (4) RAJ 265*, it was observed : -

*“I have heard learned counsel for the petitioner. In a judgment passed by this Court in **Hardeep Singh Vs. State of Punjab, CRM M-17260 of 2014** granting bail in similar circumstances*

*vide order dated May 29, 2014, this Court has observed that whenever any application under Section 36 A (4) of the Act was filed by the prosecution agency seeking authorization of detention of an accused in custody beyond the period of 180 days, said application should be decided expeditiously. Similarly, the Apex Court in the case of **Union of India through CBI Vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav**, 2014 (4) RAJ 265 has issued directions that an application under Section 167 (2) Cr.P.C. filed on behalf of the accused should be decided by the Magistrate on the same day. The petitioner in the present case seeks to take advantage of the following lapses:-*

- i) lapses on the part of the FSL in sending the report expeditiously pertaining to the narcotic medicines recovered from the petitioner;*
- ii) default on the part of the prosecution agency to present challan on account of above said lapse;*
- iii) lapse on the part of the trial Court in not deciding the application filed by Public Prosecutor on September 21, 2013 prior to the expiry of 180 days under Section 36 A (4) of the Act;*
- iv) lapse on the part of the Court in not deciding the application under Section 167 (2) Cr.P.C. Which*

was filed on September 24, 2013. The petitioner seems to have acquired an indefeasible right to be released on bail on the basis of the above said circumstances, as the statute confers a right upon him to be released after expiry of 180 days but at the same time, it is not out of place to observe here that as an abundant caution, the prosecution agency in order to prevent the release of accused had filed an application under Section 36 A (4) of the Act on September 21, 2013 which application could have been decided after issuing notice to the petitioner in jail by September 24, 2013 before expiry of period of 180 days. Had that application been decided by passing a speaking order in accordance with law, the petitioner would not have got an opportunity to seek the advantage of default of the prosecution agency in presentation of challan by moving an application under Section 167 (2) Cr.P.C.”

It has been observed on numerous occasions that Courts dealing with the cases under the NDPS Act should expeditiously decide the application prior to the expiry of period of 180 days, in case the same is filed before the expiry of above said period. At the same time, it was also directed that the law laid down by Hon'ble the Apex Court in ***Union of India through CBI Vs. Nirala Y adav @ Raja Ram Yadav @ Deepak Yadav , 2014 (4) RAJ 265***, directing

that the application under Section 36 A (4) of the NDPS Act should be disposed of by the concerned Magistrate on the same day should be complied with.

A co-ordinate Bench in ***Ranjit Singh @ Rana Vs. State of Punjab in Crl. Revision No.2087 of 2014*** has referred the following issues before the larger Bench for adjudication vide order dated 11.09.2014:-

(i) Whether the petitioner has indefeasible right to be released on bail on the expiry of period of 60 or 90 or 180 days as the case may be;

(ii) Whether the right to bail of the petitioner gets effected in case the application is moved after the expiry of that period;

(iii) Whether the petitioner has a right to be released on bail even without moving any application on expiry of said period;

(iv) Whether the application moved by the prosecution can be extended as a matter of right or after seeing the reasons and circumstances of each case.

(v) Whether after dismissal of the bail application before the trial Court, the remedy is of filing revision or petition under Section 439 Cr.P.C .or 482 CrPC;

(vi) Whether while deciding the application under Section 167(2) CrPC, the merits of the case or nature of the offence is to be seen or not;

(vii) Whether the application for extension of time moved by the prosecution and application seeking grant of bail moved by the accused should be decided together on the same date and in the presence of both the parties;

In context of the aforesaid decisions, it is observed that the right to be released on bail under Section 167(2) Cr.P.C., accrued to the petitioner on 23.03.2015 on expiry of 180 days of his detention. The application under Section 167 (2) Cr.P.C. had been

filed on 24.03.2015 and no decision was taken by the Court concerned on application under Section 36 A (4) of the NDPS Act, till 16.04.2015, an indefeasible right to be released on bail which accrued to the petitioner after 23.03.2015 and could not have been defeated by keeping the application under Section 167(2) Cr.P.C. and application under Section 36 A (4) of the NDPS Act, pending till 16.04.2015.

The petition is allowed. Petitioner is ordered to be released on bail on his furnishing bail bonds/ surety bonds to the satisfaction of the trial Court.

(ANITA CHAUDHRY)
JUDGE

07.05.2015
'Sunil Sehgal'