

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

CRM M-24591 of 2015

Date of Decision: September 9, 2015

Yudhvir Singh @ Yodha

.....Petitioner

Vs.

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.

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Present:- Mr.V.K. Jindal, Advocate
for the petitioner.

Mr. Jashanpreet Singh, AAG, Punjab.

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M.M.S. BEDI, J. (ORAL)

The petitioner seeks the concession of bail under the provisions of Section 167(2) Cr.P.C. in a case u/s 27 of the NDPS Act, wherein recovery of 260 grams of intoxicating powder was effected and thereafter recovery of 500 grams of intoxicating powder on his disclosure statement was made from him.

Through the instant petition, the petitioner challenges order dated 16.5.2015 (Annexure P-4) passed by the Special Judge, Amritsar declining the release of the petitioner on bail on account of an application

under Section 36-A(4) of NDPS act, having been allowed by the said court. The petitioner in this case was arrested on 18.11.2014. 180 days in custody expired on 17.5.2015. Before the expiry of 180 days, the Public Prosecutor filed an application Annexure P-2, signed by SHO, Police Station B Division Amritsar City with his report, which reads as follows:-

“As per submission by IO, the investigation is still pending regarding the fact that from where accused used to smuggle the recovered contraband and which person/smuggler are involved in such smuggling. Report of Chemical Examiner is also yet to be received. Hence, investigating time may kindly be extended beyond 180 days as per 36-A(4) NDPS Act.”

The said application was filed on 11.5.2015. Vide order dated 16.5.2016 (Annexure P-4) the Special Judge had extended the period for presentation of challan and extended the period for two months for filing of challan, permitting the detention of the petitioner. An application filed by the petitioner u/s 167(2) Cr.P.C. for release on bail was dismissed on 20.5.2015 (Annexure P-6) on the ground that the application u/s 36-A(4) of the NDPS Act praying for extension of time to present challan, stands allowed.

Learned Sr.counsel for the petitioner has vehemently contended that the foundation of the order declining application 167(2) Cr.P.C. is vitiated as neither the application (Annexure P-2) nor the order granting time, to the prosecution agency u/s 36-A(4) of the NDPS Act, has been

passed in consonance with the judgment of the Supreme Court in **Sanjay Kumar Kedia @ Sanjay Kedia vs. Intelligence Officer, Narcotic Control Bureau and anr.** 2009(17) SCC 631 and other judgments. He has vehemently urged that allowing an application *u/s* 36A(4) of the NDPS Act merely on the ground that the report of Chemical Examiner has not been received, is contrary to the above said judgment and the judgment of this court in CRM M 14269 of 2014, decided on 14.5.2014 (**Har Govind Singh vs. State of Punjab**).

He has also argued that on account of inconsistent views of various Bench of this court, the matter is pending before the Division Bench of this Court in **Ranjit Singh @ Rana vs. State of Punjab** (Crl. Rev. 2087 of 2014). He has urged that the petitioner can be granted the concession of interim bail during the adjudication of the matter by the Division Bench of this Court. He has also urged that the statutory requirement of Section 36-A(4) of NDPS Act, if seen in the light of **Sanjay Kumar Kedia's** case (*supra*) would make order dated May 16, 2015 (Annexure P-4) illegal as neither the report of Public Prosecutor mentions the specific reasons nor any specific reasons have been mentioned to permit the detention of the petitioner beyond the period of 180 days.

Counsel for the petitioner has vehemently urged that the prosecution agency had sought extension of time for presentation of challan vide application annexure P-4 dated May 11, 2015, six days before the expiry of 180 days. No doubt it was decided before the expiry of 180 days

vide annexure P-4 dated May 16, 2015 on the ground that the report of the chemical examiner having not been received but same is legally not tenable in view of the following judgments:-

- i) **Har Govind Singh Vs. State of Punjab**, CRM-M 14269 of 2014, decided on May 14, 2014, wherein in case of recovery of 7 kg of heroin, it was observed as follows:-

“.....A perusal of the application preferred by the prosecution seeking extension of time under Section 36-A of the Act at Annexure P2 would reveal that the basis for seeking extension was two-fold, i.e. (i) the investigation has to cover various parts of India as also Pakistan, England and Canada and (ii) the Chemical examination report of Forensic Science Laboratory, Chandigarh is yet awaited. On such application, the trial Court granted the extension of 30 days vide order dated 11.2.2014 at Annexure P4 by merely re-producing the bald averments made at the hands of the prosecution in the application seeking extension. This Court would have no hesitation in observing that

the order dated 11.2.2014 passed by the trial Court granting extension of 30 days for completion of investigation was done in a routine and mechanical fashion.”

- ii) CRM-M 37781 of 2014, **Surjit Singh Vs. State of Punjab**, wherein it was observed as follows:-

“Merely non-filing of report of chemical examiner with report under Section 173 of the Code cannot be treated as an incomplete challan. It appears that the persons defending the cases on behalf of the State are not updating themselves about the settled position of law. There is a provision in the Code for submitting supplementary challan also in which other documents can also be brought on the record which may be collected by the investigating agency during further investigation.”

- iii) CRM M-41673 of 2013, **Jeevan Sharma @ Vicky Vs. State of Punjab**, wherein the Court has observed that non-receipt of forensic science laboratory report without giving any reason would amount to non-application of mind for extension of

time by a Court. Relevant portion of the judgment referred to by counsel for the petitioner is as follows:-

“10. In the present case also, the sole reason given in the application of the public prosecutor (Annexure P-3 with the petition), is that:

“That I am satisfied that the investigating officer of this case made every effort to receive the report of the Director, Forensic Science Laboratory, Mohali. But the same was beyond his control, so the extension of above noted period for presenting the challan is very much necessary and the same may be extended in the interest of justice. Otherwise prosecution will suffer irreparable loss.

It is therefore requested that the application may kindly be allowed in the interest of justice.”

11. Keeping in view the contents of the application moved by the public prosecutor for extension of time, I find that the matter would be squarely covered by the ratio of the law laid down in Sanjay Kumar Kedias' case, as extension of time for presentation of “challan” was obviously sought on similar

grounds as given in the case before the Apex Court, wherein such reason has been held to be not good for grant of extension of time. It is further necessary to state here that, upon specific query from learned State counsel, he, on instructions, states that reports under Section 173 Cr.P.C. are often presented, without the report of the FSL having been received, which is, therefore, often presented along with a supplementary “challan” under Section 173 (8) Cr.P.C.

12. Hence, in my opinion, the application for extension of time for presenting the challan in the present case, only on the ground of non-receipt of the FSL report, without giving any reasons, as to why non-receipt of such report was sufficient cause for delay in the completion of investigation, would amount to non-application of mind, as is essential for seeking such extension of time by the public prosecutor, as has been held by the Supreme Court.”

- iv) In CRM-M 39703 of 2013- **Sanjeev Kumar Vs. State of Punjab**, decided on December 4, 2013, wherein it was observed as follows:-

“....In the application (Annexure P-3), no reason, much less specific reason, was stated as to how detention of the petitioner could have served any purpose beyond the period of 180 days in the event of investigating agency not obtaining the report of the chemical examiner and presenting the final report under Section 173 Cr.P.C.”

- v) CRM-M 7279 of 2015-**Major Singh Vs. State of Punjab**, it was observed as under:-

“Report of Chemical Examiner has not been received, the same cannot serve as valid reason for seeking extension and the same also does not serve as valid reason for rejecting the prayer under Section 167 (2) Cr.P.C.”

- vi) CRR 1694 of 2015-**Gurjant Singh Vs. State of Punjab**, decided on April 1, 2015: In that case the application for seeking extension of time was not accompanied by the report of PP while allowing petition for bail under Section 167 (2) Cr.P.C. It

was also observed that simply because report of the chemical examiner was awaited, is not ground to decline bail to the accused under Section 167 (2) Cr.P.C.

Mr. Jindal also made a reference to judgment in **Hitendra Vishnu Thakur Vs. State of Maharashtra**, AIR 1994 SC 2623, in support of his contention that the gravity of the offence is not to be considered while dealing with an application under Section 20 (4) of the TADA Act which makes Section 167 Cr.P.C. applicable in relation to the cases involving offence punishable under TADA ACT. It as observed that the ground regarding serious and grave nature of the offence was irrelevant for grant of bail under Section 20 (4) of the TADA Act which is almost perimeteria of the conditions laid down under Section 36-A (4) of the NDPS Act.

There is no dispute regarding the facts of the present case that the petitioner was arrested in this case on November 18, 2014. 180 days from the date of arrest, giving margin of the day of arrest expired on May 17, 2015. The application under Section 36-A (4) of the NDPS Act was filed on May 11, 2015 alongwith with the report of the PP. In the application, it was mentioned that the samples of the intoxicating powder had been deposited with the Chemical Examiner, Kharar, vide Road No. 227/21 dated December 15, 2014 by hand HC Jasbir Singh No.1227 and the chemical result was awaited. It was mentioned that 180 days were going to be completed on May 16, 2015. The chemical result having not been

obtained, challan of the accused could not be presented in Court within time limit, therefore, the application under Section 36-A (4) of the NDPS Act was being filed requesting for extension of time. It was mentioned that the **“investigation as regards procurement of intoxicating powder by the accused, the source thereof,”** is also pending. Alongwith the application the report of the PP was mentioned which reads as follows:-

“Report of Additional PP for the State:

As per submission by IO, investigation is still pending regarding the fact that from where accused used to smuggle the recovered contraband and which person smuggler are involved in such smuggling. Report of Chemical Examiner is also yet to be received. Hence, investigating time may kindly be extended beyond 180 days as per 36-A NDPS Act.

Sd/-Additional PP for the State, 11.5.2015”

Learned Presiding Officer of the Special Court had vide order dated May 16, 2015 vide order annexure P-4, granted two months time to the prosecution agency to file the challan. The operative part of the judgment is reproduced as under:-

“I have heard both the sides and I am of the considered opinion that total recovery in the present case is 260 grams intoxicant powder and another 500 grams of intoxicant powder and the same fall under commercial

quantity and the challan could not be filed due to non-receiving of FSL report and explained reasons have been given by the prosecution in the application. So the present application is allowed and two months more time is granted to the prosecution to file the challan. Application is disposed of accordingly and be attached with the remand papers.”

The said order was passed after giving notice to the petitioner. The petitioner filed an application under Section 167 (2) Cr.P.C. on expiry of 180 days on May 19, 2015. Since the trial Court had already extended the period under Section 36-A (4) of the NDPS Act prior to the expiry of 180 days, considering the right of bail under Section 167 (2) Cr.P.C. having been defeated, the application for bail was dismissed vide order annexure P-6 dated May 22, 2015. The legality of the orders annexures P-4 and P-6 has been questioned besides seeking concession of bail under Section 167 (2) Cr.P.C. by the petitioner.

I have carefully gone through all the above said judgments in context to the facts of the present case, the provisions of Section 167 (2) Cr.P.C. and Section 36-A (4) of the NDPS Act. The Apex Court in **Sanjay Kumar Kedia's** case (supra) had held that extension of judicial remand beyond 180 days can be permitted under Section 36-A (4) of the NDPS Act only if the following conditions are fulfilled:-

- i) There is a report of Public Prosecutor;

- ii) The report of Public Prosecutor should indicate the progress of the investigation;
- iii) The report should specify the compelling reasons for seeking the detention of accused beyond the period of 180 days; and
- iv) The application under Section 36 A (4) of the NDPS Act should be decided after giving notice to the accused.

A perusal of the application annexure P-2 dated May 11, 2015 indicates that the application is accompanied by the report of PP. The PP has indicated the stage of the investigation and the progress of the same. The application and report reflects three compelling reasons for seeking the extension of time to present challan i.e. the chemical examiner report having not been obtained; the investigation regarding procurement of the intoxicating powder by the accused and the source of the contraband being pending; the proper application of mind by the PP is mentioned i.e. investigation regarding origin of the recovered contraband from where the petitioner used to smuggle, was pending. While allowing the application for extension of period to present challan, the trial Court has objectively considered the circumstances in the light of **Sanjay Kumar Kedia's** case (supra). It is very important to highlight here that the application under Section 36- A (4) of the NDPS Act has been decided prior to the expiry of 180 days i.e. before the indefeasible right to be released on bail under Section 167 (2) Cr.P.C. accrued to the accused. In **Hitendra Vishnu**

Thakur's case (supra) while considering the provisions of Section 20 (4) (bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, which are at par with the provisions under Section 36 A (4) of the NDPS Act, it was observed that the report of the Public Prosecutor is not a mere formality but it is a very vital report because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements of the statute. The judgment cited by learned counsel for the petitioner that mere mentioning that report of PP with the report of the chemical examiner has not been received, is an inadequate ground for granting extension, are not applicable to the facts of the present case, as all the conditions of **Sanjay Kumar Kedia's** case (supra) and the requirement of Section 36-A (4) of the NDPS Act stand fulfilled. The Special Judge has not committed any illegality or irregularity in granting the extension under Section 36 –A (4) of the Act.

In the present case, the additional ground and the compelling reasons for seeking the detention of the accused beyond period of 180 days are mentioned. The scope of analyzing of the reasons given by the prosecution agency for extension of time is limited. Unless and until there are glaring and absurd grounds for seeking extension, it will not be appropriate to analyze the grounds mentioned by the prosecution agency to seek extension of time under Section 36-A (4) of the NDPS Act. It is not mandatory as per the provisions of Section 36-A (4) of the NDPS Act or as per the judgment of **Sanjay Kumar Kedia's** case (supra) that the

application should be accompanied by an extra report in a particular format. It is not out of place to observe here that an indefeasible right accrues to an accused under NDPS Act in case of recovery of commercial quantity, to be released after a period of 180 days in case the investigation is not complete, as per the settled principle of law but at the same time it cannot be ignored that the objective of an application under Section 36-A (4) of the NDPS Act is to dilute the effect of statutory right under Section 167 (2) Cr.P.C. by incorporating the statutory provisions which requires the PP to intimate the Court regarding the progress of the investigation and the specific reasons for the detention of the accused beyond a period of 180 days. The validity of the application and the soundness of the reasons is not to be assessed by the Court beyond the scope and parameters, as laid down in the judgment of **Sanjay Kumar Kedia's** case (supra). As per said judgment in case no notice is given to the accused or the application under Section 36-A (4) of the Act is not filed by the PP or where it does not contain the report regarding the progress of investigation, the application can be declined by the Court. In **Rasheed S/o Ammenshaik Tanveer s/o Akbar Khan and Amruth s/o Mahadev Vinmur Vs.The State of Karnataka, through Santhpur Police**, 2007 (CrI.L.J.) 2316, it was observed that Section 36-A (4) of the NDPS Act, is an exception to the general rule contained in Section 167 (2) Cr.P.C. The NDPS Act was enacted, for the purpose of declaring law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic

substances to provide for the forfeiture of property derived from or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on narcotic drugs and psychotropic substances and for matters connected thereto. As per the provisions of Section 167 (2) Cr.P.C., an accused is entitled to bail, on account of default by the investigating agency in completing investigation. The said indefeasible right accrues to an accused on expiry of the period of 180 days which is prescribed as outer limit for presentation of challan in cases of recovery of commercial quantity of narcotic substances. But taking into consideration the defaults of the prosecution, in context to the above said objectives, provisions of Section 36-A (4) of the NDPS Act were incorporated by the Legislation to carve out an exception to the provisions of Section 167 (2) Cr.P.C.

The Apex Court in recent judgment **Union of India through CBI Vs.Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav**, 2014 (4) RAJ 265, has held that Court cannot act to extinguish the right of accused if the law so confers on him, by laying down the law that application for bail under Section 167 Cr.P.C., is required to be decided on the same day when it is filed before the Magistrate. The adjournment by the Magistrate to extinguish the right of an accused conferred by law would defeat his rights.

I am of the considered opinion that where Section 167 (2) Cr.P.C. confers a right on an accused to be released on bail on account of investigation having not been completed within prescribed limit, at the same

time the statute by provisions under Section 36-A (4) of the NDPS Act grants right to the prosecution agency to seek extension and defeat the right of an accused in case the ingredients of Section 36-A (4) of the NDPS Act, as interpreted in **Sanjay Kumar Kedia's** case (supra) are fulfilled. I am of the considered opinion that the rights of the investigating agency under Section 36-A (4) of the NDPS Act can also not be defeated by a Court by delaying the adjudication of the application under Section 167 (2) Cr.P.C. A court of law is a neutral referee to implement the provisions of law.

As discussed hereinabove, in the present case all the requirements of Section 36-A (4) of the NDPS Act had been complied with by the prosecution agency and the application had been decided prior to May 17, 2015, vide order annexure P-4 dated May 16, 2015 by granting extension to complete the investigation, the right of the petitioner under Section 167 (2) Cr.P.C. stood defeated before the expiry of 180 days. There does not appear to be any illegality in the order annexure P-4 granting extension of time for presentation of challan and order annexure P-6 dated May 20, 2015 dismissing the application under Section 167 (2) Cr.P.C. filed by the petitioner after expiry of 180 days. Since the petitioner has not been able to make out a case regarding violation of any legal right and the facts and circumstances of the present case seem to be not related with the questions referred to in **Surjit Singh's** case (supra), I do not find any ground to grant concession of bail or interim bail to the petitioner.

The petition is dismissed.

September 9, 2015
sanjay

(M.M.S.BEDI)
JUDGE