

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

**CRR No. 110 of 2016 (O&M)
DECIDED ON: September 26, 2016**

GURDEV SINGH

.....PETITIONER..

VERSUS

STATE OF PUNJAB

...RESPONDENT..

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

Present: Mr. D.S. Pheruman, Advocate,
for the petitioner.

Mr. B.S. Cheema, DAG, Punjab,
for the respondent-State.

JASPAL SINGH, J.

By virtue of instant revision petition, the petitioner has sought quashing of impugned order dated 06.08.2015 whereby an application moved by the petitioner under Section 167 (2) of the Code of Criminal Procedure (for brevity, "Code") read with Section 36(A)(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "Act") was dismissed.

2. The only question, which requires determination in instant case is whether presentation of report under Section 173 (2) of the Code minus the report of chemical examiner is a complete report or incomplete report and if, incomplete report, whether the petitioner is entitled to the concession provided under Section 167 (2) of the Code.

3. The case of the prosecution, in brief, is that the petitioner has been

arrested on 01.02.2015 under Section 21 of the Act and after investigation, report under Section 173(2) of the Code was presented in the Court of Id. Jurisdictional Magistrate but without the report of the chemical examiner.

4. Undoubtedly, in the instant case, the investigating agency presented the report under Section 173 (2) of the Code but without the report of the chemical examiner. An application was moved by the petitioner on the ground that due to the submission of incomplete challan/report, indefeasible right of bail has accrued to him. Consequently, he is entitled to bail under Section 167(2) of the Code but while holding that since the report has been presented in the Court, an application moved by him under Section 167 (2) of the Code, was dismissed vide order dated 06.08.2015.

5. Aggrieved against the said order, he approached this Court by way of instant revision petition.

6. By now, through a catena of cases, it is fully established that failure on the part of investigating agency to present a complete police report within the prescribed period confers an indefeasible right upon the accused to be released on bail because in the absence of the report of chemical examiner, the Court is incompetent to take cognizance of an offence. Even otherwise, filing of charge-sheet under Section 173(2) of the Code is not complete, unless, it is accompanied by all the documents contemplated under Section 173(5) of the Code and is taken on record for the examination for taking cognizance. In ***“Sub-Divisional Magistrate, Delhi v. Master Ram Kali”***, AIR 1968 Supreme Court 1, the Hon'ble Apex Court has held that when Section 190(1)(b) of the Code uses the words “may take cognizance” it means that the Court must take cognizance and it has no discretion in the matter. Moreover, no reasons are

required to be given for taking cognizance under Section 193 of the Code. But in order to enable the Magistrate to take cognizance on a police report under Section 173 (2) of the Code, the same has to be a complete report thereunder accompanied by the documents under sub-section (5) of Section 173 of the Code so that the Magistrate may apply his judicial mind for the purpose after looking into the police report and the materials annexed therewith. In other words, it can be said that the term “taking cognizance” means a judicial action permitted by the Code taken with a view to take eventual prosecution preliminary to the commencement of the enquiry or trial. In case, **“H.S. Bains v. State, AIR 1980 Supreme Court 1883”**, it was observed that a Magistrate on receipt of police report under Section 173 of the Code may as well decide that there is no sufficient ground for proceeding further, and drop action, or he may take cognizance of the offence under Section 190(1) (b) of the Code on the basis of the police report. In view of another decision of Hon'ble Supreme Court in **“Satya Narain Musadi v. State of Bihar”, 1980 Cri LJ 227**, the police report under Section 173(2) of the Code unaccompanied by the documents under Section 173(5) of the Code cannot be said to be police report in the eyes of law being an incomplete one. A Magistrate would be incompetent to take cognizance of an offence on such a police report as he would not be in a position to look the documents which are required to be accompanied by it for the purpose of taking cognizance. Similarly, in **“R.R. Chari v. State”, AIR 1950 Allahabad 626**, it was observed that the expression “taking cognizance” of an offence means the Court deciding to proceed against the offender with a view to determine his guilt. In case, **“State v. Siba Prasad”, AIR 1953 Orissa 84**, it was held that the until the charge-sheet has been filed, a Magistrate cannot be said to

have taken cognizance of any offence because he can take cognizance of the offence and direct the issue of process only on receipt of police report, till that stage is reached, he can be said to be acting only as a Magistrate controlling the investigation made by the police. In another case ***“D. Lakshminarayana v. Narayana”***, AIR 1976 Supreme Court 1972, the Hon'ble Supreme Court held that cognizance can be said to be taken when the Magistrate applies his mind for proceeding further with the case. Taking cognizance of an offence is a judicial act and not administrative and at that juncture, application of mind is necessary. Thus, a scrutiny of the various observations made in the aforesaid cases lead to the conclusion that a police report (charge-sheet) under Section 173 (2) of the Code is not complete unless it is accompanied by the material documents as contemplated under Section 173(5) of the Code.

7. Adverting to the facts of the case in hand, though the report under Section 173(2) of the Code has been filed by the investigating agency in the Court of Id. Jurisdictional Magistrate but without the report of chemical examiner. Until and unless, the report of chemical examiner is available on record, the Court cannot charge-sheet a person for the violation of various provisions of the Act. To sum up, it is observed that in the absence of the report of chemical examiner, a person cannot be charge-sheeted and the trial can't proceed. Thus, the submission of the report minus the report of the chemical examiner cannot scuttle down an indefeasible right, which stands accrued to the accused for non-presentation of the report under Section 173 of the Code in the Court of Id. Jurisdictional Magistrate within the period stipulated under the Act.

8. As an upshot of the aforesaid discussion, this Court is of the considered view that the impugned order suffers from material illegalities and

irregularities. Thus, it is not sustainable in the eyes of law. Accordingly, instant petition is allowed whereby the impugned order dated 06.08.2015 is set aside. Consequently, application under Section 167(2) of the Code moved by the petitioner before the Id. Magistrate/Trial Court stands allowed. He is ordered to be released on bail at the satisfaction of trial Court/Duty Magistrate.

September 26, 2016
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(JASPAL SINGH)
JUDGE

Whether speaking/reasoned: Yes

Whether reportable: Yes