

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Revision No. 582 of 2018**

1. Praveen Kumar, S/o Jagdish, aged about 35 years, R/o Gharondha, PS- Gharondha, Ward No.2, Rajeev Colony District- Karnal, Haryana,
2. Vinod Kumar, S/o Dharampal, aged about 25 years, R/o Rampur (wrongly mentioned as Raipur in impugned order) Jatan, PS- Gharondha, District- Karnal, Haryana.

--- Applicants**Versus**

State of Chhattisgarh through the Special Judge (NDPS) Act, Kondagaon, District- Kongadaon (C.G.).

---- Respondent

For Applicants	:	Mr. Shobhit Koshta, Advocate
For Respondents	:	Mrs. Smita Ghai, Advocate

Hon'ble Shri Justice Arvind Singh Chandel

Order on Board**01/10/2018**

1. This petition has been preferred against the order dated 30/04/2018 passed by the Special Judge (NDPS), whereby the learned Special Judge has rejected the application of the applicants for grant of default bail under Section 167 (2) Cr.P.C.
2. The case of the prosecution in brief is that an offence under Section 20 (b) (ii) (c) of the NDPS Act has been registered against both the applicants as crime No. 241/2017. After registration of the crime, both the applicants were arrested on 28/10/2017 and they were sent for remand on 29/10/2017. Thereafter, further remand was obtained from

Special Court (NDPS). The case was lastly fixed for 30/04/2018. On the said date, a charge-sheet was filed i.e. after expiry of 180 days and on 183rd day. On 30/04/2018, both the applicants were presented before the trial Court. The charge-sheet along with application under proviso to Section 36A (4) of the NDPS for condoning delay in filing of the charge-sheet was filed. The said application was presented by the police officer not by the Public Prosecutor. On the very date i.e. 30/04/2018, both the applicants also moved an application under Section 167 (2) Cr.PC for their release on default bail as the charge-sheet was filed after the prescribed period of 180 days.

3. The learned Court below after hearing the parties, firstly allowed the application filed under proviso 36 A (4) of the NDPS Act and condoned the delay in filing the charge-sheet. The Court below, thereafter rejected the application filed under Section 167 (2) Cr.P.C on the ground that just after expiry of 180 days, the applicants were not present with their application for default bail, and they have submitted their application after filing of the charge-sheet.
4. Learned counsel for the applicants submits that the applicants were arrested on 28/10/2017 for the offence punishable under Section 20 (b) (ii) (c) of the NDPS Act, consequently, the applicants should have been released on bail as the charge-sheet was not filed within a period of 180 days when the bail was claimed. He further submits that the learned Court below has failed to appreciate that there was no report of the Public Prosecutor which is mandatory requirement for granting extension of time under proviso to Section 36A of the NDPS Act. Moreover, the

above mentioned provision provides for seeking extension of time in filing of the charge-sheet and the same cannot be exercised for condoning the delay in filing of the charge-sheet. The charge-sheet is deemed to be filed as per relevant law when it is sent to the Central Filing Section and allotted a separate number from there. Merely showing the charge-sheet to the Court below would not suffice. A bare perusal of the charge-sheet shows that neither any number appears nor any endorsement appears on the face of the filing of the charge-sheet. He further submits that it is the duty and responsibility of a Court on coming to know that the accused person before it is entitled to default bail and at least apprise him or her of the indefeasible right. Therefore, merely because the applicants have filed application under Section 167 (2) Cr.P.C on 183rd day and not on 181st day would not come in way of applicants to seek their rights envisaged under Section 167 (2) of Cr.P.C.

5. Learned State Counsel opposes the submission made by the learned counsel for the applicant and submits that the order passed by the Court below is well merited, which do not call for any interference.
6. I have perused the order of the Court below and have heard both the parties.
7. In the instant case, both the applicants were arrested on 28/10/2017 and first remand was obtained on 29/10/2017.
8. Section 36 A (4) of the NDPS Act provides as under:-

(4). In respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27A or for offences involving commercial quantity the references in sub-section (2) of Section

167 of the Code of Criminal Procedure 1973 (2 to 1974), thereof “ninety days”, where they occur, shall be construed as reference to “one hundred and eighty days”:

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

9. In the instant case, the quantity of seized contraband is 68.310 Kg. Therefore, for the purpose of Section 167 (2) of the Cr.P.C., “Ninety days” shall be construed as reference to “one hundred and eighty days”
10. Since first remand was taken on 29/10/2017, therefore, for determination of the period for the purpose of Section 167 (2) of the Cr.P.C, it would start from 30/10/2017. The charge-sheet in this case was filed on 30/04/2018 and the period as calculated is shown hereunder:-

Custody Period	Total Period
From 30/10/2017 to 31/10/2017	2 days
From 01/11/2017 to 30/11/2017	30 days
From 01/12/2017 to 31/12/2017	31 days
From 01/01/2018 to 31/01/2018	31 days
From 01/02/2018 to 28/02/2018	28 days
From 01/03/2018 to 31/03/2018	31 days
From 01/04/2018 to 30/04/2018	30 days
Total	183 day

11. Therefore, the charge-sheet was filed on 183rd day i.e. on 30/04/2018.
12. The provisions of Section 167 (2) Cr.P.C. as amended today is shown hereunder:-

“167- Procedure when investigation cannot be completed in twenty-four hours.

(1) xxxxxxxxxxxx

(2) xxxxxxxxxxxx

(a) Provided that-

The Magistrate may authorize 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.”

13. In **Union of India v. Thamisharasi & Others, (1995) 4 SCC 190**, it was held by the Apex Court in paras 10, 13 & 14 as under:-

10. *The limitations on granting of bail specified in clause (b) of Sub-section (1) of Section 37 come in only when the question of granting bail arises on merits. By its very nature the provision is not attracted when the grant of bail is automatic on account of the default in filing the complaint within the maximum period of custody permitted during investigation by virtue of sub-section (2) of Section 167 Cr.P.C. The only fact material to attract the proviso to sub-section (2) of Section 167 is the default in filing the complaint within the maximum period of specified therein to permit custody during investigation and not the merits of the case which till the filing of the complaint are not before the Court to determine the existence of reasonable grounds for forming the belief about the guilt of the accused. The learned Additional Solicitor General submitted that this belief can be formed during investigation by reference to the contents of the case diary even before the charge-sheet has been filed. This is fallacious. Till the complaint is filed the accused is supplied no material from which he can discharge the burden placed on him by Section 37 (1) (b) of the NDPS Act. In our*

opinion, such a construction of clause (b) of sub-section (1) of Section 37 is not permissible.

11. XXXXXXXX

12. XXXXXXXX

13. *Accordingly, the provision in Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the corresponding provision in the Code and imposes limitation on granting of bail in addition to the limitations under the Code of Criminal Procedure as expressly provided in sub-section (2) of Section 37. These limitations on granting of bail specified in sub-section (1) of Section 37 are in addition to the limitations under Section 437 of the Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding the applicability of the proviso to sub-section (2) of Section 167 Cr.P.C which operates in a different field relating to the total period of custody of the accused permissible during the investigation.*

14. *In our opinion, in order to exclude the application of the proviso to sub-section (2) of Section 167 Cr.P.C in such cases an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary implication. As shown by us, there is no such provision in the NDPS Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 Cr.P.C which is expressly applied. The absence of any provision inconsistent therewith in this Act is significant.*

14. From the above, it is clear that the provisions of Section 167 (2) of the Cr.P.C is applicable to the case related to the NDPS Act.
15. The Courts have time and again have shown its concern about personal liberty qua the penal statutes as also the obligation of the Court. It is the duty and obligation of the Magistrate before whom a person accused is produced to make him fully aware about his right flows from Articles 21 & 22 (1) of the Constitution of India and such mandates needs to be strictly enforced as has been held by the Supreme Court in the matter of **Rakesh Kumar Paul v. State of Assam (AIR 2017 SC 3948)**. The Court therein has held that it is the duty and responsibility of a Court on

coming to know that the accused person before it is entitled to default bail and at least apprise him or her of the indefeasible right.

16. Taking into facts of this case, order sheet dated 30/04/2018 would show that the charge-sheet was filed on very day i.e. 30/04/2018 i.e. 183rd day along with an application under proviso to Section 36 A (4) of the NDPS Act for condoning the delay in filing of the charge-sheet. Thereafter, the charge-sheet was sent to Central Filing Section for its registration. The order sheet further reflects that at that time itself, an application under Section 167 (2) Cr.P.C was also filed by the applicants. The learned trial Court, firstly allowed the application submitted under proviso to Section 36 A (4) of the Act and condoned the delay in filing of the charge-sheet, and thereafter rejected the application under Section 167 (2) of the Cr.P.C on the ground that the charge-sheet have already been filed by the prosecution. The order sheet also reflects that on the same day i.e. 30/04/2018 both the applicants were present in the Court below, but the Presiding Judge has not apprised them that there is right which was already carrying for default bail under Section 167 (2) of the Cr.P.C. Whereas, the Supreme Court has laid down that it would be the duty and responsibility of the Court to inform the accused about his right of default bail.
17. The said order-sheet also shows that the charge-sheet was sent for central filing Section for its registration. Until the charge-sheet actually is filed in the central filing section according to the Rules & orders (Criminal) as amended by the High Court, the same cannot be terms as filing.

18. For this reason the notification of amendment of the Rule would be relevant. The notification was published in the official gazette dated 16.12.2013 which reads as under:-

“No.9004/R.G/2013.- It is hereby informed that, the High Court of Chhattisgarh hereby makes the following amendments in the Civil Court Rules as also in the Rules and Orders (Criminal), which shall come into force from the date of publishing in Chhattisgarh Gazette.

AMENDMENTS

In Civil Court Rules :-

1. xxx xxx xxx
 xxx xxx xxx
 xxx xxx xxx

2. In Chapter 24 of Rules and Orders (Criminal), Rule 571 shall be numbered as 571 (1) and following shall be added after Rule 571 (1) :-

Section 571 (2) :-

(i) There shall be a Central Filing Section headed by the Registrar at the Civil District Headquarter and Deputy Registrar at the outlying Station in each Civil District.

(ii) The District Judge shall appoint any of its employee/officer to function as Registrar/Deputy Registrar.

(iii) District and Sessions Judge shall also provide as many employees as required to assist the Registrar and Deputy Registrar to perform their function.

(iv) All charge-sheet in Criminal matters, Criminal Appeals, Criminal Revisions and Miscellaneous Judicial Cases shall be presented to the Registrar at Civil District Headquarter and to Deputy Registrar at outlying station in Civil District.

(v) Registrar and Deputy Registrar respectively shall allot a separate number to each case and transmit the same amongst the Courts of Judicial Magistrates as per Distribution order of Chief Judicial Magistrate, under section 14 (1) and 15 (1) of Cr.P.C.

19. While dealing with this issue, this Court in **CRMP NO. 1045/2017,**

(Mukesh Pandey v. State of Chhattisgarh) has held in Paras 11 & 12

as under:-

11. According to the prevailing rules, unless and until the Registrar and Deputy Registrar respectively transmit the charge-sheet after allotting a separate number, the same cannot be said to be in compliance to the amended rules. As otherwise, there would have always an ambiguity about the timing of the filing of the charge-sheet and dispute would be in every case especially in the case where the default bail is prayed. Therefore, as per the rules, when the charge-sheet is filed, it is to be presented to the Registrar at Civil District Headquarter and to Deputy Registrar at outlying station in civil District. Thereafter, the Registrar and Deputy Registrar respectively shall allot a separate number to case and transmit the same amongst the Courts of Judicial Magistrates as per Distribution. Herein, in the instant case, apparently such Rules were not followed. Neither any number is appearing nor any endorsement appears on the face of the filing of the challan. So mere showing the challan to a Magistrate cannot be said to be filing of the challan. The judge cannot take the role of prosecutor or show any interest on behalf of the prosecution as he has to act independently. Therefore, the amended Rule will prevail over the observation of a Judge with respect to date & filing of it with time.

12. The principle as has been laid down in the case of **Rakesh Kumar Paul (supra)** the Supreme Court has held that in matters of personal liberty, the Court cannot be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' it is of no consequence. It was directed that the concerned Court must deal with such an application by considering the statutory requirements, namely whether the statutory period for filing a charge-sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

20. In the instant case also, the record shows that just after submitting the charge-sheet before the trial Court and before condoning the delay in filing the charge-sheet, the application for default bail under Section 167 (2) Cr.P.C was already submitted by the applicants before the trial Court.
21. As informed by the Sessions Judge, Kondagaon that on 30/04/2018 at about 4:44 pm, the said charge-sheet was filed before the Central Filing Section, thereafter, it was registered. Thus, it is clear that the charge-

sheet was actually filed on 30/04/2018 at about 16:44, however, the default bail application had already been filed before that. In these circumstances, the default bail application under Section 167 (2) Cr.P.C should have been allowed. The finding of the trial Court that the application under Section 167 (2) Cr.P.C was filed after filing of the charge-sheet, is not in accordance with actual status.

22. In a result, I am of the opinion that the principle laid down in the case of **Rakesh Kumar Paul (supra)** shall govern the facts of this case and I am of the opinion that the petitioner has satisfied all the requirements of obtaining default bail on 30/04/2018 as he has been put more than 180 days in custody pending investigation for the alleged offence. Since he was prepared to furnish bail for his release, as such he ought to have been released by the Court below on reasonable terms and conditions of bail. In a result, since the petitioner was not released, I am inclined to allow this petition.
23. Accordingly, the petition is allowed. The petitioner is directed to be released on default bail on each of them executing personal bond in sum of Rs.2,00,000/- with two sureties each of Rs. 1,00,000/- to the satisfaction of the trial Court. They are directed to appear before the trial Court on each and every date given by the said Court.

Sd/-
(Arvind Singh Chandel)
Judge