135 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR No.361 of 2021 (O&M)
Date of Decision :09.08.2021

Jagvinder Singh …Petitioner

Versus

State of Haryana ….Respondent

Coram : Hon'ble Mr. Justice B.S. Walia

Present : Mr. Aditya Sanghi, Advocate for the petitioner.
Mr. Pawan Kumar Longia, DAG, Haryana.
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B.S. Walia, J. (VC)

[1] Prayer in the revision petition under Sections 397/401 Cr.P.C. is for setting aside order dated 12.02.2021 passed by the learned Additional Sessions Judge, Fatehabad dismissing the application of the petitioner for default bail under Section 167 (2) Cr.P.C. despite the final report filed by the prosecution before the expiry of 180 days not being accompanied by FSL report.

[2] Learned counsel contends that the petitioner was arrested in case FIR No.111 dated 08.08.2020 registered under Sections 22-C/27-A NDPS Act No.61 of 1985 at Police Station Jakhal, District Fatehabad, Haryana. Challan was presented in the aforementioned case on 02.02.2021 though without the FSL report, whereafter the petitioner moved an application for default bail under Section 167(2) Cr.P.C. read with Section 36 (A)(iv) NDPS Act on the ground that in the absence of FSL report having been filed along with the challan presented on 02.02.2021,the challan was incomplete in view of the decision of

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Hon'ble the Division Bench of this Court in ***Ajit Singh @ Jeeta and another Vs. State of Punjab, CRR No.4659 of 2015,*** besides, no application under Section 36 (A) (iv) NDPS Act had been filed by the prosecution prior to the filing of the application for default bail by the petitioner and for that matter, no such application having been filed by the prosecution before the learned trial Court under Section 36 (A)(iv) NDPS Act has been brought to the notice of this Court though report of the FSL is stated to have been placed on record before the learned trial Court holding the recovered material to be contraband of commercial quantity. Learned counsel has also placed reliance on the decision of Hon'ble the Supreme Court in ***M. Ravindran Vs. The Intelligence Officer, Directorate of Revenue Intelligence, CRR No.699 of 2020, decided on 26.10.2020.***

[3] Learned counsel contends that in the absence of an application under Section 36 (A)(iv) of the NDPS Act having been filed by the prosecution before the learned trial Court for extension of time and an order on the same having been passed extending the period for investigation, the petitioner is entitled to be released on default bail and the learned trial Court erred in law by rejecting the application under Section 167 (2) Cr.P.C. by referring to the decisions of Hon'ble the Supreme Court in **Narendra Kumar Amin Vs. CBI and others, 2015(3) SCC 417, Abdul Azeez P.V. & others Vs. National Investigation Agency, 2014(6) SCC 543** and learned Single Bench of this Court in **Shankar Vs. State of Haryana, CRM-M-44412-2019, decided on 20.12.2019.**

[4] Learned counsel further contends that the aforementioned judgments were considered by the learned Single Bench of this Court in

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State of Haryana vs Dildar Ram @ Dari, CRM-M No.25600 of 2021 decided on 15.07.2021 wherein the State had challenged the grant of default bail under Section 167 (2) Cr.P.C. to the respondent / accused therein by way of revision petition due to failure of the prosecution in filing the FSL report with the challan under Section 173 (2) Cr.P.C., the learned Co-ordinate Bench also took into account the decision of **Narendra Kumar Amin'scase (Supra) and Abdul Azeez's case (Supra),** Full Bench of this Court in **State of Haryana Vs. Mehal Singh and others, 1978 PLR 480,** as well as the judgments passed by the learned coordinate benches of this court **in Rahul Vs. State of Punjab, CRR No.1016-2020, decided on 21.12.2020, Azuka Vs. State of UT, Chandigarh, CRR-765-2020, decided on 13.03.2020, Shankar'scase (Supra) and Akash Kumar @ Sunny Vs. State of Haryana, CRR No.1731-2019 decided on 16.10.2019,** wherein it was held that challan under Section 173 (2) Cr.P.C. having been filed without FSL report would not entitle the accused to be released on default bail under Section 167 (2) Cr.P.C., that the learned Co-ordinate Bench also took into account the decision of another learned Co-ordinate Bench of this Court in **Julfkar Vs. State of Haryana, CRR No.1125 of 2020 decided on 16.09.2020** referring the matter to a Hon'ble Division Bench of this Court in view of the conflict in judgments, by taking into account the judgment of a learned Co-ordinate Bench of this Court i.e. **Suresh v. State of Haryana, CRR No.1135 of 2020 decided on 18.11.2020** and observing that in the event of the Hon'ble Division Bench opining that the challan filed without the FSL report was a complete challan, the State would be at liberty to prefer an application for cancellation of bail.

Learned Counsel further contends that the learned Co-ordinate Bench

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also took into account order dated 03.11.2020 passed in CRR No.1150 of 2020 in case titled as Rinku Vs. State of Haryana that as the matter had been referred to a Larger Bench, in the meantime, the accused would be entitled to be released on default bail and that while considering the decision of the learned trial Court granting default bail to the respondent in the light of decision of Hon'ble the Division Bench of this Court in case of Ajit Singh @ Jeeta's case (Supra) the learned single bench observed that the judgments of the Supreme Court as well as Full Bench of this Court relied upon by the counsel for the State [as have also been relied upon by the learned DAG in the instant case] were distinguishable on facts as the judgment of Hon'ble, the Supreme Court in the case of Narendra Kumar Amin's case (Supra)did not pertain to a case under the NDPS Act and in that case complete set of documents had not been filed along with the challan and it was in such circumstances it was held that merely because complete set of documents were not filed, the accused would not have the right to be released on default bail, while in Abdul Azeez P.V.'s case (Supra), the Co-ordinate Bench while taking into account that although challan had been filed but foreign bank transaction details were yet to be collected and call data records had to be analysed, for which further investigation was sought observed that the said case was also not a case under the NDPS Act.

[5] Learned Counsel further contends that the learned Co-ordinate Bench further observed that the Hon'ble Full Bench of this Court in the case of **State of Haryana Vs. Mehal Singh and others, 1978 PLR 480,** had held that challan without the report of experts including chemical examiner, serologist, ballistic and finger print expert would be considered to be a complete challan for the purposes of

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deciding concession of default bail under Section 167(2) Cr.P.C. but observed that said case also did not pertain to an offence under the NDPS Act, therefore, it would not be applicable to the facts of the case. Learned Counsel further contends that the learned Co-ordinate Bench also took into account that the Hon'ble Full Bench decision of this Court as referred to above had also been distinguished by the Hon'ble Division Bench in Ajit Singh @ Jeeta's case (Supra) which had been constituted to answer the specific question with regard to concession of default bail under Section 167(2) Cr.P.C. if a challan had been filed without the FSL report for an offence under the NDPS Act and it was held by the Hon'ble Division Bench that the Hon'ble Full Bench was interpreting the provisions and scope of the Cr.P.C. in the backdrop of general offences pertaining to IPC and other statutes but was not seized of the NDPS Act. Learned Counsel further contends that the learned Co-ordinate Bench also referred to the observations of Hon'ble the Division Bench distinguishing the judgment in **Mehal Singh's** case (supra). Relevant extract of the same is reproduced below :

> *"Evidently, the Court while making the aforeextracted observations, did so while strictly interpreting the provisions and scope of the Cr.P.C. and in the backdrop of general offences confined to the I.P.C. or some other statutes but was not seized of a Special Act as the N.D.P.S. Act, which though brings out the same conflict in view of certain provisions contained therein but is lending a new dimension that demands an answer through an incisive insight to the provisions of the Act despite the authoritative pronouncement of the Full bench in State of Haryana v. Mahal Singh and others (supra) and that of the Hon'ble Supreme Court in Tara Singh's case (supra)."*

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Learned Counsel contends that the learned Co-ordinate Bench held that in the circumstances, it was apparent that the FSL report, especially in NDPS cases, goes to the root of the matter and formed the very basis and foundation of a charge under the NDPS Act and if Courts permitted filing of challan under Section 173(2) Cr.P.C. without the FSL report, without scientifically confirming the type of contraband involved, it would invariably lead to violation of the fundamental right to life and liberty of the citizens guaranteed by Article 21 of the Constitution of India, as there had been several instances of challans having been filed without the FSL report and after receipt of the FSL report, it was found that the recovered substance was neither a narcotic nor a psychotropic substance as was found in the case of **Robin Singh vs State of Punjab CRM No.M-20140-2021, decided on 30.06.2021**, wherein this court had granted bail after it was found that FSL report did not find any incriminating substance. Learned Counsel contends that in the light of the aforementioned discussion, the Co-ordinate Bench dismissed the revision petition filed by the State of Haryana challenging the grant of default bail to the accused therein.

[6] Learned counsel has also referred to the decision of ***Julfkar's case*** **(Supra)** wherein a Co-ordinate Bench of this Court took into account not only the decision of Hon'ble the Division Bench in Ajit Singh @ Jeeta's case (Supra) but also a number of learned Single Bench judgments of this Court i.e. **Bhupinder Kumar @ Binder versus State of Haryana 2019 (2) RCR (Criminal) 376, Tarlok and others versus State of Haryana, 2019 (3) RCR (Criminal) 348, besides, judgement dated 22nd May 2020 passed in Criminal Revision No. 1626 of 2019** in case titled as **Janta Singh versus State of Haryana** following the

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decision in Ajit Singh @ Jeeta's case (supra) as also the decision dated 16th October 2019 passed in Criminal Revision No. 1731 of 2019 in case titled as Akash Kumar @ Sunny versus State of Haryana whereby a learned Single Bench of this Court held that the Hon'ble Division Bench judgement in Ajit Singh @ Jeeta's case (supra) was per incuriam, the decision in Akash Kumar @ Sunny's case (Supra) was followed by another learned Single Bench in Shankar's case (Supra), and the learned Single Bench in ***Julfkar's case*** **(Supra)** by observing that the doctrine of stare decisions had been the bedrock of our judicial system and had resulted in uniformity and certainty in decision making and while referring to the decision in **Dr. Shah Faesal versus Union of India, 2020 (4) SCC 1, National Insurance Company Limited versus Pranay Sethi, (2017) 16 SCC 680, Mahadeolal Komadia versus The Administrator General of West Bengal (1960) 3 SCR 578; Ayyaswami Gounder vs. Munuswamy Gounder (1985) 1 SCR 808; Pritam Kaur versus Surjit Singh 1984 PLR 202; Young v. Bristol Aeroplane Co. Ltd., 1944 KB718 (CA)** observed that a judgement may be held to be per incuriam in case it failed to notice an earlier binding precedent which covered the field but that even in such a situation a Bench of lesser strength could not say that the judgement of a larger Bench was per incuriam and the only course available to it was to make a reference to a larger Bench and in the circumstances, the learned Co-ordinate Bench observed that the file of the case be placed before Hon'ble the Chief Justice with a request to constitute a Hon'ble Division Bench for consideration of the matter and meanwhile directed that the petitioner be released on bail on furnishing bail and surety bonds to the satisfaction of the learned trial Court.

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[7] Learned State counsel on the other hand has relied upon the decision of Hon'ble the Supreme Court in **Abdul Azeez P.V.'s case (Supra);Narendra Kumar Amin's case (Supra); Central Bureau of Investigation Vs. R.S.Pai& Another, 2002(2) RCR (Crl.) 536; Suresh Kumar Bikam Chand Jain v. State of Maharashtra and another, 2013 (2) RCR (Crl.) 170 as also of this Court in Akash Kumar @ Sunny's case (Supra) and Shankar's case (Supra)**. Learned State counsel contends that the FSL report has subsequently been received and placed on record before the learned trial Court on 17.03.2021 wherein it is recorded that the recovered substance was prohibited contraband, therefore, the petitioner is not entitled to be released on bail, more so, on account of recovery being of commercial quantity.

[8] I have considered the submissions of learned counsel for the parties. Admittedly, the petitioner filed an application on 11.02.2021 under Section 167 (2) Cr.P.C. for grant of default bail i.e. on the 186th day from the date of registration of FIR and his arrest on 08.08.2020 on account of the challan presented under Section 173 (2) Cr.P.C. on 02.02.2021 not being accompanied by the report of the FSL and no application having been filed by the prosecution under Section 36 (A) (iv) NDPS Act for extension of time for investigation and continued detention of the petitioner beyond the period of 180 days. The Hon'ble Division Bench in Ajit Singh @ Jeeta's case (Supra) has categorically held that the report of the FSL with regard to the nature of the recovered substance would go to the root of the matter and, a challan filed without the FSL report with regard to the nature of the substance would be an incomplete challan and would not satisfy the requirement envisaged under Section 167(2) Cr.P.C. and that in the absence of the challan

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having been presented along with the report of the FSL, the accused in such circumstances would be entitled to be released on default bail. Relevant extract of the aforesaid decision is reproduced as under:-

> *"We emphasize on the stringent aspect of the N.D.P.S. Act which would compellingly persuade us to take the aforesaid view. Without determining the nature and content of the contraband, it would be draconian to propel an accused into the throes of a trial. The liberty of an individual would constantly be imperiled at the hands of dubious officials of the police who may venture to falsely implicate a person. It is for this reason that we would unhesitatingly conclude that the Chemical Examiner's report is an essential ; integral and inherent part of the investigation under the N.D.P.S. Act as it would lay the foundation of an accused's culpability without which a Magistrate would not be enabled to form an opinion and take cognizance of the accused's involvement in the commission of offence under the Act."*

[9] Hon'ble the Supreme Court in ***M. Ravindran's case (Supra)*** has held that in the absence of the Public Prosecutor having filed an application seeking extension of time to investigate into the crime prior to the filing of an application under Section 167 (2) Cr.P.C. after the expiry of 180 days by the petitioner, the accused would be deemed to have availed of his indefeasible right to bail, the moment he filed an application for being released on bail and offered to abide by the terms and conditions of the bail order and such an accused is entitled to be released on bail notwithstanding the subsequent filing of an additional complaint. Relevant extract of the same is reproduced as under:-

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"17. In the present case, admittedly the Appellant-accused had exercised his option to obtain bail by filing the application at 10:30 a.m. on the 181st day of his arrest, i.e., immediately after the court opened, on 01.02.2019. It is not in dispute that the Public Prosecutor had not filed any application seeking extension of time to investigate into the crime prior to 31.01.2019 or prior to 10:30 a.m. on 01.02.2019. The Public Prosecutor participated in the arguments on the bail application till 4:25 p.m. on the day it was filed. It was only thereafter that the additional complaint came to be lodged against the Appellant.

Therefore, applying the aforementioned principles, the Appellant-accused was deemed to have availed of his indefeasible right to bail, the moment he filed an application for being released on bail and offered to abide by the terms and conditions of the bail order, i.e. at 10:30 a.m. on 01.02.2019. He was entitled to be released on bail notwithstanding the subsequent filing of an additional complaint.

17.1 It is clear that in the case on hand, the State/the investigating agency has, in order to defeat the indefeasible right of the accused to be released on bail, filed an additional complaint before the concerned court subsequent to the conclusion of the arguments of the Appellant on the bail application. If such a practice is allowed, the right under Section 167(2) would be rendered nugatory as the investigating officers could drag their heels till the time the accused exercises his right and conveniently files an additional complaint including the name of the accused as soon as the application for bail is taken up for disposal. Such complaint may be on flimsy grounds or motivated merely to keep the accused detained in custody, though we refrain from commenting on the merits of the additional complaint in the present case. Irrespective of the seriousness of the offence and the reliability of the evidence available, filing additional complaints merely to circumvent the

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application for default bail is, in our view, an improper strategy.

Hence, in our considered opinion, the High Court was not justified in setting aside the judgment and order of the Trial Court releasing the accused on default bail.

17.2 We also find that the High Court has wrongly entered into merits of the matter while coming to the conclusion. The reasons assigned and the conclusions arrived at by the High Court are unacceptable.

18. Therefore, in conclusion:

18.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under section 167(2), CrPC, 1973 read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

18.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge sheet or a report seeking extension of time by the prosecution before the Court; or filing of the charge sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.

18.3 However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge sheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the

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right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

18.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid."

[10] In the instant case, application under Section 167 (2) Cr.P.C. was filed by the petitioner on 11.02.2021 i.e. on the 186th day from the date of his arrest and after the presentation of the challan on 02.02.2021 minus the FSL report without the prosecution having moved an application under Section 36 (A)(iv) NDPS Act for extension of time for investigation. Hon'ble the Supreme Court in ***M. Ravindran's case (Supra)*** took into account that the subsequent filing of an additional complaint before the concerned Court subsequent to the conclusion of the arguments of the accused on the bail application if allowed, the right under Section 167(2) Cr.P.C. would be rendered nugatory as the investigating officers could drag their heels till the time the accused exercises his right and conveniently files an additional complaint including the name of the accused as soon as the application for bail was taken up for disposal. Hon'ble the Supreme Court further held that the right to be released on default bail continues to remain enforceable if the accused had applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge sheet or a report seeking

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extension of time by the prosecution before the Court; or filing of the charge sheet during the interregnum when challenge to the rejection of the bail application was pending before a higher Court.

[11] Admittedly, the judgments cited by the learned State Counsel of Hon'ble the Supreme Court in **Central Bureau of Investigation's case (Supra); Suresh Kumar Bikam Chand Jain's case (Supra) v. State of Maharashtra and another's case (Supra), Narendra Kumar Amin's case (Supra) and Abdul Azeez P.V.'s case (Supra)** do not pertain to cases under the NDPS Act. Hon'ble Division Bench in Ajit Singh @ Jeeta's case (Supra) has categorically held that the report of the FSL with regard to the nature of the recovered substance would go to the root of the matter and, a challan filed without the FSL report with regard to the nature of the substance would be an incomplete challan and would not satisfy the requirement envisaged under Section 167(2) Cr.P.C. and that in the absence of the challan having been presented along with the report of the FSL, the accused in such circumstances would be entitled to be released on default bail. Accordingly, the right to default bail accrued to the petitioner on filing of the application under Section 167 (2) Cr.P.C. on the 186th day from the date of his arrest after the presentation of challan on 02.02.2021 by the prosecution minus the report of the FSL and without an application for extension of time or continuing investigation and continued detention of the petitioner having been moved under Section 36 (A) (iv) NDPS Act by the prosecution before the learned trial Court. The petitioner's right to default bail had accrued on the date of presentation of the application notwithstanding the subsequent placing on record of report of FSL though despite pointed query learned DAG has not brought it to the

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notice of the Court as to whether an application under Section 36 (A) (iv) NDPS Act was moved by the prosecution and order obtained on the same from the learned trial Court prior to submission of the FSL report.

[12] Accordingly, in the light of what has been noted in the preceding parts of this order, the impugned order dated 12.02.2021 passed by the learned Addl. Sessions Judge, Fatehabad is *set aside*. The application under Section 167 (2) Cr.P.C. filed by the petitioner is *allowed*. The petitioner is held entitled to default bail subject to his furnishing bail / surety bonds to the satisfaction of the learned trial Court. Petitioner is also directed to surrender his passport, besides, undertaking before the learned trial court to join investigation as and when required and also not to leave the jurisdiction of Fatehabad city except without leave of the learned trial Court in order to alleviate concerns, if any, of the petitioner absconding from the jurisdiction of the Court. The petitioner shall also faithfully attend the hearing of the case during the trial on each and every date, besides, abide by the conditions as contained in Section 437(3) Cr.P.C. and in case of violation of any of the conditions or involvement in any other case under the NDPS, Act, 1985 during the period the petitioner is on default bail, the prosecution would be at liberty to move an application for cancellation of bail granted to the petitioner in the instant case.

[13] Petition ***allowed*** in the aforementioned terms.

(B.S. Walia)
Judge

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'Amit/Rajneesh'

Whether speaking/ reasoned : Yes/No
Whether reportable : Yes/No

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