

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRR-568-2021

Date of Decision: 28.05.2021

Vivek Sabharwal

..... Petitioner

Versus

Union Territory of Chandigarh

..... Respondent

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present: Mr. Vikram Chaudhri, Sr. Advocate with
Mr. Rahil Mahajan, Advocate
for the petitioner.

Mr.A.M. Punchhi, P.P., U.T. Chandigarh with
Mr. Anupam Bansal, A.P.P., U.T. Chandigarh
for the respondent-State.

SUDIP AHLUWALIA, J

This Revision is directed against the order passed by the Ld. Additional Sessions Judge, Chandigarh on 24.02.2021 vide which the Petitioner's application for being released by way of default bail in terms of Section 167(2) Cr.P.C. read with Section 36(A)(4) of the NDPS Act was dismissed.

[2] According to the FIR, on on 18.08.2020 at about 8.20 **PM** in the area of Football Ground, Sector 17 Chandigarh, the Police laid a 'Naka' and apprehended the Petitioner, who was found to be in possession of 25 plastic bottles of Chlorpheniramine Maleate and Codeine Phosphate Syrup 100 ml each and 06 injections of Buprenorphine 02 ml each and Pheniramine Maleate 10 ml each, and he was therefore alleged to have committed the offence punishable under Section 22 of the NDPS Act. The

Ld. Court below rejected his initial prayer for being released on bail following his arrest vide its earlier order dated 04.09.2020, after which he approached this Court by filing **CRM-M-32833-2020** seeking regular bail, which was later withdrawn on 25.05.2021.

[3] However, during pendency of the said petition, on 30.10.2020 the Police apparently prepared the Challan/Final Report against the Petitioner, a copy of which is Annexure P-5. The same was, however, actually presented in Court much later on 10.02.2021, as can be seen by the order passed by the Ld. Judge, Special Court, Chandigarh on that date, which is Annexure P-6. At that stage the matter was already pending in the Trial Court for 19.02.2021. But before the scheduled date the Petitioner filed his application on 16.02.2021 (Annexure P-7) seeking his release on default bail under Section 167(2) read with Section 36(A)(4) of the NDPS Act by contending that the period of 180 days following his arrest and custody had already lapsed, and till then no proper Charge Sheet had been filed by the Police, nor any permission sought by the prosecution from the Trial Court for not filing the proper Charge Sheet within the statutory permissible period on account of which he had become entitled to the benefit of statutory bail.

[4] The aforesaid application was thereafter dismissed by the Ld. Court below, which by relying upon the decision of a Co-ordinate Bench of this Court in '**Shankar v. State of Haryana**' (**CRM-M-44412-2019**) decided on 20.12.2019, observed that a Final Report under Section 173(2) Cr.P.C. filed without report of CFSL under the NDPS Act cannot be said to be incomplete for entitling an accused to the benefit of default bail under Section 167(2) of the Cr.P.C. read with Section 36(A)(4) of the NDPS Act.

[5] After hearing the submissions raised on behalf of both sides and considering the citations relied upon by them, this Court is of the opinion that at this stage the Petitioner would be entitled to be conditionally released on bail in view of the decision of a Division Bench of this Court in **Criminal Revision No. 4659 of 2015**, which was a bunch matter of which the leading case was “**Ajit Singh alias Jeeta and another v. State of Punjab**”.

[6] It may be mentioned that the aforesaid decision of the Division Bench in **Ajit Singh alias Jeeta's case (supra)** was passed in view of a question sent up for consideration in those seven cases, which was as follows :-

“Whether the presentation of report under Section 173(2) Cr.P.C. by the police without the report of Chemical examiner/Forensic Science Laboratory amounts to incomplete challan and in the absence of any extension of time under Section 36-A(4) of the N.D.P.S. Act, the accused is entitled to bail under Section 167(2) Cr.P.C.?”

[7] The Division Bench answered the above reference by holding that a Challan presented without Chemical Examiner's Report can only be termed as an incomplete one, which would result in Default Bail to the accused unless an Application was moved by the Investigating Agency with a prayer for extension of time. The relevant extracts from the decision of the Division Bench are set down as below :-

“For this reason as well, it is essential that the report of the Chemical Examiner be included in the report under Section 173 Cr.P.C. and without which it can at best be termed to be an incomplete challan depriving the Magistrate of relevant material take cognizance and if it is not submitted within the requisite period of 180 days, it would essentially result in a

default benefit to the accused unless an application is moved by the Investigating Agency apprising the Court of status of investigation with a prayer for extension of time to the satisfaction of the Court. 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.”

[8] The Ld. Court below nevertheless rejected the Petitioner's Application by relying upon the Single Bench's decision of this Court in case of '**Shankar vs. State of Haryana – CRM-M No.44412 of 2019**', in which it was held that the above decision of the Division Bench was *per incuriam* since it had not taken into account an earlier decision of the Supreme Court in the case of '**Narendra Kumar Amin vs. CBI and others, 2015(3) SCC 417**', wherein it was mentioned that once a Police Report has been filed as defined in Section 2(r) read with Section 173(2) of the Cr.P.C., the accused cannot claim that since along with the Police Report some documents have not been attached, hence the accused is entitled to Bail under Section 167(2) of the Cr.P.C.

[9] Ld. Counsel for the Petitioner has thereafter relied upon several subsequent decisions of other Co-ordinate Benches of this Court including

CRR No.1125 of 2020 - **Julfkar vs. State of Haryana**, in which the said Bench disagreed with the decision of the Single Bench in **CRR No.1713 of 2019 - 'Akash Kumar @ Sunny vs. State of Haryana'** as it was of the view that a smaller Bench could not have declared the Judgment of a Larger Bench to be *per incuriam*. The concerned Petitioner was therefore granted bail by the Single Bench in the subsequent decision with a further direction that the matter be referred to a Division Bench for consideration of the controversy which had thus arisen. The relevant observations of the Bench in **Julfkar's case (supra)** are set out as below :-

*"I am now faced with a situation where I am confronted with two Single Bench judgments in **Akash Kumar alias Sunny (supra)** and **Shankar (supra)** and a binding Division Bench judgement in **Ajit Singh alias Jeeta (supra)**. By virtue of the doctrine of stare decisis, the Single Bench judgements in **Akash Kumar alias Sunny (supra)** and **Shankar (supra)** are binding on me as they lay down a proposition of law although at variance with the law laid down by the Division Bench in **Ajit Singh alias Jeeta (supra)**. However, I express my respectful disagreement with the aforementioned Single Bench judgements on the ground that a smaller Bench could not have declared the judgement of a larger Bench to be *per incuriam* in view of the doctrine of stare decisis and also that the principle of *per incuriam* has been applied erroneously. Judicial discipline demands that a reference be made to a Division Bench regarding the validity and correctness of the aforementioned Single Bench judgements. The file of this case be, thus, placed before Hon'ble the Chief Justice with a request to constitute a Division Bench for consideration of this matter. Since the law has been unsettled and is leading to confusion amongst the trial Courts, the matter may be considered urgently.*

Meanwhile, it is directed that the petitioner be released

on bail on furnishing bail and surety bonds to the satisfaction of the trial Court.”

[10] This Court itself thereafter in **Suresh v. State of Haryana (CRR No. 1135 of 2020)** also took the same view and permitted the Petitioner in the said case by observing *inter alia* :

*'9. In the given circumstances, this Court is also of the view that at this stage the Petitioner ought to be granted Bail in any case since he has already remained in detention for more than 8½ months now and there is not record of his involvement in any other case under the NDPS Act, and on account of on-going Covid-19 Pandemic, the trial which could not commence is likely to take a considerable time in its completion. Further, the validity of the decision in disregarding the Division Bench's decision in **Ajit Singh alias Jeeta's case (supra)** cannot at this stage be said to be altogether beyond controversy, since the matter has now been referred for consideration afresh in view of the decision in **Julfkar's case (supra)** which has subsequently been followed in the case of **Rinku vs. State of Haryana (supra)**.'*

[11] In the present case also the detention undergone by the Petitioner so far is already more than 9 months following his arrest on 18.08.2020, and there is also no record of his involvement in any other case under the NDPS Act. Trial in the case again is likely to be delayed on account of on-going Covid-19 Pandemic. So in the totality of all these circumstances, the Court finds no reason to take any different view of the matter from that taken earlier in the case of **Suresh v. State of Haryana (supra)**, which has been subsequently followed by other Co-ordinate Benches in **Dilawar Singh v. State of Haryana (CRR-37-2021)** and **Sumit @ Mittu v. State of Haryana (CRR-1221-2020)**.

[12] The Criminal Revision petition is, therefore, allowed at this stage and the Petitioner is permitted to be conditionally released on bail to the satisfaction of the Ld. Trial Court concerned. It is however clarified that in case of any different result coming forth from the referral Bench, from that in the decision in **Ajit Singh alias Jeeta's case (supra)**, the State would be at liberty to seek cancellation/modification of this order, if so warranted at that stage.

28.05.2021*Satyawan***(SUDIP AHLUWALIA)
JUDGE**

1. Whether speaking/reasoned : Yes/No
2. Whether reportable : Yes/No