

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

CRM-M- 24655-2021 (O&M)

Date of Decision: July 26, 2021

(Heard through VC)

Rakesh alias Moni

... Petitioner

Versus

State of Haryana

... Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Rajesh Khandelwal, Advocate
for the petitioner.

Mr. Dhruv Sihag, AAG, Haryana.

JAISHREE THAKUR, J. (Oral)

1. The petitioner has approached this High Court under Section 439 Cr.P.C. read with Sections 167(2) and 482 Cr.P.C aggrieved against order dated 11.6.2021 passed by the Additional Sessions Judge, Hisar by which his application for default bail has been denied.

2. In brief the facts are that the petitioner herein was nominated as an accused in FIR No. 64 dated 21.10.2020 under Section 328, 363, 366-A, 376, and 506 IPC read with Section 6 of the POCSO Act, 2012 (Sections 376-D , 420, and 201 IPC and Section 67-B of the Information Technology Act added later on) registered at Women Police Station Hansi. It was alleged that the daughter of the complainant had been enticed away by two boys namely Sunil and Moni in a car to an unknown place, where after

consuming liquor she was raped. When she woke up, she found herself without any clothes. The incident complained of was 40 days prior to the date of filing of the FIR. In the FIR, it was alleged that both the boys were daily threatening her daughter as they had video and photos of her daughter, apart from threatening to kill the victim's younger brother if she failed to listen to them. As the prosecutrix was a minor, strict action was sought against the accused. On the registration of the FIR, the statements of the prosecutrix was recorded under Section 161 and 164 Cr.P.C., consequent to which the petitioner was arrested on 27.10.2020.

3. Learned counsel appearing on behalf of the petitioner raises a two-fold contention while challenging the above-mentioned impugned order. It is contended that the FIR was registered on 21.10.2020 and the petitioner was arrested on 27.10.2020. Thereafter an incomplete challan was submitted on 23.11.2020 (admittedly without the Cyber Cell report). It is argued that the application for default bail has been dismissed without taking into consideration that an incomplete challan was presented and hence the petitioner would be entitled to bail under provisions of Section 167 (2) Cr.P.C. It is submitted that default bail under first proviso to Section 167(2) Cr. P.C. is a fundamental right and not merely a statutory right. It is also submitted that the petitioner would be entitled to regular bail as well, while considering that the statement of the prosecutrix under Section 164 Cr.P.C. and the medical report do not indicate that the petitioner herein is guilty of an offence under Section 376 IPC. Counsel has placed reliance upon a judgement rendered by the Supreme Court recently on 15.03.2021 in ***Fakhrey Alam vs State of U.P in Crl. Appeal No. 319 of***

2021 arising out of SLP (Crl.) No. 6181 of 2020 in support of his argument. He would also rely upon a judgement rendered in ***Bikramjit Singh Versus State Of Punjab in Criminal Appeal No. 667 of 2020 arising out of SLP(Crl.) No. 2293 of 2020*** to contend that the investigation must be completed expeditiously and default bail is not merely a statutory right but is also a fundamental right under Article 21 of the Constitution of India. Furthermore reliance is placed upon judgement rendered in ***Sharadchandra Vinayak Dongre Vs. State Of Maharashtra*** reported as **1991 Crl. L.J. 3329** to contend that a Magistrate cannot take cognizance of an incomplete Challan.

4. Per contra, Mr. Dhruv Sihag AAG Haryana appearing for the respondent-State submits that the challan has been presented within the specified time and the present petition is not maintainable in the present form, as bail before the trial court was filed only under Section 167(2) Cr.P.C. Since, the application was for default bail, and the same was dismissed, therefore, a revision petition would be maintainable. Further, the order of dismissal under Section 167(2) Cr.P.C cannot be challenged under Section 439 Cr.P.C. by filing a petition for a regular bail. It is submitted that the challan has been submitted with all the necessary details under Section 173(2) Cr.P.C. and in case certain documents are not accompanied with it, it will not be considered an incomplete challan and the accused would not be entitled to default bail. Reliance has been placed upon ***Narender Kumar Amin vs CBI (Supreme Court) 2015 (2) RCR (CR) 566***. It is submitted that the case law as relied upon by the counsel for the petitioner is distinguishable and not applicable to the facts of the present case.

5. I have heard the counsel for the parties and with their assistance have gone through the pleadings of the case and the case laws relied upon.

6. Admittedly, the petitioner herein has been nominated as an accused in FIR No. 64 dated 21.10.2020 under Section 328, 363, 366-A, 376, and 506 IPC read with Section 6 of the POCSO Act, 2012 (Sections 376-D , 420, and 201 IPC and Section 67-B of the Information Technology Act added later on) registered at Women Police Station Hansi. An application had been preferred by the petitioner seeking regular bail under Section 439 Cr.P.C. which was dismissed by the Special Court on 4.6.2021 and immediately thereafter, an application was filed under Section 167 (2) Cr.P.C. The application for default bail was dismissed which has led to the filing of the present petition.

7. In the present petition, the relief argued for is two-fold, i.e. seeking default bail on the ground that an incomplete challan was filed without the report of the Cyber Cell and another prayer has been made for grant of regular bail as the statements of the prosecutrix given under Section 161 and 164 Cr.P.C with allegations of an offence of rape are not supported by medical report.

8. The petitioner herein had an option of challenging the order dated 04.06.2021 when his application for regular bail was denied by the Special Court, however he chose to file an application under Section 167 (2) Cr.P.C. instead. The application seeking default bail was dismissed and the remedy for the petitioner herein would have been to challenge the same by filing a Criminal Revision Petition which has not been done, instead he has filed a Criminal Misc Petition with a prayer for default bail by invoking

Section 439 Cr.P.C. and inherent powers of the Court under Section 482 Cr.P.C.

9. The legislature in its wisdom has outlined the time within which investigation is to be completed, with a view that a person cannot be kept in custody indefinitely till the investigation is complete. There is no dispute with the argument as set forth that an accused will be entitled to grant of default bail under Section 167 (2) Cr.P.C in case the investigation is not completed within the specified period as prescribed under the proviso; (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, and (ii) sixty days, where the investigation relates to any other offence.

10. The foremost question that needs to be addressed is whether the instant Criminal Misc. Petition as filed under Section 439 Cr.P.C. read with Section 482 Cr.P.C. seeking to challenge the order dated 11.6.2021, dismissing the application for default bail under Section 167 (2) Cr.P.C. is maintainable. A similar question came up for hearing in ***CRR No. 2087 of 2014*** titled as ***Ranjit Singh @ Rana Versus State of Punjab*** before the Division Bench of this very High Court. The accused moved an application praying for grant of statutory bail under Section 167(2) Cr. P. C. Learned Sessions Judge allowed the application moved by the prosecution seeking extension of time retrospectively and declined the application of the accused seeking grant of default bail under Section 167(2) Cr. P. C. Under such circumstances, the above revision was preferred by the accused challenging the order passed by the Sessions Court declining statutory bail to him.

During the course of arguments, the Single Bench formulated seven questions which were then referred to the Division Bench. One of the questions formulated was “*Whether after dismissal of the bail application before the trial Court, the remedy is of filing revision or petition under Section 439 Cr.P.C. or 482 Cr.P.C.;?*” The Division Bench held:

“16(a) Section 439 Cr.P.C. confers concurrent jurisdiction on the High Court as well as the Court of Sessions to grant bail. Therefore, after dismissal of the application moved under Section 439 Cr.P.C. before the Sessions Court, the accused can again move an application before the High Court under the very same provision of law invoking the concurrent jurisdiction of the High Court. In other words, the accused does not virtually challenges the order passed by the Sessions Judge under Section 439 Cr.P.C. before the High Court. Further, Section 167(2) of the Code contemplates a statutory right on the accused to go on bail immediately after the period for investigation contemplated therein expires. It is only a compulsive bail that is sought for by the accused under Section 167(2) of the Code. He does not apply for bail under Section 439 Cr.P.C. where concurrent jurisdiction on the High Court and the Sessions Court has been contemplated. Further, the order passed under Section 167(2) of the Code is a final order which could only be revised by the competent Court.

16(b) Coming to the provision under Section 482 Cr.P.C., we are of the view that inherent jurisdiction under Section 482 Cr.P.C. has to be exercised sparingly and with caution. Only in a case where the orders passed will have to be given effect to or to prevent the abuse of process of any Court or to secure the ends of justice, such an inherent jurisdiction can be invoked. Further, it is a well settled proposition of law that inherent powers under Section 482 Cr.P.C. can be exercised only when no other remedy is available to the litigant and no specific remedy is provided by the statute.

16(c) In the above facts and circumstances, we are of the considered view that the final order passed under Section 167(2) of the Code read with Section 36A(4) of the Act shall be challenged only by way of revision and not by filing a petition under Section 439 Cr.P.C. or under Section 482 Cr.P.C.”

The order passed by the Addl. Sessions Judge declining to

grant default bail to the petitioner herein is a final order and, therefore, will have to be challenged by way of filing revision petition. Therefore, the criminal miscellaneous petition seeking to challenge order dated 11.6.2021 is held to be not maintainable.

11. As far as the argument raised by the petitioner that he would be entitled to grant of regular bail as the statement of the prosecutrix under Section 164 Cr.P.C and the medical support do not support the allegation of rape, the same cannot be taken into consideration as the petitioner has not challenged the order dated 4.6.2021 declining regular bail by the Addl. Sessions Judge.

12. Petition stands dismissed accordingly.

July 26,2021
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(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No