

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

CRM (NDPS) 213 of 2022

Raju Mandal

Vs.

The State of West Bengal

For the Petitioner : Mr. Joy Chakraborty, Adv.

For the State : Mr. Ranadeb Sengupta, Adv.

Heard on : March 16, 2022

Judgement on : April 1, 2022

DEBANGSU BASAK, J.:-

1. The petitioner has applied for bail in respect of NDPS Case No. 15 of 2020 arising out of Englishbazar P.S case No. 155 of 2020 dated February 16, 2020 under Sections 21(c)/29 of the Narcotics Drugs and Psychotropic Substances Act, 1985.

2. Learned Advocate appearing for the petitioner has submitted that, the petitioner was arrested on February 16, 2020. The police had filed charge-sheet on August 12, 2020. The

charge-sheet had been filed without the Chemical Examination Report. According to him, the petitioner is entitled to default bail under Section 167(2) of the Criminal Procedure Code as the police had failed to submit the charge-sheet with the Chemical Examination Report within 180 days from the date of arrest of the petitioner. Moreover, the police has not prayed for or obtained extension of time to file the charge-sheet under Section 36A of the Act of 1985.

3. Learned Advocate appearing for the petitioner has submitted that, the petitioner had applied for default bail on August 14, 2020. The learned jurisdictional Court had turned down such prayer erroneously. He has submitted that, since the charge-sheet filed on August 14, 2020, was not accompanied with the Chemical Examination Report, the petitioner was entitled to default bail.

4. Learned Advocate for the petitioner has submitted that, the issue as to whether a charge-sheet filed without the Chemical Examination Report is incomplete or not and, therefore, the accused being entitled to default bail is pending before the Hon'ble Supreme Court. He has referred to the order dated December 13, 2021 passed by the Hon'ble Supreme Court in **SLP**

Criminal Nos. 8164-8166/2021(MOHD. ARBAZ & Ors. vs. State of NCT DELHI). He has also referred to various judgements of the High Courts and submitted that, different High Courts have taken different views with regard to the issue. He has referred to the judgement and order dated **November 3, 2020** passed in **CRL.REV.P. 1219/2019 and CRL.M.A.10252/2020 (MOHD. ARBAZ vs. State of NCT DELHI)** passed by the Delhi High Court. He has also referred to the order dated **September 9, 2021** passed in **Criminal Revision No. 619 of 2021 (Charanjeet Singh vs. State of Haryana)**, order dated **July 15, 2021** in **State of Harayana vs. DILDAR RAM @ DARI**, order dated **November 30, 2018** passed in **Criminal Revision No. 4659 of 2015 (Ajit Singh @ Jeeta and Another vs. State of Punjab)** of the Punjab Haryana High Court and **2002 Volume 3 MHLJ 689 (Sunil Vasantraw Phulbande and another vs. State of Maharashtra)** passed by the Bombay High Court in support of his contentions.

5. Learned Advocate appearing for the State has submitted that, the petitioner was arrested on February 16, 2020 with commercial quantity of narcotics. The petitioner had been produced before the jurisdictional court on February 17, 2020.

The police had filed a charge-sheet on August 12, 2020 without the Chemical Examination Report in respect of the contraband seized. The Chemical Examination Report was subsequently obtained and supplementary charge-sheet including the same had been filed on July 7, 2021. The Court has taken the supplementary charge-sheet into consideration and took cognizance on July 12, 2021. He has contended that, a charge-sheet without the Chemical Examination Report cannot be construed to be no charge-sheet at all. He has referred to the provisions of Section 36A of the Act of 1985. He has contended that, the petitioner is not entitled to default bail in the facts of the present case.

6. Section 36A of the Act of 1985 which has been referred to be the parties is as follows :-

“36A. Offences triable by Special Courts.□

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),□

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Speical Courts

than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate: Provided that in cases which are triable by the Special Court where such Magistrate considers□

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or

upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.

(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 of 1974), thereof to "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.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.”

7. Section 36A(1)(d) has stipulated that, a Special Court can take cognizance of an offence under the Act of 1985 upon perusal of the police report of the facts constituting the offence or upon a complaint being made by an officer of the Central Government or a State Government authorized in that behalf.

8. Section 36A(4) has prescribed that the period referred to in sub-section (2) of Section 167 of the Code of Criminal Procedure shall be construed as 180 days in respect of an offence punishable under Section 19 or 24 or 27A of the Act of 1985. The proviso to sub-section (4) of Section 36A has provided for an extension of time period to file the report, for a 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 period of 180 days.

9. Prayer for bail of an accused under the provisions of the Act of 1985 has to be considered in terms of Section 37 of the Act of

1985. In the facts of the present case, the petitioner has not prayed for bail in terms of Section 37 of the Act of 1985. Rather, the petitioner has submitted that, since the police report filed within the initial period of 180 days was not accompanied with the chemical forensic report and, therefore, such police report cannot be treated to be valid. It has to be construed as no report in the eye of law. Therefore, the petitioner has to be enlarged on default bail.

10. Section 173 of the Criminal Procedure Code has provided for submission of the report of the police officer on completion of the investigation. The report as has been contemplated under section 173 (2) of the Criminal Procedure Code is variously called as the completion report or the charge-sheet. The report filed under section 173 (2) of the Criminal Procedure Code has to be treated as the opinion of the police as to the commission of the offence. Such report cannot be said to have binding effect upon the learned court considering the issue as to whether cognizance should be taken or not. However, the report under section 173 of the Code of Criminal Procedure is a vital piece of document which the court has to consider for the purpose of taking cognizance.

11. Section 173 (8) of the Code of Criminal Procedure has contemplated a situation where the police can undertake further investigation in respect of an offence after a report under subsection (2) of the Code of Criminal Procedure has been submitted with the learned Magistrate. In a given situation therefore, the police can submit a supplementary report or charge-sheet disclosing further materials as to the commission of the offence. Consequently, in an investigation concerning the offences under the act of 1985, the Chemical Examination Report of the seized articles may not be made available to the police within the stipulated period of 180 days as has been provided under section 36A (4) of the act of 1985. The police however, in a given case, may be satisfied on the materials available with them, that the accused should stand trial in respect of the offences they have been investigated upon, and consequently, file a charge-sheet under section 173 of the Code of Criminal Procedure. Subsequent to the filing of such charge-sheet, the Chemical Examination Report of the articles seized may be made available to the police. In such a scenario, there is nothing under the Act of 1985 or under the provisions of the Code of Criminal Procedure

preventing the police from submitting a supplementary charge-sheet disclosing the Chemical Examination Report.

12. Filing of charge-sheet or report under Section 173 of the Criminal Procedure Code and the taking cognizance of an offence under Section 190 thereof are two different distinct and separate acts. Charge-sheet or report under Section 173 of the Criminal Procedure Code is filed by the investigating agency and the cognizance of the offence under Section 190 thereof is taken by the Court.

13. Section 190 of the Criminal Procedure Code has provided for the mechanism by which the Cognizance of an offence is taken by the Magistrate. Section 36A(1)(d) has empowered the Special Court, upon perusal of the police report of the facts constituting the offence under the Act of 1985 or upon complaint being made by the officer of the Central Government or State Government authorized in his behalf, take cognizance of that offence without the accused being committed to it for trial. Cognizance is understood to mean that the Court has applied its mind as to whether there is sufficient cause or ground for it to do so. Taking cognizance by the Court has also been understood to mean discharge of a judicial function. While taking cognizance, the

Court has to be satisfied that there is sufficient ground for proceeding against the accused for the offence alleged to be committed. The Court does not have to be satisfied that the evidence placed at that stage, would be sufficient to convict the accused. Sufficiency of the evidence has to be considered at the trial.

14. Section 36A(4) does not stipulate that the Special Court has to take cognizance of the offence within the prescribed period of 180 days. The Act of 1985 has not prescribed any time period for the taking of cognizance. Rather, it has stipulated that the report under Section 173 of the Criminal Procedure Code has to be submitted by the police within 180 days from the date of the arrest of the accused or within the extended period which is extendable for the maximum period of one year. Section 173(2) of the Criminal Procedure Code has not stipulated that, the police report must be accompanied by Chemical Examination Report with regard to the contraband seized. Absence of the Chemical Examination Report in the police report submitted under Section 173 of the Criminal Procedure Code does not vitiate the police report by itself. A police report submitted under Section 173 of the Criminal Procedure Code

without the Chemical Examination Report nonetheless is a police report within the meaning of Section 173 of the Criminal Procedure Code. Whether or not the Court, takes cognizance on the basis of a police report without the Chemical Examination Report reflects on the decision of taking cognizance and not the filing of the police report under Section 173 of the Criminal Procedure Code.

15. The Delhi High Court has considered the issue as to whether a police report under Section 173(2) of the Criminal Procedure Code can be considered as such if it is not accompanied by the Chemical Examination Report with regard to the substance recovered, in ***Mohd. Arbaz (supra)***. The Delhi High Court has rejected such contention following a Division Bench of that Hon'ble Court reported in ***1989 (39) DLT 392 (Kishan Lal vs. State)***. The Punjab and Haryana High Court has granted bail in ***Charanjeet Singh (supra)*** subject to the condition that, if the issue was overturned by the Division Bench then the State can seek cancellation of the bail granted. In ***Dildar Ram @ Dari*** the Punjab and Haryana High Court has refused to intervene in respect of an order of default bail granted by the Sessions Court due to the failure of the prosecution in filing the Chemical

Examiner's Report with the charge-sheet under Section 173(2) of the Criminal Procedure Code.

16. The Division Bench of the Punjab and Haryana High Court in **Ajit Singh @ Jeeta and Another (supra)** has held that Chemical Examination Report needs to be included with the charge-sheet under Section 173 of the Criminal Procedure Code. Without the Chemical Examination Report, it would be an incomplete challan depriving the Magistrate of the relevant material to take cognizance and therefore, if such report is not submitted within the stipulated period of 180 days, it would essentially result in a default benefit to the accused.

17. The Bombay High Court in **Sunil Vasantraw Phulbande and another (supra)** has held that the charge-sheet filed must fulfil the requirements of Section 173(2) and (5) of the Criminal Procedure Code and only on such compliance, can the charge-sheet be construed to be a complete report.

18. It has been held in **(2021) Volume 2 Supreme Court Cases 485 (M. Ravindran vs. The Intelligence Officer, Directorate of Revenue Intelligence)** that, the indefeasible right accruing to the accused under Section 167(2) of the Criminal Procedure Code

gets extinguished by subsequent filing of charge-sheet by the investigating agency, if the accused did not avail of the default bail prior to the filing of the charge-sheet within time. It also stands extinguished if the accused had failed to challenge the order of rejection of prayer for bail prior to the filing of the charge-sheet or the supplementary sheet.

19. The Supreme Court in **2015 Volume 3 Supreme Court Cases 417 (Narendra Kumar Amin vs. Central Bureau of Investigation & Ors)** has held that, the word “shall” used in subsection (5) of Section 173 cannot be interpreted as mandatory. It has been held to be directory. It has also been held that, non-filing of full set of documents with the charge-sheet within the statutory period does not entitle the accused to default bail so long as the charge-sheet is in compliance with Section 173(2) of the Criminal Procedure Code. In the facts of that case, the order of taking cognizance remained unchallenged. The Supreme Court had upheld the order of the High Court rejecting the prayer for default bail in the facts of that case. It has held that if same mistake is committed by producing relevant documents at the time of submitting the charge-sheet, it is always open to the police to submit the same with the permission of the Court.

20. In the facts of the present case, the police had arrested the petitioner on February 16, 2020. The police had filed charge-sheet albeit without the Chemical Examination Report on August 12, 2020. The petitioner had filed a petition for bail on August 14, 2020 which was not granted. The petitioner had prayed for bail before this Hon'ble Court by CRM 6986 of 2020 which was rejected on October 5, 2020. Both before the jurisdictional Court as also before the High Court the issue of default bail had not been raised by the petitioner. Subsequent thereto, the police had filed a supplementary charge-sheet containing the Chemical Examination on July 7, 2021. The Court had considered the supplementary charge-sheet and took cognizance on July 12, 2021. The petitioner had applied for bail before the jurisdictional Court on August 31, 2021 which was rejected by the jurisdictional Court. The petitioner has not placed any material or record to suggest that the petitioner assailed the order taking cognizance. The right of the petitioner to obtain default stood extinguished on July 7, 2021 when the police had filed the supplementary charge-sheet.

21. Applying the ratio of ***Narendra Kumar Amin (supra)***, in the facts of the present case, the petitioner herein is not entitled to

default bail in view of his right to obtain default bail being extinguished on the taking on the cognizance by the jurisdictional Court and the petitioner not assailing the order of cognizance.

22. The petitioner had been arrested with commercial quantity of narcotics. The petitioner is unable to overcome the restrictions under Section 37 of the Act of 1985. Consequently, we are unable to grant bail to the petitioner. CRM (NDPS) 213 of 2022 is rejected.

[DEBANGSU BASAK, J.]

23. I Agree.

[BIBHAS RANJAN DE, J.]