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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.675 of 2022

N.Santosh Kumar Choudhury

....

Petitioner

Mr.T.K.Sahu, Advocate

-versus-

State of odisha

....

Opp.Party

Mr.K.K.Das, ASC

**CORAM:
JUSTICE B. P. ROUTRAY**

**ORDER
20.4.2022**

Order No.

2.

1. Heard Mr.Sahu, learned counsel for the Petitioner and Mr.Das, learned Additional Standing Counsel for the State- Opposite Party.

2. The Petitioner has prayed for his release on default bail. The Petitioner was arrested for commission of offence under Sections 20(b)(ii)(C)/29 of the N.D.P.S.Act along with four other co-accused persons in connection with Padwa P.S.Case No.85 of 2019 in the district of Koraput corresponding to T.R.Case No.35 of 2019 pending on the file of the learned Additional Sessions Judge-cum-Special Judge, Koraput for possession and

transportation of 344 Kg. 800 Grams of contraband ganja in a Max Pick Up Van.

3. The Petitioner was remanded to custody on 26th November, 2019. The investigation continued and charge-sheet was filed on 23rd May, 2020. Consequently, cognizance was taken on the same day and thereafter charge was framed on 7th July, 2021. Presently five witnesses have already been examined in course of trial. The Petitioner filed an application on 22nd February, 2022 praying to release him on default bail under Section 167(2) of the CrPC read with Section 36-A(4) of the N.D.P.S. Act. It is the specific contention of the Petitioner that though charge-sheet was filed on 23rd May, 2020 within the period of 180 days, but the same was incomplete being not accompanied with the chemical examination report and as such, the right of default bail accrued in favour of the Petitioner.

4. Learned counsel for the Petitioner in support of his contention relies on the decision of the Punjab and Haryana High Court in the case of *Vinay Kumar @ Vicky vs. State of Haryana* in CRR No.712-2021 dated 14.10.2021. In the said case, the Punjab and Haryana High Court has allowed the Petitioner to be released on default bail in terms of Section 167(2) of the Cr.P.C.

by holding that in a case concerning offences under the N.D.P.S. Act, the report of FSL forms foundation of the case for prosecution and when the same is not filed, the entire case of prosecution falls.

5. In reply, Mr. Das, learned Additional Standing Counsel for the State relies on a decision of the Calcutta High Court reported in 2022 SCC OnLine Cal 623 (Raju Mandal vrs. State of West Bengal). In the said case, the Calcutta High Court upon referring to different other judgments including the decision of the Supreme Court in the case of *Narendra Kumar Amin vrs. Central Bureau of Investigation*, (2015) 3 SCC 417 have held that the police having filed the supplementary charge-sheet containing chemical examination report subsequently and the cognizance being taken thereof, the right of default bail of the Petitioner is extinguished upon taking of cognizance and further, the Petitioner did not assail the order of cognizance.

6. Delhi High Court in the case of *Mohd. Arbaz vs- State of NCT, Delhi, CRL. Rev. P. 1219/2019, decided on 3rd November, 2020*, has considered the issue as to whether a police report under Section 173 (2) of the Cr.P.C can be considered as

such if it is not accompanied by the chemical examination report, and finally rejected the contention of the Petitioner for his release on default bail.

7. In the case of *Ajit Singh @ Jeeta vrs. State of Punjab*, Crl.Rev.No.4659 of 2015, the Punjab and Haryana High Court held that chemical examination report needs to be included along with the charge-sheet under Section 173 (2) of the CrPC and without such report it would be considered incomplete and would essentially result in giving rise to default benefit to the accused.

8. The Bombay High Court in the case of *Sunil Vasantraw Phulbande and State of Maharashtra*, (2002) 3 Mah LJ 689, held that the charge-sheet filed must fulfill the requirements of Section 173 (2) and (5) of the Criminal Procedure Code and only on such compliance, it will be construed as a complete report.

9. Now looking back to the instant case, it is seen that the learned trial court has relied on a decision of the Supreme Court in the case of *M.Rabindran v. The Intelligence Officer, Directorate of Revenue Intelligence*, (2021) 2 SCC 485 wherein it is held that, where the accused fails to apply for default bail

when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished.

10. The Supreme Court in the case of *Narendra Kumar Amin* (supra) have held that the word “shall” used in sub-section (5) of Section 173 cannot be interpreted as mandatory and the same has to be construed as directory and 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. It is further held that when the order of taking cognizance remains unchallenged, the order of High Court rejecting the prayer for default bail is upheld.

11. In the instant case, admittedly, the chemical examination report was not filed along with the charge-sheet on the date of submission of the same. The fact of submission of the C.E. report subsequently thereto, is not disputed. For the offences relating to the NDPS Act particularly under Section 20(b)(ii)(C) where the question of possession of contraband is vital, the report

of the chemical examiner is crucial to satisfy the requirement that the seized article is a 'Narcotic drug' within the definition of Section 2(xiv). Therefore, non-submission of the same along with the charge-sheet becomes a relevant consideration for accepting the charge-sheet as a complete one. Thus, in absence of the same, the charge-sheet is treated as incomplete for the purpose of Section 173(2) of the Cr.P.C.

12. However in the instant case, it is seen that, the petitioner did not pray for default bail in time and by the time he prays for default bail i.e. on 22nd February, 2022, the chemical examination report was already submitted and cognizance was already taken and admittedly, the petitioner does not challenge the cognizance order.

13. So, applying the principles settled in the cases of *M. Ravindran* (supra) and *Narendra Kumar Amin* (supra), as discussed earlier, the right of default bail in favour of the accused is extinguished. It is relevant to reiterate here that, the order of cognizance is dated 26th November, 2019 and the application for default bail was submitted much after to that. As such, the Petitioner fails in his contention to get any benefit of default bail under Section 167(2) Cr.P.C.

14. In the result, the prayer is rejected and the CRLMC is dismissed.

(B.P. Routray)
Judge

C.R.Biswal