

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR-1035-2022 (O & M)
Date of decision: 25.07.2022

Anil Kumar @ LillaPetitioner

V/s

State of Haryana ...Respondent

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Ms. Garima Sharma, Advocate, for the petitioner.

Mr. Gaurav Bansal, AAG, Haryana.

JASJIT SINGH BEDI, J. (Oral)

The present revision petition has been directed against the order dated 04.03.2022 passed by the Judge, Special Court, Ambala, vide which the bail application filed by the petitioner under Section 36-A of the NDPS Act read with Section 167(2) Cr.P.C., seeking default bail was dismissed.

2. Briefly, FIR No.225 dated 28.08.2021 under Section 15 of the NDPS Act with Police Station Mullana, District Ambala, came to be registered in pursuance to the recovery of 17 kilos of poppy straw alongwith 54 kilos 700 grams of poppy husk from the petitioner and his co-accused.

3. The petitioner was arrested on 28.08.2021 and the report under Section 173(2) Cr.P.C. without the FSL report was submitted on 14.10.2021. 180 days lapsed on 28.02.2022. An application was moved under Section 167(2) Cr.P.C. on 02.03.2022 which came to be dismissed on 04.03.2022 (the impugned order).

4. The learned counsel for the petitioner *inter alia* contends that the Trial Court has wrongly dismissed the application filed by the petitioner under Section 167(2) Cr.P.C. read with Section 36-A of the NDPS Act for default bail without assigning any cogent reason and despite knowing the fact that an incomplete challan had been filed.

5. The learned counsel for the petitioner has placed reliance on a Division Bench judgment of this Court in ***“Ajit Singh alias Jeeta and another versus State of Punjab, (Criminal Revision No.4659-2015 decided on 30.11.2018)*** wherein it has been held that a challan presented without the report of the Chemical Examiner has to be termed as an incomplete challan which deprived the Magistrate of relevant material to take cognizance. The submission of an incomplete challan within the requisite period of 180 days would essentially result in the grant of default bail to the accused unless an application was moved by the investigating agency apprising the Court about the status of the investigation with a prayer for extension of time to the satisfaction of the Court. The relevant extract of the judgment is reproduced below:-

“With respect to the question posed by the learned Single Judge regarding some of the contraband being identifiable through naked eye, inspection based on experience and knowledge, would be a great fallacy and we would respectfully state that it would be grossly unsafe to rely upon such an opinion based on naked eye inspection backed by experience or knowledge to arrive at a prima facie opinion of the commission of an offence to submit an accused to the rigors of trial by the Magistrate in the exercise of its powers under Section 190 Cr.P.C.

The only way that it can be done is to establish the nature of contraband on the basis of the Chemical Examiner's report and for this reason, the Chemical Examiner's report assumes an immense significance for the

trial Court, to formulate an opinion as the very cognizance of an offence would depend on it. Non-inclusion of the Chemical Examiner's opinion in the report under Section 173 Cr.P.C. would expose the accused to unfounded dangers imperiling and endangering his liberty since the provisions of the N.D.P.S. Act in its applicability to a trial and conclusion are stringent in consequence.

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”.

The counsel further points out that in a subsequent Single

Bench judgment of this Court in ***Akash Kumar @ Sunny versus State of***

Division Bench judgment in ***Ajit Singh @ Jeeta (supra)*** has been declared to be *per incuriam*. The said judgment in ***Akash Kumar @ Sunny (supra)*** was followed by another Single Bench decision of this Court in ***Shankar versus State of Haryana, (CRM-M-44412-2019, decided on 20.12.2019)***.

6. The learned counsel, however, submits that the same controversy arose once again in the case of ***Julfkar versus State of Haryana, (Criminal Revision No.1125 of 2020 decided on 16.09.2020)*** where the matter has been referred once again to a Division Bench for consideration and the accused were ordered to be released on bail. Reliance is placed on another Single Bench decision of this Court in ***Melody Yodhanpuri versus State of Punjab (Criminal Revision No.983 of 2020 decided on 12.10.2020)*** where the accused was granted the default bail after the expiry of 180 days as the challan was not accompanied with the report of the Chemical Examiner and the reliance was placed upon the judgment in the case of ***Ajit Singh @ Jeeta (supra)***.

7. The learned counsel has also referred to another judgment of the Single Bench of this Court in ***“Rinku versus State of Haryana, (Criminal Revision No.1150-2020 decided on 03.11.2020)***, in which once again the Court granted the concession of default bail relying on the judgment in ***Ajit singh alias Jeeta (supra)***. Similarly, the learned counsel for the petitioner has relied upon a judgment of this Court in ***“Suresh versus State of Haryana (Criminal Revision No.1135 of 2020 decided on 18.11.2020)”***, and ***“Rohtash @ Raju versus State of Haryana (Criminal Revision No.933 of 2022 decided on 01.06.2022)”***.

8. Other than this, the petitioner refers to the orders of the Hon’ble Supreme Court in ***“Mohd. Arbaz and others versus State of NCT of Delhi***

(Special Leave to Appeal (Crl.) No(s). 8164-8166/2021” wherein on 13.12.2021, the following interim order was passed:-

“The main relief sought by the petitioners in these petitions is that they are entitled to bail in default on account of the fact that the investigating agency has failed to file a police report under Section 173(2) of the Cr.P.C. within the stipulated period of one hundred and eighty days. Although, it is not disputed that a report was filed within the stipulated, the petitioners contend that the said report was incomplete as it was not accompanied by the report of the Chemical Examiner.

Heard learned counsel for the parties and carefully perused the material placed on record.

Taking into consideration the fact that the petitioners have suffered incarceration for a period of more than 2 years and 11 months, we are inclined to grant interim bail to them for a period of three months from today subject to the terms and conditions to be imposed by the trial court.

The petitioners are, accordingly, directed to be enlarged on interim bail for a period of three months from today subject to the terms and conditions to be imposed by the trial court.

List these matters on 08.02.2022 for final disposal.

SLP(Crl.) No.8718/2021

The relief sought by the petitioner in this petition is that he is entitled for default bail as the complete and final challan has not been filed within 180 days and final report was not accompanied with an FSL Report.

Heard learned counsel for the parties and carefully perused the material placed on record.

Taking into consideration the fact that the petitioner has suffered incarceration for a period of more than 1 year and 4 months, we are inclined to grant interim bail to the petitioner for a period of three months from today subject to the terms and conditions to be imposed by the trial court.

The petitioner is, accordingly, directed to be enlarged on interim bail for a period of three months from today subject to the terms and conditions to be imposed by the trial court.

List the matter on 08.02.2022 for final disposal.

SLP(Crl.) Nos.8496-8497/2021

Heard learned counsel for the parties and carefully perused the record.

List these matters on 08.02.2022 for final disposal”.

The learned counsel for the petitioner also refers to the order of the Hon’ble Supreme Court dated 11.12.2021 passed in the case of **Mohd. Arbaz & others (supra)**. The same is reproduced as hereunder:-

“The Court is convened through Video Conferencing.

SLP(Crl.) Nos.8164-8166/2021 heard learned counsel for the parties. List on 13.12.2021.

To be taken up after admission matters. SLP(Crl.) No.8574/2021 Heard learned counsel for the petitioner and carefully perused the material placed on record.

Although the petitioner State of Haryana has challenged the impugned order affirming the order passed by the Sessions Court granting default bail to the respondent in terms of Section 167(2) Cr.P.C. due to the failure of the prosecution in filing the FSL report with the challan under Section 173(2) Cr.P.C. yet taking into consideration the fact that the smack found in the possession of the respondent was small quantities of 15 gm 100 mg and more particularly the fact that the petitioner has suffered incarceration for a period of three months, we are not inclined to interfere with the impugned order passed by the High Court.

The special leave petition is, accordingly, dismissed. The question of law is left open.”

9. The learned counsel for the State, on the other hand, has relied upon the judgment of the Hon'ble the Supreme Court passed in the cases of ***“Abdul Azeez P.V. and others versus National Investigation Agency 2015 (1) RCR (Cri.) 239, Narendra Kumar Amin versus CBI and others, 2015(1) RCR (Cri.) 566”*** and a judgment passed by this Court in the cases of ***“State of Haryana versus Mehal Singh and others, 1978(2) ILR (Punjab) 44”*** and ***“Akash Kumar @ Sunny versus State of Haryana, (Criminal Revision No.1731-2019 decided on 16.10.2019)”*** to contend that merely because the challan had not been accompanied with the FSL report, it cannot be considered to be incomplete, and therefore, the accused cannot claim the benefit of default bail.

10. I have heard the learned counsel for both the parties at the length.

11. In the case of ***Abdul Azeez P.V. (supra)***, the FIR was under Section 143, 147, 153B r/w Section 149 IPC under Section 5(1) r/w Section 25(1)(a) of the Arms Act, under Section 4 and 5 of the Explosive Substances Act and under Section 18 of the Unlawful Activities (Prevention) Act (“UAPA” for short). Subsequently, Section 153A IPC and Section 13(1)(1) (b) and Section 18 of the UAPA were also invoked. The issue in that case was not regarding the filing of an FSL report alongwith report under Section 173 Cr.P.C., and therefore, prima facie, the said judgment would not apply to the facts of the present case.

12. In the case of ***Narendra Kumar Amin (supra)***, once again the issue before the Hon'ble Supreme Court was not in the context of the non-submission of an FSL report alongwith the report under Section 173 Cr.P.C.

13. So far as the judgment in the ***“State of Haryana versus Mehal Singh and others (supra)”***, is concerned, the said judgment has been

considered and dealt with in the case of ***Ajit Singh alias Jeeta (supra)***, and even otherwise the issue in this case did not pertain to the NDPS Act.

14. In the case of ***Mohd. Arbaz and others (supra)***, the Hon'ble Supreme Court has left the question of law open as to whether in case of the failure of the prosecution in filing the FSL report with the challan under Section 173(2) Cr.P.C. the accused would be entitled to default bail. In view of the said question having been left open at this stage, the State cannot possibly place reliance on the cases of ***Abdul Azeez P.V. (supra)*** and ***Narendra Kumar Amin (supra)*** to contend that an incomplete report under Section 173(2) Cr.P.C. would disentitle the accused to the grant of the default bail. It may be reiterated here that the aforementioned judgments are strictly not on the issue which is before this Court. The identical issue has been left open by the Hon'ble Supreme Court for consideration at an appropriate stage.

15. It would be apposite to mention here that a case under the NDPS Act cannot be established without firstly and most importantly identifying the contraband and therefore no Court can possibly take cognizance of an offence under the NDPS Act without an FSL report.

On the other hand in most other cases the report of the FSL/Chemical Examiner/Serologist/ballistic report etc. would be primarily corroborative in nature and there lies the difference.

16. In view of the above and the various judgments of this Court as have been discussed hereinabove, the present petition is allowed and the impugned order dated 04.03.2022 passed by the Additional Sessions Judge, Ambala is set aside. The petitioner is ordered to be released on bail on his furnishing necessary bail bonds/surety bonds to the satisfaction of the Trial

However, it is clarified that in case any different/contrary view is taken by the Courts from that taken in *Ajit Singh alias Jeeta (supra)*, the State would be at liberty to seek cancellation/modification of this order, if warranted at that stage.

(JASJIT SINGH BEDI)
JUDGE

July 25, 2022
sukhpreet

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No