

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH

(207)

CRR-2301-2022 (O&M)

Date of decision: - 02.12.2022

Balkaran Singh @ Kaka and another

....Petitioners

Versus

State of Haryana

.....Respondent

CORAM : HON'BLE MR. JUSTICE VIKAS BAHL

Present:- Mr. Aditya Sanghi, Advocate,  
Mr. Lokesh Sharma, Advocate  
and Mr. Maninder Singh Sidhu, Advocate  
for the petitioner.

Mr. Praveen Bhadu, AAG, Haryana.

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**VIKAS BAHL, J. (ORAL)**

The challenge in the present case is to the order dated 21.10.2022, vide which the application filed by the petitioners under Section 167(2) Cr.P.C. for default bail has been dismissed.

2. Learned counsel for the petitioners has submitted that the petitioners are in custody since 20.03.2022 and the challan had to be filed within a period of 180 days and prior to the said period having been elapsed, the prosecution had filed an application dated 14.09.2022 for extension of time for filing the challan and vide order dated 15.09.2022 (Annexure P-6), a period of 30 days was granted by the Additional Sessions Judge, Sirsa to complete the investigation in

accordance with the provisions of Section 36A(4) of the NDPS Act. It is further submitted that the said period of 30 days elapsed on 16.10.2022 and although, the challan was presented on 15.10.2022, but the said challan did not include the FSL report and thus, the said challan was an incomplete challan. It is also submitted that the petitioners had moved an application under Section 167(2) Cr.P.C. on 18.10.2022 and the said fact is apparent from a reading of page 55 of the paperbook, which is the first page of the impugned order, on which the date of the registration of the said application is mentioned. It is stated that it is only subsequent to the filing of the said application on 18.10.2022, that the FSL report was filed by the prosecution on 20.10.2022. It is argued that the time period granted to file the complete challan including the FSL was to elapse on 16.10.2022 and no further application for extension of time was sought, much less, granted. Learned counsel for the petitioners has submitted that as per the law laid down by the Hon'ble Supreme Court in “*M. Ravindran Vs. The Intelligence Officer, Directorate of Revenue Intelligence*”, reported as 2021(2) SCC 485, it is the date of the application filed by the petitioner under the proviso to 167(2) Cr.P.C. which is to be considered in order to determine the rights accruing to the petitioner and once the petitioner/accused files an application for bail under proviso to Section 167(2) Cr.P.C., then he is deemed to have ‘availed of’ or enforced his right to be released on default bail and no subsequent event would extinguish the said right.

3. Learned counsel for the petitioners has placed reliance upon the Division Bench judgment of this Court in CRR-4659-2015 titled s **“Ajit Singh @ Jeeta and another Vs. State of Punjab”**, to contend that a challan presented without the FSL report cannot be considered to be a complete challan and thus, in view of the provisions of the NDPS Act, the petitioners would be entitled to default bail in case the FSL report is not submitted along with the challan and the period for submission of the same has elapsed and the petitioners have moved an application under Section 167(2) Cr.P.C. prior to the submission of the FSL report after such lapse of time. It is also contended that in view of the conflict of opinion on the said point, the matter was referred to a Division Bench and has further relied upon a judgment dated 18.11.2020 passed in ***CRR No.1135 of 2020*** titled as **“Suresh Vs. State of Haryana”** in which a Coordinate Bench of this Court, after considering the entire aspect, was pleased to release the petitioner/accused therein on conditional bail with the clarification that in case the legal point is held against the petitioner/accused therein, the State would be at liberty to seek cancellation/ modification of the order, if warranted at that stage. It is contended that the impugned order has not taken into consideration the said important aspects and thus, deserves to be set aside.

4. Learned State counsel, on the other hand, has opposed the present revision petition and has submitted that although, the dates and the facts as stated by learned counsel for the petitioners are not being disputed, but a perusal of the impugned order would show that

reliance has been placed upon various judgments to contend that even in case some documents have not been attached or appended with the report under Section 173 Cr.P.C., then also the concession of default bail under Section 167(2) Cr.P.C. shall not be available to the petitioner and the said documents can always be subsequently supplied and since the FSL report in the present case was supplied on 20.10.2022, although subsequent to the filing of the default bail application by the present petitioner on 18.10.2022, the same does not call for setting aside the impugned order. It is however, not disputed that the application under Section 167(2) Cr.P.C. dated 18.10.2022 was filed after the lapse of 180 days and also the extended time granted vide order dated 15.09.2022.

5. Learned counsel for the petitioners, in rebuttal, has submitted that the said judgments, which have been relied upon in the impugned order, are not with respect to the NDPS Act, whereas, on the other hand, the judgment of the Division Bench of this Court in **Ajit Singh @ Jeeta's case (supra)** has been passed after specifically considering the provisions of the NDPS Act and it has been held therein that a challan without the FSL report cannot be considered to be a complete challan.

6. This Court has heard learned counsel for the parties and has gone through the paper-book.

7. The facts in the present case are not in dispute. The petitioners are in custody since 20.03.2022 and the challan had to be

presented within a period of 180 days. On 14.09.2022 an application for extension of time was filed by the prosecution for filing the challan and the said application was allowed, vide order dated 15.09.2022 (Annexure P-6) and the prosecution was granted 30 days' time to complete the investigation in accordance with the provisions of Section 36A(4) of the NDPS Act. It is the admitted case of the parties that the said time had elapsed on 16.10.2022 and the said date i.e., 16.10.2022 had also been highlighted by the public prosecutor appearing before the trial Court and it was so recorded in para 4 of the impugned order. The challan in the present case without the FSL report was submitted on 15.10.2022. It is also not in dispute that on 18.10.2022 the petitioners had moved an application under the proviso to Section 167(2) Cr.P.C. for grant of default bail and the FSL report was submitted subsequent to the same i.e., on 20.10.2022 . It is also not in dispute that the application under Section 167(2) Cr.P.C. dated 18.10.2022 was filed after the lapse of 180 days and also the extended time granted vide order dated 15.09.2022 and that no further extension of time was sought after passing of the order dated 15.09.2022. The learned Additional Sessions Judge, Hisar, vide order dated 21.10.2021, has primarily rejected the application filed by the petitioners under Section 167(2) Cr.P.C. by observing that in case some documents have not appended/attached with the report under Section 173 Cr.P.C., the default bail as provided under Section 167(2) Cr.P.C. shall not be available to the accused and the recovery of contraband in the present case is of heavy quantity.

8. In the background of the above-said admitted facts and circumstances, this Court is of the opinion that the following two issues would arise in the present case:-

- (i) Whether the right of the petitioners would be seen & ascertained considering the date of the filing of the said application i.e. 18.10.2022 or the date when the order was passed by the learned Additional Sessions Judge, Sirsa on 21.10.2022 i.e., after the FSL report had been submitted on 20.10.2022.
- (ii) 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, thus, entitling the accused to grant of default bail which has been filed after the lapse of 180 days and the extended period granted.

9. With respect to first issue, the Hon'ble Supreme Court of India in **M. Ravindran's case (supra)**, has held as under: -

“xxx xxx xxx xxx xxx xxx

*9. Thus the points to be decided in this case are:*

*(a) Whether the indefeasible right accruing to the appellant under Section 167(2) Cr.P.C. gets extinguished by subsequent filing of an additional complaint by the investigating agency;*

*(b) Whether the Court should take into consideration the time of filing of the application for bail, based on default of the*

*investigating agency or the time of disposal of the application for bail while answering (a).*

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*18. Therefore, in conclusion:*

*18.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2) Cr.P.C. read with Section 36A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.*

*18.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.*

*18.3 However, 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. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the Cr.P.C.*

*18.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the*

*actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid.*

*19. Hence the impugned judgment of the High Court stands set aside and the Trial Court judgment stands confirmed. However, we additionally direct that apart from furnishing the sureties as directed by the Trial Court, the Appellant-accused should also surrender his passport, undertake to report to the Respondent Directorate when required for purposes of investigation, and also undertake to not leave Chennai city limits without the leave of the Trial Court. This should alleviate any concerns about the Appellant absconding from the jurisdiction of the Court.*

*20. The appeal is allowed accordingly.*

10. A perusal of the above-said judgment would show that it has been categorically held by the Hon'ble Supreme Court that once the accused has filed an application for default bail under Proviso to 167(2) Cr.P.C., then he is deemed to have 'availed of' or enforced his right to be released on default bail and in case the said bail application is filed upon the expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay and the said right to be released on default bail continues to remain enforceable in case the accused has applied for such bail, notwithstanding the subsequent filing of the chargesheet or a report seeking extension of time by the prosecution or filing the chargesheet during the interregnum period when challenge to the rejection of the bail application is pending before a higher Court.

Thus, from the law laid down in the above-said judgment, it comes about that the right of the petitioners to default bail is to be determined considering the date when the said application is filed under the proviso to Section 167(2) Cr.P.C. and merely because subsequent to the filing of the said application i.e. on 18.10.2022, the FSL report in the present case has been submitted on 20.10.2022, the same would not take away the right of the petitioners which had crystallized on the date of the filing of the said application i.e. on 18.10.2022. No contrary law has been shown by the respondent on the said aspect. Thus, issue No.1 therefore stands decided in favour of the petitioners.

11. With respect to issue No.2, it would be relevant to note that on account of the conflict of opinion on the point that is, as to whether in the NDPS cases, 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. or not, the matter had been referred to a Division Bench of this Court and the said fact has been noticed in Criminal Revision No.1135 of 2020. The relevant portion of the judgment in Suresh's case (supra) passed by a Coordinate Bench is reproduced hereinbelow:

*2. Vide the Impugned Order, the Ld. Additional Sessions Judge, Fatehabad had dismissed the Petitioner's Application for*

*Bail under Section 36-A of the NDPS Act read with Section 167(2) of the Cr.P.C.*

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*4. 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.?”*

*5. 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.”

6. The Ld. Court below nevertheless rejected the Petitioner's Application by relying upon a 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. 7. Ld. Counsel for the Petitioner has however relied upon a subsequent decision of another Single Bench of this Court in 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. 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.”*

*“This Criminal Revision Petition is directed against the Impugned Order dated 31st August, 2020 passed by the Ld. Additional Sessions Judge, Fatehabad, in case arising out of FIR No.38, dated 28th February, 2020, under Sections 22(C) of the Narcotic Drugs and Psychotropic Substances Act No.61 of 1985 (for short, the NDPS Act) and Sections 18(A) and 18(C) of Drugs and Cosmetics Act, 1940 registered at Police Station Sadar Tohana, District Fatehabad, Haryana.*

*8. Relying on the decision in Julfkar's case (supra), another Single Bench thereafter has similarly granted Default Bail to the Petitioner in 'CRR No.1150 of 2020 - Rinku vs. State of Haryana' since in another subsequent decision in 'M. Ravindran vs. The Intelligence Officer, Directorate of Revenue*

*Intelligence, Criminal Appeal No.699 of 2020', the Apex Court has held that subsequent presentation of FSL Report after submission of the Bail Application, will not extinguish the right of a Petitioner to seek Default Bail. Another Single Bench of this Court in 'Melody Yodhanpuri vs. State of Punjab, Criminal Revision No.983 of 2020', had similarly granted Bail by relying upon the Division Bench decision in Ajit Singh @ Jeeta's case (supra).*

*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).*

*10. Taking into account all the above circumstances, the Criminal Revision Petition is 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 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 warranted at that stage.*

*11. Disposed off.*

November 18, 2020

(SUDIP AHLUWALIA)  
JUDGE"

A perusal of the above judgment would show that after considering the judgment of Division Bench and also the judgment

passed in CRR No.1125 of 2020 titled as “Julfkar vs. State of Haryana”, vide which the matter has been referred to a Division Bench, the petitioner therein was granted interim bail.

12. The case of the present petitioners, with respect to the second issue is covered by the judgment passed in Suresh’s case (supra) and thus, the petitioners also deserve the relief which has been granted in Suresh’s case (supra). It would be relevant to note that as per far as the observation with respect to the quantity of contraband recovered in the present case being heavy, falling under commercial category, is concerned, suffice it is to note that the conjoint reading of Section 167(2) Cr.P.C. & Section 36A(4) of NDPS Act would show that in a case of heavy recovery falling under commercial category, the relevant period to be taken into consideration is 180 days, subject to further extension having been granted under Section 36A(4) of the NDPS Act. In the present case, the period which has been taken into consideration, while adjudicating the present case, is 180 days plus the extended period. Thus, the said point also would not disentitle the petitioner to grant of default bail.

13. Keeping in view the abovesaid facts and circumstances as also the law laid down in the above-said judgments, the present revision petition is allowed at this stage and the petitioners are ordered to be released on bail conditionally subject to the satisfaction of the concerned trial Court/Duty Magistrate. It is, however, clarified that in case, the question of law is held against the present petitioners and is

contrary to the law laid down in Ajit Singh alias Jeeta's case (supra), then, the State would be at liberty to seek cancellation/modification of this order, if warranted at that stage.

14. Pending application, if any, stands disposed of in view of the aforesaid order.

December 02, 2022  
naresh.k

( VIKAS BAHL )  
JUDGE

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|----------------------------|-----|
| Whether reasoned/speaking? | Yes |
| Whether reportable?        | Yes |