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

CRR-221-2023

Date of decision : 30.01.2023

Sonu

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE VIKAS BAHL

Present: Mr. Johan Kumar, Advocate for the petitioner.

Mr. Rajneesh Chadwal, AAG, Haryana.

VIKAS BAHL, J. (ORAL)

Challenge in the present Criminal Revision is to the order dated 11.01.2023, vide which, an application filed by the petitioner under Section 167(2) of Cr.P.C. for default bail in FIR No.321 dated 07.07.2022 registered under Section 22C/29/61/85 of the NDPS Act, at Police Station Kheri Pul, Faridabad, has been dismissed.

Learned counsel for the petitioner has submitted that the petitioner was taken in custody on 07.07.2022 and the challan in the present case was filed on 30.09.2022 and the said challan was an incomplete challan inasmuch as the FSL report was not attached with the same. It is further submitted that a period of 180 days for submitting the complete challan elapsed on 03.01.2023 and no extension of time was sought by the

prosecution as per the provisions of Section 36(a)(4) of the NDPS Act. It is contended that the petitioner had filed the present application under Section 167(2) of Cr.P.C. for default bail on 09.01.2023 and it is thereafter, on 11.01.2023, (as is apparent from page 38 of the paper book) that the FSL report has been filed by the prosecution.

Learned counsel for the petitioner 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.

Learned counsel for the petitioner 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 petitioner 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 petitioner has 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.

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 petitioner are not being disputed but has submitted that a perusal of impugned order would show that the Additional Sessions Judge, Faridabad had taken into consideration the judgments including judgment in the case of ***Shankar Vs. State of Haryana***, reported as ***2020 CRiLJ 2979*** as well as judgment in the case of ***Narindra Kumar Amin Vs. Central Bureau of Investigation and others***, reported as ***2015(3) SCC 417*** and other judgments on the point that even in case, the FSL report has not been submitted along with challan and the same has not been done within a period of 180 days, then also, petitioner was not entitled for grant of default bail under Section 167(2) of Cr.P.C. as once, challan has been submitted then, the right of the petitioner to seek default bail elapses.

Learned counsel for the petitioner, in rebuttal, has stated that the judgment of the Hon'ble Supreme Court in ***Narindra Kumar Amin's***

case (Supra) was with respect to case not under 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.

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

The facts of the present case are not in dispute. Challan in the present case had to be presented within a period of 180 days from 07.07.2022. On 30.09.2022, the challan was presented however, FSL report was not attached with the same and thus, the same was an incomplete challan. After a lapse of a period of 180 days, the petitioner moved the application under Section 167(2) of Cr.P.C. for default bail on 09.01.2023. Till the filing of the application dated 09.01.2023, the FSL report had not been presented before the Court and same was submitted/presented in the Court on 11.01.2023. No application for extension of time in accordance with the provisions of Section 36(a)(4) of the NDPS Act was filed by the prosecution's side. The Additional Sessions Judge, Faridabad, had primarily rejected the present application on the point that even in case, the FSL report has not been filed along with challan then also, the petitioner would not be entitled to grant of default bail.

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 petitioner would be seen & ascertained

after taking into consideration the date of the filing of the said application i.e., 09.01.2023 or the date when the order was passed by the Additional Sessions Judge, Faridabad on 11.01.2023 i.e., after the FSL report had been submitted on 11.01.2023?

- (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 an incomplete challan and thus, entitling the accused to grant of default bail which has been filed after the lapse of 180 days and the extended period granted?

With respect to the first question, 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.

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 ratio of law laid down in the above-sad judgment, it can be inferred that the right of the petitioner 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 present application i.e., on 09.01.2023, the FSL report has been submitted on 11.01.2023, the same would not take away the right of the petitioner which had crystallized on the date of the filing of the said application i.e., on 09.01.2023. No contrary law has been shown by the respondent on the said aspect. Thus, question No.1 stands decided in favour of the petitioner.

With respect to question No.2, it would be relevant to note that on account of the conflict of opinion on the issue that is, whether in 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 an 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.

The case of the present petitioner, with respect to the second question is covered by the judgment of Coordinate Bench of this Court passed in **Suresh’s case (supra)** and thus, the petitioner also deserves the relief which has been granted in **Suresh’s case (supra)**.

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 petitioner is 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 petitioner 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.

30.01.2023

Pawan

**(VIKAS BAHL)
JUDGE****Whether speaking/reasoned:-****Yes/No****Whether reportable:-****Yes/No**