

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

1. CRR No.1709 of 2022 (O&M)

Mukesh Kumar @ Mukesh

... Petitioner

Versus

State of Haryana

... Respondent

2. CRM-M No.37221 of 2022 (O&M)

Mukesh Kumar @ Mukesh

... Petitioner

Versus

State of Haryana

... Respondent

Date of decision: 5th January, 2023

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present: Mr. Raman Chawla, Advocate for the petitioner.

Mr. Pawan Kumar Jhanda, Asstt. AG, Haryana
for the respondent/State.

MANJARI NEHRU KAUL, J.

The above captioned petitions are being disposed of by this common judgment since the issue involved in both of them is identical.

By way of instant petitions, the petitioner has sought setting aside of the orders dated 25.07.2022 passed by learned Additional Sessions Judge, Hisar with a further prayer to release him on bail under Section 167(2) Cr.P.C.

Learned counsel for the petitioner submits that the petitioner is innocent and has been falsely implicated in the case in

hand i.e. FIR No.39 dated 17.01.2022 under Section 21C of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as, 'the NDPS Act') pertaining to Police Station City Hansi, District Hisar (Annexure P-1). He further submits that the impugned orders dated 25.07.2022 suffer from patent illegality and being contrary to the settled principles of law deserve to be set aside.

Learned counsel further submits that the petitioner was remanded to judicial custody on 18.01.2022 and subsequently, though the chargesheet was filed by the investigating agency before the trial Court, however, it was incomplete as no FSL report had been annexed with it. It has been urged that in the circumstances, the indefeasible right of the petitioner for grant of default bail under the proviso to Section 167(2) of the Code of Criminal Procedure had accrued on 17.07.2022, i.e. after a lapse of period of 180 days. Accordingly, the petitioner, in order to avail of his aforesaid right, moved an application on 25.07.2022 as on that day as well, the FSL report had not been submitted by the investigating agency. Learned counsel submits that the trial Court failed to appreciate the above facts and clearly fell into an error by declining the prayer of the petitioner for grant of default bail. Learned counsel has vehemently argued that it is a settled principle of law that once the right to be released on default bail has accrued to the accused and still further the accused has moved an appropriate application in the said regard, it being an indefeasible right

cannot be frustrated by the subsequent filing of either chargesheet or even a report seeking extension of time by the prosecution.

Learned counsel has still further submitted that it was also a matter of record that a decision on the application of the prosecution for extension of time for investigation was still pending when the application for default bail was moved by the petitioner. Hence, the trial Court had erred not only in dismissing application of the petitioner for grant of default bail but also in allowing the application of the prosecution for extension of time without as much as specifying the duration of such extension.

Per contra, learned State counsel, while opposing the prayer and submissions made by the counsel opposite, submits that it is a matter of record and not disputed by the learned counsel for the petitioner that an application for extension of time was moved by the Public Prosecutor before the petitioner filed his application for default bail. Thus, no right to default bail could be said to have accrued in favour of the petitioner. He still further submits, on instructions, that soon after the prosecution was granted extension of time by the trial Court, the FSL report had been received and submitted before the trial Court within two months i.e. in September 2022.

I have heard learned counsel for the parties and perused the relevant material on record.

At the outset, it would be relevant to note that the expression “*default bail*” connotes the right to be released on bail under the proviso to Section 167(2) Cr.P.C. on account of the failure of the investigating agency to complete the investigation within the prescribed time period and the merits of a case would have no bearing while deciding the application for grant of default bail.

Before proceeding further, it would be apposite to reproduce Section 36A(4) of the NDPS Act, which provides for some modification of Section 167(2) Cr.P.C. in its application to offences punishable under Sections 19, 24, 27A of the NDPS Act or offences involving commercial quantity of contraband:-

“36A. Offences triable by Special Courts

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(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27 A 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.”

The aforesaid provision provides for a time limit of 180 days instead of 90 days for completion of investigation into the offences prescribed therein. Further, the proviso to Section 36A(4) of the NDPS Act empowers the Special Court to extend the said period upto one year on a report of the Public Prosecutor.

This Court in ‘**Saleem @ Mulla vs. State of Haryana**’ (CRM-M No.11271 of 2021 d/d 26.03.2021) has held as under:

“Thus, what can be culled from the above definition of 'investigation' is that it would include within its ambit all proceedings conducted by the investigating agency for collection of all such material and evidence which would help in ascertaining whether an offence has been committed or not. In other words, investigation would be deemed to have been completed in cases under the NDPS Act only after an opinion has been formed and given by the chemical examiner qua the nature of the articles/substance sent to it by the investigating agency. Therefore, without a doubt in cases under NDPS Act, FSL report would be a decisive document to link the accused with the alleged commission of crime for attracting the mischief of offences under the NDPS Act. It is precisely for this reason that it becomes imperative in cases under the NDPS Act that the challan is mandatorily accompanied by FSL report. Unless and until no definite opinion is given by the chemical

examiner qua the nature of the articles etc., sent, it would lead to no other inference but the one that the investigation is still incomplete as 'smell' and 'sight' of the articles/substance seized by the investigating agency cannot be taken to be a conclusive proof of the nature of the articles/substance. Moreover, in the absence of the FSL report not being part of the challan, the Magistrate would be handicapped to proceed further and take cognizance of the offences. FSL report in cases under NDPS Act is an intrinsic part of the investigation and it is for this reason that investigation of cases under the NDPS Act would have to be kept at a pedestal, different from investigation which is carried out in cases under the Indian Penal Code and certain other statutes.”

Adverting to the case in hand, it is a matter of record that the charge sheet filed by the investigating agency before the trial Court was not accompanied by the FSL report. Thus, the investigation could not have been deemed to be completed. No doubt learned counsel for the petitioner has vehemently argued that the right of the petitioner for grant of default bail under the proviso to Section 167 (2) Cr.P.C. had accrued after a lapse of the period of 180 days from the date on which the petitioner was remanded to judicial custody, however, the petitioner, to avail his right to default bail, moved an application only on 25.07.2022 and still further, it is also a matter of record that an application for extension of the said period of 180 days as per the

proviso to Section 36A(4) of the NDPS Act, for filing the FSL report, already stood filed prior thereto on 12.04.2022 which was allowed by the trial Court vide order dated 25.07.2022 (impugned in CRM-M No.37221 of 2022). In the above circumstances, once the application for extension of time as per the proviso to Section 36A(4) of the NDPS Act had been moved by the prosecution prior to the filing of an application for default bail by the petitioner and which was subsequently allowed by the trial Court, the right of the petitioner to be released on default bail would thus stand extinguished.

The Hon'ble the Supreme Court, in '**Hitendra Vishnu Thakur v. State of Maharashtra**' (1994) 1 SCC 602, has observed as under:

“30. ... It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under clause (bb). In this view of the matter, it is immaterial whether the application for bail on ground of 'default' under Section 20(4) is filed first or the report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by clause (b) of Section 20(4) has expired and the court does not grant an extension on the

report of the public prosecutor made under clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under clause (bb) but the charge-sheet is not filed within the extended period, the court shall have no option but to release the accused on bail if he seeks it and is prepared to furnish the bail as directed by the court...”

Further in ‘**Sanjay Dutt v. State through C.B.I.**’ (1994) 5 SCC 410’, the Hon’ble Apex Court has categorically held that the grant of default bail to an accused is subject to the refusal of a prayer made by the prosecution for extension of time.

The position would have been altogether different had it been a case where the application for extension of time for filing of the FSL report had been moved by the prosecution subsequent to the filing of the application for default bail by the petitioner as in such a situation the right of the petitioner to be released on default bail would have remained intact.

Still further, the trial Court did not err in any manner whatsoever while passing the order dated 25.07.2022 (impugned in CRM-M No.37221 of 2022) as it was only upon consideration of the report of the Public Prosecutor qua the progress of the investigation, it rightly extended the time as admittedly the investigating agency had already dispatched the samples to FSL Hisar on 19.01.2022 and the

report from the FSL Hisar was still awaited. Furthermore, learned State counsel, on instructions, has also apprised this Court that subsequent to the extension of time by the trial Court, FSL report had been received and submitted before the trial Court within 2 months, in the month of September 2022.

In the facts and circumstances as enumerated hereinabove, this Court does not deem it fit to accept the prayer of the petitioner for extending the concession of default bail to him. Both the petitions, being devoid of any merit, are dismissed. However, anything contained hereinabove shall not be construed to be an expression of opinion on the merits of the case.

(MANJARI NEHRU KAUL)
JUDGE

January 5, 2023
rps

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No