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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 10.04.2023
Pronounced on: 18.04.2023

+ **CRL.M.C. 2164/2023**

ARIF KHAN

..... Petitioner

Through: Mr. Akshay Bhandari,
Advocate.

versus

STATE (GOVT OF NCT DELHI)

..... Respondent

Through: Mr. Manoj Pant, APP for the
State along with SI Sonal Raj,
P.S. Daryaganj.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present petition has been filed under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (*hereinafter 'Cr.P.C.'*) seeking setting aside of order dated 17.03.2023 passed by learned Additional Sessions Judge/Special Judge, NDPS, Central, Tis Hazari Court (*hereinafter 'learned Special Judge'*) where the prayer of petitioner for release on default bail was declined, and accordingly, the petitioner seeks his release on regular bail in FIR bearing no. 152/2022, registered at Police Station Daryaganj under Sections 21/29/61/85 of the Narcotics Drugs and

Psychotropic Substances Act, 1985 (*hereinafter 'NDPS Act'*).

2. The petitioner is stated to be in judicial custody since 26.03.2022 on the ground that he had been apprehended with 340 grams of contraband 'morphine' in his possession which is a commercial quantity. After completion of 180 days of his arrest, charge-sheet was filed by the Investigating Officer without FSL report.

3. Learned counsel for the petitioner states that petitioner has already undergone 12 months in judicial custody. It is stated that the charge-sheet in the present case has been filed without FSL result, and thus, the same would be termed as 'incomplete'. It is argued that the charge-sheet and investigation be considered as to be not filed as per provisions of Cr.P.C. and within the time period stipulated therein, thereby entitling the petitioner to relief of bail in present case.

4. It is argued by learned counsel for petitioner that the Hon'ble Apex Court in *Mohd Arbaz & Ors. v. State of NCT of Delhi SLP (Criminal) No. 6876-6877/2022*, arising out of order passed by a Co-ordinate Bench of this Court in *Mohd. Arbaz v. State (NCT of Delhi) 2020 SCC OnLine Del 2542* in a similar case, has granted bail to the petitioners therein whose charge-sheets were filed without the FSL result.

5. Learned APP for the State, on the other hand, argues that the bail granted by the Hon'ble Apex Court in the aforesaid case was on grounds and circumstances which were different from the case in hand. It also stated that till the issue in question i.e. whether a charge-sheet filed without FSL report is complete or incomplete for the

purpose of default bail is decided by the Hon'ble Apex Court, the prevailing law will cover the present case and the petitioner will not be entitled to bail, also because the judgment challenged therein has not been stayed by the Hon'ble Apex Court.

6. Learned counsel for the petitioner states that the petitioner may be granted bail till the issue in question is decided by the Hon'ble Supreme Court.

7. I have heard arguments and have also gone through the case file.

8. As per the case of prosecution, the petitioner, along with two other co-accused, was apprehended on 26.03.2022 at the instance of a secret informer near N.S. Marg/Ansari Road, Mahavir Vatika. Upon his search after compliance of statutory provisions, a plastic box was recovered from his bag, containing 340 grams of morphine/smack, which is a commercial quantity. The contraband was tested with the NDPS Testing Kit at the spot and the same was also sent to FSL for detailed analysis, report of which is still awaited. On the basis of Call Detail Records and disclosure of present petitioner, two more accused persons were arrested on 13.04.2022.

9. The main grievance of petitioner is that the learned Special judge had erroneously declined the relief of default bail to him. Learned counsel for the petitioner had primarily relied upon the decision in *Mohd. Arbaz & Ors. (supra)* where the Hon'ble Apex Court has been pleased to observe as under:

“In all these petitions the question that arises for consideration is relating to the completeness of the charge

sheet in accordance with law if the same is filed without the CFSL Report. **The matter would require detailed consideration.** In the meantime, all parties to complete their pleadings.

For the present, **though the issue of default bail is to be considered in the petitions since it would require some time, without reference to that aspect of the matter,** keeping in view that the petitioners in SLP (Crl.) Nos. 6876-6877/2022, SLP (Crl.) No. 532/2022 and SLP (Crl.) No. 5190/2022 are still in custody, we order that they be released on bail subject to the conditions to be imposed by the concerned trial courts.

While indicating so we also take note of the objection put forth by learned counsel for the respondent-State in SLP (Crl.) No. 2666/2022 who objects to the grant of bail since the petitioner therein has not surrendered despite the bail being cancelled by the High Court. Though in a normal circumstances we would have taken a serious view of the matter keeping in view the fact that the petitioner has approached this Court immediately after cancellation of the bail and the petition has been tagged alongwith similar matters and could not be taken up, we allow the benefit of bail to the petitioner. Hence, the order cancelling bail which is impugned in SLP (Crl.) No. 2666/2022 shall remain stayed. List all these petitions on 17.01.2023.”

(Emphasis supplied)

10. In the aforesaid case, the Hon’ble Supreme Court has been pleased to grant bail to the petitioners therein, however, it has been clearly mentioned that bail was granted without ‘*reference to that aspect of the matter*’. It is, thus, clear that bail in the said case was not granted with reference to the question of completeness of charge-sheet in accordance with law, if the same is filed without FSL report. Therefore, the contention of learned counsel for the petitioner that since the Hon’ble Supreme Court has granted bail in the case of

Mohd. Arbaz & Ors. (supra), the present petitioner is also entitled to same relief is devoid of merit.

11. Further, in one of the petitions i.e. *SLP (Crl.) No. 2666/2022* before the Hon'ble Supreme Court in the aforesaid case, the petitioner had not surrendered despite the bail being cancelled by the High Court. It is also clearly mentioned in the order of the Hon'ble Supreme Court that the petition for grant of bail of the said petitioner had been tagged along with similar matters dealing with the question of law mentioned above and could not be taken up and thus, benefit of bail was being granted to the petitioner. It is also to be noted that in facts of the said case, the quantity of contraband recovered were not placed before the Court, also as to whether it was a case of commercial quantity of recovery of contraband or not.

12. It is, thus, clear that *no general directions* have been passed by the Hon'ble Supreme Court for grant of default bail in case of charge-sheet being filed without FSL report in NDPS cases.

13. On the issue in question, this Bench in ***Suleman v. State (NCT of Delhi) 2022 SCC OnLine Del 2346*** had observed that non-filing of FSL report along with the chargesheet does not fall within the ambit of Section 173(2) Cr.P.C. so as to consider it as "incomplete chargesheet" and the same does not give any right of default bail to the accused. The relevant portion of the judgment is reproduced as under:

“12. Further in view of the decision of *Kishan Lal vs State (supra)*, a Coordinate Bench of this Court in a recent judgement of *Babu vs The State (Govt. Of NCT of Delhi)*

BAIL APPLN. 2075/2020 dated 25.09.2020, observed as under: -

"...18. Though this Court is of the view that the decision of the Division Bench of the Punjab and Haryana High Court is an appropriate opinion in relation to cognizance of an offence under NDPS Act without the FSL report being an illegality, however, bound by the Division Bench decision of this Court, judicial discipline mandates this Court to follow the same. Consequently, in view of the decision of the Division Bench of this Court in *Kishan Lal vs. State* (supra), it is held that the petitioner is not entitled to grant of bail under Section 167(2) CrPC for non-filing of the FSL report along with the charge sheet..."

12. A similar view was followed by the Coordinate Bench of this Court in *Mohd. Arbaz vs State of NCT of Delhi CRL. REV. P. 1219/2019 on 03.11.2020*, wherein it was observed that the accused should not be entitled to bail in default as the charge sheet was already filed. The Court held that the report shall not form part of the charge sheet and hence, the bail under Section 167(2) was rejected. An appeal against the said judgement is pending before the Hon'ble Supreme Court in *Mohd. Arbaz vs State of NCT of Delhi SLP (Crl.) Nos. 8164-8166/2021*. The observation of the Hon'ble High Court reads as under: -

"...24. This Court concurs with the view expressed by the Coordinate Bench of this Court in *Babu* (supra). Thus, the view expressed by the Division Bench of Punjab and Haryana High Court in *Ajit Singh @Jeeta* (supra) and the view expressed by the Bombay High Court in *Sunil Vasant Rao Phulbande* (supra), convinced this Court that the view of the Division Bench in *Kishan Lal* (supra) is binding.

25. In view of the above, the petitioners' contention that the report submitted on 27.05.2019 could not be construed as a report under Section 173(2) of the Cr.PC must be rejected. The first question is, thus, answered in the negative..."

13. At present, the settled law persists in the view that non filing of FSL Report with the charge sheet does not fall within the realms of Section 173(2) of the Cr.P.C so as to consider it as "incomplete report". In the present case although FSL Report has not been filed, however, the charge sheet was already filed on 03.03.2021 within the time period as per law. Further, the amount of quantity recovered from the accused is of commercial nature barring the accused from bail under Section 37 of the NDPS Act."

14. In view of the foregoing discussion, there are no reasons to interfere with the impugned order and no case for grant of default bail is made out in favour of the petitioner.

15. Accordingly, the present petition stands dismissed.

SWARANA KANTA SHARMA, J

APRIL 18, 2023/zp

