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

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Reserved on: 17.11.2023
Pronounced on: 22.12.2023

+ **CRL.M.C. 6982/2023**

ARSHAD (IN JC)

..... Petitioner

Through: Mr. Akshay Bhandari and Mr.
Anmol Sachdeva, Advocates

versus

STATE GOVT OF NCT OF DELHI

..... Respondent

Through: Mr. Manoj Pant, APP for the
State with SI Mahavir, PS –
Daryaganj

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present petition under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 has been filed seeking the following prayers:

- i. Set aside the impugned order dated 12.09.2023 passed by the learned Special Judge, NDPS, Tis Hazari Courts in FIR No. 152/2022, registered at Police Station Daryaganj, under Sections 21/29/61/85 of Narcotic Drugs and Psychotropic Substances Act,



1985 (*'NDPS Act'*).

ii. Release the applicant on default bail in the aforesaid FIR.

2. Briefly stated, the facts of the case are that on 25.03.2022, pursuant to a secret information received informing that co-accused Arif can be caught with smack near Mahavir Vatika, a raiding team had been constituted, after following the prescribed procedure. On the same day, at about 10:40 PM, secret informer had identified the co-accused Arif, who was seen coming from NS Marg to Ansari road, Mahavir Vatika, and was carrying a bag on his right shoulder. Thereafter, two persons had come near Arif and had asked him whether he had brought smack for them to sell. Immediately thereafter, the raiding team had surrounded the three persons i.e. co-accused Arif, Salman, and Naeem. After giving notice under Section 50 of NDPS Act and calling the concerned ACP on the spot, the raiding team had carried out the search of accused persons. Upon conducting search, the team had found a plastic box inside the sports bag carried by co-accused Arif, in which a plastic polythene of white colour was found, containing smack (morphine) like substance. The team had then tested the substance using NDPS testing kit and it was found to be morphine. The plastic polythene containing the morphine had then been weighed, which was found to be 340 grams i.e. commercial quantity. All the three accused persons were arrested on 26.03.2022. During investigation, it was revealed that co-accused Arif had received the plastic box containing morphine from one Parvez, who runs a juice shop in Delhi, and the box had been carried from Shambhal,



Uttar Pradesh to Delhi by one Arshad i.e. the present petitioner, who ferried passengers and goods from Shambhal to Delhi in his car. Thereafter, Call Detail Records of co-accused Arif were obtained, and it was found that on 24.03.2022, Arif had talked to the petitioner Arshad. Thereafter, petitioner Arshad had also been arrested, who had disclosed that he was involved in carrying parcels of morphine from Sambhal to Delhi, in his car, on a commission basis.

3. Learned counsel for the petitioner argues that the petitioner has been in judicial custody since 13.04.2022, but he has been falsely implicated in the present case, and no recovery has been affected from him. It is argued that the charge-sheet in this case was filed without FSL Report, and therefore, the petitioner is entitled to default bail. It is also stated that petitioner is entitled to bail on the ground of parity since the main accused Arif, from whom the recovery of contraband was affected, has been granted bail by the Hon'ble Supreme Court *vide* order dated 28.07.2023. It is also stated that the Hon'ble Apex Court in ***Mohd Arbaz & Ors. v. State of NCT of Delhi SLP (Criminal) No. 6876-6877/2022***, has granted bail to the petitioners therein whose charge-sheets were filed without the FSL result. Thus, it is prayed that present petitioner be released on default bail.

4. Learned APP for the State, on the other hand, opposes the present petition and states that petitioner was is involved in the larger conspiracy and he was the one who had carried the morphine, recovered in the present case, from State of Uttar Pradesh to Delhi in his car. It is



stated that FSL report has already been filed before the learned Trial Court by way of supplementary chargesheet dated 31.08.2023. It is submitted that in the case of ***Mohd Arbaz*** (*supra*), the Hon'ble Apex Court had merely opted to examine the legal issue in detail and for the time being, interim relief was granted to the petitioners, and similar is in the case of co-accused Arif. 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.

5. This Court has heard arguments advanced by learned counsel of petitioner as well as learned APP for the State, and has perused the material on record.

6. In a nutshell, the case of prosecution is that co-accused Arif and two other co-accused were apprehended on 26.03.2022 at the instance of a secret informer near N.S. Marg/Ansari Road, Mahavir Vatika. Upon search of Arif, after compliance of statutory provisions, a plastic box was recovered from his bag, containing 340 grams of morphine, which is commercial quantity. On the basis of Call Detail Records and disclosure of accused persons, two more accused persons including the present petitioner were arrested later on. The allegations against the present accused Arshad are that he had collected the box containing morphine from some person in Sambhal and had carried it to Seelampur, Delhi in exchange of commission of Rs.3000/-, even after knowing that



the box contained commercial quantity of morphine, and he had supplied it to the co-accused Parvez so that it can further be sold to other persons.

7. However, the main grievance of petitioner is that the learned Special judge has erroneously declined the relief of default bail to him. In this regard, the observation of the learned Special Judge in the impugned order, reads as under:

“In the light of the submissions, this court has specifically asked from Ld. Counsel for accused/applicant as to if any general direction was passed whereupon the Ld. Counsel for applicant/accused fairly conceded that no such general direction has been issued by Hon'ble Apex Court -in the matter of Mohd Arbaz Vs State (Supra). I concur with the Ld. CPP for State that merely because relief has been granted to some of the petitioners by Hon'ble Apex Court that cannot be considered as a legal proposition to hold that in all pending cases accused persons are entitled for default bail though the charge-sheet has been filed.”

8. This Court, while considering the plea of default bail of co-accused Arif, in case of *Arif Khan v. State (NCT of Delhi) 2023 SCC OnLine Del 2374*, had made the following observations, while dismissing the petition:

“9. ...Learned counsel for the petitioner had primarily relied upon the decision in Mohd. Arbaz (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 (CrI.) Nos. 6876-6877/2022, SLP (CrI.) No. 532/2022 and SLP (CrI.) 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 (CrI.) 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 (CrI.) 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 (supra), the present petitioner is also entitled to same relief is devoid of merit.

11. Further, in one of the petitions i.e. SLP (CrI.) 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) 5 HCC (Del) 108 : 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...”

(Emphasis supplied)

9. Though the co-accused Arif has now been enlarged on bail by the Hon'ble Apex Court *vide* order dated 28.07.2023, the said relief has been granted to him on similar ground i.e. pendency of larger issue i.e. whether chargesheet filed without an FSL report is incomplete chargesheet, before the Hon'ble Apex Court. However, neither the decisions challenged before the Hon'ble Apex Court have been stayed, nor any general directions have been given to the Courts to release the accused persons on default bail if the chargesheet is filed without an FSL report.



10. In such circumstances, this Court finds no ground to set aside the impugned order or to release the petitioner on default bail.
11. Accordingly, the present bail application is dismissed.
12. It is, however, clarified that nothing expressed herein above shall tantamount to an expression of opinion on merits of the case.
13. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

DECEMBER 22, 2023/ns