

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO. 1913 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Mohd Ikram Ali Khari	Versus	...Applicant
Union of India and ors.		...Respondents

Mr. Ashok Mundargi, Senior Advocate, a/w Ayaz Khan, for
the Applicant.
Mr. Ashish Chavan, Special PP for the UOI/NCB.
Mr. S. R. Aagarkar, APP for the State/Respondent No.1.

CORAM: N. J. JAMADAR, J.
Reserved On: 30th APRIL, 2024
Pronounced On: 9th MAY, 2024

ORDER:-

1. The applicant, who is arraigned in NCB/BZU/CR-39/2022 for the offences punishable under Sections 22(c), 27(a) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act, 1985"), has preferred this application for default bail.
2. The applicant was allegedly found in possession of 49.3 kg. Mephedrone (MD) in a seizure effected on 6th October, 2022 at Lucky House, Fort, Mumbai. The applicant was arrested on 6th October, 2022. The period of 180 days prescribed under Section 36A(4) of the NDPS Act, 1985 expired on 4th April, 2023.
3. The applicant preferred an application before the learned Special Judge with a contention that though the period of 180

days had expired on 4th April, 2023, the prosecution failed to lodge the charge-sheet. Instead, on 13th April, 2023, a remand report was filed by the prosecution and the judicial custody of the applicant came to be extended till 27th April, 2023. Thus, the applicant was entitled to be released on bail in view of the default on the part of the investigating agency to lodge the charge-sheet within the period stipulated by Section 167(2) read with Section 36A(4) of the NDPS Act, 1985.

4. By an order dated 9th May, 2023, the learned Special Judge rejected the application observing that the report submitted by the Registry indicated that the charge-sheet was, in fact, filed on 13th March, 2023 vide CF No.5492 of 2023. The fact that the prosecution took time to remove the objection raised by the Registry did not imply that the charge-sheet was not filed. Thus, the applicant was not entitled to seek bail on the ground of default in filing the charge-sheet.

5. Being aggrieved, the applicant has preferred this application.

6. I have heard Mr. Mundargi, the learned Senior Advocate for the applicant, and Mr. Chavan, the learned Special PP for the NCB - respondent No.1 and Mr. Agarkar, the learned APP for the State - respondent No.2.

7. Mr. Mundgargi, the learned Senior Advocate for the applicant, submitted that the learned Special Judge proceeded on an incorrect premise. It was urged that the two stages of completion of investigation by police and taking of cognizance by the Court are distinct: cognizance was not required to be taken within the stipulated period of 180 days.

8. Mr. Mundargi was at pains to draw home the point that the premise of the application preferred by the applicant before the learned Special Judge was not that he was entitled to be released on bail on the ground that the Court did not take cognizance within the stipulated period. Rather, the basis of the application was default on the part of the investigating agency to complete the investigation and lodge the charge-sheet. The learned Special Judge misconstrued the application preferred by the applicant.

9. Mr. Mundargi further submitted that the right of the accused to default bail in the event of failure on the part of the investigating agency to lodge the charge-sheet is not only a statutory right, but has also been construed to be a part of fair and reasonable procedure envisaged by Article 21 of the Constitution of India. Therefore, the mere fact that the investigating agency had lodged some document in the Registry

and did not care to comply with the office objections for weeks together could not have been construed by the learned Special Judge as filing of the charge-sheet within the statutory period.

10. Mr. Chavan, the learned Special PP for the NCB, submitted that the submissions now sought to be canvassed on behalf of the applicant are belied by the assertions in the application preferred before the learned Special Judge. Taking the Court through the averments in the said application, Mr. Chavan submitted that the said application was indeed preferred on the premise that cognizance was not taken within the stipulated period. It was urged that it is well-neigh settled that filing of the charge-sheet within the stipulated period is sufficient compliance of the provisions contained in Section 167 and it does not matter whether the Court has taken cognizance of the offences within the said period.

11. Mr. Chavan further submitted that the learned Special Judge was well within his rights in declining to accede to the submissions canvassed on behalf of the applicant as it is not the requirement in law that the charge-sheet be placed before the Magistrate within the stipulated period. For this purpose, Mr. Chavan placed reliance on an order passed by this Court in

the case of *Dheeraj Wadhawan vs. Central Bureau of Investigation*¹.

12. I have carefully perused the material on record and the submissions canvassed across the bar. There is not much controversy over the facts. The applicant was arrested and produced before the jurisdictional Magistrate on 6th October, 2022. The period of 180 days expired on 4th April, 2023. The controversy boils down to the question as to whether investigation was completed and charge-sheet was lodged before the expiry of the period of 180 days.

13. To begin with, it may be necessary to note that before the learned Special Judge, the applicant had raised the ground that the Court ought to have taken the cognizance of offences before the expiry of 180 days. Even in the instant application the applicant has averred that the cognizance was required to be taken within 180 days. The legal position is absolutely clear.

14. In the case of *Suresh Kumar Bhikamchand Jain vs. State of Maharashtra and anr.*², a three-Judge Bench of the Supreme Court considered the question as to whether the failure of the Special Court to take cognizance of the offences on account of the failure of the prosecution to obtain the sanction to prosecute

1 Criminal BA(Stm)/1924/2020 dtd. 4/11/2020.

2 (2013) 3 Supreme Court Cases 77.

the accused amounts to non-compliance of the provisions of Section 167(2) of the Code of Criminal Procedure. The Supreme Court observed in paragraph 18 as under:

“18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Cr.P.C. is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Cr.P.C. The scheme of the Cr.P.C. is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/ or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.”

(emphasis supplied)

15. In the case of *Serious Fraud Investigation Office vs. Rahul Modi and ors.*³, after a survey of the judgments, the Supreme

3 2022 SCC Online SC 153.

Court again enunciated that judicial precedents do not endorse an additional requirement of cognizance to be taken within the period prescribed under Section 167(2) of the Code, failing which the accused could be entitled to the default bail even after the filing of the charge-sheet within the stipulated period.

16. As the applicant does not profess to agitate this issue before this Court, though raised in the application before the learned Special Judge and even this Court, the submissions on behalf of the applicant regarding the failure of the investigating agency to file the charge-sheet, which is essentially a matter rooted in facts, deserves consideration.

17. The documents on record (page Nos.38 and 39) indicate that the investigating agency had filed the charge-sheet vide CF No.5492/2023 on 31st March, 2023. As many as 62 objections were raised. The first lot of objections was removed on 19th April, 2023 and the rest on 21st April, 2023. Inviting the attention of the Court to a circular issued by the Registrar, City Civil and Sessions Court, Mumbai, to the effect that if the office objections are not removed within one week the charge-sheet be returned to the concerned investigating agency, Mr. Mundargi would submit that the learned Special Judge could not have

held that the charge-sheet was lodged within the stipulated period.

18. I find rather it difficult to accede to this submission. The learned Special Judge was fully justified in observing that the removal of office objections was a ministerial act. The substance of the matter was whether the investigating agency completed the investigation within stipulated period and filed the charge-sheet. The material on record indicates that the investigating agency did file the charge-sheet before the expiry of 180 days. The time taken for removal of office objections, even if considered to be a long one, cannot imply that the charge-sheet was not lodged.

19. The endeavour of Mr. Mundargi to bank upon the *roznama* of the proceedings before the learned Special Judge dated 13th April, 2023, wherein it was recorded that the investigating agency had filed remand report, does not merit countenance. The fact remains that before the expiry of the statutory period, charge-sheet was lodged by the investigating agency. Ultimately the challenge essentially boils down to the aspect of the cognizance having been taken by the Special Court. That aspect is totally distinct from the issue which warrants consideration while deciding the prayer for default bail.

20. For the foregoing reasons, I am inclined to hold that the learned Judge, Special Court, committed no error in rejecting the application for default bail. Resultantly, the instant application deserves to be rejected.

21. Hence the following order:

: O R D E R :

- (i) Application stands rejected.
- (ii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for default bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

[N. J. JAMADAR, J.]