

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-16549-2023

Roshan Lal

.....Petitioner

Vs.

State of Haryana

.....Respondent

Reserved On.: 20.02.2024
Pronounced On: 26.02.2024

CORAM: - HON'BLE MR. JUSTICE DEEPAK GUPTA

Present: Ms. Himani Anand, Advocate
for the petitioner.

Mr. Randhir Singh, Addl. A.G., Haryana.

DEEPAK GUPTA, J.

By way of this petition filed under Section 482 Cr.P.C., petitioner has prayed to quash order dated 27.04.2021 (Annexure P-1) passed by learned Additional Sessions Judge, Kurukshetra, whereby application moved by the prosecution for extension of time under Section 36A(4) of NDPS Act for filing of the report under Section 173 Cr.P.C., was allowed in case FIR No.580 dated 30.10.2020 registered under Sections 15, 20, 27A and 29 NDPS Act, 1985 registered at Police Station Sadar, Thanesar, District Kurukshetra.

2. As it emerges from paper-book, on 30.10.2020, secret information was received by the police to the effect that petitioner along with his servants Sandeep Kumar, Firoz Khan and others used to sell poppy husk and Ganja to truck drivers, visiting his *Dhaba* running in the name and style of “*Shiv Gorakh*” on G.T. Road in the area of Masana. After making statutory compliances raid was conducted in the godown situated on the backside of

CRM-M-16549-2023

Shiv Gorakh Dhaba. Petitioner with others were found working in the godown. Compliance of Section 50 of the NDPS Act was made. After arrival of the Gazetted Officer, Shri Jaibir Singh Ranga, Naib Tehsildar, Thanesar, necessary search of the godown was conducted. 47 bags containing poppy husk with total weight of 1037 kg; and two bags containing Ganja weighing 34 kg were found from the different rooms of the godown, apart from plastic bags containing empty polythene, two machines of polythene packing and small digital scale. All the case property was taken into possession. Necessary formalities were completed at the spot.

3. Petitioner was arrested on the same date i.e. 30.10.2020.

Following dates are material in this case:

- 30.10.2020 : Recovery of contraband and arrest of petitioner
- 28.04.2021 : Period of 180 days to complete the investigation expired.
- 27.04.2021 : *Application under Section 36A(4) NDPS Act moved for extension of time for completion of investigation
*Allowed on the same date by extending the period by two months for filing of the challan.
- 07.05.2021 : Final report under Section 173 Cr.P.C./challan filed.
- 13.05.2021 : *Application for default bail under Section 167(2) Cr.P.C. moved.
*Declined on the same date.

4. Perusal of the paper-book would reveal further that petitioner challenged the order dated 13.05.2021, whereby default bail under Section 167 (2) Cr.P.C. was declined to him, by filing CRR-630-2021 before this Court. However, that revision was dismissed on 23.01.2023 after observing that order dated 27.04.2021, whereby time was extended for completion of the

CRM-M-16549-2023

investigation by two months, had not been challenged. It also emerges that petitioner challenged the order dated 23.01.2023 as passed by this Court in CRR-630-2021, by filing Special Leave to Appeal (Criminal Appeal No.2650/2023) but the same was dismissed by Hon'ble Supreme Court vide order dated 03.03.2023, copy of which has been placed on record by Ld. State Counsel. Petitioner then filed CRM-M-24150-2023 seeking regular bail under Section 439 Cr.P.C., which was also dismissed by this Court vide order dated 20.09.2023 (*Annexure R4*).

5. Now, by way of the present petition, petitioner has assailed the order dated 27.04.2021 extending the time under Section 36A(4) of NDPS Act for filing the report under Section 173 Cr.P.C. By placing reliance upon ***“Sanjay Dutt v. State” (1994)5 SCC 410*** & ***“Sanjay Kumar Kedia v. Narcotics Control Bureau” (2009) 17 SCC 631***, it is contended by learned counsel that as per requirement of the law, it was mandatory for the Court, before an application under Section 36A(4) is allowed for extension of time, to seek report of the Public Prosecutor, which must indicate the progress of investigation and specify the compelling reasons for seeking the detention of the accused beyond the period of 180 days and that application is required to be disposed of only after notice to the accused. Learned counsel has then drawn attention towards the impugned order dated 27.04.2021 passed by learned Additional Sessions Judge, Kurukshetra, which would reveal that accused or his counsel were not even present, when the application was moved nor any notice was served upon them nor any report from the Public Prosecutor was obtained and simply on the basis of application moved by the Investigating Officer ASI Vinod Kumar and on the basis of submissions made by the Public

CRM-M-16549-2023

Prosecutor, the application was allowed.

6. Learned State counsel has strongly opposed the petition by submitting that petitioner had earlier applied for default bail, which was declined by the Trial Court on 13.5.2021 and that revision against said order dated 13.05.2021 has already been dismissed by this Court. Learned State counsel further submits that final report under Section 173 Cr.P.C. had already been filed on 07.05.2021 i.e. before moving of the application for default bail and that in these circumstances, petitioner will not be entitled to be released on default bail, even if the impugned order dated 27.04.2021 is found to be not justified.

7. As it was confronted to the counsel for the petitioner that prayer in this petition was made only to set aside the order dated 27.04.2021, whereby application for extension of time under Section 36A(4) was allowed, without seeking further relief of default bail, learned counsel made an oral prayer for granting default bail to the petitioner. Learned counsel has referred to ***“Rakesh Kumar Paul v. State of Assam”, (SC) : Law Finder Doc Id # 889381*** in order to contend that Court may grant default bail on oral or written application, though oral request should not be a Rule.

8. I have considered submissions of both the sides and have perused the record carefully.

9. The questions to be considered are :

- (i) Whether the order dated 27.04.2021 passed by learned Additional Session Judge, extending the time by 2 months under Section 36A(4) NDPS Act, for filing of the final report under Section 173 Cr.P.C. is sustainable in the eyes of law.
- (ii) If the answer to the first question is in the affirmative, whether petitioner

CRM-M-16549-2023

is entitled for default bail.

10. Section 36A (4) of the NDPS Act reads as under:

“Offences triable by Special Courts.-

(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 subsection (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.”

11. In ***Sanjay Kumar Kedia’s case (supra)***, Hon’ble Supreme Court while dealing with the scope of Section 167 of the Code of Criminal Procedure Code held as under:

“7. We have considered the arguments of learned counsel for the parties. Section 167 of the Code deals with the procedure wherein investigation cannot be completed in 24 hours and the various sub-sections provide for the maximum period beyond which a person cannot be detained and this period varies between 60 and 90 days keeping in view the gravity of the offence - the maximum period of 90 days being provided with respect to offences punishable with death etc. and 60 days for other offences, and if the Investigation is not completed within this period, the accused is entitled to bail under Section 167 sub-section (2) if he makes an application for that purpose and is prepared to furnish ball. It will be seen that Section 167 does not envisage an extension of the period of detention of an accused in custody beyond the specified periods. The legislature, however, thought in its wisdom, that certain special categories or situations required that the investigating agencies should be given more time to investigate a matter and to file their complaint or charge-sheets and such provisions have been made under special statutes.”

CRM-M-16549-2023

12. Hon'ble Supreme Court then noticed that the Terrorist and Disruptive Prevention Act, 1987 and the Narcotic Drugs and Psychotropic Substances Act are two such special legislations. Notice was then taken to Section 36A(4) of the Act and then it was held as under:

“10. The maximum period of 90 days fixed under Section 167 (2) of the Code has been increased to 180 days for several categories of offences under the Act but the proviso authorizes a yet further period of detention which may in total go up to one year, provided the stringent conditions provided therein are satisfied and are complied with. The conditions provided are:

- (1) a report of the public prosecutor,*
- (2) which indicates the progress of the investigation, and*
- (3) specifies the compelling reasons for seeking the detention of the accused beyond the period of 180 days, and*
- (4) after notice to the accused.*

11. *The question to be noticed at this stage is as to whether the two applications for extension that had been filed by the public prosecutor seeking an extension beyond 180 days met the necessary conditions. We find that the matter need not detain us as it is no longer res integra and is completely covered by the judgment of this Court in **Hitendra Vishnu's case (supra)**. In this case, the Bench was dealing with the proviso inserted as clause (bb) in Sub-section (4) of Section 20 of TADA, which is parimateria with the proviso to Sub-Section (4) of Section 36-A of the Act. This Court accepted the argument of the accused that an extension beyond 180 days could be granted but laid a rider that it could be so after certain conditions were satisfied. It was observed :*

“It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also

strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party.

13. Similar question was also considered by Hon'ble Supreme Court in ***"Jigar @ Jimmy Pravinchandra Adatiya vs. State of Gujarat"*** [Criminal Appeal No.1656 of 2022 arising out of SLP (Crl.) No.7696 of 2021 decided on 23.09.2022] and it was held as under:

*"Clause (b) of sub-section (2) of section 167 of CrPC, 1973 lays down that no Magistrate shall authorise the detention of the accused in the custody of the police unless the accused is produced before him in person. It also provides that judicial custody can be extended on the production of the accused either in person or through the medium of electronic video linkage. Thus, the requirement of the law is that while extending the remand to judicial custody, the presence of the accused has to be procured either physically or virtually. This is the mandatory requirement of law. This requirement is sine qua non for the exercise of the power to extend the judicial custody remand. The reason is that the accused has a right to oppose the prayer for the extension of the remand. When the Special Court exercises the power of granting extension under the proviso to sub-section (2) of Section 20 of the 2015 Act, it will necessarily lead to the extension of the judicial custody beyond the period of 90 days up to 180 days. Therefore, even in terms of the requirement of clause (b) of sub-section (2) of section 167 of CrPC, 1973 it is mandatory to procure the presence of the accused before the Special Court when a prayer of the prosecution for the extension of time to complete investigation is considered. In fact, the Constitution Bench of this Court in the first part of paragraph 53(2)(a) in its decision in the case of **Sanjay Dutt** holds so. The requirement of the report under proviso added by sub-section (2) of Section 20 of the 2015 Act to clause (b) of sub-section (2) of section 167 of CrPC, 1973 is two-fold. Firstly, in the report of the Public Prosecutor, the progress of the investigation should be set out and secondly, the report must disclose specific reasons for continuing the detention of the accused beyond*

CRM-M-16549-2023

the said period of 90 days. Therefore, the extension of time is not an empty formality. The Public Prosecutor has to apply his mind before he submits a report/ an application for extension. The prosecution has to make out a case in terms of both the aforesaid requirements and the Court must apply its mind to the contents of the report before accepting the prayer for grant of extension.”

14. Keeping in view the legal position as above, when the impugned order dated 27.04.2021 is perused, it is found that the said order has been passed without even serving any notice to the accused (*petitioner herein*). On the day the application was moved on 27.04.2021, neither the accused nor his counsel were present. No notice was sent to him. He was not directed to be produced by the jail authorities. Even the report of the Public Prosecutor was not called for, which should have disclosed the progress of the case and should have specified the compelling reasons for seeking the detention of the accused beyond the period of 180 days. Thus, without any notice to the accused and without any report of the Public Prosecutor, the impugned order was passed.

15. In these circumstances, in view the legal position explained by Hon'ble Supreme Court in ***Sanjay Kumar Kedia's case***, the impugned order cannot be sustained in the eyes of law. As such, question No.1 is answer in the affirmative.

16. Coming to question No.2, final report under Section 173 Cr.P.C. was filed by the police on 07.05.2021, though the period of 180 days had expired on 28.04.2021. Since the order dated 27.04.2021, whereby extension was granted for filing the challan, has been found to be unsustainable in the eyes of law, so it means that final report was required to be filed within 180 days i.e. up to 28.04.2021. However, the same was filed on 07.05.2021. At the

CRM-M-16549-2023

same time, it is noticed that petitioner did not exercise his right to seek default bail after expiry of 180 days and before filing of the challan. Rather, he moved an application for default bail on 13.05.2021, which was declined. That order dated 13.05.2021 was already challenged by the petitioner before this Court, which was dismissed in CRR-630-2021 and has been upheld by Hon'ble Supreme Court. This is true that CRR-630-2021 was dismissed because by that time the order dated 27.04.2021 granting extension of time had not been challenged but at the same time, the Court cannot ignore that default bail had not been moved after expiry of 180 days and before filing of the challan.

17. In ***Rakesh Kumar Paul (supra)***, it has been held by Hon'ble Supreme Court as under:

*"105. It has also been urged on behalf of the State that since the charge-sheet has now been filed, the petitioner is not entitled to grant of 'default bail'. Both my learned brothers have referred to the case of **Sanjay Dutt v. State through C.B.I., Bombay (II), (1994) 5 SCC 410**. Reference has also been made to **Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453**.*

*106. It is not necessary to multiply citations because in **Union of India v. Nirala Yadav, 2014(3) RCR (Criminal) 534: 2014(4) Recent Apex Judgments (R.A.J.) 265: (2014) 9 SCC 457**, this Court has considered the entire law on the subject and followed the law laid down in **Uday Mohanlal Acharya's case (supra)** as well as in **Mohamed Iqbal Madar Sheikh & Ors. v. State of Maharashtra, (1996) 1 SCC 722**, wherein this Court deprecated the practise followed by some courts of adjourning applications for grant of 'default bail' till the prosecution filed the charge-sheet and held that the statutory right should not be defeated by keeping the applications pending till the charge-sheet is filed.*

*107. In **Uday Mohanlal Acharya's case (supra)** the Court culled out six guidelines, which are as follows:*

"1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can

authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

2. Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of" used by this Court in Sanjay Dutt v. State through CBI, (1994) 5 SCC 410, must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the

CRM-M-16549-2023

court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

108. A reading of the aforesaid judgments leaves no manner of doubt that if an accused files an application for grant of default bail and is willing to furnish bail, then he is deemed to have exercised his right to avail of bail and this right cannot be defeated by filing the charge-sheet thereafter."

18. It is, thus, clear from the legal position as above that an accused, who wants to enforce his indefeasible right under Section 167(2) Cr.P.C. for default bail, is required to move an application before the filing of the final report under Section 173 Cr.P.C., though after expiry of the statutory period for filing of the challan.

19. Since in the present case, default bail was not moved within that period, therefore, petitioner is not entitled for grant of default bail. As such, the oral request made by learned counsel for the petitioner so as to grant default bail to the petitioner, cannot be accepted in view of the facts and circumstances of the present case.

Dismissed.

(DEEPAK GUPTA)
JUDGE

February 26, 2024

Neetika Tuteja

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No