

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR-733-2024
DECIDED ON: 18.04.2024

PARDEEP KUMAR

.....PETITIONER

VERSUS

STATE OF HARYANA

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Arjun Dhingra, Advocate
for the petitioner.

Mr. B.S. Virk, Sr. DAG, Haryana.

SANDEEP MOUDGIL, J (ORAL)

1. The instant revision petition has been preferred invoking jurisdiction of this Court under Section 401 Cr.P.C. while seeking two reliefs in the common petition i.e. for setting aside order dated 26.02.2024 whereby the application under Section 36-A(4) of NDPS Act, 1985 for extension of time to file the challan has been allowed and the order dated 27.02.2024 vide which default bail sought by the petitioner has been declined in case FIR No.0584, dated 30.08.2023, under Section 20 of NDPS Act, 1985, registered at Police Station City Palwal.

2. Since, the orders challenged before this Court by way of a common revision petition are passed on different dates on different cause of action, Mr. Arjun Dhingra, Advocate for the petitioner confines his prayer to the order dated 27.02.2024 and prays for default bail while withdrawing his

petition qua the challenge to order dated 26.02.2024 with liberty to challenge the same by separate revision petition.

3. The prayer is accepted in the interest of justice and this Court would proceed further to adjudicate on the revision petition on the prayer as to whether petitioner is entitled to the benefit of default bail under Section 167(2) Cr.P.C. The facts culminated into the FIR could be read as narrated therein which is reproduced hereinbelow:-

“To the SHO sir police station city palwal jai hind that today on dated 30.08.2023 I ASI Kushal Kumar with HC Manoj No. 1194, Constable Sandeep No. 478, Constable Ravindra No. 1007 patrolling at Hooda Chowk Delhi Agra Road flyover for prevention of crime and drug abuse. in Palwal and the special informer informed that Captain and Pardeep are coming towards Delhi from Mathura (U.P.) in car canter number RJ-32GB-0932, after filling coconuts with hemp and covering them with tripaal. If immediate blockade is imposed on NH 19, the above mentioned vehicle along with the ganja can be controlled. On receiving the information about the intoxicating substance Ganja, the ASI prepared a separate written notice and for the information and necessary action, constable Ravindra No. 1007 is being sent to Palwal police station. Near the blockade, I left for NH 19 ahead of Palwal flyover, which I along with my ASI employee reached NH 19 ahead of Delhi bypass, Palwal flyover, and started the blockade, after about 20 minutes from Mathura (U.P.) side towards Delhi. A canter car was seen coming on the road and When the canter driver came near the canter, the canter driver stopped his canter about 10-15 steps before the blockade. After shining the torch on the number plate of the canter, RJ-32GB-0932 was seen written on it. ASI, with the help of his fellow officer, overpowered the canter driver and the man sitting on the conductor seat and checked the number at the front and rear of the canter. But RJ-

32GB-0932 was found written on the number plate behind which a tripal was covered. On asking the name and address of the canter driver, the driver gave his name as Captain Yadav, son of Mr. Sardar Singh Yadav, resident of village Bijwad Naruka police station Malkheda district Alwar (Rajasthan) and conductor. The person sitting on the seat told his name as Pradeep Kumar, son of Vinod Kumar, resident of Malkheda police station Malkheda district Alwar (Rajasthan). If there is any suspicion that there is any intoxicant in the person's vehicle or vehicle, a separate notice like Section 50 NDPS should be written to the person informing them that you have the legal right to allow a gazetted officer or area magistrate to search you and your vehicle.. The person gave in writing to the Gazetted Officer regarding the search of his vehicle and the ASI prepared a separate notice under Section 42 of the NDPS Act and sent it to Duty Magistrate Mr. Prashant Kumar SDO DHBVN Hasanpur today in the case of NDPS Act. Constable Ravindra No. 1007 Sent by and I requested the duty magistrate from my mobile number 9050684314 to come to the spot on mobile number 7419701708, after waiting for about an hour, the duty magistrate and constable Ravindra came to the spot and the situation was verbally explained to the duty magistrate. When the duty magistrate searched the car and canter car, he found seven bags of yellow colour plastic under the coconuts covered with tripaal in the rear trunk of the car canter. When all the plastic bags were opened and checked, they were found to be filled with ganja leaves. When the ganja leaves were put back in the same plastic bags and weighed using a computer scale, the weight of bag number 1 was found to be 32 kg, weight of bag number 2 was 28 kg, weight of bag number 3 was 26 kg 200 grams, weight of bag number 4 was 30 kg. 250 grams, weight of Katta No. 5 was 30 kg 100 grams, weight of Katta No. 6 was 28 kg 300 grams and weight of Katta No. 7 was 19 kg 100 grams. Whose total weight was 193 kg 950 grams, all the

plastic pieces were sealed by ASI with his seal KK and Duty Magistrate Sahib with his seal AS, which I used my seal with HC Manoj Kumar number 1194 and Duty Magistrate Sahib. Kept his seal with him. The verandah, ganja leaves and the vehicle canter mentioned above were taken to Bajaria Fard police as evidence. The signatures of the accused witnesses and the duty magistrate were obtained on the documents. The above mentioned person has committed crime under section 20.61.85 NDPS ACT by illegally possessing a total of 193 kg 950 grams of ganja leaves in their possession, which is being sent through Constable Sandeep No. 478. Must be informed through form. And the special report of the case should be sent by a special carrier to the service of the area magistrate and officer And it should be sent to 1.0 chance for further investigation.,l along with the ASI, my fellow officers, the accused are present at the opportunity of the case at AJ Near Delhi Bypass Palwal Fly Over NH 19 SD:- KUSHAL KUMAR ASI CIA Staff Palwal Date 29.08.2023 Time 11.50 PM On receipt of AJ police station after getting Tehri in police station the above case was registered under crime 20-61-85 NDPS ACT special report CCTNS Prepared by computer, special carrier ESI Shyam Chand 47/ is being sent to the service of Palwal area magistrate or senior officer. 10th chance is being sent to Police Constable Sandeep No. 478 or ASI Rakesh CIA Staff Palwal for further action.”

4. Mr. Dhingra, learned counsel for the petitioner submits that the period of 180 days as prescribed under Section 36-A of NDPS Act expired on 26.02.2024 in the instant FIR which was registered on 30.08.2023 and accordingly, the application for grant of default bail was preferred by the revisionist though the same has been declined without appreciating the fact that the petitioner-accused is in custody pending investigation which has not been completed within the stipulated period as envisaged under Section 167(2) Cr.P.C. He vehemently submits that on the expiry of stipulated period

for completing the investigation and filing of challan, an indefeasible right accrued in favour of the petitioner-accused to be released on bail on account of default by the Investigating Agency. While referring to the case law in ***“Sanjay Kumar Kedia Sanjay Kedia versus Intelligence Officer, Narcotic Control Bureau”, 2010 (1) RCR (Criminal) 942*** has to be understood in wider prospect to mean that when the petitioner-accused files an application for default bail and is prepared to offer bail on being directed, in other words, on expiry of the period specified in paragraph (a) to proviso to sub-Section (2) of Section 167 Cr.P.C. if the petitioner-accused files an application for bail and offers also to furnish the bail on being directed, then, it has to be held that the petitioner-accused has availed his indefeasible rights even though the Court has not considered the said application and has not indicated the terms and conditions of the bail, and the accused has not furnished the same.

5. It has also been asserted on behalf of the petitioner-accused that there is a violation of Section 36-A of NDPS Act, 1985, since no report of public prosecutor was either sought or filed seeking the detention of the petitioner beyond the period of 180 days and, therefore, the order dated 27.02.2024 is stated to be violative of Section 36-A(4) of NDPS Act.

6. Notice of motion.

7. On the asking of the Court, Mr. B.S. Virk, Sr. DAG, Haryana accepts notice on behalf of the respondent-State, who submits that the FIR was registered on 30.08.2023 and prior to expiry of 180 days available with the Investigating Agency, an application for extension of time was preferred which was allowed by extension of 30 days more to conclude the investigation on 26.02.2024 by the Additional Sessions Judge, Palwal and in

the light of the same, the prayer for seeking default bail is not maintainable at this stage to the petitioner-accused and sought dismissal of the present revision petition on that ground alone.

8. It would be appetite to note down the provisions as incorporated under Section 167(2) Cr.P.C. which read as under:-

“(2)The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :Provided that -(a)[the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding, -[Substituted by Act 45 of 1978, Section 13, for paragraph (a) (w.e.f. 18-12-1978).](i)ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; (ii)sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b)[no Magistrate shall authorise detention of the accused in custody of the police under this Section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.][Substituted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), Section 14 (a) (i), for Cl. (b). Prior to its substitution, Cl (b) read as under.-(b) no Magistrate shall authorise detention in any custody under this Section unless the accused is produced before him;].]

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.”

9. Without having glance at Section 36-A particularly sub-Section (4) of NDPS Act, the discussion would be improper which is also reproduced hereinbelow:-

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

10. It is an admitted fact that no report of public prosecutor was received as the question of endorsement would also not arise since no such application was admittedly filed by the public prosecutor seeking detention of the petitioner-accused beyond 180 days.

11. Section 36(A)(4) of NDPS Act is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the Public Prosecutor in the first instances and satisfy him about the progress on the investigation and furnish reasons for seeking further custody of an accused. A Public Prosecutor is an important officer of the State Government and is appointed by the State under the code of Criminal Procedure. He is not a part of the Investigating Agency. He is an independent statutory authority. The Public Prosecutor is expected to independently apply his mind to the request of the Investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. Thus for seeking extension of time, the Public Prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation and must attach the request of the Investigating Officer along with his request or application and

report and the same must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary.

12. Thus, the impugned order dated 27.02.2024 lack satisfaction of mandatory conditions of Section 36 A (4) of the NDPS Act and in the absence of an appropriate report, the Court below should not have deprived the petitioner for his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within a prescribed time. Moreover, no extension should have been granted to keep the petitioner in custody on the prescribed period except to enable the investigation to be completed. Accordingly this Court is of considered view that as per Section 167 (2) Cr.P.C., the indefeasible right had been accrued in favour of the petitioner when police failed to complete the investigation and put up the challan against him in accordance with law and the said right to bail under Section 167 (2) Cr.P.C., is absolute, which is a legislative command and not a Court's discretion.

13. A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 180 days before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167 (2), kicks in and must be granted.

14. However, the question of personal liberty of an accused, under a statute which imposes drastic punishments is involved. The right to default bail, as has been held by the judgments of the Apex Court as well as of this Court, is not only the statutory right under the first proviso to Section 167 (2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled.

15. The question of default bail has been a matter of discussion for quite a long time before the Hon'ble Supreme Court in "***Uday Mohanlal Acharya versus State of Maharashtra***", (2001) 5 SCC 453 and in para 12 of its judgment crystallized the issue as to the rights of an accused who is in custody pending investigation which is not completed within the stipulated time as prescribed under Section 167(2) Cr.P.C. The relevant paragraph therefrom would read as under:-

12. On the aforesaid premises, we would record our conclusions 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 the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days in the whole.

2. Under the proviso to aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than 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 furnish 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 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 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 art 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 bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and, therefore, if during that period the investigation is complete and 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's case (supra)** 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 paragraph (a) of 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 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.

Also, in the latest case of **Joginder Singh V. State of Haryana, 2022 (1) Law Herald 765, CRM M-48705/2021 decided on 11.02.2022**, it has been held that:-

14. In the case in hand, the application for extension signed by the Investigating Officer cannot be construed as a report of the Public Prosecutor as envisaged in Proviso to sub section (4) of Section 36A of the NDPS Act for the reason that Public Prosecutor had only appended his signatures at the bottom of the page, that too, without even making an endorsement that he had perused the grounds and that, he was satisfied about the progress of investigation and reasons set out for extension of time to complete the investigation. Further, the report did not disclose the progress of investigation It is a settled proposition of law that report is not a mere formality but requires due application of mind as to the ground for delay in filing challan and the reasons for further detention of accused. In the considered view of this Court, the application/report filed by the prosecution did not meet the aforesaid requirements envisaged in Proviso to Section 36(4) of the NDPS Act. It can safely be held

that the application for seeking extension of time was nothing but a transmission of request of an Investigating Officer. The report did not reflect the steps taken for obtaining FSL report during the period of first 180 days.

16. Record clearly reveals that the impugned orders) lack satisfaction of aforesaid mandatory conditions of Section 36(4) of the NDPS Act. In the absence of an appropriate report, the court would have no jurisdiction to deny an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated above, before any extension is granted, the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension.

17. As regards Section 167(2) Cr.P.C., 1973 it creates an indefeasible right in an accused person, on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section 167(2) Cr.P.C., 1973 is generally termed as an "order-on-default" as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. As a consequence of amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charges, where the prosecution fails to put up challan against him on completion of the Investigation. Thus, in the

*considered view of this Court, as per Section 167(2) Cr.P.C. 1973 an indefeasible right to be enlarged on bail accrues in favour of the accused, if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 Cr.P.C., 1973 An obligation, in such a case, is cast upon the Court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand. There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. This legal position has been very ably stated in **Aslam Babalal Desai v. State of Maharashtra, 1993 (1) Recent Criminal Reports 600**, where speaking for the majority, the Hon'ble Supreme Court referred the law laid down in **Rajnikant Jivanlal Patel & another v. Intelligence Officer, Narcotic Control Bureau, New Delhi, AIR 1990 SC 71**, wherein it was held that:-*

"The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/96 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the magistrate has no power to remand a person beyond the stipulated period of 90/96 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bond."

16. Having given a considerable thought and after scrutinization of the submissions of the respective parties, this Court would conclude to hold that the revisionists/petitioner-accused has an indefeasible right accrued to him even if the period of 180 days stands extended by the trial Court vide

order dated 26.02.2024 i.e. the last date on which the period of 180 days stood expired and, therefore, he is entitled to the benefit of ‘default bail’ under Section 167(2) of Cr.P.C.

17. It is further made clear that this order would not stand in between or would not mean to prohibit or otherwise prevent the arrest or re-arrest of the petitioner-accused on cogent grounds, and upon such arrest or re-arrest, the petitioner would also be entitled to seek regular bail which shall be considered on its own merit and the observation made hereinabove will have no bearing in that eventuality. Hence, the order dated 27.02.2024 passed by the Additional Sessions Judge, Palwal is hereby set aside and the present petition is allowed.

18. Accordingly, the petitioner is directed to be released on default bail subject to his furnishing requisite bail/surety bonds to the satisfaction of the trial Court/Special Judge (Duty).

19. However, it is made clear that observations made hereinabove shall have no bearings on the merits of the case.

18.04.2024
Poonam Negi

(SANDEEP MOUDGIL)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>