



2024:DHC:4097



IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 20.05.2024

+ **CRL.REV.P. 1176/2023 & CRL.M.A. 29946/2023**

VISHAL @ GOLU

.....Petitioner

versus

STATE NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Pramod Kumar Dubey, Sr. Adv. with Mr. Arvind Kumar, Mr. Subit Kumar Singh, Mr. Prince Kumar, Ms. Amrita Vatsa, Mr. Satyam Sharma, Mr. Ankit Kumar Vats, Ms. Pallavi Garg, Mr. Himanish Rana, Mr. Piyush Yadav & Mr. Nikhil Anand, Advs.

For the Respondent : Mr. Pradeep Gahalot, APP for the State SI Arun Kumar, Anti Narcotics Squad, Distt. South-East

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petition has been filed under section 397 of the Code of Criminal Procedure, 1973 ('CrPC') has been filed, *inter-alia*, praying for setting aside the order dated 12.10.2023, passed by the learned Additional Sessions Judge (ASJ)-04, Special Judge-NDPS,

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South East, Saket Court, Delhi (hereafter '**the impugned order**') in Bail Application No. 2859/2023. Application filed by the petitioner seeking default bail in the FIR No. 146/2023 registered at Police Station Okhla Industrial Area under Sections 21/29/61 of the Narcotic and Psychotropic Substances Act, 1985 ('**NDPS Act**') was dismissed by the impugned order.

Brief Facts

2. Briefly stated, the facts involved in the present case are that the Anti-Narcotic Squad received a secret information regarding possession and supply of contraband by the petitioner/accused along with co-accused Sameer Beg. On the basis of the said information, the police officials apprehended both of them on 12.03.2023 for violation of several provisions of the NDPS Act.

3. It is alleged that the search of the petitioner and co-accused was conducted by the Investigating Agency, and contraband smack/heroin in proportion of 260 grams and 86 grams was recovered from the petitioner and co-accused Sameer Beg respectively. FIR No. 146/2023 was thereafter registered under Sections 21/29/61 of the NDPS Act.

4. Consequently, the accused persons were arrested on 12.03.2023 and remanded to custody on the same day. The custody of the petitioner was extended from time to time. As per the custody warrants, the petitioner was remanded to judicial custody on 23.08.2023 for a period of 14 days i.e. till 06.09.2023. The remand was further extended till 13.09.2023 by the learned Duty Metropolitan Magistrate, South East, Saket.



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5. The statutory period for completion of investigation as prescribed under Section 167(2) of the CrPC read with Section 36A (4) of the NDPS Act is 180 days. The said statutory period of 180 days was completed on 07.09.2023 as per the calculation done below:

Remanded to JC on 12.03.2023	20 days
April	30 days
May	31 days
June	30 days
July	31 days
August	31 days
07.09.2023 (holiday)	07 days
	180 days

6. After the completion of investigation, the chargesheet in the present case was filed on 08.09.2023 before the learned Duty Metropolitan Magistrate, South East, Saket under Sections 21 and 29 of the NDPS Act. The said chargesheet was filed in the pre-lunch session.

7. It is pertinent to mention that 07.09.2023 was a Gazetted holiday on account of the festival of Janmashtami. Consequently, the court was closed on 180th day of custody of the petitioner.

8. The petitioner had filed an application under Section 167(2) of the CrPC read with Section 36A (4) of the NDPS Act before the learned Trial Court seeking grant of default bail on the ground of default in completion of the investigation within the statutory period of 180 days, through email on 08.09.2023 at 3:09 PM i.e. in the post-lunch session.



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Submissions

9. The learned Senior Counsel for the petitioner submitted that the petitioner was arrested on 12.01.2023 and remanded to custody on the same day. The chargesheet in the present case was filed on 08.09.2023 i.e. after the expiry of statutory period as contemplated by section 167(2) CrPC read with section 36A (4) of NDPS Act, therefore the petitioner is entitled to default bail.

10. The learned counsel argued that in the case of ***K. Muthuirul v. The Inspector of Police, Samayanallur Police Station : (2022) 1 MWN (Cri) 196***, the Hon'ble High Court of Madras held that the accused can exercise his right to apply the default bail on the whole day, on which, the indefeasible right to apply the statutory bail accrues to him. To buttress his argument, the learned counsel has further placed reliance upon:

- i. ***Abhishek v. State NCT of Delhi : 2021:DHC:3293***
- ii. ***Enforcement Directorate, Government of India v. Kapil Wadhawan & Anr. : 2023 SCC Online SC 972***
- iii. ***Powell Nwawa Ogechi v. The State (Delhi Administration): 1986 SCC Online Del 224***
- iv. ***Lambodar Bag & Ors. v. State of Orissa : 2018 (II) OLR 918***
- v. ***State of Maharashtra v. Sharad B. Sarda : 1983(1) Bom CR758***
- vi. ***Trilochan Singh v. The State (Delhi Administration, Delhi) : 1981 SCC OnLine Del 205***



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11. *Per Contra*, the learned Additional Public Prosecutor (**APP**) for the State vehemently opposed the present petition. It is argued that since 07.09.2023 was declared a gazette holiday on account of festival of Janmashtami, the learned Duty Metropolitan Magistrate, South East, Saket visited jail to extend the custody of all the prisoners including the petitioner on 06.09.2023.

12. It is further argued that the chargesheet in present case was filed before the learned Duty Metropolitan Magistrate, South East, Saket on 08.09.2023 i.e. 181th day of the custody in pre-lunch session. It is an admitted fact that the petitioner sent the application for grant of default bail through email on 08.09.2023 at 3:09 PM. Therefore, the moment the chargesheet is filed, the right of the petitioner to default bail under Section 167(2) of the CrPC ceases to exist. Reliance has been placed upon ***Enforcement Directorate, Government of India v. Kapil Wadhawan &Anr. : 2023 SCC Online SC 972*** and ***Uday Mohanlal Acharya v. State of Maharashtra : 2001 5 SCC 453***.

13. The learned APP further placed reliance upon the judgment passed by the Hon'ble High Court of Bombay in ***Adnan Misbahuddin Khan v. State of Maharashtra : 2022 SCC OnLine Bom 8485*** wherein, the chargesheet was filed at 12:00 PM whereas the application for grant of default bail was filed at 12:20 PM i.e. after filing of the chargesheet. The Hon'ble High Court of Bombay held that the indefeasible right to default bail of the accused under section 167(2) of the CrPC stands extinguished upon filing of the chargesheet.



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The learned APP has also relied upon the following judgments in support of his contentions:

- i. ***Rajendra Singh Bhati v. State of Madhya Pradesh : 2023 SCC Online MP 4301***
- ii. ***Master Bholu v. CBI : 2018 SCC Online P&H 747***
- iii. ***Serious Fraud Investigation Office v. Rahul Modi : 2022 SCC OnLine SC 153***
- iv. ***Rajendra Singh Bhati v. State of M.P. : 2023 SCC OnLine MP 4301***

Conclusion

14. The principal question for consideration of this court is, whether the petitioner is entitled to default bail in terms of Section 167(2) of the CrPC read with Section 36A (4) of the NDPS Act, on the ground of non-filing of chargesheet on 180th day of the custody. Section 167 (2) of the CrPC and Section 36A (4) of the NDPS Act provides as under:

“167. Procedure when investigation cannot be completed in twenty-four hours.—

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(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 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,—

(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;]

(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.

36A. Offences triable by Special Courts.—

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(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



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progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

15. A bare reading of Section 167(2) of the CrPC and Section 36A (4) of the NDPS Act shows that when the maximum period prescribed therein for investigation is over and chargesheet is not filed, then the accused becomes entitled to be released on default bail. The Hon'ble Supreme Court and High Courts have held that the right to default bail is not merely a statutory right, but also a fundamental right which flows from Article 21 of the Constitution of India.

16. While referring to the decisions of ***Rakesh Kumar Paul v. State of Assam : (2017) 15 SCC 67*** ; ***Union of India v. Nirala Yadav: (2014) 9 SCC 457*** ; ***Uday Mohanlal Acharya v. State of Maharashtra: (2001) 5 SCC 453*** ; ***Sanjay Dutt v. Bombay through C.B.I.: 1994 (5) SCC 410***, the Hon'ble Supreme Court in a recent decision in ***Enforcement Directorate v. Kapil Wadhawan: 2023 SCC Online SC 972*** observed as under:

“40. In Rakesh Kumar Paul v. State of Assam, a three-judge Bench of this Court while examining the ratio in Union of India v. Nirala Yadav and Uday Mohanlal Acharya v. State of Maharashtra, observed that on the expiry of the 60/90 day period 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 completion of the investigation within the prescribed period. The opinion in Sanjay Dutt v. Bombay through C.B.I was also considered, wherein the Constitution Bench laid down that if the chargesheet is not filed and the right for “default bail” has ripened into the status of indefeasibility, such right cannot be frustrated by the prosecution.”



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17. In ***Bikramjit Singh v. State of Punjab*** : (2020) 10 SCC 616, the Hon'ble Supreme Court has dealt with the scope of section 167(2) Cr.P.C. as under:

“36. 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 90 days (which application need not even be in writing) 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.”

18. In the case of ***Uday Mohanlal Acharya v. State of Maharashtra*** (*supra*), the Hon'ble Supreme Court has held that the indefeasible right to default bail extinguishes, the moment the chargesheet is filed by the investigating agency:

“28. It is true that the right of an accused to be released on bail for default in submission of a challan is a valuable and indefeasible right, but by the time the court is considering the exercise of the said right if a challan is filed then the question of grant of bail has to be considered only with reference to merits of the case under the provisions of the Code relating to grant of bail after filing of the challan which view is consistent with the view expressed by different Constitution Benches of this Court in several decades in connection with the issuance of a writ of habeas corpus as well as for grant of bail.

29. My learned brother has referred to the expression “if not already availed of” referred to in the judgment



in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] for arriving at Conclusion 6. According to me, the expression “availed of” does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression “availed of” does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised.”

(emphasis supplied)

19. The indefeasible right to default bail accrued under Section 167(2) of the CrPC is enforceable only prior to the filing of the chargesheet and it does not remain enforceable upon filing of the chargesheet, if not availed already. Once the chargesheet is filed, the question of grant of bail is to be dealt with in accordance with the provisions relating to grant of regular bail. If the right to default bail has accrued due to non-filing of chargesheet, but has remained



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unenforced till the filing of the chargesheet, then there remains no question of enforcement of the said right thereafter. The entitlement of an accused to the grant of default bail extinguishes the moment chargesheet is filed.

20. The petitioner is charged with offences mentioned under Sections 21 and 29 of the NDPS Act. The manufacture, possession, sale, purchase, transport, import inter-State, export inter-State of contraband in contravention of the Act is punishable with rigorous imprisonment for a term of not less than 10 years but which may extend to 20 years. As per Section 36A (4) of the NDPS Act, the “ninety days” under Section 167(2) of the CrPC is to be construed as “one hundred and eighty days” for completing investigation of offences involving commercial quantity.

21. The petitioner was arrested on 12.03.2023 and was remanded to custody on the same day. The remand of the petitioner was extended from time to time. On 23.08.2023, the petitioner was remanded to judicial custody for a period of 14 days till 06.09.2023. Thereafter, the judicial custody of the petitioner was extended further on 06.09.2023 by the learned Duty Metropolitan Magistrate, South East, Saket till 13.09.2023.

22. The investigating agency has filed the chargesheet, in the present case, after the expiry of statutory period prescribed for completion of investigation as contemplated under Section 167(2) read with Section 36A (4) of the NDPS Act. The chargesheet was filed on 08.09.2023 before the learned Duty Metropolitan Magistrate, South



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East, Saket on 181st day of the custody. The chargesheet was filed in the pre-lunch session on 08.09.2023. On the other hand, the application for default bail was admittedly filed through email on 08.09.2023 at 3:09 PM i.e. post-lunch session.

23. It is a well-settled law that an indefeasible right to default bail accrues upon non-filing of chargesheet by the investigating agency within the statutory period of 60/90 or 180 as the case may be. If the accused applies for the grant of default bail on expiry of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. However, if the chargesheet is filed on 181st day but before the filing of application for grant of default bail, then the accrued right to seek default bail extinguishes.

24. In the entire petition as well as the submissions made on behalf of the Petitioner, the thrust is on non-filing of chargesheet on or before 180th day of the custody and accrual of right to default bail in favour of the petitioner. As noted above, the chargesheet in the present case was filed on 08.09.2023 in pre-lunch session whereas the application for default bail was filed through email on 08.09.2023 at 3:09 PM i.e. after the filing of the chargesheet.

25. In response to the present petition, the Status Report dated 29.01.2024 under the signature of Inspector Vishnu Dutt, Anti-Narcotic Squad, South-East District has been placed on record. The relevant excerpt of the status report has been reproduced below:

“In the continuation of the previous Status Report submitted before the Hon’ble Court, most respectfully it is further



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submitted that on 08.09.2023, SI Surest Bhatia, Anti-Narcotic Squad/SED, submitted the chargesheet before the Ld. Duty MM/SED, Saket Court. The departure DD entry of SE Suresh Bhatia, vide DD No. 5, dt. 08.09.23, Anti-Narcotics Squad/SED, has been collected and annexed with the report (Annexure-A). The copy of the order of Ld. Duty MM/SED, Saket Court, dated 08.09.23, has also been obtained and same has been annexed with the report (Annexure B).”

26. Upon perusing the above Status Report, it can be noticed that the concerned police official had departed from the police station to file the chargesheet before the learned Duty Metropolitan Magistrate, South East, Saket on 08.09.2023 at 9:55 AM as stated in DD entry no. 5, and had returned at 2:30 PM. The same has also been recorded by the concerned Duty Metropolitan Magistrate in the order-sheet dated 08.09.2023.

27. The learned Single Judge of the Hon'ble High Court of Bombay in similar circumstances, in the case of **Adnan Misbabbuddin Khan & Anr. v. State of Maharashtra & Anr** (*supra*), where the application seeking default bail was filed at 12.20 p.m whereas the chargesheet was filed at 12.00 noon that is 20 minutes before the filing of the bail application, had refused to give any benefit to the accused under Section 167(2) of the CrPC.

28. The Hon'ble High Court of Madhya Pradesh in case of **Rajendra Singh Bhati v. State of M.P** (*supra*), where the chargesheet was filed after the period of 60 days before the tea break, whereas the application seeking default bail was filed after the tea break, held that



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the accused will not get the benefit of Section 167(2) of the CrPC since the application was filed after the filing of the chargesheet.

29. The Hon'ble High Court of Punjab and Haryana at Chandigarh in ***Master Bholu v. CBI*** (*supra*) had also considered the similar situation and held that if the bail application is filed in the morning and the chargesheet is filed on the same day, *albeit*, later in the day, the right to seek default bail would extinguish.

30. I respectfully concur with the view taken by above High Courts.

31. The Hon'ble Apex Court in ***M Ravindran v. The Intelligence Officer Directorate of Revenue Intelligence : (2021) SCC 485***, had categorically held that where the accused fails to apply for default bail on the right accruing to him and subsequently, a chargesheet is filed, the right to default bail would get extinguished. It therefore, is of no consequence if the chargesheet and the application seeking default bail are filed on the same day. The test therefore, would remain the same, that is, whether the application was filed prior to filing of the chargesheet. The Hon'ble Apex Court held as under:

“25.3. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.”

32. In the present case, the indefeasible right to default bail of the Petitioner accrued on 181st day of the custody on ground of non-filing



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of chargesheet. However, the said right extinguished the moment the chargesheet was filed by the investigating agency on 181st day of the custody in the pre-lunch session. The application for default bail was sent on official email ID of the court of learned Duty Metropolitan Magistrate, South East, Saket on the same day at 3:09 PM, that is, after filing of the chargesheet.

33. In view of the law as discussed above, the petitioner had no right to seek default bail after filing of the chargesheet and the learned ASJ rightly dismissed the application filed by the petitioner.

34. This court, therefore, finds no merit in the present petition, and the same is dismissed.

35. It is made clear that the present petition is limited to the issue of default bail and nothing stated hereinabove is to be taken as expression of opinion on the merits of the case.

AMIT MAHAJAN, J

MAY 20, 2024
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