

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Date of Decision: *February 11th, 2022*

1.

Criminal Miscellaneous No.M-48705 of 2021 (O & M)

Joginder Singh

..... PETITIONER(S)

VERSUS

State of Haryana

..... RESPONDENT(S)

...

2.

Criminal Revision No.1314 of 2021 (O & M)

Joginder Singh

..... PETITIONER(S)

VERSUS

State of Haryana

..... RESPONDENT(S)

...

CORAM: HON'BLE MR. JUSTICE SANT PARKASH

...

PRESENT: - Mr. Aditya Sanghi, Advocate, for the petitioner.

Mr. Amreek Singh Narwal, Deputy Advocate General,
Haryana.

. . .

Sant Parkash, J

The aforesaid presence is recorded through video conferencing since proceedings are being conducted in virtual court.

With the consent of parties, application (Crl. Misc. No.1682 of 2021 In Crl. Revision No.1314 of 2021) for preponement of the date in the main petition is allowed and the petition is taken up for hearing and final disposal today itself.

Reply dated 14.12.2021 on behalf of respondent-State in Crl. Misc. No.M-48705 of 2021 is also taken on record.

This judgment shall dispose of aforementioned two petitions as they arise out of same FIR and involve similar facts and questions of law.

Criminal Revision No.1314 of 2021 has been preferred by the petitioner challenging order dated 25.10.2021 passed by the trial court whereby application filed by him for grant of default bail under Section 167 (2) Cr.P.C. read with Section 36(A)(4) has been dismissed, citing the reasons recorded in order dated 02.07.2021 which has been impugned in connected petition viz. Criminal Miscellaneous No.M-48705 of 2021 whereby an application moved by the prosecution for extension of time for filing challan was allowed on the ground that co-accused Pawan son of Shankar, was yet to be arrested and report of FSL had not been received.

The FIR was registered on the basis of statement of ASI Ashok Kumar to the effect that on 07.01.2021, petitioner was intercepted by police party. He was carrying a plastic bag on his motor-cycle. On search, he was found in conscious possession of 19 boxes containing 20 strips (3800 tablets) of Tramado Hydrochloride Prolonged-release Tablets-IP and Tricore-SR each. Total quantity/weight of tablets was found to be 1599.8 grams. Petitioner was arrested and FIR No.8 dated 07.01.2021 under Section 22C of Narcotic Drugs & Psychotropic Substances, 1985 (for short, 'NDPS Act') was registered with Police Station, Civil Lines, Sirsa.

Learned counsel for the petitioner has submitted that allegedly 3800 intoxicant tablets were recovered as per prosecution but final report could not be filed within statutory period of 180 days as FSL report was not received. Allowing of time for filing final report upto one year to prosecution is in direct violation of mandate of Section 36(A)(4) of the NDPS Act as well as law laid down in **Sanjay Dutt vs. State through**

C.B.I., Bombay, (1994) 5 SCC 410 and **Sanjay Kumar Kedia vs. Narcotics Control Bureau, (2009) 17 SCC 631**. Learned counsel for the petitioner has further submitted that petitioner is in custody since 07.01.2021.

Learned counsel for the State has submitted that Investigation is complete. Final report under Section 173 Cr.P.C. was filed on 14.12.2021 against the petitioner and two other co-accused. Learned counsel further submitted that co-accused Kalu @ Daulat Ram had already been granted regular bail by this Court vide judgment dated 04.06.2021 passed in CrI. Misc. No.M-19022 of 2021 and another co-accused Pawan is also on bail. Petitioner is not involved in any other case. Lastly, learned counsel has contended that recovery in the present case is heavy commercial quantity, as such, both the petitions are liable to be dismissed.

I have heard learned counsel for the parties and perused the record.

In the present case, petitioner prayed for grant of bail under Section 167(2) Cr.P.C. read with Section 36-A(4) of NDPS Act since challan was not filed within stipulated period of 180 days. However, vide order dated 25.10.2021, petitioner was denied the concession of default bail on the primary ground that prosecution had been permitted to file final report under Section 173 Cr.P.C. within an extended period upto one year vide order dated 02.07.2021.

For proceeding further, relevant provisions of Section 36A of NDPS Act need to be gone into and it reads as under:-

“36.A. Offences triable by Special Courts.-

(1) xx xx

(2) XX XX

(3) XX XX

(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.

The aforesaid provision of NDPS Act clearly shows that there are three conditions, to be satisfied for the court, before granting extension of time to the prosecution for filing final report. Merely filing of an application in this regard does not *ipso facto* empower the court to extend the stipulated period for filing challan. In the case in hand, record clearly depicts that copy of application for extension of time was not served on the petitioner and impugned order dated 02.07.2021 was passed in absence of petitioner without disclosing the grounds of extension.

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 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 investigation. He is not merely a post office or a forwarding agency. A Public Prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. Thus, for

seeking extension of time, the Public Prosecutor after an independent application of mind to the request of the investigating agency, is required to make a report to the 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. The Public Prosecutor may attach the request of the investigating officer alongwith his request on application and report, but his report 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. The report of the Public Prosecutor, therefore, is not merely a formality but a very vital report because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements of Section 36A(4) of the NDPS Act. The contents of the report to be submitted by the Public Prosecutor, after proper application of his mind, are designed to assist the court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the court must be satisfied for the justification, from the report of the Public Prosecutor, to grant extension of time to complete the investigation.

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 36A(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.

In similar circumstances, the Hon'ble Supreme Court in the case of **Sanjay Kumar Kedia (supra)** 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 offence under the Act but the proviso authorizes a yet further period of detention which may in total go upto 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) specified the compelling reasons for seeking the detention of the accused beyond the period of 180 days,
and

(4) after notice to the accused.

xx xx xx xx

14. A bare perusal of the application shows that it has been filed by the investigating officer of respondent No.1 and does not indicate even remotely any application of mind on the part of the public prosecutor. It further does not indicate the progress of the investigation, nor the compelling reasons which required an extension of custody beyond 180 days. This application was allowed by the Special Judge on 2nd August, 2007 i.e. on the day on which it was filed which also reveals that no notice had been issued to the accused and he was not even present in Court on that day.”

Record clearly reveals that the impugned order(s) lack satisfaction of aforesaid mandatory conditions of Section 36A(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.

As regards Section 167(2) Cr.P.C., 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. 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., 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. 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 Vs. 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 Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi, AIR 1990 Supreme Court 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.”

The record clearly deciphers that application for extension of time was allowed without any notice to the petitioner. The liberty of the accused is at stake and cannot be taken away in a casual manner without affording an opportunity of hearing. The other ingredients inasmuch as specific reasons for extension of time, the progress of the investigation and compelling reasons for detention of the petitioner beyond the period of 180 days have not been spelt out in the order extending time for completion of investigation or in the order declining default bail to the petitioner relying on extension of time to complete investigation.

Keeping in view the aforementioned discussion on the subject, the impugned order rejecting default bail to the petitioner is hereby set aside and he is ordered to be released on default bail on furnishing requisite bonds to the satisfaction of the trial court.

Criminal Miscellaneous No.M-48705 of 2021 is accordingly disposed of and Criminal Revision No.1314 of 2021 is also disposed of as having been rendered infructuous.

Since the main petitions have been decided, any miscellaneous application pending adjudication has been rendered infructuous and is disposed of as such.

**(Sant Parkash)
Judge**

February 11th, 2022

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Whether Speaking/ Reasoned:

Yes/ No

Whether Reportable:

Yes/ No