2023: PHHC: 081617

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR No.1326 of 2023
Date of decision: 6th June, 2023

Chander Prakash

… Petitioner

Versus

State of Haryana

… Respondent

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present: Mr. Navkiran Singh, Advocate for the petitioner.

Mr. Chetan Sharma, Dy. Advocate General, Haryana for the respondent/State.

MANJARI NEHRU KAUL, J.

1. The petitioner is impugning order dated 04.05.2023 passed by learned Additional Sessions Judge, Sonipat, vide which his application under Section 167(2) Cr.P.C. for grant of default bail in case bearing FIR No.80 dated 01.11.2022 under Section 22(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as, 'the NDPS Act') registered at Police Station GRP Sonipat, District GRP Ambala Cantt. was dismissed.

2. Learned counsel for the petitioner while, impugning order dated 04.05.2023, has vehemently contended that the petitioner was arrested on 01.11.2022 in the FIR in question. Thereafter, challan was presented by the investigating agency, but without the report of the Forensic Science Laboratory (hereinafter referred to as, 'FSL') on 13.04.2023. The case was then adjourned by the Court below for

01.05.2023 to await the receipt of the FSL report. Since the petitioner was arrested on 01.11.2022; the statutory period for completing investigation under the NDPS Act, i.e. 180 days was thus, to expire on 01.05.2023. However, as the FSL report had not been filed by the investigating agency even by 01.05.2023, the investigation could not be said to be complete. Therefore, in the circumstances, an indefeasible right stood accrued to the petitioner under Section 167(2) Cr.P.C. for being granted default bail. Thus, immediately thereafter, the petitioner moved an application before the trial Court under Section 167(2) Cr.P.C. on 02.05.2023. In support, learned counsel has placed reliance upon **'Ajit Singh @ Jeeta & another vs. State of Punjab' (CRR No.4659 of 2015 d/d 30.11.2018)** to urge that challan without the FSL report would be an incomplete challan, entitling the accused to default bail under Section 167(2) of the NDPS Act.

3. It has been further vehemently argued that as per the mandate of Section 36-A(4) of NDPS Act, it was incumbent upon the Public Prosecutor to submit a report before the Court for seeking extension of time to file the FSL report and it would have been only then that the extension could have been granted by the Court concerned. However, the learned Court arbitrarily extended the period of investigation on the ground that the investigating agency had already presented the final report with a clarification that the FSL report had not been received. Learned counsel therefore, has asserted that the rationale behind the impugned order, on the face of it, is erroneous, as

it is not the investigating agency but only the Public Prosecutor, who as per the provisions of Section 36-A(4) of the NDPS Act could have sought extension of time after presenting the report. Hence, the impugned order was not sustainable in the eyes of law. In support, reliance has also been placed on **'Uday Mohanlal Acharya vs. State of Maharashtra' (2001) 5 SCC 453** and '**Hitendra Vishnu Thakur vs. State of Maharashtra' (1994) 4 SCC 602.**

4. Learned State counsel, while opposing the prayer and submissions made by the counsel opposite, submits that the period of investigation had not elapsed as the Court below had already extended it for a year vide the impugned order. However, learned State counsel was not able to dispute the fact that no report as mandated under Section 36-A of the NDPS Act, seeking extension of time, had ever been made by the Public Prosecutor to the Court concerned.

5. I have heard learned counsel for the parties and perused the relevant material on record.

6. Before proceeding further, it would be apposite to reiterate that if on the expiry of the prescribed period of 180 days, investigation is still incomplete, an indefeasible right would accrue in favour of the accused under Section 167 (2) of Cr.P.C.

7. Still further, even if the challan has been presented by the investigating agency within the prescribed period of 180 days, in cases under the NDPS Act, the FSL report must be a part of the challan as the

same would be one of the factors to determine the nature of the substance, allegedly recovered.

This Court in **'Saleem @ Mulla vs. State of Haryana' CRM-M No.11271 of 2021 d/d 26.03.2021,** has held as under:

> *"A co-joint reading of Section 167(2) Cr.P.C., as well as Section 36A(4) of the NDPS Act reveals that a great deal of emphasis has been laid on completion of 'investigation'. The moot question which thus arises is as to what would be implied by 'investigation' which appears in both the aforementioned Sections and as to when 'investigation' would be deemed to have been completed in cases under the NDPS Act. Section 2(h) of the Cr.P.C., defines investigation as:-*
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> > *"investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;'*
>
> *Thus, what can be culled from the above definition of 'investigation' is that it would include within its ambit all proceedings conducted by the investigating agency for collection of all such material and evidence which would help in ascertaining whether an offence has been committed or not. In other words, investigation would be deemed to have been completed in cases under the NDPS Act only after an opinion has been formed and given by the chemical examiner qua the nature of the articles/substance sent to it by the investigating agency. Therefore, without a doubt in cases under NDPS Act, FSL report would be a decisive document to link the accused with the alleged*

commission of crime for attracting the mischief of offences under the NDPS Act. It is precisely for this reason that it becomes imperative in cases under the NDPS Act that the challan is mandatorily accompanied by FSL report. Unless and until no definite opinion is given by the chemical examiner qua the nature of the articles etc., sent, it would lead to no other inference but the one that the investigation is still incomplete as 'smell' and 'sight' of the articles/substance seized by the investigating agency cannot be taken to be a conclusive proof of the nature of the articles/substance. Moreover, in the absence of the FSL report not being part of the challan, the Magistrate would be handicapped to proceed further and take cognizance of the offences. FSL report in cases under NDPS Act is an intrinsic part of the investigation and it is for this reason that investigation of cases under the NDPS Act would have to be kept at a pedestal, different from investigation which is carried out in cases under the Indian Penal Code and certain other statutes."

Still further, Hon'ble Division Bench of this Court in **Ajit Singh @ Jeeta's case (supra)**, has held that the challan filed without the FSL report with regard to the nature of the substance in question would be an incomplete challan and in such circumstances, the accused would be entitled to be released on default bail.

8. Adverting to the case in hand, it is a matter of record that challan had been presented without the FSL report on 13.04.2023 and the period of 180 days had expired on 01.05.2023. Admittedly, even on 01.05.2023, the FSL report had not been filed. Therefore, in the

absence of FSL report, there is no manner of doubt that the challan presented would be deemed to be an incomplete one.

9. A further challenge has been laid by the petitioner to the extension of time for a period of one year by the Court below for filing of the FSL report. For facility of reference, the provisions under Section 36-A(4) of the NDPS Act are reproduced herein under:-

> ***"36A. Offences triable by Special Courts***
>
> *XXXX XXXX XXXX*
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> *(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 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 cannot be over emphasised that the constitutional guarantee of protection of life and liberty against unauthorized and arbitrary detention must be interpreted in consonance with the provisions of Section 167(2) Cr.P.C. Therefore, it must be borne in

mind that time period for investigation cannot be mechanically extended under Section 36-A of the NDPS Act. The legislative intent is amply clear in so far as the option for seeking extension of time has not been left to the investigating agency. The relevant provisions categorically provide that the Court may grant extension of time but only on a report of the Public Prosecutor. In this regard, reference may be made to the observations of the Hon'ble Supreme Court in **Hitendra Vishnu Thakur' case (supra)** wherein it has been held:

> *"22. We may at this stage, also on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision 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 instance and satisfy him about the progress of 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. 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. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), 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. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), 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. The use of the expression "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" as occurring in clause (bb) in sub-section

(2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. 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 as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court 'shall' release hi on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated 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 Designated Court must be satisfied for the Justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes

indefeasible and cannot be defeated by reasons other than those contemplated by sub-section (4) of Section 20 as discussed in the earlier part of this judgment. We are unable to agree with Mr Madhava Reddy or the Additional Solicitor General Mr Tulsi that even if the public prosecutor 'presents' the request of the investigating officer to the court or 'forwards' the request of the investigating officer to the court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a 'post office' of the investigating agency nor its 'forwarding agency' but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub-section (4) of Section 20. Since the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report falls in the performance of one of its essential duties and renders its order under clause (bb) vulnerable. Whether the public prosecutor labels his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the face of it that he has applied his mind and is satisfied with the

progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (supra). Even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to 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 before any extension is granted under clause (bb), 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."

11. It is a matter of record and which fact has not been disputed by the learned State counsel that no report had been submitted by the Public Prosecutor for extension of time. The Court below had granted the extension of time on the ground that the reason for extension had been explained by the investigating agency in the final report itself to the effect that the FSL report had not been received.

12. This Court has no hesitation in holding that the Court below has misinterpreted the provisions of Section 36-A(4) of the NDPS Act. Rather, the provisions of Section 36-A(4) of the NDPS Act insofar as the requirement of a report being made by the Public Prosecutor for extension of time is concerned, are mandatory in nature.

13. As a sequel to the above, since the investigation was incomplete on the date when the petitioner moved an application under Section 167(2) Cr.P.C. for default bail, the instant petition deserves to be allowed.

14. The petitioner is hereby ordered to be admitted to bail in terms of Section 167(2) Cr.P.C. to the satisfaction of trial Court/Magistrate concerned. However, it is made clear that anything observed hereinabove shall not be construed to be an expression of opinion on the merits of the case.

(MANJARI NEHRU KAUL)
JUDGE

June 6, 2023
rps

Whether speaking/reasoned Yes/No
Whether reportable Yes/No