

**IN THE HIGH COURT OF JAMMU AND KASHMIR  
AT JAMMU**

*(THROUGH VIRTUAL MODE)*

Reserved on: 11.12.2020  
Pronounced on: 18.12.2020

Bail App No.167/2020  
CrIM No.979/2020,  
CrIM 980/2020

Gurdev Singh ... Petitioner(s)

Through: - Mr.Irfaan Khan Advocate

Vs.

Union Territory of J&K and another ...Respondent(s)

Through: - Mr. Jamrodh Singh G.A.

**CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE**

**JUDGMENT**

1 FIR No. 17/2020 for offences under Sections 8/15 NDPS Act came to be registered by the Police of Police Station, Banihal on the basis of an information received from the reliable sources to the effect that a Truck bearing Registration No. PB02CC-7060 in which some narcotic drugs were concealed was coming from Kashmir towards Jammu. On this information, the police laid a naka at Chakori Nallah and stopped the aforesaid Truck, which was being driven by the petitioner herein. Upon conducting the search of the aforesaid Truck, 44 kgs of poppy straw was recovered from its tool box.

2 It appears that the petitioner had filed an application for grant of bail in his favour in the aforesaid FIR before the Court of Principal Sessions Judge, Ramban,(hereinafter referred to as the 'Special Judge')

but the same was rejected by the said Court vide order dated 24.06.2020. Being aggrieved of the said order, the petitioner has filed the instant petition before this Court for grant of bail in his favour on the grounds that the petitioner is entitled to grant of default bail because the investigating agency has failed to produce the chargesheet within the stipulated time; that the contraband allegedly shown to be recovered from the possession of the petitioner is an intermediate quantity, as such, the rigor of Section 37 NDPS Act will not apply to the present case; that there is grave threat to the life of the petitioner while being lodged in jail due to outbreak of Covid-19 infection; that the bail should not be denied to him as a measure of inflicting punishment upon him and that the petitioner will abide by all the conditions that may be imposed by this Court if he is enlarged on bail.

3 The respondent has resisted the bail petition by filing its reply thereto. In its reply, the respondent has contended that the offences committed by the petitioner/accused are serious, grave and heinous in nature and as such, he cannot claim bail as a matter of right; that the petitioner/accused is involved in the illicit trade of sale and purchase of narcotic substance i.e. Poppy Straw which is very dangerous for the society, especially for younger generation and its consumption by the youth may affect their health and future and that there is every apprehension that the petitioner/ accused may indulge in similar activities in case he is admitted to bail.

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

5 As already noted, in the instant case, learned Special Judge, has rejected the bail petition of the petitioner. The question that arises for consideration is whether or not successive bail applications will lie before this Court. The law on this issue is very clear that if an earlier application was rejected by an inferior court, the superior court can always entertain the successive bail application. In this behalf, I am supported by the ratio laid down by the Supreme Court in the case titled [Gurcharan Singh & Ors vs. State \(Delhi Administration\)](#), [AIR 1978 SC 179](#) which has been followed by the Bombay High Court in the case of [Devi Das Raghu Nath Naik v. State,\(1987 Crimes Volume 3 page 363\)](#). Thus, the rejection of a bail application by Sessions Court does not operate as a bar for the High Court in entertaining a similar application under [Section 439](#) Cr. P. C on the same facts and for the same offence.

6 The primary ground urged by the petitioner seeking bail is that he is entitled to default bail as the investigating agency, in the instant case, has failed to present the charge-sheet before the Special Judge within the stipulated period of time.

7 If we have a look at the order of the learned Special Judge whereby the bail application of the petitioner has been rejected, it is clear that the petitioner had urged before the said Court that he deserved to be given the benefit of default bail because the investigating agency had failed to present the charge-sheet within the stipulated period of time. The learned Special Judge, while rejecting the bail application of the petitioner vide its order dated 24.06.2020 has

not, at all, dealt with this aspect of the matter, though the contention of the petitioner has been noted in the order. The bail plea of the petitioner has been rejected by the learned Special Judge on merits.

8 In order to test the merit of contention of the petitioner that he was entitled to default bail, it is necessary to examine the relevant facts in this regard. As per the status report filed by the respondents, the petitioner was arrested on 11.02.2020 when the recovery of contraband was effected from his possession. The status report further reveals that the charge-sheet has been filed against the petitioner on 23.06.2020 i.e. after 122 days of his arrest.

9 Section 36A(4) of NDPS Act provides for modified application of Cr.P.C including the provisions contained in Section 167 of Cr.P.C to remand proceedings in respect of offences triable by the Special Courts under the said Act. Section 36A(1)(c) of NDPS Act empowers the Special Court constituted under the Act to exercise the same powers which a Magistrate having jurisdiction to try a case exercises under Section 167 of Cr.PC in relation to an accused person in such case, who has been forwarded to him under that Section. Section 36A (4) of NDPS Act provides that investigation into offences under Section 19, 24 & 27A and offences involving commercial quantity can be completed within a period of 180 days instead of 90 days as provided under Section 167(2) of Cr.PC. Thus, the benefit of additional time limit is given for investigating more serious category of offences.

10 In the instant case, the accused is alleged to be involved in commission of offence of possession of intermediate quantity of contraband. The said offence is punishable under Section 20 of NDPS Act and, as such, provisions of Section 36A (4) are not applicable to the instant case.

11 The time limit for completion of investigation in a case of instant nature is to be governed by the provisions contained in Section 167(2)(a) of Cr.P.C which read as under:

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

*(1) .....*

*(2).....*

*(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,-*

*(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 subsection shall be deemed to be so released under the*

*provisions of Chapter XXXIII for the purposes of that Chapter”*

12 As already noted, intermediate quantity of contraband is alleged to have been recovered from the accused, therefore, the offence for which the petitioner/accused has been booked is punishable with rigorous imprisonment for a term which may extend to 10 years and fine which may extend to rupees one lakh in terms of Section 20 of NDPS Act. Having regard to afore-quoted extracts of Section 167 of CrPC, the detention of the accused person in custody in the instant case cannot go beyond 90 days. The charge-sheet against the petitioner/accused in this case has been filed after 122 days of his arrest. On the expiry of 90 days, the petitioner/accused was entitled to default bail in terms of Section 167(2) of the Cr.P.C. However, despite making an application to the learned Special Judge seeking his release on bail in default of presentation of chargesheet within the prescribed period, the learned Special Judge has not extended the benefit of default bail to him.

12 The Supreme Court, in a recent case titled **M Ravindran vs Directorate of Revenue Intelligence, 2020 SCC Online SC 867,** while dealing with the question, whether the right of default bail is available to an accused even in a case where the charge sheet has been filed against him after the statutory period, concluded as under:

*“Once the accused files an application for bail under the Proviso to [Section 167\(2\)](#) he is deemed to have ‘availed of’ or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation.*

*Thus, if the accused applies for bail under Section 167(2) with Section 36A (4) NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.*

*The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, 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.*

*Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid.*

13 From the foregoing enunciation of law on the subject, it is clear that once the petitioner had applied for grant of bail under proviso to Sub-Section (2) of Section 167 of Cr.PC. after the expiry of stipulated time limit for investigation, it was the duty of the Court to release him on bail forthwith without any unnecessary delay. The filing of a charge sheet subsequent to the expiry of the stipulated time limit for investigation would not defeat the right of the petitioner to default bail.

14 In the instant case, the learned Special Judge not only avoided the release of the petitioner on default bail, but he also turned a deaf ear to the plea of the petitioner/accused in this behalf by not, at all, dealing with the same while rejecting the bail application. **In Sayed Mohd Ahmad Kazmi v State (Government of NCT OF Delhi), (2012) 12 SCC 1**, the Supreme Court expressly censured the dilatory tactics adopted by the Magistrate in dealing with the application for grant of default bail in the following words:

*“25. Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General, Mr. Raval. There is no denying the fact that on 17th July, 2012, when CR No.86 of 2012 was allowed by the Additional Sessions Judge and the custody of the Appellant was held to be illegal and an application under [Section 167 \(2\) Cr.P.C.](#) was made on behalf of the Appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate*



*adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20th July, 2012 extended the time of investigation and the custody of the Appellant for a further period of 90 days with retrospective effect from 2nd June, 2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the Appellant on the expiry of 90 days from the date when the Appellant was taken into custody. Such right, as has been commented upon by this Court in the case of Sanjay Dutt (supra) and the other cases cited by the learned Additional Solicitor General, could only be distinguished once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.*

*26. The circumstances, in this case, however, are different in that the Appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.*

*27 We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the Appellant acquired the right for grant of statutory bail on 17th July, 2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time*

*for continuing the investigation was filed by the prosecution. In our view, the right of the Appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise”.*

15 Again, the Supreme Court, in the case of **Uday Mohanlal Acharya vs. State of Maharashtra, (2001) 5 SCC 453**, while considering the provisions contained in Section 167(2) of Cr.P.C, in the light of fundamental right to personal liberty of the person and the effect of deprivation of the same, observed as under:

*“Personal Liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorize the detention of the accused in custody up to maximum period as indicated in the proviso to sub-section (2) of Section 167, and further detention beyond the period without filing of a challan by the investigating agency would be subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code and as such, could be violative of Article 21 of the Constitution.*

16 In the instant case, the learned Special Judge has failed to appreciate the fact that the detention of the petitioner beyond 90 days, particularly after he had applied for availing the right to default bail, had become illegal. The learned Special Judge, while dealing with the application of the petitioner for grant of bail on merits, did not even

bother to deal with the aspect of the matter relating to grant of default bail, which is highly reprehensible.

17 By ignoring the statutory provisions as well as the precedents governing the grant of default bail, the learned Special Judge has shown utter disregard to the procedure established by law and has acted arbitrarily, while dealing with the application of the petitioner for grant of default bail.

18 The petitioner, as already noted, had spent more than 90 days in the custody and it was only on 122<sup>nd</sup> day of his detention that the investigating agency presented the chargesheet before the Court of learned Special Judge on 23.06.2020. Prior to that, the petitioner had filed an application for grant of bail before the Court of Special Judge on 09.06.2020. The petitioner had, therefore, availed his indefeasible right to default bail which could not have been denied to him in any circumstances. He is, accordingly, held entitled to grant of statutory bail in terms of Section 167(2) of Cr.P.C.

19 Even otherwise, the quantity of contraband alleged to have been recovered from the petitioner falls within the parameters of intermediate quantity, as such, rigor of Section 37 of NDPS Act is not attracted to the instant case. Allowing the petitioner to remain in custody because of the reason that the offences alleged to have been committed by him are serious in nature, would amount to inflicting pre-trial punishment upon him. The investigation of the case is complete and the chargesheet

already stands filed before the Court of Special Judge. Thus, even on merits, the petitioner is entitled to grant of bail.

20. For the foregoing reasons, the petition is allowed and the petitioner is admitted to bail subject to the following conditions:

(i) That he shall furnish personal bond in the amount of Rs.1.00 lac with one surety of the like amount to the satisfaction of the learned trial court;

(ii) That he shall appear before the trial court on each and every date of hearing;

(iii) That he shall surrender his passport, if any, before the learned trial Court;

(iv) That he shall not tamper with prosecution witnesses.

Copy of this order be provided to the learned counsel for the petitioner through available mode and a copy be also sent to the learned trial Court.

**(SANJAY DHAR)**  
**JUDGE**

**Jammu**  
**18.12.2020**  
**“Sanjeev, PS”**

*Whether the order is speaking:* **Yes**  
*Whether the order is reportable:* **Yes**