

PUNJAB AND HARYANA HIGH COURT

Kanshi Ram

Vs

State of Punjab

(Rekha Mittal, J.)

11.03.2014

JUDGMENT

Rekha Mittal, J.

Kanshi Ram petitioner, an accused in FIR No. 53 dated 07.08.2013 registered in Police Station Khuian Sarvar, District Fazilka for offence punishable under Sections 18 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act') has approached this Court under Section 167(2) read with Section 439 of the Code of Criminal Procedure (in short 'the Code') for grant of bail, pending conclusion of trial. Mr. Param Preet Singh Paul, DAG, Punjab has put in appearance on behalf of the State of Punjab to contest the bail application. The allegations against the petitioner are that on 07.08.2013, a police party headed by ASI Baljit Singh of Police Station Khuian Sarvar apprehended the petitioner and recovered 2 kg 800 grams of opium, without any permit or licence. Counsel for the petitioner submits that the prosecution failed to file the charge sheet within a period of 180 days from the date of arrest as Davinder Kumar 2014.03.28 10:29 I attest to the accuracy and integrity of this document prescribed by law. On 10.02.2014, the petitioner filed an application under Section 167(2) of the Code before the Special Judge, Fazilka and on 11.02.2014, the Court issued notice to the State for 13.02.2014. The prosecution filed the charge sheet on 12.02.2014. The Special Judge dismissed the bail application on 13.02.2014 primarily on the ground that as the charge sheet has been filed, in view of the judgment of the Hon'ble Supreme Court of India in Sadhwi Pragyna Singh Thakur Vs. State of Maharashtra, 2010(1) RCR(Criminal), 302, the petitioner is no longer entitled to statutory bail under Section 167(2) of the Code. It is argued with vehemence that once the petitioner has filed an application for grant of statutory bail under Section 167(2) due to default of the prosecution to present the challan within the stipulated period of 180 days from the date of arrest of the accused, the said right cannot be defeated by subsequent presentation of challan. In support of his contention, he has placed heavy reliance upon the judgment of the Hon'ble Supreme Court of India in Sayed Mohd. Ahmed Kazmi Vs. State, GNCTD and others, 2012(4) RCR (Criminal) 875. Counsel for the State, while relying upon the judgment of the Hon'ble Apex Court in Sadhwi Pragyna Singh Thakur's case (supra) referred to in the order passed by Judge, Special Court would submit that after the charge sheet is filed, the right of the petitioner to get statutory bail under Section 167(2) of the Code gets extinguished and thereafter his bail

application is to be decided only on merits. I have heard counsel for the parties and perused the case file. Davinder Kumar 2014.03.28 10:29 I attest to the accuracy and integrity of this document A plain reading of averments set up in the petition and arguments advanced by counsel for the parties make it manifest that it is an admitted position of the case that the prosecution did not file charge sheet under Section 173 of the Code before expiry of period of 180 days from the date of arrest of the petitioner. In the instant case, the prosecution did not file an application seeking extension of time for presentation of challan by invoking the provisions of Section 36A(4) of the Act. It is also not disputed that the application filed by the petitioner for grant of bail was put up for the first time before the Judge, Special Court on 11.02.2014 and he issued notice to the State for 13.02.2014. In the meantime, on 12.02.2014, the prosecution presented the challan and the application of the petitioner for grant of statutory bail was dismissed while relying upon the judgment in Sadhwi Pragyna Singh Thakur's case (supra) that the right of the petitioner to statutory bail gets defeated, the moment the challan was presented in the Court. Before advertng to the submissions made by respective counsels and the judgments relied upon by them, it is appropriate to mention that in cases under the Act, the accused exercises the right of statutory bail due to failure of the prosecution to present the challan within a period of 180 days or extended period either before the challan is presented in the Court or application for extension is filed as contemplated under Section 36 (A)4 of the Act. Therefore, there are two situations which crop up in different cases namely:-

i) during pendency of the application for bail, the prosecution files an application seeking extension of time invoking Davinder Kumar 2014.03.28 10:29 I attest to the accuracy and integrity of this document Section 36(A)4 of the Act;

ii) the accused files an application for grant of bail under Section 167(2) of the Code and before decision on the application, the prosecution presents the charge sheet. In Sayed Mohd. Ahmed Kazmi's case (supra) relied upon by counsel for the petitioner, the petitioner 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. The Hon'ble Supreme Court taking into consideration that the circumstances in this case, are different vis a vis the circumstances in the case of Sanjay Dutt Vs. State through C.B.I.Bombay, 1994(3) RCR (Criminal) 684 held in para 26 of the judgment quoted hereinbelow:-

"26. 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."

In the case at hand, the situation is different because in this Davinder Kumar 2014.03.28 10:29 I attest to the accuracy and integrity of this document case, no application has been filed by the prosecution seeking extention of time in exercise of power under Section 36(A)4 of the Act rather the charge sheet was filed before the application for grant of bail under Section 167(2) of

the Code came to be decided by the Judge, Special Court. In *Sadhwi Pragyna Singh Thakur's* case (supra), the Hon'ble Supreme Court has held that the accused is not entitled to bail under Section 167(2) of the Code if charge sheet is filed in the Court during pendency of his application for bail. Under these circumstances, the petitioner cannot gain any advantage to his contention from the observations made in *Sayed Mohd. Ahmed Kazmi's* case (supra).

The issue in regard to right of the accused to statutory bail after presentation of challan came up for consideration before the Hon'ble Supreme Court in *Sanjay Dutt's* case (supra). In *Uday Mohanlal Acharya Vs. State of Maharashtra, 2001(2) RCR (Crl.) 452*, the Hon'ble Apex Court interpreted expression 'if not already availed of' used by the Supreme Court in *Sanjay Dutt's* case (supra). However, in *Sadhwi Pragyna Singh Thakur's* case (supra), the Apex Court after noticing the judgment in *Sanjay Dutt's* case (supra) and *Uday Mohanlal Acharya's* case (supra) held in paras 21 to 23, reads as follows:-

"21. There is yet another aspect of the matter. The right under Section 167(2) of Cr.P.C. to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet.

In other words, even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge sheet is filed, the said right to be released on bail would be lost. After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from Constitution Bench decision of this Court in *Sanjay Dutt vs. State¹(b)*. The reasoning is to be found in paras 33 to 49. This principle has been reiterated in the following decisions of this Court :

(1) *State of M.P. vs. Rustam and Others²* *Dr. Bipin Shantilal Panchal vs. State of Gujarat³*. It may be mentioned that this judgment was delivered by a Three Judge Bench of this Court. (3) *Dinesh Dalmia vs. CBI⁴*, and (4) *Mustaq Ahmed Mohammed Isak and others vs. State of Maharashtra⁵*. In *Uday Mohanlal Acharya vs. State of Maharashtra⁶* a Three Judge Bench of this Court considered the meaning of the expression "if already not availed of" used by this court in the decision rendered in case of *Sanjay Dutt* and held in para 48 and held that if an application for bail is filed before the charge sheet is filed, the accused could be said to have availed of his right under Section 167(2) even though the Court has not considered the said application and granted him bail under Section 167(2) Cr.P.C. This is quite evident if one refers para 13 of the reported decision as well as conclusion of the Court at page 747.

22. It is well settled that when an application for default bail is filed, the merits of the matter are not to be gone into. This is quite evident from the principle laid down in *Union of India vs. Thamisharasi and Others⁷* *placitum c-d*.

23. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, before the consideration of the same and before being released on bail if charge sheet is filed, the said right to be released on bail, can

be only on merits. So far as merits are concerned the learned counsel for the appellant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all. In the face of observations made by the Apex Court in Sadhwi Pragyna Singh Thakur's case (supra), I find myself unable to be persuaded with the submissions by counsel for the petitioner that the petitioner is entitled to statutory bail even if the charge sheet had been filed by the prosecution subsequent to his filing the application for grant of bail. It is pertinent to mention that counsel for the petitioner has not addressed this Court at all and did not claim bail on merits. For the foregoing reasons, the petition is liable to be dismissed and ordered accordingly. (REKHA MITTAL) JUDGE March 11, 2014. Davinder Kumar Davinder Kumar 2014.03.28 10:29 I attest to the accuracy and integrity of this document

Cases Referred.

- 1(1994) 5 SCC 410 [Paras 48 and 53
- 21995 Supp. (3) SCC 221, para 4
- 3(1996) 1 SCC 718 para 4
- 4(2007) 8 SCC 770 para 39
- 5(2009) 7 SCC 480 para 12
- 6(2001) 5 SCC 453
- 7(1995) 4 SCC 190 para 10