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Statutory Bail Under Sec. 167(2) of the Criminal Procedure Code, 1973 vis-a-vis the Provisions of the NDPS Act, 1985: An Analysis

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ABSTRACT

Section 51 of the NDPS Act, 1985 (hereinafter referred to as the Act) categorically lays down that the provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) shall apply, insofar as they are not inconsistent with the provisions of the Act, to all warrants issued and arrests, searches & seizures made under the provisions of the Act. Further, in terms of s36C of the Act, the provisions of the Code including the provisions as to bail and bonds shall apply to the proceedings. Accordingly, the statutory bail, also commonly known as default bail, in terms of s167(2) of the Code is applicable to cases booked under the Act.

1. Section 51 of the NDPS Act, 1985 (hereinafter referred to as the Act) categorically lays down that the provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) shall apply, insofar as they are not inconsistent with the provisions of the Act, to all warrants issued and arrests, searches & seizures made under the provisions of the Act. Further, in terms of s36C of the Act, the provisions of the Code including the provisions as to bail and bonds shall apply to the proceedings. Accordingly, the statutory bail, also commonly known as default bail, in terms of s167(2) of the Code is applicable to cases booked under the Act.

2. The Act provides distinct penal provisions for offences, in relation to narcotic drugs, psychotropic substances, controlled substances, coca plant, opium poppy and cannabis plant. The statutory time limit for filing of prosecution charge sheet before the competent court in respect of controlled substance is 60 days and in respect of narcotic drug or psychotropic substance, the time limit depends on the quantity involved and the specified offence committed by the accused person. In respect of narcotic drugs or psychotropic substances, the prosecution charge sheet is required to be filed within 60 days in cases involving small quantity/quantity

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greater than small quantity but lesser than commercial quantity. In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving a commercial quantity of narcotic drug or psychotropic substance, the prosecution charge sheet is required to be filed within 180 days. However, in case, if it is not possible to complete the investigation within 180 days, the special court may extend the said period up to one year on the report of the Public Prosecutor under certain circumstances. Readers may note here that the concept of small quantity and commercial quantity is not applicable to controlled substances notified by the Government.

3. The classification of the offences and consequently the punishment inflicted by the Hon'ble Courts are based on the quantity and the same stood notified vide Notification S.O. 1055 (E) dated 19th October 2001. Further, vide Notification No. S.O. 2942 (E) dated 18.11.2009, Note 4 was added to the Notification S.O. 1055 (E), dated 19.10.2001. Note 4 reads as "*The quantities shown in columns 5 and 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or solution or any one or more narcotic drugs or psychotropic substances of the particular drug in dosage form of isomers, esters, ethers and salts or these drugs, including salts or esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.*"

4. For the purpose of determination of small quantity or commercial quantity, the entire substance (neutral substance + the narcotic/psychotropic substance) has to be taken into account in terms of the Larger Bench judgment of the Hon'ble Supreme Court of India in Hira Singh vs. UOI & Ors.² Consequently, the judgment rendered in E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau³ [which was based on the purity of the substance recovered and certified by the FSL/CFSL/CRCL] stood overruled.

5. Section 167(2) in the Code reads as under:

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no 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-

² 2020 SCC OnLine SC 382 : 2020 (4) TMI 671 - SUPREME COURT

³ (2008) 5 SCC 161 : 2008 SCC OnLine SC 480

(a) the Magistrate may authorize 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 authorize 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 authorize detention in any custody under this section unless the accused is produced before him;

(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."

6. A reading of Orders passed by various Trial Courts dealing with NDPS matters reveals that the manner of calculating the period of 60 days or 180 days is incorrect and accordingly, some of the Orders passed are discussed herein to understand the intricacies involved in the manner of calculation, the concept of default bail, an extension of the period of investigation by the Court, the rights vested with the accused along with the inapplicability of the General Clauses Act, 1897 to the default bail.

7. In order to appreciate the issues, it is essential to read the orders passed by some of the Trial Courts. To illustrate:

In N.D.P.S. Bail Application No. 509 of 2021⁴, the accused was arrested on 09.12.2020, was produced before the Hon'ble Court of Metropolitan Magistrate on 10.12.2020 and was remanded on 10.12.2020 for commercial quantity, for which charge sheet was to be filed within 180 days. The charge sheet came to be received on 08.06.2021. The accused having preferred default bail application and having availed the said right, the Hon'ble Court of Special Judge held that the accused was entitled to default bail under s167(2) of the Code.

⁴ N.D.P.S. Remand Application No. 1026 of 2020 in C. R. 36/2020 in the case of Mubaraq Hamid Sayyad vs. The State of Maharashtra (at the instance of Dindoshi Police Stn., vide C. R. No.36/20) decided by the Hon'ble Special Judge for N.D.P.S. Cases at Greater Mumbai

Similarly, in N.D.P.S. Bail Application No. 1318 of 2021 in C. R. NO. 46 of 2021⁵, the applicant-accused moved an application for grant of default bail under s167 (2) of the Code. It was the case of the applicant-accused that he came to be arrested by the officers of the respondent on 07.05.2021 and produced & remanded on 07.05.2021 for the alleged offence of violation of provisions of s8©, 9A read with s25A, s25, s28 & s29 of the Act for which the punishment prescribed for the offences under s25A, s25, s28 & s29 is up to 10 years and the prosecution ought to have filed the charge sheet before the Hon'ble Court within 60 days. The Hon'ble Court, after perusing the record held that the accused was produced in court on 07.05.2021 and the period of 60 days for filing charge sheet, from date of remand elapsed on 05.07.2021 and charge sheet, in this case, was filed on 06.07.2021. Therefore, in the facts of the case, the Hon'ble Court held that an indefeasible right of being released on bail is accrued in favour of the accused which cannot be extinguished by the subsequent filing of charge sheet and the accused was entitled to default bail under s167(2) of the Code.

8. The question in both the above cases is as to whether the accused persons were entitled to the statutory bail as ordered by the Hon'ble Courts. In the first case/example, since commercial quantity was involved, the period for filing the charge sheet was 180 days while in the second case, the quantity involved being intermediate quantity, the charge sheet was required to be filed within 60 days. The manner of calculation of 180 days in the first example and 60 days in the second example would be as under:

First case:

Date of arrest	09.12.2020	
Date of remand	10.12.2020	
Applicable days for filing charge sheet before the Competent Court	180 days being commercial quantity	
Charge sheet filed on	08.06.2021	
Manner of calculation	December 2020	21 days
	January 2021	31 days
	February 2021	28 days

⁵ Nachiket Padmakar Borker vs. The Intelligence Officer, NCB Mumbai, vide C. R. No.46/21 decided on 07.05.2021 by the Hon'ble Special Judge for N.D.P.S. Cases at Greater Mumbai

	March 2021	31 days
	April 2021	30 days
	May 2021	31 days
	June 08.06.2021	8 days
	Total number of days	180 days

The charge sheet was accordingly required to be filed on or before 8th June 2021 and the charge sheet came to be filed on 8th June 2021 hence the statutory bail was not available to the accused applicants.

Second Case:

Date of arrest	07.05.2021	
Date of remand	07.05.2021	
Applicable days for filing charge sheet before the Competent Court	60 days being intermediate quantity	
Charge sheet filed on	06.07.2021	
Manner of calculation	May 2021	24 days
	June 2021	30 days
	July 2021	6 days
	Total number of days	60 days

The charge sheet was thus required to be filed by 6th July 2021 and came to be filed on 6th July 2021 hence in this case too, the accused was not entitled to default/statutory bail.

9. The question in both the above cases was as to whether the accused persons were entitled to the statutory bail as ordered by the Hon'ble Courts. It may be noticed that while calculating the days for the default bail, the first day of remand is excluded and the last day is included. This is in terms of the judgment of the Larger Bench of the Hon'ble Supreme Court

in the case of M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence.⁶ In this case, the Hon'ble Supreme Court followed the ratio of the judgment rendered in Ravi Prakash Singh @ Arvind Singh vs. the State of Bihar.⁷ Readers may note that the decision of the Larger Bench in M. Ravindran (*supra*) would prevail over on the subject on two counts:

- (a) It has been rendered by a Larger Bench and would over-rule all contrary judgments rendered by the Division Bench of the Supreme Court;
- (b) The later decision would prevail over the former decisions

10. Moving further, another subsidiary question that arises is as to whether Government holidays are to be excluded for the purpose of counting the statutory period for filing charge sheet/challan i.e. whether section 10 of the General Clauses Act, 1897 would be applicable if the 60th day or 180th day happens to be a government holiday? The issue is no longer *res Integra*. This issue was examined by the Hon'ble Supreme Court in the matter of Chaganti Satyanarayana vs. the State of A.P.⁸ wherein it was observed as under:

"As the terms of proviso (a) with reference to the total periods of detention can be interpreted on the plain language of the proviso itself we do not think it is necessary to invoke the provisions of the General Clauses Act or seek guidance from the Limitation Act to construe the terms of the proviso".

11. Article 141 of the Constitution of India stipulates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Thus, the law laid down, by the Hon'ble Supreme Court in M. Ravindran (*supra*) is binding on courts subordinate to the Supreme Court. Following the ratio of the judgment rendered in M. Ravindran (*supra*), it can be categorically concluded that in both cases, the default bail was granted erroneously by the Hon'ble Special Judge for N.D.P.S. Cases at Greater Mumbai and the respondents in these cases were required to agitate the matter.

12. In terms of proviso to s36A(4) of the Act, if it is not possible to complete the investigation within the said period of one hundred and eighty days, an extension can be sought from the Special Court, which may extend the same up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention

⁶ Criminal Appeal Number 699/2020 (arising out of S.L.P. (Criminal) No. 2333 of 2020 and reported as 2020-TIOL-170-SC-NDPS-LB : 2020 SCC OnLine SC 867

⁷ CRIMINAL APPEAL NO.325 OF 2015 decided on 20.02.2015 and reported as (2015) 8 SCC 340 : 2015 SCC OnLine SC 144

⁸ Criminal Appeal No. 278 of 1986 decided on 8th May, 1986 and reported as 1986(3) SCC 141 : 1986 AIR 2130 : 1986 SCR (2)1128

of the accused beyond the said period of one hundred and eighty days. The following requirements are to be mandatorily complied with by the prosecution;

- (i) The Investigating Officer has to submit his report to the Public Prosecutor, who in turn will file his report indicating the progress of the investigation and file an application for extension of time. The Public Prosecutor cannot simply file the application forwarded by the Investigation Officer seeking an extension.
- (ii) The Public Prosecutor must categorically list out and mention the compelling reasons⁹ for seeking detention of the accused beyond 180 days. A merely formal application will not suffice.
- (iii) A notice must mandatorily be issued to the accused and he must be produced in court whenever such an application is taken up. The principles of *Audi Alteram Partem* should be invariably followed.
- (iv) An application seeking extension of time in the filing of charge sheet by the prosecution ought not to be kept pending and must be decided as expeditiously as possible and certainly before the expiry of the statutory period;
- (v) The application for extension should be filed well in advance.¹⁰
- (vi) The restrictions under Section 37 of the Act will have no application in such cases. It will have application only in the case of an application being decided on merits; &
- (vii) When an application under Section 167(2) of the Code read with Section 36A(4) of the Act has been filed after expiry of the 180 days period and no decision is thereupon taken, an indefeasible right to be released on bail accrues to the accused which cannot be defeated by keeping the said applications pending.
- (viii) Extension for filing of a charge sheet is between the Court & the prosecution and the Court should not adjourn the matter for the counter of the accused and the same shall be disposed of expeditiously.¹¹ Similarly, non-service of the notice seeking extension

⁹ Criminal Application (APL) No. 489 / 2021 in the case of Kuldeep Suresh Indalkar vs. State of Maharashtra along with Criminal Application (APL) No. 511 / 2021 in the case of Kiran Dinkar Rajguru vs. State of Maharashtra, Criminal Application (APL) No. 543 / 2021 in the case of Manoj Eknath Palande vs. State of Maharashtra, Writ Petition No. 1882 / 2021 in the case of Tushar Suryakant Kale and Anr. vs. State of Maharashtra and Writ Petition No. 3260 / 2021 in the case of Akshay Shiwaji Kale and Anr. vs. State of Maharashtra decided by the Hon'ble Bombay High Court.

¹⁰ Dinesh vs. The State of Madhya Pradesh in M. Cr. C. 38064-2021, Cr. R. 1838-2021 & M. Cr. C. No. 44843-2021 decided by the Hon'ble Madhya Pradesh HC on 21.09.2021. Vide Order dated 21.09.2021 it was held that the extension of time limit for filing charge sheet under s36A(4) of the Act has to be invariably filed at least one to two weeks before the expiry of the period.

¹¹ Criminal Petition No. 3735 of 2021 dated 26.10.2021 decided by the Hon'ble Telangana High Court.

vitiates the proceedings and enables the accused to be enlarged on bail.¹²

13. In the event of the application for extension gets rejected, the consequence thereof is that the prosecution is required to file the charge sheet well within the time.¹³ Another issue that arises during the proceedings pertains to filing of bail applications and being rejected on merits and subsequently the accused reversing his stand and filing of applications for his enlargement under section 167(2) of the Code. The Hon'ble Orissa High Court had an occasion to examine this issue.¹⁴ The Hon'ble Orissa High Court, answering the question in the negative ruled that once the accused persons waived of their right to seek default bail and their application for bail being rejected thereafter on merits and permitted to be withdrawn, they cannot be permitted to turn around and seek bail on the earlier ground belatedly.

14. There were matters where the Public Prosecutor files the complaint well within the statutory period of 60 or 180 days but the Hon'ble Court was/is unable to take cognizance of the charge sheet (say on account of pandemic Covid 19, etc.). In a situation of this kind, whether the accused is entitled to default bail? This matter is also no longer *res Integra*. The Division Bench of the Hon'ble Supreme Court in Serious Fraud Investigation Office vs. Rahul Modi & Ors.¹⁵ held that filing of a charge sheet is sufficient compliance with the provisions of s167 of the Code and an accused cannot demand release on default bail under Section 167(2) of the Code on the ground that cognizance has not been taken before the expiry of 60 or 90 days, as the case may be.

15. Since the Division Bench of the Hon'ble Supreme Court in the case of Fakhrey Alam vs. State of Uttar Pradesh¹⁶ has held that default bail is a fundamental right and not merely a statutory right, it is essential that the issues raised herein be given their due importance and the empowered departments/officers update themselves to keep abreast of the latest position on the subject matter.

¹² BLAPL No.10152 of 2019 decided on 20.08.2020 in the case of Ishwar Tiwari vs.. State of Odisha by the Hon'ble Orissa High Court

¹³ Order dated 21.10.2021 passed in Criminal Petition No.4822 of 2021 by the Hon'ble Andhra Pradesh High Court in the case of Rohtash vs. The State of Andhra Pradesh.

¹⁴ CRLMC No. 1090 of 2021 & CRLMC No. 1091 of 2021, both decided on 24.11.2021 by the Hon'ble Orissa High Court in the case of Tinku Kumar @ Tiku and Sacin Kumar vs. State of Odisha and Another.

¹⁵ . Criminal Appeal Nos.185-186 of 2022 (Arising out of Special Leave Petition (CrI.) Nos. 5180-5181 of 2019) decided on 07.02.2022 and reported as 2022 LiveLaw (SC) 138 : 2022 SCC OnLine SC 153

¹⁶ Order dated 15.3.2021 in Criminal Appeal No. 319 of 2021, arising out of SLP (CrI.) No. 6181/2020, reported as LL 2021 SC 165 : 2021 SCC OnLine SC 532