

Court No. - 70

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 14416 of 2023

Applicant :- Hari Shankar

Opposite Party :- State of U.P.

Counsel for Applicant :- Dharmendra Kumar, Maithali Sharan Pipersenia, Ray Sahab Yadav

Counsel for Opposite Party :- G.A.

Hon'ble Sameer Jain, J.

1. Heard Shri Ray Sahab Yadav, learned counsel for the applicant and Shri R. N. Srivastava, learned A.G.A. for the State-respondent.

2. The instant second bail application has been filed seeking release of the applicant on bail in Case Crime No.463 of 2022, under Sections 8/20 N.D.P.S. Act, Police Station Kotwali Padrauna, District Kushi Nagar during pendency of the trial.

3. Learned counsel for the applicant submits that this is second bail application filed on behalf of the applicant. The first bail application of the applicant has been dismissed by this Court on merit vide order dated 04.01.2023 passed in Criminal Misc. Bail Application No.48083 of 2022 and he is pressing the instant second bail application mainly on the ground that at the time of passing of the order on first bail application of the applicant, the point with regard non-compliance of the mandatory provisions of Section 52-A of N.D.P.S. Act could not be placed.

4. He further submits that from the recovery memo, it reflects that sample was drawn at spot and not before the Magistrate concerned.

4. He further submits that the **Apex Court in the cases of Mangilal Vs. The State of U.P. 2023 SCC Online 862** and **Simarnjit Singh Vs. State of Punjab 2023 SCC OnLine SC 906** observed that if sample has been drawn at spot and not before the Magistrate then it is in violation of mandatory provision of Section 52-A of N.D.P.S. Act and on this ground the recovery becomes doubtful and even the **Apex Court in the case of Yusuf @ Asif Vs. State 2023 SCC OnLine SC 1328** clearly observed that if there is violation of Section 52-A of N.D.P.S. Act then entire trial can be vitiated.

5. He further submits that as per prosecution, applicant and co-accused Virendra Tiwari were carrying the contraband (Ganja) on the motorcycle and from the motorcycle 30.5 kg. Ganja was recovered and co-accused Virendra Tiwari had already been released on bail by Co-ordinate Bench of this Court vide order dated 07.12.2022 passed in Criminal Misc. Bail Application No.45235 of 2022.

6. He further submits that applicant is not having any previous criminal history but after involvement of the applicant in the present matter, applicant has also made accused under the provisions of Gangster Act and apart from present case and case under the provisions of Gangster Act, there is no other case is pending against him and he is in jail since 30.08.2022 i.e. for last more than a year. He further

submits, till date only statement of P.W.-1 could be recorded and therefore, it appears that trial of the case is moving with languid pace and there is no hope of its early disposal.

7. Per contra, learned AGA opposed the prayer for bail and submits that this is second bail application filed on behalf of the applicant. The first bail application of the applicant was dismissed by this Court on merit on 04.01.2023 after considering the entire facts of the case but could not dispute the fact that at the time of passing of the order on first bail application of the applicant, the point with regard non-compliance of the mandatory provision of Section 52-A of N.D.P.S. Act could not be placed.

8. He further could not dispute the fact that apart from present case and case under the provisions of Gangster Act, there is no other case is pending against the applicant and he is in jail since 30.08.2022 i.e. for last more than a year and till date only one prosecution witness could be examined.

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

10. However, this is second bail application filed on behalf of the applicant and his first bail application has been dismissed by this Court on merit vide order dated 04.01.2023 but from the rejection order dated 04.01.2023, it reflects that at the time of passing of the order on first bail application of the applicant, the point with regard non-compliance of the mandatory provision of Section 52-A of N.D.P.S. Act could not be placed.

11. From the recovery memo, it reflects that sample was drawn at spot and not before the Magistrate concerned, therefore, prima-facie at this stage, it appears that there is violation of mandatory provisions of Section 52-A of N.D.P.S. Act.

12. The Apex Court in the cases of **Mangilal (supra)** and **Simarnjit Singh (supra)** observed that if sample has been drawn at spot and not before the Magistrate then it is violation of mandatory provision of Section 52-A of N.D.P.S. Act and on this ground the recovery becomes doubtful and even the Apex Court in the case of **Yusuf @ Asif (supra)** observed that even due to non-compliance of Section 52-A of N.D.P.S. Act entire trial can be vitiated.

13. Further, applicant is not having any previous criminal history and it appears that after involvement of the applicant in the present matter, he has also been made accused under the provisions of Gangster Act and apart from present case and case under the provisions of Gangster Act, there is no other case is pending against him and he is in jail since 30.08.2022 i.e. for last more than a year. Further it appears, till date only one prosecution witness could be examined therefore, it appears that trial of the case is moving with languid pace and there is no hope of its early disposal.

14. Recently, the Apex Court in the case of **Mohd. Muslim alias Hussain Vs. State (NCT of Delhi) 2023 SCC OnLine SC 352** observed that provisions of Section 37 of N.D.P.S. Act cannot prevail over Article 21 of the Constitution of India

and if there is violation of fundamental right of speedy trial of the accused then this Court can consider this fact while disposing off the bail application.

15. Further, co-accused Virendra Tiwari had already been released on bail by Co-ordinate Bench of this Court vide order dated 07.12.2022. Therefore, considering the facts and circumstances of the case discussed above, in my view, applicant is entitled to be released on bail.

16. Accordingly, without expressing any opinion on the merits of the case, the instant bail application is **allowed**.

17. Let the applicant - **Hari Shankar** be released on bail in the aforesaid case on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

(i) The applicant shall appear before the trial court on the dates fixed, unless his personal presence is exempted.

(ii) The applicant shall not directly or indirectly, make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or any police officer or tamper with the evidence.

(iii) The applicant shall not indulge in any criminal and anti-social activity.

18. In case of breach of any of the above condition, the prosecution will be at liberty to move an application before this Court for cancellation of the bail of the applicant.

19. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

Order Date :- 7.12.2023
Zafar