Court No. - 70

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 19509 of 2023

Applicant :- Shivam @ Daini
Opposite Party :- State of U.P.
Counsel for Applicant :- Pt. S.P. Sharma,Archana Maurya
Counsel for Opposite Party :- G.A.

Hon'ble Sameer Jain,J.

1. Heard Pt. S.P. Sharma, learned counsel for the applicant and R. N. Srivastava, learned AGA for the State-respondent.

2. The instant second bail application has been filed seeking release of the applicant on bail in Case Crime No.787 of 2022, under Sections 21/22 N.D.P.S. Act, 1985, Police Station Sikandrabad, District Bulandshahr, during pendency of the trial in the court below.

3. Learned counsel for the applicant submits that this is the second bail application filed on behalf of the applicant and first bail application of the applicant has been dismissed on merits by this Court vide order dated 03.01.2023 passed in Criminal Misc. Bail Application No.46606 of 2022 and he is pressing the instant second bail application mainly on the ground that at the time of preparation of recovery memo, mandatory provisions of Section 52-A of N.D.P.S. Act could not be complied with and admittedly sample was drawn at spot and it was not drawn before the Magistrate concerned.

4. He further submits that it is alleged that from the possession of the applicant 162.5 gms. Alprazolam tablets were recovered but Alprazolam is a mind tranquilizer and it is easily available in the open market even without prescription of the medical practitioner. Further applicant is not having any previous criminal history to his credit and he is in jail since 31.08.2022 i.e. for more than a year.

5. Per contra, learned AGA opposed the prayer for bail and submits that this is the second bail application and first bail application of the applicant has been dismissed after considering the entire facts of the case by this Court vide order dated 03.01.2023 but he could not dispute the fact that at the time of deciding first bail application the point with regard to violation of provision of Section 52-A of N.D.P.S. Act could not

be placed and further applicant is not having any previous criminal history to his credit and he is in jail since 31.08.2022 i.e. for more than a year.

6. Learned A.G.A. also could not dispute the fact that sample of the alleged contraband was drawn at spot and not before the Magistrate concerned.

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

8. However, this is the second bail application filed on behalf of the applicant and first bail application of the applicant has been dismissed after considering the facts of the case by this Court vide order dated 03.01.2023 but it reflects that at the time of hearing of first bail application the ground of non-compliance of Section 52-A of N.D.P.S. Act could not be placed.

9. From the record, it reflects that sample has been drawn at spot and it has not been drawn before the Magistrate concerned as provided under Section 52-A of N.D.P.S. Act. 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 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.

10. Further, applicant is not having any previous criminal history to his credit and he is in jail since 31.08.2022 i.e. for more than a year.

11. Therefore, considering the facts and circumstances of the case discussed above, particularly the fact that applicant is in jail for more than a year and there appears to be violation of Section 52-A of N.D.P.S. Act, in my view, applicant is entitled to be released on bail.

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

13. Let the applicant- **Shivam @ Daini**, 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.

14. 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.

15. 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 :- 29.11.2023
Zafar

Digitally signed by :-
MOHAMMAD ZAFAR ANSARI
High Court of Judicature at Allahabad