

Court No. - 70

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 23095 of 2023

Applicant :- Akash

Opposite Party :- State of U.P.

Counsel for Applicant :- Brij Raj Singh

Counsel for Opposite Party :- G.A.

Hon'ble Sameer Jain,J.

1. Heard Sri Brij Raj Singh, learned counsel for the applicant and Sri R.N. Srivastava, learned AGA for the State-respondent.

2. The instant application has been filed seeking release of the applicant on bail in Case Crime No. 309 of 2022, under Sections 8/18 NDPS Act, Police Station- Sahawar, District- Kasganj, during pendency of the trial in the court below.

3. Learned counsel for the applicant submitted that this is the second bail application filed on behalf of the applicant and his first bail application was dismissed on merit by this Court on 05.04.2023 and he is pressing the instant second bail application on the ground that at the time of disposal of the first bail application, the legal argument with regard to non compliance of provisions of Section 52-A NDPS Act could not be placed before this Court.

4. He further submitted that from the recovery memo, it reflects that sample was drawn at spot and it was not drawn before the Magistrate and therefore, there is violation of mandatory provisions of Section 52-A NDPS Act. He further submitted that alongwith the applicant one co-accused Sanjay was also arrested and from his possession also 3 Kgs. afem was recovered but he has already been released on bail by co-ordinate Bench of this Court.

5. He further submitted that applicant is not having any criminal history and he is in jail since 22.10.2022 i.e. for last more than a year.

6. Per contra, learned AGA opposed the prayer for bail and submitted that after considering the entire facts of the case, first

bail application of the applicant was dismissed by this Court but could not dispute the fact that at the time of disposal of the first bail application the argument with regard to non compliance of provisions of Section 52-A NDPS Act could not be discussed. He further could not dispute the fact that co-accused Sanjay has already been released on bail by another co-ordinate Bench of this Court and case of applicant is at par with him and applicant is not having any criminal history.

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

8. However, it appears that this is second bail application filed on behalf of the applicant and his first bail application was dismissed by this Court on merit on 05.04.2023 but from the perusal of the order dated 05.04.2023 passed by this Court, it appears that at the time of disposal of the first bail application of the applicant, the fact of non compliance of the provisions of Section 52-A NDPS Act could not be discussed.

9. From the recovery memo, it reflects that sample of the alleged recovered contraband was drawn at spot and not before the Magistrate concerned, therefore, *prima facie*, it appears that there was violation of provisions of Section 52-A NDPS Act.

10. The Apex Court in the cases of ***Mangilal Vs. The State of U.P. 2023 SCC Online 862***, ***Simarnjit Singh Vs. State of Punjab 2023 SCC OnLine SC 906*** and ***Yusuf @ Asif Vs. State 2023 SCC OnLine SC 1328*** observed that the provision of Section 52-A of N.D.P.S. Act is mandatory and if sample was taken at the spot and not before the Magistrate then it creates doubt on the entire recovery of the alleged contraband and even trial of the case can be vitiated.

11. Further, applicant is not having any criminal history and he is in jail since 22.10.2023 i.e. for more than a year.

12. Further, co-accused Sanjay, who was arrested alongwith the applicant and from his possession also 3 Kgs. afem was recovered, has been released on bail and case of applicant is at par with him.

13. Therefore, considering the facts and circumstances of the case discussed above, in my view, applicant is entitled to be released on bail.

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

15. Let the applicant- **Akash** 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.

16. 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.

17. 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 :- 5.12.2023

KK Patel