

Court No. - 76

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 27453 of 2023

Applicant :- Bobby @ Malkhan Singh Yadav

Opposite Party :- State of U.P.

Counsel for Applicant :- Anand Pati Tiwari, Deepak Upadhyay, Raj Kumar Vaishya, Sanjay Kumar Vishwakarma

Counsel for Opposite Party :- G.A.

Hon'ble Vikram D. Chauhan, J.

1. Learned A.G.A. submits that instructions have been received and has no objection in case the bail application is heard on merits.

2. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

3. It is submitted by learned counsel for the applicant that as per the first information report it is alleged that from the possession of the applicant 70.200 kg ganja is alleged to have been recovered. The provisions of Section 52-A(2) of the N.D.P.S. Act has not been complied with as the sampling has not been made before the Magistrate. Learned counsel for the applicant has drawn attention of this Court to the judgment passed by the Apex Court in the case of **Simarnjit Singh Vs. State of Punjab, 2023 0 Supreme (SC) 658**.

3A. It is submitted that the procedure prescribed under Section 52-A of the N.D.P.S. Act is mandatory in nature and in accordance with the aforesaid judgment of the Supreme Court in **Simarnjit Singh** (supra). The preparation of sample without the presence of a Magistrate is violative of sub-Section (2) of Section 52-A of the N.D.P.S. Act. The applicant has explained criminal history in paragraph 16 of the affidavit. Applicant is languishing in jail since 10.05.2023 and in case he is released on bail, he will not misuse the liberty of bail and will cooperate in the trial.

4. Learned A.G.A. for the State opposed the prayer for bail but does not dispute factual matrix of the case. He also does not dispute the fact that the sampling in the present case has not been made before the Magistrate as per the provisions of Section 52A of the N.D.P.S. Act.

5. Learned AGA has pointed out the criminal antecedents of the Applicant. No material or circumstance has been brought to the notice of this court with regard to tampering of evidence or intimidating of witness in previous criminal cases. In **Ash Mohammad v. Shiv Raj Singh, (2012) 9 SCC 446**, the Apex Court in para 30 has observed:

"We may hasten to add that when we state that the accused is a history-sheeter we may not be understood to have said that a history-sheeter is never entitled to bail. But, it is a significant factor to be taken note of regard being had to the nature of crime in respect of which he has been booked."

6. In the case of **Prabhakar Tewari Vs. State of U.P. and another, 2020 (11) SCC 648**, the Hon'ble Supreme Court has observed that pendency of several criminal cases against an accused may itself cannot be a basis for refusal of bail.

7. In so far as criminal antecedents of the applicant is concerned, it is not the case of the State that applicant might tamper with or otherwise adversely influence the investigation, or that he might intimidate witnesses before or during the trial. The State has also not placed any material that applicant in past attempted to evade the process of law. If the accused is otherwise found to be entitled to bail, he cannot be denied bail only on the ground of criminal history, no exceptional circumstances on basis of criminal antecedents have been shown to deny bail to accused, hence, the Court does not feel it proper to deny bail to the applicant just on the ground that he had criminal antecedent.

8. The principle that Bail is a rule and Jail is an exception has been well recognised by Apex Court more specifically on the touch stone of Article 21 of the Constitution. The said principle has been reiterated by the Apex Court in **Satyendra Kumar Antil Vs Central Bureau of Investigation and another, 2022 (10) SCC 51**. Learned AGA has not shown any exceptional circumstances which would warrant denial of bail to the applicant.

9. No material, facts or circumstances has been shown by learned AGA that the accused may tamper with the evidence or witnesses or the accused is of such character that his mere presence at large would intimidate the witnesses or that accused will use his liberty to subvert justice or tamper with the evidence.

10. It is settled principle of law that the object of bail is to secure the attendance of the accused at the trial. No material particulars or

circumstances suggestive of the applicant fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like have been shown by learned AGA for the State.

10A. In the present case, it is to be seen that the Apex Court in the case of **Simarnjit Singh** (supra) has made the following observation:-

"7. We have perused the evidence of PW-7 Hardeep Singh in which he has stated that from the eight bags of poppy husk, two samples of 250 gms each were drawn and converted into 16 parcels. This has been done immediately after the seizure.

8. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case (Supra), it was held thus:

"15. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-

section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure."

9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal 1. This creates a serious doubt about the prosecution's case that substance recovered was a contraband."

11. Learned AGA for the State has not shown any material or circumstances that the accused/applicant is not entitled to bail in larger interests of the public or State.

12. Considering the facts and circumstances of the case, the fact that once it is shown that the provisions of Section 52A of the Act has not been complied with, nature of offence, evidence, complicity of the accused, submissions of learned counsel for the parties and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

13. Let the applicant **Bobby @ Malkhan Singh Yadav** involved in Case Crime No.49 of 2023, under Sections 8/20 of Narcotic Drugs and Psychotropic Substances Act, 1985, Police Station Basrehar, District Etawah, be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to the following conditions:-

- i. The applicant will not tamper with the evidence during the trial.
- ii. The applicant will not pressurize/intimidate the prosecution witness.
- iii. The applicant will appear before the trial court on the date fixed, unless personal presence is exempted and/or the applicant shall make himself available for interrogation by a police officer as and when required.
- iv. The applicant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected.
- v. The applicant shall not directly or indirectly make any 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 to any police officer or tamper with the evidence.

vi. The applicant shall not leave India without the previous permission of the Court.

vii. In the event, the applicant changes his residential address, the applicant shall inform the court concerned about new residential address in writing.

14. In case of breach of any of the above condition, the prosecution shall be at liberty to move bail cancellation application before this Court.

Order Date :- 17.11.2023

S.Prakash