

Court No. - 70

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 30699 of 2023

Applicant :- Sanjay Kumar

Opposite Party :- State of U.P.

Counsel for Applicant :- Rajesh Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Sameer Jain,J.

1. Heard Sri Naveen Kumar, Advocate holding brief of Sri Rajesh Kumar, learned counsel for the applicant and Sri Suresh Bahadur Singh, learned AGA for the State.

2. The instant bail application has been filed seeking release of the applicant on bail in Case Crime No. 1163 of 2021, under Sections 8/20 N.D.P.S. Act, Police Station Vijay Nagar, District Ghaziabad during pendency of the trial.

3. Learned counsel for the applicant submitted that this is second bail application filed on behalf of the applicant. The first bail application of the applicant was dismissed by this Court vide order dated 28.03.2023 passed in Criminal Misc. Bail Application No. 5062 of 2023 and he is pressing the instant second bail application on the ground that at the time of first bail application, the ground of violation of Section 52-A of N.D.P.S. Act could not be taken and further applicant is in jail since 22.08.2021 i.e. for more than two years and till date not even single prosecution witness could be examined.

4. He further submits that from the recovery memo, it reflects that sample was drawn at spot and it has not been drawn before the Magistrate, therefore, it is clear violation of mandatory provision of Section 52-A of N.D.P.S. Act. He placed reliance on the judgments of the Apex Court in the cases of **Simarnjit Singh Vs. State of Punjab 2023 SCC OnLine SC 906**, **Mangilal Vs. The State of U.P. 2023 SCC Online 862** and **Yusuf @ Asif Vs. State 2023 SCC OnLine SC 1328**.

5. He further submits that applicant is in jail since 22.08.2021 i.e. for more than two years and charges could only be framed on 16.09.2022 i.e. after more than a year and till date not even a

single prosecution witness could be examined and on 14.03.2023 trial court also issued Bailable warrants against head constable Durjan Singha and Neeraj Rathi, therefore, it appears that trial of the case is moving with languid pace and right of speedy trial of the applicant has been violated.

6. He placed reliance on the judgement of the Apex Court in the case of **Mohd. Muslim alias Hussain Vs. State (NCT of Delhi) 2023 SCC OnLine SC 352** and submits 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 the accused then this Court can consider this fact while disposing off the bail application. He further submits that applicant is not having any criminal history to his credit.

7. Per contra, learned AGA opposed the prayer for bail and submits that from the possession of applicant huge quantity of 85 Kgs. Ganja was recovered and after considering the entire facts of the case, the first bail application of the applicant was dismissed but could not dispute the fact that at the time of dismissal of first bail application, the fact that there was violation of Section 52-A of N.D.P.S. Act could not be placed and further applicant is in jail for more than two years and till date not even single prosecution witness could be examined and even charges could be framed after more than a year.

8. Learned AGA further could not dispute the fact that against prosecution witnesses, who were police personnels, coercive steps are being taken by the trial court.

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

10. Although, this is second bail application filed on behalf of the applicant and it appears that his first bail application has been dismissed on the ground that from the possession of applicant 85 Kgs. Ganja was recovered, which is commercial quantity but from the perusal of the order dated 28.03.2023 passed on the first bail application of the applicant, it appears that point with regard to violation of Section 52-A of N.D.P.S. could not be discussed.

11. Further, however, law is settled that ground which was available at the time of first bail application, cannot be considered as new and fresh ground but argument of violation of Section 52-A N.D.P.S. Act is legal ground and now as per judgements of the Apex Court, reliance on which placed by learned counsel for the

applicant provisions of Section 52-A of N.D.P.S. Act are mandatory one and even its non compliance may vitiate the trial, therefore, in my view under these circumstances, it can be considered even in second bail application.

12. From the record, it reflects that the sample was drawn at spot and not before the Magistrate, therefore, in view of the recent judgment of the Apex Court **Yusuf @ Asif (supra)** even the trial on the basis of such violation of Section 52-A of N.D.P.S. Act can even be vitiated.

13. Further, from the record it reflects that applicant is not having any criminal history and he is in jail since 22.08.2021 i.e. for more than two years and charges could only be framed against him on 16.09.2022 i.e. after more than a year and till date not even single prosecution witness could be examined and from the order sheet dated 14.03.2023 it appears that coercive measures are being taken against the witnesses, who are police personnels, therefore, it appears that trial of the case is moving with languid pace and fundamental right of speedy trial of the accused has been violated.

14. The Apex Court in the case of **Mohd. Muslim alias Hussain (supra)** categorically observed that Article 21 of the Constitution of India overrides the provision of Section 37 of N.D.P.S. Act and if there is violation of Article 21 of the Constitution of India then even under the provisions of N.D.P.S. Act, bail can be considered.

15. 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 - **Sanjay Kumar** 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 :- 28.10.2023

AK Pandey