

Court No. - 44

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 46334 of 2023

Applicant :- Ganga Prasad

Opposite Party :- State of U.P.

Counsel for Applicant :- Istyak Khan

Counsel for Opposite Party :- G.A.

Hon'ble Pankaj Bhatia,J.

1. Heard learned counsel for the applicant, learned AGA and perused the record.

2. The FIR in question was lodged, alleging that the recovery of 1 Kg. 48 gms. Charas was made from the applicant during search carried out by the police. It was also alleged that the applicant was carrying a polythene bag, in which ten bricks of charas rapped with plastic total weighing 10 Kg. 48 gms. were found. It was also alleged in the FIR that a gazetted officer was called to witness the entire search. It further records that from the each packet a small quantity of charas was taken and after mixing the same 100 gms. of charas was sent for chemical evaluation.

3. Learned counsel for the applicant argues that the recovery was not in accordance with the mandate of Section 50, Section 51 of NDPS Act read with Section 100 Cr.P.C., inasmuch as the Gazetted Officer allegedly who was the witness has not even signed the recovery memo, which is clear from the recovery memo contained in the case diary. He further argues that the applicant is having no criminal history in his credit and he is in custody since 29.8.2023.

4. Learned counsel for the applicant places strong reliance on the judgment of the Supreme Court in the case of ***Mohd Muslim @ Hussain v. State (NCT of Delhi); 2023 LiveLaw (SC) 260 as well as in the case of Rabi Prakash v. The State of Odisha decided in Special Leave to Appeal (Crl.) No(s).4169 of 2023.*** She also places reliance on the order passed by this Court in the case of ***Wahid Ali v. Narcotics Control Burear Lucknow decided in Criminal Misc. Bail Application No.13590 of 2021 on 12.07.2023.***

5. Learned counsel for the applicant further argues that even as per the FSL report, samples were not sent from all the packets

allegedly found in possession of the applicant and only sample was drawn from one of the said packets and thus, the same is not in accordance with the standing orders. She further argues that the samples were not drawn in the presence of the Magistrate, which is a requirement under Section 52A of the NDPS Act and thus, for all the said reasons, the prosecution may not be able to establish the guilt during trial and thus, the applicant should be enlarged on bail.

6. Learned AGA opposes the bail application by arguing that the recoveries were effected and the test of Section 37 of the NDPS Act has to be satisfied.

7. Considering the submissions made at the Bar, on a plain reading of the recovery memo as is evident in the case diary, it is clear that the Gazetted Officer has not signed the recovery memo based upon which the applicant has been charged with the offence in question, thus, the mandate of Section 50 of NDPS Act has not been followed as the search was also conducted in person on the applicant besides the bag which he was carrying. The FSL report also on record indicates that 500 gm was sent only from one of the packets allegedly recovered from the applicant and thus, there is a prima-facie violation of the notification issued providing for the manner of sampling. As admittedly, the samples were not drawn in the presence of the Magistrate, in view of the law laid down in the case of ***Simarnjit Singh v. State of Punjab; 2023 LiveLaw (SC) 570***, there is a prima-facie violation of Section 52A of NDPS Act also. The status report and the order sheet of the Court below indicates that the trial has not even started. It is equally well settled that prolonged incarceration without trial violates the right enshrined under Article 21 of the Constitution of India as explained in the case of Mohd Muslim (supra).

8. Considering all the issues as discussed above, I am of the view that the prosecution may not be able to establish the guilt of the applicant. In view of there being a clear non-compliance of the procedure prescribed under Section 50 & Section 51 of the NDPS Act read with Section 100 Cr.P.C., the first condition of the twin conditions prescribed under Section 37 of NDPS Act stands satisfied. As the applicant has no criminal antecedent, in view of the law laid down in the case of ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr.; (2005) 5 SCC 294***, the second condition of the twin conditions of Section 37 of NDPS Act also stands satisfied.

9. Thus, for all the reasons recorded above, the applicant is entitled to be enlarged on bail. In view thereof, the application is allowed.

10. Let the applicant Ganga Prasad be released on bail in FIR No. 147 of 2023, under Section 8/20 of NDPS Act, P.S. Gwaltoli, District Kanpur Nagar on his furnishing a personal bond with two sureties of the like amount each to the satisfaction of court concerned with the following conditions:

(a) The applicant shall execute a bond to undertake to attend the hearings;

(b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and

(c) 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.

Order Date :- 2.11.2023

Faridul