

Court No. - 27

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 11552 of 2023

Applicant :- Sujit Kumar

Opposite Party :- Union Of India Thru. D.R.I. Lucknow

Counsel for Applicant :- Anil Kumar Sharma

Counsel for Opposite Party :- Digvijay Nath Dubey

Hon'ble Brij Raj Singh,J.

1. Heard Sri Annil Kumar Sharma, learned counsel for the applicant, Sri Digvijay Nath Dubey, learned counsel for opposite party Union of India, DRI, Lucknow, and perused record.
2. This first application for bail under Section 439 CrPC is moved with prayer for bail to applicant in DRI Case No.08/2022 under Section 8/20/25/27A/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS), PS Challaned by D.R.I., Gomti Nagar, district Lucknow.
3. It has been submitted by the learned counsel for the applicant that the alleged recovery of Ganja pertaining to 903.500 kg., is shown from the possession of co-accused Bapina Gouda and Ajit Kumar Naik but the same is shown neither to have been recovered from the possession of the applicant nor the applicant is career of the contraband substance.
4. As per prosecution case, two named accused persons Bapina Gouda and Ajit Kumar Naik were arrested at the place of occurrence on 30.5.2022 along with Truck No.OD-07-AC-0286 by the team of DRI Department, Lucknow at Sri Mahesh Prasad Degree College, National Highway, 24-B, Mohanlalganj, Lucknow-227305 (U.P.). The said truck was coming to Lucknow from Rae Bareli side and

the truck driver was Bapina Gouda and other person who was sitting in the truck, was identified as Ajit Kuar Naik.

5. It is relevant to mention here that both accused persons who were arrested on spot, did not take the name of the applicant nor any statement was given against the applicant by them. In their confessional statement, they stated that the said truck was belonging to Balaji Svain Transport and contraband substance was uploaded by the owner of the Balaji Svain Transport. At the place of recovery, no incriminating substance recovered from the co-accused which could indicate that the applicant was involved in any manner.
6. It is submitted that surprisingly, after four months in the night of 2/3.10.2022, the DRI Officer in other case bearing DRI Case No.7 of 2019 under Section 8/20/23/25/27/28/29 of NDPS Act, PS Challaned by DRI, Gomti Nagar, district Lucknow (in the said case, the applicant has been released on bail) and at the time of arrest, two mobile phones bearing Mobile Phone No.7889106729 and 8709937752 of the applicant have been recovered. Only on the basis of confessional statement, the applicant has been made accused in the present case and without any incriminating evidence, the DRI has planted the case to the extent that the recovered Ganja from the co-accused was to be delivered to the applicant.
7. It is relevant to mention here that the conversation of the aforesaid two mobile phone numbers has been investigated by the Investigating Officer and as per call detail, there is no conversation between the applicant and other two co-accused i.e. co-accused Bapina Gouda and Ajit Kumar Naik who were arrested on spot. It has been submitted that the applicant has been implicated in the present case only on the basis of confessional statement and the applicant has been made accused on the basis of confessional statement and recovery of two other mobile phone No. 8260583846

and 9083713039. It is further submitted that said two mobiles are not registered in the name of the applicant and alleged conversation is not between the co-accused and applicant rather, the conversation is between Basant and Sharat Chandra Gouda. It is mentioned that Basant and Sharat Chandra Gouda are not the accused and the location of applicant is found in Punjab as per call detail.

8. Learned counsel for the applicant has submitted that no independent witness is there to support the prosecution case because the alleged witness namely, Raju Pal, Shani Kumar shown in the recovery memo, could not be traced during the course of investigation, therefore, their statements were not recorded which clearly indicates that the allegation levelled against the applicant are incorrect and concocted. He has submitted that prima facie, there is no case made out against the applicant to disentitle him to grant bail in view of provisions of Section 437 CrPC. It is submitted that there is non-compliance of Section 100 and 165 CrPC. He has further submitted that the applicant is not previous convict and he has criminal history of one case in which he has been acquitted. He has further submitted that the applicant has been implicated in the DRI Case No.7 of 2019 under Section 8/20/23/25/27/28/29 of NDPS Act, PS Challed by DRI, Gomti Nagar, district Lucknow and he was again implicated in three other cases relating to DRI Case No.5 of 2022 under Section 8/20/25/27A/29 of NDPS Act, PS DRI district Lucknow. DRI Case No.11 of 2022 under Section 8/20/25/27A/29 of NDPS Act, PS DRI district Lucknow and DRI Case No.8 of 2022 under Section 8/20/25/27A/29 of NDPS Act, PS DRI district Lucknow (present case). It is submitted that in the aforesaid cases, the applicant has been made accused on the basis of confessional statement of co-accused. Learned counsel for the applicant has submitted that only on the basis of confessional statement the applicant has been made accused which is not admissible under

Section 25 of Evidence Act. He has submitted that the applicant is in Jail since 2.10.2022.

9. Learned counsel for the applicant has relied upon the judgment of Hon'ble Supreme Court in the case of **Balwinder Singh (Binda). Vs. The Narcotics Control Bureau: Crl. Appeal No.1136 of 2014, along with Crl. Appeal No.1933 of 2014 (Satnam Singh. Vs. The Narcotics Control Bureau. decided on 22.9.2023.** The relevant par-9 and 10 of the said judgment is quoted below:-

"9. After a detailed examination of the legal position in the light of the provisions of the NDPS Act, vis-à-vis revenue Statutes like the Customs Act, 1962 and the Central Excise Act, 1944 as also the Cr.P.C and Section 25 of the Evidence Act, the majority decision authored by Justice Nariman, arrived at the following conclusion:

“155. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any non obstante clause doing away with Section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.

156. The judgment in *Kanhaiyalal* [*Kanhaiyalal v. Union of India*, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474] then goes on to follow *Raj Kumar Karwal* [*Raj Kumar Karwal v. Union of India*, (1990) 2 SCC 409 : 1990 SCC (Cri) 330] in paras 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.

157. On the other hand, for the reasons given by us in this judgment, the judgments of *Noor Aga* [*Noor Aga v. State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748] and *Nirmal Singh Pehlwan v. Inspector, Customs* [*Nirmal Singh Pehlwan v. Inspector, Customs*, (2011) 12 SCC 298 : (2012) 1 SCC (Cri) 555] are correct in law.

158. We answer the reference by stating:

158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.” [emphasis laid] 10. In view of the aforesaid decision that declares that any confessional statement made by an accused to an officer invested with the powers under Section 53 of the NDPS Act, is barred for the reason that such officers are “police officers” within the meaning of Section 25 of the Evidence Act, a statement made by an accused and recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

(emphasis laid)

10. Learned counsel for the applicant has submitted that on the basis of the aforesaid judgment, the confessional statements made, are not admissible and the applicant cannot be made accused on the basis of confessional statements; otherwise, there is no any other incriminating evidence.
11. Learned counsel for the applicant has further relied upon the judgment of Hon'ble Supreme Court in the case of **Tofan Singh. Vs. State of Tamil Nadu: MANU/SC/0797/2020**. Relevant para 152 and 155 of the said judgment are quoted below:-

"152. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under section 42 or section 53 can be the basis to convict a person under the NDPS Act, without any non obstante clause doing away with section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20 (3) and 21 of the Constitution of India.

155. We answer the reference by stating:

- (i) That the officers who are invested with powers under section 53 of the NDPS Act are “police officers” within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.
- (ii) That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

12. Learned counsel for the applicant has further relied upon the judgment of Hon'ble Supreme Court in the case of **Union of India. Vs. Rattan Mallik @ Habul: 2009 (1) SCC (Cri) 831**. Relevant para-12, 13 and 14 of the said judgment are quoted below:-

"13. It is plain from a bare reading of the non-obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPA Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari²] Thus, recording of satisfaction on both the

aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."
13. Learned counsel for the applicant has lastly submitted that on the similar footing in another case, the same accused (the present applicant) has been granted bail by this Court by a detailed order in Crl. Misc. Bail Application No.8690 of 2023 on 5.9.2023. He has submitted that said case was also imposed by the DRI on the confessional statement and this Court passed the order granting bail, a copy of the bail order is annexed as Annexure No.1 to the rejoinder affidavit.
14. On the other hand, Sri Digvijay Nath Dubey, learned counsel for the DRI has opposed the bail and has submitted that the accused Sujeet Kumar had made confessional statement and he is the person who had to receive the contraband substance. He has submitted that the applicant is fully involved in the smuggling of ganja and in his voluntary statement dated 2/3.10.2022 tendered under Section 67 of the NDPS Act, 1985, he had confessed that he was the buyer of Ganja in DRI, LZU Case No.8 of 2022 dated 30.5.2022 (related to smuggling of 903.500 kg Ganja) DRI LZU Case No.05/2022 dated 9.4.2022 (related to smuggling of 1316.52 kg Ganja and DRI LZU Case

No.11/2022 dated 2.7.2022 (related to smuggling of 572.970 kg. Ganja and he also provided other details related to all the three cases. All these details were found correct during the investigation of all these cases, after which the complaint against the accused Sujeet Kumar has been filed in the Hon'ble Court along with all the related documents in these three cases. He is also an accused in DRI LZU Case No.7 of 2019 dated 3.5.2019 related to seizure of 555.88 kg Ganja. Further, the SHO PS Madhuban, district Motihari, Bihar in his report dated 27.3.2023 informed that case No.147 of 2017 dated 13.6.2017 against Sujeet Kumar son of Yogendra Prasad Village Kothia, PS Madhuban, district East Champaran has been registered under Section 188 of IPC and Section 20 (b), 22, 23 and 24 of NDPS Act and the chargesheet number of the said case is 353 of 2017 dated 26.12.2017. Therefore, the submission of the accused Sujeet Kumar that he is innocent is completely false hence Sujeet Kumar is a habitual offender.

15. Sri Digvijay Nath Dubey learned counsel for DRI has further submitted that according to the available documents and the complaint filed in the case, the role of the accused Sujeet Kumar in DRI LZU Case No.8 of 2022 dated 30.5.2022 was revealed during the voluntary statement dated 2/3.10.2022 of accused Sujeet Kumar himself, which was found to be correct as per the facts gathered during the investigation of the case. Consequently, the complaint against the accused Sujeet Kumar has been filed in the Hon'ble Court along with all the related documents. As per the complaint filed in the instant case, there is sufficient evidence in the complaint to prove the role of accused Sujeet Kumar. From the analysis of the call records and locations of all mobile numbers of Sujeet Kumar revealed in the instant case and other related cases of DRI, LZU, which

have been mentioned in the supplementary complaint, it is clearly evident that accused Sujeet Kumar used to run a complete nexus related to the sale and purchase of Ganja and Sujeet Kumar was its mastermind. It is very important to mentioned here that in this whole nexus, Sujeet Kumar and many other people used to get SIM cards issued in the name of other people and used them for their illegal work and most of their illegal work is done in cash to escape the law. But during the investigation of the case, it came to light that all the mobile numbers of accused Sujeet Kumar that have been investigated are inter connected and all those numbers have been used to talk with other alleged smugglers in the said case and also to make calls to other numbers being used by accused Sujeet Kumar.

16. Sri Digvijay Nath Dubey learned counsel for the DRI has further relied upon he judgment in the case of **Union of India. Vs. Ram Samujh: 1999 (39) ACC 643** to support his argument.
17. Thus, having heard learned counsel for both the parties, it is relevant to note that on the basis of confessional statement only, the applicant has been made accused and the statement recorded under Section 67 of NDPS Act is not admissible which is supported by the judgment of Balwinder Singh and Tofan Singh (supra). The other submission is also very important that the statement of two co-accused does not indicate that the applicant was involved in commission of crime. Nothing incriminating is found in possession of co-accused against the applicant and the call details of two registered mobile numbers do not indicate that there was any conversation between the applicant and the other two co-

accused. It is also evident that there is no conversation of the applicant with truck owner Balaji Svain Transport. Further argument of the learned counsel for the applicant is that the applicant has also been granted bail in DRI Case No.7 of 2019 under Section 8/20/23/25/27/28/29 of NDPS Act, PS DRI, Gomti Nagar, district Lucknow. The said case was also based on confessional statement of applicant and the Court granted bail on 5.9.2023; thus, twin condition as provided under Section 37 (1) (b) of NDPS Act is satisfied in view of law laid down by the Hon'ble Supreme Court in the case of Rattan Mallik (supra).

18. In view of the discussions and observations made hereinabove, it is a fit case for bail. The application for bail is allowed.
19. Let the accused/applicant-Sujit Kumar involved in above-mentioned case, be released on bail on his furnishing a personal bond with two sureties in the like amount to the satisfaction of the court concerned subject to following conditions:-
 - (i) The applicant shall not tamper with the prosecution evidence by intimidating/pressurizing the witnesses, during the investigation or trial.
 - (ii) The applicant shall cooperate in the trial sincerely without seeking any adjournment.
 - (iii) Applicant shall deposit his passport with the trial court and if he is not having any passport issued in his name, he shall file an affidavit in this regard before the trial court.
 - (iv) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail and his involvement in any subsequent crime would be a sufficient ground for the trial court to cancel the facility of bail granted by this Court.
20. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

21. Identity, status and residence proof of the applicant and sureties be verified by the Court concerned before the bonds are accepted.
22. Observations made herein-above by this court are only for the purpose of disposal of this bail application and shall not be construed as an expression of this Court on the merits of the case.

Order Date :- 18.12.2023

Rajneesh JR-PS)