

Court No. - 27

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 11600 of 2023

Applicant :- Raj Kumar Gupta

Opposite Party :- Union Of India Thru. Narcotics Control Bureau Lko

Counsel for Applicant :- Prateek Shrivastava, Amar Singh

Counsel for Opposite Party :- Akhilesh Kumar Awasthi

Hon'ble Brij Raj Singh, J.

1. Counter affidavit filed on behalf of Union of India and rejoinder affidavit filed in behalf of the applicant, are taken on record.

2. Heard learned counsel for the applicant and Sri Akhilesh Kumar Awasthi learned counsel for Union of India.

3. The present second bail application has been filed by the applicant with a prayer to enlarge him on bail in Case Crime No.07 of 2021 under sections 8, 20, 29 and 63 of the N.D.P.S. Act, Police Station N.C.B. Lucknow District Lucknow.

4. This is second bail application of the applicant as the first bail application bearing Criminal Misc. Bail Application No. 5886 of 2022 was rejected by this Court vide order dated 26.04.2022 and after rejection of first bail application of the applicant, co-accused Shamsbad has been granted bail vide order dated 27.07.2023 passed in Crl. Mis. Bail Application No.5597 of 2021.

5. Learned counsel for the applicant has submitted that co-accused Rashid @ Lallu has also been granted bail vide order dated 21.07.2023 passed in Criminal Misc. Bail Application No.4248 of 2021 which reads as under:-

"1. Heard learned counsel for the applicant, Shri Akhilesh Kumar Awasthi, learned counsel for the Narcotics Control Bureau Mahanagar, Lucknow.

2. The first bail application has been filed by the applicant seeking enlargement on bail in N.C.B. Crime No.07 of

2021 under sections 08/20/29 of Narcotic Drugs and Psychotropic Substances Act, P.S. N.C.B. Lucknow, District Lucknow.

3. It was alleged in the application that an FIR was registered alleging that an information was received that two vehicles Nos.UP44AK8886 (Scorpio) and MP09CG7896 (Indica) which were allegedly carrying the drugs and psychotropic substances. On apprehending, the four persons were found occupying the said two vehicles. It is said that an option was given to the said persons of getting the search conducted before a Gazetted Officer or a Magistrate and on being given the said option, they exercised the option and stated that they want to be searched in the presence of a Magistrate or a Gazetted Officer. In terms of the said option exercised by the accused, one Lal Chandra Chaudhary was contacted. On 13.02.2021, the said Lal Chandra Chaudhary, a Gazetted Officer, reached on the spot and in his presence search was carried out on the person of the said two accused person and nothing incriminating was found on their person. Subsequently, in the vehicle No. MP09CG7896 (Indica), on which the driver Mohammad Tariq was sitting and adjacent to him, Rashid @ Lallu (applicant) was sitting, was inspected and in the boot of the said car, special space was created in which a dark green colour leafy substance was kept. A part of the said substance was extracted and was inspected with the D.D. Kit, and on such inspection, it was found to be ganja. Similarly in respect of car No.UP44AK8886 (Scorpio) on which at the driving seat one Rajkumar Gupta was sitting and on search behind the middle seat, a dark green colour leafy substance was stored in a plastic bag. A part of the said substance was extracted and inspected through a D.D. kit and was also found to be ganja. In terms of the said, ganja kept in vehicles was taken down and was weighed. On weighing, in vehicle No. MP09CG7896 (Indica), 50 kg of ganja was kept whereas in the other vehicle No.UP44AK8886 (Scorpio), 45 kg of ganja was found. Both were named as L1 and L2. The total weight of ganja of both the bags was 95 kg. It is stated that on account of bad weather and inadequate light on the spot, the entire seized ganja was brought to the Police Station-Chanda and it was seized there and an inscription was done through marker pen and signature were obtained from the inspection team. The registration and insurance papers from both the vehicles were also seen and confiscated under Section 63 of N.D.P.S. Act. It

was also recorded that the sample shall be drawn in the presence of the competent court. It was also recorded that the entire proceeding started from 13.02.2021 at about 8:30 P.M. till 14.02.2021 at about 01.15 A.M.

4. The counsel for the applicant argues that the applicant had gone to the relatives for his brother's wedding in which the applicants were shown to be sitting and the applicant had no knowledge of the recovery and he was not aware of any ganja being transported in the vehicle in question. It is also argued that the applicant serves in Saudi Arabia and came back in September 2020 to attend his brother's wedding. It is argued that based upon the said recovery, the applicant is in jail since 14.02.2021. It is also stated that the applicant has no criminal antecedent.

5. In pursuance to the said, the counsel for the applicant further argues that the applicant has been charged for the commission of offence under Section 8/20/29/63 of the N.D.P.S. Act. He next argues that the recovery memo through which the entire proceedings were initiated was not signed by the Gazetted Officer but as per the seizure memo, the Gazetted Officer was summoned and in whose presence the search was allegedly carried out. He further argues that there was prima facie non compliance of Section 50 of the Act in as much as the seizure memo was not signed by the Gazetted Officer. He further argues that since the detention of the applicant, trial has not proceeded and in support of the said submission, the order of the trial court has been produced which records that only evidence of one Surendra Kumar has been recorded and most of the order sheet records that the prosecution witnesses are absent. He thus argues that the trial has also not proceeded which by itself violates the right of the applicant under Article 21 of the Constitution of India. He places reliance of judgment of the Hon'ble Supreme Court in **Rabi Prakash vs. The State of Odisha** decided in the **Special Leave to Appeal (Crl.) No(s). 4169 of 2023**.

6. The counsel for the respondent, Shri Akhilesh Kumar Awasthi on the other hand has filed counter affidavit and argues that the bail application should be rejected as the recovery was done in accordance with law and voluntary statement was also recorded under Section 67 of the N.D.P.S. Act. He further places reliance on the Section 50 of the N.D.P.S. Act to argue that there is the presumption against the accused which has to be discharged by the

accused. He also relied upon the mandate of Section 37 of the Act(1)(b)(ii) of the N.D.P.S. Act to argue that it is incumbent that the twin conditions specified therein should be satisfied before the bail is granted, in the counter affidavit although there is a reference of Chemical Examination Report, however, the same is not enclosed as Annexure No.CA-7. He thus argues that the bail application should be rejected.

7. The admitted facts in between the parties are that the recovery memo was not signed by the Gazetted Officer and the applicant has no criminal antecedent.

8. This Court while deciding **CRIMINAL MISC. BAIL APPLICATION No. - 4248 of 2021** in the case of **Wahid Ali vs. N.C.B.** decided on 12.07.2023, on similar grounds has extensively considered the scope of Section 50 of the Act read with Section 51 and the mandate of Section 100 CrPC, to hold that on a reading of the said provision, it is incumbent that the witnesses to the recovery, in the present case Gazetted Officer, should necessarily affix his signatures. This Court also held that the entire gamut of allegations leveled by the respondent is of 'illegal possession' which is prohibited under Section 8 of the Act and is punishable under the Act. This Court had expressed its view that the foundation of 'illegal possession' is to be established by following the procedure as prescribed under Chapter V of the N.D.P.S. Act.

9. It is also clearly well settled that Section 37 of the Act and the twin conditions have to be necessarily considered by the court while deciding the bail application. In the present case, the scope of twin conditions specified in Section 37 have been specifically considered by the Hon'ble Supreme Court in the case of **Mohd Muslim @ Hussain vs. State (NCT of Delhi)** reported in **2023 LiveLaw (SC) 260** wherein the Hon'ble Apex Court has explained the scope of twin conditions of Section 37 as under:-

"18. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is "not guilty of such offence" and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections

436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws – be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading,

which does not call for meticulous examination of the materials collected during investigation (as held in Union of India vs. Ratan Malik). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having 19 (2009) 2 SCC 624 regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail. "

10. In the present case clearly the recovery memo was not signed by the Gazetted Officer and thus prima facie the mandate of Section 50 of the Act has been violated and thus, the prosecution may not be able to prove the guilt solely based upon the possession. The views expressed by this Court are tentative views and based upon prime facie reading of the material on record. It is clarified that these views shall not influence the trial court while deciding the case on merits.

11. In view of my finding that prima facie Section 50 of the act was violated and thus on the said material, it may be difficult for the prosecution to prove the guilt, I am of the view that the first of the two conditions prescribed under Section 37 are satisfied in the present case and I have reasons to believe that the prosecution may not be able to prove the guilt of 'possession' in the absence of a valid order of seizure.

*12. The second condition of the twin conditions prescribed under Section 37 of the Act with regard to the criminal antecedent, it is necessary to note the law laid down and explained by the Hon'ble Supreme Court in the case of **Ranjitsingh Brahmajeetsing Sharma vs. State of Maharashtra and Another** reported in (2005) 5 SCC 294 decided in the **Criminal Appeal No.523 of 2005** wherein the Hon'ble Apex court had recorded that for forming a view that the applicant will not engaged in the similar offence in future, the criminal antecedent is a guiding factor. In the present case as the applicant has no criminal antecedents, I can form a view that applicant if enlarged on bail is not likely to commit any offence.*

13. Having satisfied the twin conditions, as recorded above, the applicant who is in custody and coupled with the fact that the trial is not likely to be completed in the near future and is being delayed at the instance of the prosecution, the applicant who is in jail since 14.02.2021

*and continues in custody for almost two and half years is entitled to be released on bail. Judgment of Supreme Court in the case of **Rabi Prakash vs. The State of Odisha** decided in the case of **Special Leave to Appeal (Crl.) No(s). 4169 of 2023** would also apply with full rigour in the present case. Thus the bail application is allowed."*

6. It has been submitted by learned counsel for the applicant that case of the applicant is at par with the case of co-accused Rashid @ Lallu and Shamshad, who have been granted bail. A detailed bail orders have been passed by the Co-ordinate Bench of this Court while granting the bail of the aforesaid co-accused. Learned counsel for the applicant has submitted that he is adopting the same submission which has been put forth before the co-ordinate Bench in the case of Rashid @ Lallu and Shamshad. It has been submitted by learned counsel for the applicant that the applicant has no previous criminal history and he is in jail 14.02.2021.

7. Sri Akhilesh Kumar Awasthi, learned counsel for Union of India though opposed the prayer for bail but could not dispute the fact that the case of the applicant is at par with the case of co-accused Rashid @ Lallu and Shamshad, who have been granted bail by the Co-ordinate Bench of this Court.

8. Without expressing any opinion on the merits of the case and after hearing learned counsel for the parties and looking into overall facts and circumstances of the case as well as the argument that co-accused Rashid @ Lallu and Shamshad have been granted bail by this Court and the case of the applicant is at par with the case of aforesaid co-accused. While granting the bail of co-accused Rashid @ Lallu the Co-ordinate Bench has passed a detailed order and finding is recorded that prima facie section 50 of the NDPS Act has not been complied with and twin condition mentioned in section 37 of the NDPS Act stands satisfied as such I do not take any other view which has been accepted by the Co-ordinate Bench, therefore, I am of the opinion that the applicant is entitled to be released on bail.

9. Let the applicant, namely, **Raj Kumar Gupta**, be released on bail in the above case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Court concerned with the following conditions :-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

Order Date :- 27.10.2023

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