Court No. - 14

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 12805 of 2023

Applicant :- Vivek Kumar Singh
Opposite Party :- State Of U.P Thru. Secy. Deptt. Home Civil Secrt. Lko.
Counsel for Applicant :- Ravindra Shukla
Counsel for Opposite Party :- G.A.

Hon'ble Mohd. Faiz Alam Khan,J.

1. Rejoinder affidavit filed on behalf of the applicant is taken on record.

2. Heard Shri Ravindra Shukla, learned counsel for the accused-applicant as well as learned A.G.A. for the State and perused the record.

3. This bail application has been moved by the accused/applicant- **Vivek Kumar Singh** for grant of bail, in Case Crime No.349 of 2023, under Sections 8/20/25/29/60 of the Narcotic Drugs & Psychotropic Substances Act, Police Station Kotwali Nagar, District Sultanpur, during trial.

4. Learned counsel for the accused-applicant while pressing the bail application submits that the applicant has been falsely implicated in this case and no contraband as claimed by the prosecution has been recovered from the possession of the applicant.

5. It is further submitted that the case of the prosecution is to the tune that on the basis of prior information, a Swift Dzire car was intercepted and on the search of the same, 40.220kg of ganja is recovered from a secret compartment made below the rear seat of the vehicle and the said car was being driven by driver Chandra Prakash Singh and one Arvind Yadav as well as applicant were found sitting in the same.

6. Highlighting the above facts, it is vehemently submitted that admittedly the recovery has been shown from a private vehicle owned by one Ajay Pandey and thus Section 42 of the N.D.P.S. Act would be applicable, however, the information received with regard to the transportation of the contraband has not been reduced in writing either before, during or after arrest of the applicant or recovery, thus mandatory provisions of Section 42

has been violated.

7. It is also submitted that the place from where the alleged arrest or recovery has been made is a busy place and in all probability independent public witness would be available, however, no serious effort appears to have been made for procurement of the same and thus recovery as well as arrest is in a shadow of doubt in absence of independent public witness.

8. It is further submitted that Section 52A of the N.D.P.S. Act has been patently violated and also the guidelines issued in the year 1989 by the Ministry of Finance, Department of Revenue with regard to the collection of sample as the sample is shown to have been collected at the spot and the same has not been collected before a magistrate, thus Section 52A of the N.D.P.S. Act has been violated and arrest and recovery has become vitiated.

9. It is also submitted that the specimen is shown to have been collected on 20.04.2023 (at the time of alleged arrest and recovery), however, the specimen could only be sent to the forensic lab on 26.04.2023 and the link evidence is not stated in the case diary with regard to safe custody of the sample. It is further submitted that even if the story of the prosecution is believed for the sake of argument, nothing has been stated either in the recovery memo or in the letter, whereby the specimen has been sent to the forensic lab as to whether the whole contents allegedly recovered from the applicant and other accused persons was in the shape of flowering of fruiting tops of the cannabis plant and in absence of the same, the whole contraband may not be deemed ganja punishable under N.D.P.S. Act.

10. Highlighting the above factual matrix, it is vehemently submitted by learned counsel for the applicant that under Section 2(iii)(b) of the N.D.P.S. Act, ganja has been defined as the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) and there is no description in the arrest memo/recovery memo to show as to whether the whole stuff allegedly recovered from the possession of the applicant could be termed as 'Ganja' punishable under the N.D.P.S. Act.

11. It is further submitted that merely a passenger in a car, applicant was not in a conscious possession of the same more so when the contraband has been recovered from a compartment specifically made for this purpose, which could only be known to the driver or the owner of the vehicle.

12. It is also submitted that the applicant is in jail in this case since 21.04.2023 and he is not having any criminal history, charge-sheet in this case has already been submitted and there is no apprehension that after being released on bail he may flee from the course of law or may otherwise misuse the liberty. Criminal history of four cases has been adequately explained and in all the four cases, the applicant has been granted bail by competent criminal courts.

13. Learned A.G.A., however, opposes the prayer of bail of the applicant on the ground that commercial quantity of ganja i.e. 40.220kg has been recovered from the vehicle, wherein the applicant was found sitting and thus the twin conditions as enumerated under Section 37(1)(b) of the N.D.P.S. Act would attract in this case and therefore, the applicant is not entitled to be released on bail.

14. Having heard learned counsel for the parties and having perused the record, it appears that the allegations against the applicant are to the tune that 40.220 of ganja has been recovered from the vehicle, wherein the applicant was found sitting along with other two accused persons. The applicant was not driver nor the owner of the vehicle. It appears to be an admitted fact that the ganja was concealed in the vehicle in a secret compartment specifically made for this purpose and submission in this regard is that this modification of car could only be in the knowledge of the driver or the owner of the vehicle and thus the applicant may not be said to be in conscious possession of the contraband. Various other submissions have been raised by learned counsel for the applicant in order to show that mandatory provisions of Section 42 and 52A of the N.D.P.S. Act as well as the guidelines issued in this regard by the Ministry of Finance, Department of Revenue in the year 1989 pertaining to the collection of the sample have been violated, however, the same may better be appreciated by the trial court after providing an opportunity to lead the evidence to the parties. What is transpired at this stage is that 40.220kg of ganja is shown to have been recovered from a vehicle and not from the possession of the applicant and the same was concealed in a secret compartment of the vehicle, which prima facie could only be known to the driver or the owner of the vehicle. This factual position, in the considered opinion of this Court, is sufficient enough to draw satisfaction as provided under Section 37(1)(b) of the N.D.P.S. Act and thus for the reasons mentioned herein-before, the twin conditions as enumerated under Section 37(1)(b) of the N.D.P.S. Act stands satisfied. Applicant is in jail in this case since 21.04.2023 without any criminal history. The presence of the applicant may be secured before the trial court by placing adequate

conditions/restrictions.

15. Having regard to the overall facts and circumstances of the case and keeping in view the nature of the offence, evidence, complicity of the accused, severity of punishment, submissions of the learned counsel for the parties and without expressing any opinion on the merits of the case, I am of the considered view that applicant has made out a case for bail. The bail application is thus **allowed**.

16. Let the accused/applicant- **Vivek Kumar Singh** 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) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(iv). 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;

(v). In case, the applicant misuses the liberty of bail 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; and

(vi) 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 default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

17. In case of breach of any of the above conditions, it shall be

a ground for cancellation of bail.

18. Identity, status and residence proof of the applicant and sureties be verified by the Court concerned before the bonds are accepted.

19. 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 on the merits of the case.

Order Date :- 7.12.2023
Anupam S/-

Digitally signed by :-
ANUPAM SINGH PATEL
High Court of Judicature at Allahabad,
Lucknow Bench