Court No. - 14

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 13138 of 2023

Applicant :- Mainaz Khan
Opposite Party :- State Of U.P Thru. Prin. Secy. Home Deptt. Lko.
Counsel for Applicant :- Afzal Hasan
Counsel for Opposite Party :- G.A.

Hon'ble Mohd. Faiz Alam Khan,J.

1. Learned A.G.A. informs that he has procured complete instructions in the matter including upto date/complete case diary and charge sheet has also been submitted.

2. Heard 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- **Mainaz Khan** for grant of bail, in Case Crime No. 0614 of 2023, under Section 8/20 N.D.P.S. Act, Police Station Kotwali Nanpara, District Bahraich, 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 and the whole story, as shown by the prosecution in the F.I.R./recovery-memo is false, concocted and could not be believed.

5. It is further submitted that it appears to be an admitted case of the prosecution that police party was having prior information of the arrival of the applicant with contraband, however, either before, during or after the alleged recovery or arrest, the information given by the informer has not been reduced into writing and, thus, the mandatory provisions as contained under Section 42 of the N.D.P.S. Act has not been followed.

6. It is further submitted that the manner in which Section 50 of the N.D.P.S. Act is shown to have been complied would itself demonstrate that the story of search before the circle officer of the police, who is claimed to be a gazetted officer is false and concocted, as he (circle officer of the police) is not the

signatory of the recovery-memo.

7. It is further submitted that the police party itself admitted that the place from where the applicant and other co-accused persons were arrested is a busy place and motor vehicle checking was being done by the police party, however, no attempt has been made by the police party to procure independent public witness. Thus, the recovery as well as the arrest has become doubtful in absence of any independent public witness.

8. It is next submitted that even if the case of the prosecution is believed as it is, 1 kg. of 'charas' is shown to have been recovered from the possession of the applicant and as per the definition of the commercial quantity as defined under Section 2(viia) of the N.D.P.S. Act, the same would be the quantity greater than the quantity specified by the Central Government by notification in the official gazette and in the schedule appended with the N.D.P.S. Act, 1 kg. charas has been shown as the minimum commercial quantity and, thus, any quantity of 'charas', which is more than 1 kg. could only be deemed as 'commercial quantity'.

9. It is further submitted that the applicant is in jail in this case since 01.10.2023. Criminal history of one case pertaining to the N.D.P.S. Act has been alleged against the applicant and in that case he has been granted bail by a co-ordinate Bench of this Court, vide order dated 07.12.2021 passed in Bail No. 10407 of 2021 and copy of that bail order has been placed at Page No.44 to the bail application. Charge sheet in this case has 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.

10. It is also submitted that the sample, as shown in the recovery-memo, has not been taken in compliance of the guidelines issued by the circular of the Department of Revenue, Ministry of Finance of the year 1989 and there is vacuum in the link evidence with regard to the safe custody of the sample and, thus, the mandatory provisions with regard to the taking of samples, its preservation have been violated.

11. Learned A.G.A., however, opposes the prayer of bail of the applicant on the ground that 1 kg. of 'charas' has been recovered from the possession of the applicant and having regard to the quantity of 'charas' recovered from the possession of the applicant, he is not entitled to be released on bail.

12. Having heard learned counsel for the parties and having

perused the record, it is reflected that applicant is shown to have been arrested while possessing 1 kg. 'charas'. The minimum commercial quantity of 'charas' starts from 1 kg. Having regard to the definition of the commercial quantity contained under Section 2(vii-a) of the N.D.P.S. Act, any quantity which is more than the minimum commercial quantity would be deemed as commercial quantity. Thus, 1 kg. of 'charas' shown to have been recovered from the applicant is a quantity, which is lesser than the commercial quantity and, therefore, the twin conditions, as enumerated under Section 37(1)(b) of the N.D.P.S. Act would not attract in this case. Various submissions have been raised by learned counsel for the applicant in order to show that the arrest and recovery of contraband is highly doubtful in absence of independent public witnesses, non-compliance of Section 42 and 52-A of the N.D.P.S. Act. Applicant is in jail in this case since 01.10.2023. Criminal history of one case pertaining to the N.D.P.S. Act has been adequately explained. Charge sheet in this case has already been submitted and the presence of the applicant may be secured before the trial court by placing adequate conditions/restrictions.

13. 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**.

14. Let the accused/applicant- **Mainaz Khan** 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.

15. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

16. Identity, status and residence proof of the applicant and

sureties be verified by the Court concerned before the bonds are accepted.

17. 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 :- 7.11.2023
Praveen

Digitally signed by :-
PRAVEEN KUMAR
High Court of Judicature at Allahabad,
Lucknow Bench