Court No. - 11

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 468 of 2024

Applicant :- Abhishek Mishra
Opposite Party :- Union Of India Thru. Central Bureau Of Narcotics Lko.
Counsel for Applicant :- Neeraj Kumar Mishra,Neeraj Singh
Counsel for Opposite Party :- S M Singh Royekwar

Hon'ble Rajesh Singh Chauhan,J.

1. Heard Sri Neeraj Singh, learned counsel for the applicant and Shri S.M. Singh Royekwar, learned counsel for the Union of India.

2. As per learned counsel for the applicant, the present applicant is in jail since 07.10.2023 in Criminal Case/Case Crime No.03 of 2023, under Sections 8/22/27A/29 of Narcotic Drugs and Psychotropic Substances Act, 1985, Police Station– N.C.B., District– Lucknow.

3. Learned counsel for the applicant has submitted that the present applicant has been falsely implicated in the case as he has not committed any offence as alleged. As per the prosecution story so narrated in the Panchnama/ Recovery Memo on 08.09.2023 at about 8:00 P.M., a secret information was received in the office of Deputy Narcotics Commissioner, Lucknow, which was reduced in writing on a prescribed format CBN-1, which is annexed as Annexure No.C.A.-1 of the counter affidavit. As per the information on 08.09.2023, a large consignment of NRX drugs i.e. Alprazolam, Tramadol & Buprenorphine tablets, were without bills and necessary documents were under shipment from Rajasthan to Lucknow through Trackon Courier Service having Docket

No.500281308647 in the name of a fake medical firm.

4. Learned counsel has further submitted that in the evening, the delivery boy, namely, Mr. Anurag Chaurasia came back with the said undelivered consignment as the address of the consignee on the consignment was written as "To, Shreenath Medical Agency, Latouche Road, Nazirabad, Hazratganj, Lucknow, Uttar Pradesh". The consignment was opened in the presence of Mr. S.K. Singh, who was the Gazetted Officer, as well as in the presence of the independent witnesses, namely, Mr. Manoj Kumar & Mr. Kishore Sharma (both were the employees of Trackon Courier). After opening the consignment, the substances, which recovered are as follows:

i. Rlam 0.5mg Alprazolam, Tablets 28200 Weight About 0.014.
ii. Tramlax-SR-100mg Tablets 4990, Total weight 0.499 Tramadol HCI 100 mg.
iii. CYPERAMAL-100 Tablets 9990, Total weight 0.999 SR Tramadol HCI SR.
iv. Wellnack- N total tablets 100, Total weight 0.0002 Kgs Buprenorphine 2 mg.
v. Addzen - N, Total tablets 100, Total weight - 0.0002 Kgs. Buprenorphine 2 mg.

5. Learned counsel has further submitted that the consignment/ parcel contains NRX tablets of five different companies but there is only allegation against the present applicant that Rlam 0.5mg Alprazolam, Tablets 28200 Weight About 0.0141 were allegedly purchased/ sent by the Maxkind Pharma Company situated at Jaipur through a company of Gwaliar but it is submitted that the quantity of Rlam 0.5mg Alprazolam, Tablets 28200 Weight About 0.0141 is 14.1 grams, which is non-commercial quantity.

6. Learned counsel has further submitted that the present applicant, courier supplier, is an innocent person. He has no concern with the present offence. The applicant has been falsely implicated in this case on the basis of confession of co-accused person before the NCB officers, there is no evidentiary value of the statement allegedly recorded by the officers of the raiding team, as the same is barred by Article 20 (3) of the Constitution of India, prima facie, no case is made out against the applicant to dis-entitle him for grant of the bail in view of the provisions of sections 37 of the NDPS Act. Further, co-accused Kunal Gupta, having similar role, has been enlarged on bail by this Court vide order dated 29.05.2024 passed in Criminal Misc. Bail Application No.15278 of 2023, therefore, on the basis of principles of party, the present applicant may also be enlarged on bail. The applicant undertakes that he shall cooperate in the trial proceedings and shall not misuse the liberty of bail, if granted by this Court and shall abide by all terms and conditions of the bail order.

7. Learned counsel for the applicant has further submitted that there is no previous criminal history of any kind whatsoever against the present applicant. Therefore, learned counsel for the applicant has stated that in the present case, the present applicant has been implicated only on the basis of confessional statement of the co-accused recorded under Section 67 of NDPS Act, which is not admissible in the trial, in view of law laid down by the Apex Court in re; **Tofan Singh Vs. State of Tamil Nadu, (2013) 16 SCC 31**.

8. Learned counsel for the Union of India has vehemently opposed the aforesaid bail application by submitting that since the item seized is above the commercial quantity, therefore, the present bail application may not be allowed in view of bar

under Section 37 of the NDPS Act. He has further submitted that in the present case, the required legal formality indicated under Section 52-A of the NDPS Act has been followed.

9. Learned counsel for the Union of India has further submitted that the weight of the drugs so shown by the learned counsel for the applicant is not correct inasmuch as total tablets recovered are 28200 tablets is having a weight as 14.1 gm. The total weight of 28200 tablets is approx. 3.450 gm (one tablet weighs around 0.12 gm). Therefore, the recovered psychotropic substance of Alprazolam is above the commercial quantity.

10. However, on that, learned counsel for the applicant has again drawn attention towards Panchnama/ seizure memo showing internal page 3 thereof, wherein it has been indicated that out of total seized item, only one box is having batch number as the batch number of other boxes are not traceable. Therefore, he has submitted that the present applicant may not be implicated for all the boxes.

11. Having heard learned counsel for the parties and having perused the material available on record.

12. So far as rigour of Section 37 of the NDPS Act is concerned, the true intent and interpretation of Section 37 of the Act was considered by the Hon'ble Apex Court in re; **Mohd Muslim @ Hussain vs. State (NCT of Delhi) reported in 2023 Live Law (SC) 260**, to the following effect (paragraphs 18, 19 and 20) :-

"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 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 Malik19). 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."

13. A Division Bench of Hon'ble Supreme Court in **Tofan Singh Vs. State of Tamil Nadu, (2013) 16 SCC 31** while discussing the ratio laid down in decisions of Raj Kumar Karwal Vs. Union of India , (1990) 2 SCC 409 and Kanhiyalal Vs. Union of India, (2008) 4 SCC and certain other judgments observed that the ratio laid down in the case of Kanhiyalal Vs. Union of India (supra) is required to be re-looked and thus,

referred the matter to a Larger Bench. The matter was referred to a Larger Bench of three judges, who culled out following two issues for determination:-

"1. Whether an officer "empowered under Section 42 of the NDPS Act" and/or "the officer empowered under Section 53 of the NDPS Act" are "Police Officers" and therefore, statements 4 of 7 recorded by such officers would be hit by Section 25 of the Evidence Act; and

2. What is the extent, nature, purpose and scope of the power conferred under Section 67 of the NDPS Act available to and exercisable by an officer under Section 42 thereof, and whether power under Section 67 is a power to record confession capable of being used as substantive evidence to convict an accused."

14. The Larger Bench in its judgment has concluded in para 152 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." It was further held that the judgments rendered in Kanhiyalal and Raj Kumar Karwal do not state the correct law and thus overruled. The reference was therefore answered 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 5 of 7 Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

15. Without entering into merits of the issue; considering the arguments of learned counsel for the parties; contents and allegations of the panchnama; the fact that the applicant has been implicated in this case only on the basis of confession of co-accused person under Section 67 of the NDPS Act before the

NCB officers; the quantity of Rlam 0.5mg Alprazolam Tablets of which the weight is to be determined during the course of the trial so Section 37 of the NDPS Act would not be applicable at this stage; the dictum of the Hon'ble Apex Court in re; **Mohd Muslim @ Hussain** (supra) & **Tofan Singh** (supra); the fact that the present applicant is having no prior criminal history, therefore, it may be presumed that he may not be involved in such type of activities subject to final outcome of the trial as the aforesaid fact may be tested and verified during the trial; co-accused Kunal Gupta, having similar role, has been enlarged on bail by this Court and undertaking of the applicant that he shall cooperate in the trial proceedings and shall not misuse the liberty of bail, I find it appropriate to release the applicant on bail.

16. Accordingly, the bail application is **allowed**.

17. Let applicant- Abhishek Mishra be released on bail in the aforesaid criminal case/case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the 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.

(v) The applicant shall not leave India without previous permission of the court.

[Rajesh Singh Chauhan,J.]

Order Date :- 30.5.2024
RBS/-

Digitally signed by :-
RAM BIR SINGH
High Court of Judicature at Allahabad,
Lucknow Bench