

Court No. - 12

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 652 of 2024

Applicant :- Mohd. Aataif

Opposite Party :- State Of U.P Thru. Prin. Secy. Home Civil Secr. Lko.

Counsel for Applicant :- Anil Kumar Pandey

Counsel for Opposite Party :- G.A.

Hon'ble Pankaj Bhatia, J.

1. Heard learned counsel for the applicant, learned AGA and perused the record.
2. The accused-applicant seeks bail in Case Crime No.547 of 2023 under section 8/21 NDPS Act, P.S. Safdarganj, District Barabanki.
3. In terms of the FIR lodged on 01.12.2023 at about 01:45 am, it was alleged that on the basis of a search carried out on the applicant, a bag was seen carried by him from which a powder was recovered, which according to search team, was morphine/smack, when the said powder was weighted, the weight was found to be 590 grams, out of which the sample was drawn.
4. In the light of the said, the contention of the counsel for the applicant is that in terms of the arrest memo, which has been filed as SA-I to the supplementary affidavit, the arrest was shown at 08:45 pm on 30.11.2023 which bears the FIR number also whereas, as per the FIR, the same was registered on 01.12.2023 at about 01:45 am, which clearly is not possible. It is further argued that as per the FIR, the sample was drawn on 30.11.2023, however, the same was sent for analysis on 08.12.2023 as is evident from CA-5 on record. He further argues that the mandate of Section 52-A of the NDPS Act was not followed and he places reliance on the judgment of the Supreme Court in the case of ***Yusuf @ Asif v. State; Criminal Appeal No.3191 of 2023*** decided on ***13.10.2023***. He further argues that the applicant has no criminal history and is in custody since 30.11.2023.
5. Learned AGA opposes the bail application by arguing that as the recovery is more than the commercial quantity, the test of Section 37 is to be satisfied.
6. Instructions have been forwarded by the learned AGA to the effect that the averments that the sister of the applicant is to get married was found to be correct. The said instructions are taken

on record.

7. Considering the fact that the alleged recovery is more than the commercial quantity which is 250 grams in the case of morphine, the test of section 37 is to be satisfied. Section 37 of the NDPS Act is interpreted by the Supreme Court in the case of **Mohd. Muslim @ Hussain vs. State (NCT of Delhi) 2023 Live Law (SC) 260**, to the following effect :

"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.
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8. In the present case, the mention of FIR number in the arrest memo, which was prepared prior in point of time itself points out to the infirmity in the manner in which the proceedings have been drawn up against the applicant, the sending of sample after substantial delay is also an infirmity which is evident from the records, the non following of mandate of Section 52-A and the effect thereof as laid down in the case of ***Yusuf (supra)*** is also present in the present case. Thus, on these three grounds, I can form a view that the prosecution may not be able to establish the offence against the applicant. It is clarified that the said observation is tentative for the purposes of deciding the present bail application.

9. For all the reasons recorded above, the first test is satisfied in favour of the applicant. As the applicant has no criminal history, in view of the law laid down in the case of ***Brahmajeetsing Sharma vs. State of Maharashtra, (2005) 5 SCC 294*** the second of the twin condition also is found to be satisfied in favour of the applicant. Thus, for all the reasoning recorded above, the applicant is entitled for the bail. Thus the bail application is allowed.

10. Let the applicant ***Mohd. Aataif*** be released on bail in aforesaid first information report number subject to his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned with the

following conditions:

- (a) The applicant shall execute a bond to undertake to attend the hearings;
- (b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and
- (c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

Order Date :- 16.4.2024
VNP/-