

Court No. - 12

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 3275 of 2023

Applicant :- Sanjay Singh

Opposite Party :- Narcotics Control Bureau Mahanagar Lko.

Counsel for Applicant :- Sukh Deo Singh, Bal Keshwar Srivastava, Bhupendra Pratap Singh, Gunjan Pandey, Paritosh Shukla, Rishabh Srivastava

Counsel for Opposite Party :- Akhilesh Kumar Awasthi

Hon'ble Pankaj Bhatia, J.

1. Heard Shri Balkeshwar Srivastava, learned counsel for the applicant and Shri A.K. Awasthi, learned counsel for the N.C.B. and perused the record.
2. Supplementary affidavit filed on behalf of the applicant is taken on record.
3. The accused-applicant seeks bail in N.C.B. Crime No.21 of 2022, under Sections 8/20/29 of the N.D.P.S. Act, Police Station N.C.B., District Lucknow.
4. In terms of the complaint filed by the N.C.B., it was alleged that on the basis of the information received, a search was conducted on 22.7.2022 and from the tanker being driven by the applicant, the same was apprehended and thereafter a search was carried out and from the said tanker, allegedly 40 packets of same size, three packets of smaller size and two sacs were recovered from the vehicle in question which was being driven by the applicant. 40 packets which were of similar size marked as P-1 to P-40. and thereafter prima testing and finding the said to be containing ganja, the goods were apprehended. Similarly, from the three packets which were marked as P-41 to P-43. Thus, approximately 43 packets and two

sacs were recovered in all total ganja allegedly stored in the said truck was weighed as 448.722 kg. being driven by the applicant. Out of the said apprehended goods, samples were drawn and the same were sent for analysis. The duplicates of the samples were kept. In the analysis of the samples, the same was found tested as ganja.

5. In the light of the above as complaint in the complaint, learned counsel for the applicant has argued that the recovery was not effected in the presence of any independent witness. he further argued that the applicant was appointed as driver only six months' ago and even as per the statement, truck in question was taken and was delivered to him after some time, as such the according to him, the applicant cannot said to be in conscious possession of the alleged goods allegedly stored in the tanker in question. He next argued that the manner of sampling as prescribed under Section 52-A of the N.D.P.S. Act read with Notification dated 23.12.2022 issued by the Department falls short of the specific requirements.

6. Learned counsel for the applicant has drawn my attention to Chapter III of the Notification dated 23.12.2022 which prescribes the manner of sampling. Based upon paragraph 9 of the said Notification dated 23.12.2022, it is argued that the sampling has to be done in the presence of the magistrate and the same is to be certified by the magistrate in accordance with the provisions of the said notification. He further argued that on the basis of the material based upon the counter affidavit that although it is indicated that samplings were drawn in the presence of the magistrate, however, there is no certification. There is no photography of the process of sampling as prescribed under the rules, as such the same cannot be said to be a sampling as

prescribed in the Notification of the year 2022 read with Section 52-A of the N.D.P.S. Act.

7. He further argued that the co accused have been enlarged on bail, although he does not claim parity with the co accused as no recovery was effected from the co accused and they were implicated with the offence in question based upon the names of the said accused disclosed in the statement recorded under Section 67 of the N.D.P.S.Act.

8. Learned counsel for the applicant has further argued that the manner of sampling is contrary to the provisions of Notification dated 23.12.2022 which prescribes homogeneous mixture is produced for sampling whereas in the present case, the sample is heterogeneous mixture as per the F.S.L.report. He further argued that the samples should be sent within seventy two hours whereas in the present case, samples were sent after six days.

9. Learned counsel for the applicant lastly argued that the applicant is in custody since 23.7.2022 having no criminal history and out of the five witnesses, deposition of the prosecution witness no.2 is going on, thus there is no likelihood of the trial being concluded in near future. He thus argued that the applicant may be enlarged on bail.

10. Shri A.K.Awasthi, appearing on behalf of the respondent N.C.B. strongly opposes the prayer for bail by arguing that huge quantity of more than 400 kg of ganja was recovered in the tanker being driven by the applicant and thus in view of the law laid down by the Hon'ble Supreme Court passed in the case of Union of India Vs. Mohd. Nawaz Khan : Crl. Appeal No.1043 of 2021 arising out of Special Leave Petition (Crl.) No.1771 of 2021 decided on 22.9.2021, the applicant would be deemed to be in conscious possession of the apprehended

goods. He further argued that the samplings were drawn in the presence of the magistrate and samples were duly signed by the magistrate, thus there was substantial compliance of the Notification dated 231.20222 readwith Section 52-A of the N.D.P.S. Act. He further argued that the prosecution intends to produce only three witnesses although five witnesses are shown in the list of the witnesses and the testimonies of P.W.-2 is going on. Thus, the trial can be expeditiously disposed of. He however admits that the applicant has no criminal antecedents under the N.D.P.S. Act and thus prayer for bail deserves to be rejected in view of the bar created by virtue of Section 37 of the N.D.P.S. Act.

11. After hearing the learned counsel for the parties at great length and keeping in view the fact that the recovery is more than the commercial quantity, the twin tests of Section 37 of the N.D.P.S. has to be satisfied.

12. The true intent and interpretation of Section 37 of the Act was considered by Hon'ble Supreme Court in the case of **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 Malik*¹⁹). 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. The Hon'ble Supreme Court in its judgement and order dated 13.10.2023 passed in the case of **Yusuf @ Asif Vs. State : Criminal Appeal No.3191 of 2023 arising out of S.L.P.(Crl.) No.3010 of 2023**, has held as under (paragraphs 11 and 12) :-

"11. For the sake of convenience, relevant sub-sections of Section 52-A of the NDPS Act are reproduced hereinbelow :

"52A. Disposal of seized narcotic drugs and psychotropic substances.

(1).....

(2). Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make

an application, to any Magistrate for the purpose of -

*(a). certifying the correctness of the inventory so prepared;
or*

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3). Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate as primary evidence in respect of such offence."

12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/ narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn."

14. In the light of the law as explained in the above two judgements, In the present case, the manner of sampling done indicates that the samplings were drawn in the presence of the magistrate, however the certification as is required by virtue of Paragraph 9 of the Notification dated 23.12.2022 readwith Section 52-A of the N.D.P.S.Act is apparently missing, the effect of which can lead consequences as highlighted in the case of Yusuf Vs. State (supra).

15. Submission of learned counsel for the applicant that the applicant cannot be said to be in conscious possession is not in accordance with the law as explained in the case of Union of India Vs. Mohd. Nawaz Khan (supra).

16. Based upon these infirmities, the first test as prescribed under Section 37 of the N.D.P.S. Act is satisfied in favour of the applicant.

17. Furthermore, in the present case, as the applicant has no criminal history under the N.D.P.S. Act, hence the second test is also satisfied in view of the law laid down in the case of ***Ranjitsing Brahmajeetsing Sharma vs State Of Maharashtra & Anr : AIR 2005 SC 2277.***

18. Thus finding that both the tests under Section 37 of the N.D.P.S. Act are satisfied in favour of the applicant, and the fact that the applicant is languishing in jail since 23.7.2022, the applicant is entitled to be enlarged on bail.

19. Thus, the bail application is ***allowed.***

20. Let the applicant ***Sanjay Singh*** 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 below 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 :- 3.9.2024
Shukla