

Neutral Citation No. - 2024:AHC-LKO:29051

Court No. - 12

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 6984 of 2023

Applicant :- Kundan Sharma

Opposite Party :- Union Of India Thru. Intelligence Officer, Narcotic Control Bureau, Lko.

Counsel for Applicant :- Dhananjai Kumar Tripathi, Kuldeep Kumar Srivastava, Pankaj Verma

Counsel for Opposite Party :- Akhilesh Kumar Awasthi

Hon'ble Pankaj Bhatia, J.

1. Heard learned counsel for the applicant as well as Sri Akhilesh Kumar Awasthi, learned counsel for the respondent and perused the record.
2. In terms of the complaint filed against the applicant, which has been filed along with the counter affidavit, it was alleged that on the basis of an information received, a team was constituted and a Trolley was found by the said team, which was laden with Puwal and under the said Puwal, certain pharmaceutical drugs were found. It was stated that none of the person came forward to claim the goods found in the said abandoned trolley. It was also stated that no independent witness was available. Subsequently, on the basis of the search carried out, pharmaceutical formulations as specified in the complaint were found, which was divided into various lots. It was further evident from the complaint that on the basis of said pharmaceutical products, which was found in the trolley, investigation was carried out from the manufacturer of the products, who stated that the batch number on the drugs were sold by them and were sold to two medical stores of which, the applicant and his wife were the owners. Subsequently, on the

basis of the investigation carried out, statement was recorded under Section 67 of the NDPS Act, wherein allegedly the applicant had accepted the commissioning of offence and stated that for making money, the goods which were found were sold by the applicant through his two licensee shops. Based upon the said allegations, the applicant was charged for commission of an offence under Section 8/22/29 NDPS Act.

3. In the light of the said allegation, the counsel for the applicant argues that the only evidence against the applicant is the statement under Section 67 of the NDPS Act, which according to him is not admissible in view of the law laid down in the case of *Tofan Singh Vs. State of Tamilnadu : AIR 2020 SC 5592*. He further argues that the applicant has no criminal history and was having a license under the Drugs and Cosmetics Act, as such, the applicant, who is in custody since 01.03.2023 may be enlarged on bail.
4. The counsel for the opposite party strongly opposed the bail application of the applicant by arguing that on the basis of the investigation carried out from the manufactures, who informed that the pharmaceutical goods seized were sold to two firms belonging to the applicant. He further argues that in respect of one firm even the license granted under the Drugs and Cosmetics Act had come to an end. It is further argued that generally these pharmaceutical combinations are used for the purposes of intoxication and thus, there was valid material to link the applicant with the offence in question. He further argues that as the recovery is more than the commercial quantity, the test of Section 37 of the NDPS Act has to be satisfied.

5. In the light of the rival contentions, as allegedly the goods seized were having more than the commercial quantity, the test of Section 37 of the NDPS Act has to be satisfied. True import of section 37 was considered by the 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 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."

6. In the light of the said interpretation as given by the Supreme Court, it is essential to notice the scheme of the Act and particularly the Section under which, the applicant has been charged.

7. Sections 8, 22, 29 of the NDPS Act are noticed as under:-

“8. Prohibition of certain operations.—No person shall— (a) cultivate any coca plant or gather any portion of coca plant; or (b) cultivate the opium poppy or any cannabis plant; or (c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder

and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation: Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf: 1 [Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.] 2 [8A. Prohibition of certain activities relating to property derived from offence.—No person shall— (a) convert or transfer any property knowing that such property is derived from an offence committed under this Act or under any other corresponding law of any other country or from an act of participation in such offence, for the purpose of concealing or disguising the illicit origin of the property or to assist any person in the commission of an offence or to evade the legal consequences; or (b) conceal or disguise the true nature, source, location, disposition of any property knowing that such property is derived from an offence committed under this Act or under any other corresponding law of any other country; or (c) knowingly acquire, possess or use any property which was derived from an offence committed under this Act or under any other corresponding law of any other country.]

22. Punishment for contravention in relation to psychotropic substances.—*Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any psychotropic substance shall be punishable,— (a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to 5 [one year], or with fine which may extend to ten thousand rupees, or with both; (b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;*

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also

be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

29. Punishment for abetment and criminal conspiracy.—(1) *Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence. (2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India, abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which— (a) would constitute an offence if committed within India; or (b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India.”*

8. On a plain reading of Section 8 (c) of the NDPS Act, it is clear that dealing in Narcotic Drugs and Psychotropic Substances, which includes selling, is barred except when the same is for medicinal and scientific purposes, and in the manner and to the extent provided by the provisions of the NDPS Act, the Rules or orders made thereunder or requirement of license, the same is to be subject to the condition imposed in the license permit or authorization. In the present case, the allegations are that goods, apprehended were sold by the applicant, there is no allegation that the same were not sold for medical purposes and further there is no assertion in the complaint that the same was contrary to the restrictions imposed even in respect of the medical purposes under the NDPS Act.
9. On a pain reading of Section 22 of the NDPS Act, it is barred that any person in contravention of any provisions of this Act,

Rule , Order condition of license granted thereunder, commits any of the Act as prescribed he is to be punished for the offence.

10. Similarly Section 29 of the NDPS Act provides punishment to a person who abets in the commission of the offence.
11. The requirement of obtaining license under the Drugs and Cosmetics Act and the rules thereunder, is prescribed under the said Act for any person dealing with the pharmaceutical products.
12. On a plain reading of Section 22 of the NDPS Act, the offence is the contravention of any of the condition of the license being violated by any person charged with the offence, whereas for dealing with pharmaceutical products, no license is either prescribed or necessary as such, the essential foundation for trying the applicant under Section 22 and Section 8 of the NDPS Act is *prima facie* missing in the present case. Thus, the first condition specified under Section 37 of the NDPS Act is clearly satisfied in the case of the applicant.
13. As the applicant has no criminal history, the second of the twin condition is also satisfied in view of the law as laid down in the case of ***Ranjitsing Brahmajeetsing Sharma vs State Of Maharashtra & Anr : AIR 2005 SC 2277.***
14. As regards the contention of Sri Awasthi that the second shop of the applicant did not have the license under the Drugs and Cosmetics Act can not be accepted at this stage as the same would lead to punishment under the Drugs and Cosmetics Act and not under the NDPS Act. The other submission of Sri Awasthi in the light of mandate of Section 80 of the NDPS Act that the provisions of this Act shall be in addition to and not

derogation of the Drugs and Cosmetics Act is not in question as the allegations have to fall as an offence under NDPS Act.

15. In view of the reasoning as recorded above, I am of the view that the applicant is entitled to be released on bail. Accordingly, the bail application is allowed.
16. Let the applicant ***Kundan Sharma*** be released on bail in FIR/ Case Crime No. 04 of 2022, under Sections 8/22/29 of the NDPS Act, Police Station N.C.B., District Lucknow, on his furnishing personal bonds and two reliable sureties of Rs.20,000/- each 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 :- 9.4.2024
Arun

(Pankaj Bhatia,J)