

RESERVED ON 29.1.2024

DELIVERED ON 5.2.2024

Court No. - 14

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 8162 of 2023

Applicant :- Azad

Opposite Party :- Union Of India Thru. I.O Narcotics Control Bureau Lko.

Counsel for Applicant :- Nisha Srivastava, Anil Kumar Pandey

Counsel for Opposite Party :- Akhilesh Kumar Awasthi

Hon'ble Karunesh Singh Pawar, J.

1. Heard Mr. Anil Kumar Pandey, learned counsel for the applicant, Mr. Akhilesh Kumar Awasthi, learned counsel for Narcotics Control Bureau and perused the record.

2. Prosecution story is that on 18.11.2022 at about 1630 hours, a secret information was received that a person named Azad, i.e. the present applicant has been travelling in a car bearing No.UP32FN3843 with approximately 2-3 kg of charas, which allegedly is to be delivered somewhere near the main gate of Jila Mahila Chikitsalay, Barabanki. Believing on the said information, the same has allegedly been conveyed telephonically to Superintendent Harish Kumar and post getting permission, the Intelligence Officer Ashutosh Kumar Pandey reached at the spot at about 21.20 hours. On reaching at the said location, the intelligence Officer Ashutosh Kumar Pandey met Mr. Suraj Singh, S.I. ANTF, Barabanki and his team members who were already there along with the vehicle. It is alleged that both the teams mounted a surveillance at the informed place. After some time, an Indica car with above registration number has been intercepted by the joint team. The driver of the intercepted car has allegedly been identified as the present applicant. He was informed qua secret information.

The applicant was allegedly served a notice under section 50 N.D.P.S. Act, 1985 and he was explained of his legal rights. Thereafter he was personally searched, however, nothing incriminating substance has been recovered from his possession. On a search being made, from the diggi of the car, one blue coloured cloth bag was found. From the bag, 11 black coloured cylindrical shaped substance wrapped in newspaper and kept in a torn plastic polythene recovered was concealed in piles of straw. The accused applicant confessed that the said bag was allegedly provided to him by his uncle Taufeeq Ali. On

weighing, the recovered material was found to be 2.7kg of charas. After completing formalities, search memo was prepared at Police Line, Barabanki.

3. Learned counsel for the applicant submits that the mandatory provisions of section 42 of N.D.P.S. Act have not been complied with. The gist of the information mentioned in NCB 01 is not the information received from the Mukhbir; rather it is the information received from one Suraj Singh, S.I. A.N.T.F., Barabanki which has not been reduced into writing, nor copy thereof was sent by Mr. Suraj Singh to his superior officer but surprisingly, this information has been given orally to Intelligence Officer A.K. Pandey of other department although Suraj Singh himself was the competent officer to conduct search and seizure which is complete non-compliance of mandatory provisions of section 42 N.D.P.S. Act in view of the judgments in Karnail Singh versus State of Haryana (2009) SCC CrI. 887, Boota Singh and others vs. State of Haryana 2021 (3) JIC 14 (SC) and The State of Rajasthan versus Jag Raj alias Hansa (2016) 11 SCC 687.

According to the prosecution case, 11 black colour cylindrical substance has been recovered, however, only one sample has been drawn. There is no material on record to show that the sample has been drawn from each pieces recovered after making its homogenous which is against the provisions of notification No.1/88 and 1/89 issued by the Government of India as well as the judgments of Supreme Court in Gaunter Edwin Kircher versus State of Goa (1993)3 SCC 145. Again, there is non-compliance of provisions of section 52-A of N.D.P.S. Act as the procedure provided under section 52-A sub clause (2)(a), (b), (c) as well as sub clause (4) have not been complied with which are mandatory in view of the judgment of Supreme Court in Union of India versus Mohan Lal and another 2016(93) ACC 546 (paras 12, 13), Yusuf alias Asif versus State Criminal appeal No.319 of 2023 (paras 10, 11 12).

Inventory of the documents prepared and mentioned at page 34 and 35 of the counter affidavit shows that apparently, there is no certification by the Magistrate regarding drawl of sample and there is no photograph of the alleged substance and there is no specific order of drawl of sample. Only at page 48 of the counter affidavit, i.e. inventory at the time of sampling is only seen by the concerned Magistrate which is not enough. There should be proper compliance, i.e. certification, photograph etc as provided under section 52-A of N.D.P.S. Act. Sample so drawn has not been sent within 72 hours; rather after delay of 12 days. Weight of the sample received in the laboratory is suspicious. The sample drawn was 25 gms while the sample

received in the laboratory was 30.6 gms. Hence, it is submitted that tampering has been done with link evidence. Reliance has been placed on Rajesh Jagdamba Avasthi versus State of Goa (2005) (51) ACC 315.

The notification dated 23.12.2022 of Ministry of Finance, Department of Revenue has also not been followed. Reliance has been placed only on confessional statement of the applicant in custody which is not admissible under section 25 of the Evidence Act. Reliance has been placed on Tofan Singh versus State of Tamilnadu AIR 2020 SC 5592.

Learned counsel also submits that the applicant is in jail since 18.11.2022 continuously. Till date, not a single prosecution witness has been produced. The right of speedy trial guaranteed under Article 21 of the Constitution of India has been violated. Reliance has been placed on Rabi Prakash versus State of Odisha 2023 LiveLaw (SC)533. The applicant has no criminal history.

It is lastly submitted that since the mandatory compliance of sections 42 and 52-A of N.D.P.S. Act as well as notifications 1/88 and 1/89 have not been done, therefore there is no chance of conviction of the applicant. As the applicant has no criminal history, second condition of provisions of section 37 of N.D.P.S. Act also stands satisfied. Thus, the applicant is entitled to be enlarged on bail.

4.Per contra, Mr. Akhilesh Kumar Awasthi, learned counsel for N.C.B. has opposed the bail application and submitted that the information was though received by Suraj Singh, however, since it was not practicable for him to reduce it into writing, therefore, he has orally informed Mr. A.K. Pandey of his department who has reduced the information into writing. He submits that he immediately conveyed the said information to his senior officer Harish Kumar, Superintendent, N.C.B., Lucknow Zonal Unit who constituted a team. Thus, there is total compliance of section 42 of the N.D.P.S. Act.

It is further submitted that inventory and documents prepared during seizure has been seen before the Magistrate. There is total compliance of Section 52-A N.D.P.S. Act also. It is submitted that delay in sending the sample is not fatal for the trial. In case there is minor variation in the sample drawn and sample received, that will not affect the trial. In this context, he has relied on Sajan Abraham versus State of Kerala 2001 Cri.L.J. 4002 (paras 7 and 12).

Learned counsel has further relied on the judgment in Dinesh

Kumar versus State of H.P. 2010 AIR SCW 5533 and submitted that difference of 15 gms sample in weight has been held to be insignificant.

He further has relied on judgment of Supreme Court in Hamidbhai Azambhai Malik versus State of Gujarat (2009)3 SCC 403 and submitted that it is not necessary to follow in all cases conditions incorporated in section 42 of N.D.P.S. Act. He further submits that the present accused applicant was driving the seized vehicle with total 2.700kg of charas in its diggi. The said vehicle was owned by the applicant's father. The recovered contraband is more than the commercial quantity and is hazardous to society at large and therefore, the accused applicant is not entitled to seek bail and section 37 of N.D.P.S. Act is applicable in the present case.

5.I have considered the submission advanced by learned learned counsel for the applicant and learned counsel for N.C.B..

6.As regards twin conditions contained in section 37 of the NDPS Act, the first condition stands complied with as the learned counsel for the respondent has been duly heard.

7.The Supreme Court in the Constitution Bench judgment in Karnail Singh's case (supra) while answering the reference has concluded as under :

"35.In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and

sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

8.Prima facie, in the case in hand, in the complaint filed along with the counter affidavit, only this much is stated that a secret information was received by one Suraj Singh, Sub Inspector, ANTF, Barabanki and he passed on that information to Ashutosh Kumar Pandey, Intelligence Officer telephonically. Nothing has been assigned in the complaint as to why Suraj Singh who was himself competent to act under section 42 of N.D.P.S. Act could not have reduced the information into writing, coupled with the fact that the manner in which the samples have been drawn also prima facie appear to be contrary to notification No.1/88 and 1/89 which have statutory effect and also the provisions of section 52-A. Thus, the first test provided in section 37 of N.D.P.S. Act stands satisfied. Again from the record, it does not transpire that any photograph was taken or any certification has been issued by the Court under section 42-A, thus, prima facie there appears to be non-compliance of section 42 and section 52-A and the notification 1/88 and 1/89. Thus, in the opinion of the court, the applicant may not be held guilty during trial and since the applicant has no criminal history, the second condition provided under section 37 of N.D.P.S. Act stands satisfied.

9.Having regard to all the facts and circumstances, arguments advanced by learned counsel for the parties, the fact that the applicant is in jail since 18.11.2022 and till date, not a single prosecution witness has been produced, right of the applicant guaranteed under Art. 21 of the Constitution of India and right to speedy trial has also been violated, there is no previous criminal history, as also considering twin conditions as

mentioned in section 37(1)(b) of N.D.P.S. Act having been satisfied, in as much as the learned counsel for the respondent has been heard, there are reasonable grounds for believing that the accused applicant might not be guilty of the offence and that he is not likely to commit any offence while on bail, and without expressing any opinion on the merit of the case, I find it to be a fit case for enlarging the applicant on bail and accordingly, the bail application is allowed.

10.Let the applicant Azad, involved in N.C.B. Crime No.29 of 2022 under sections 8/20/25/29 of N.D.P.S. Act, challaned by Narcotics Control Bureau, Lucknow at Barabanki, district Barabanki, be released on bail 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 which are being imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not pressurize/ intimidate the prosecution witness.

(iii) 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.

(iv) 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.

(v) 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.

(vi) 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.

Order Date :- 5.2.2024/kkb/