

Court No. - 12

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 8771 of 2023

Applicant :- Noor Mohammad

Opposite Party :- Union Of India Thru. Deputy Commissioner Of Narcotics Lko.

Counsel for Applicant :- Ajay Veer Singh, Abhinav Srivastava, Bhoopal Singh, Surya Vijay Singh

Counsel for Opposite Party :- S M Singh Royekwar

Hon'ble Pankaj Bhatia, J.

1. Heard learned counsel for the applicant and Sri S M Singh Royekwar, learned counsel for the CBN.

2. The applicant seeks enlargement on bail in FIR No. 141 of 2023 under Section 8/21/29 N.D.P.S. Act, Police Station- N.C.B., District -Lucknow.

3. In terms of the F.I.R., it was alleged that on the basis of the information received, a search was carried out and the applicant was allegedly apprehended with a bag in which allegedly 500 gms of morphine was kept. In terms of the seizure memo, which has been filed, it was recorded that the applicant has given his consent to waive his right under Section 50 of the N.D.P.S. Act. It was also recorded that the seizure was done at 12:00 noon and on account of huge rush of people, rest of the process was done at the office. It was recorded that out of 600 gms of heroine allegedly seized, two samples of 5 gms each were drawn and they were sealed and kept in a plastic bag and sent for analysis, which, subsequently on the analysis were found to be containing morphine as per the report dated 31.10.2022. The said report is on record as C.A.-4 indicates that the sample was received in laboratory on 1.8.2022 and test was conducted on 27.9.2022 in which gross weight of sample received with plastic pouch weighed 3.1 gms, which was analyzed and found to be heroine.

4. Counsel for the applicant argues that mandatory provisions of sampling as prescribed in the notification dated 23.12.2022. He further argues that the said notification dated 23.12.2022 was issued in furtherance of judgment of Hon'ble Supreme Court in the case of ***Union of India Vs. Mohan Lal and Another; AIR ONLINE 2016 SC 606*** wherein the Court had noticed that the sampling has to be done before the

Magistrate in terms of the mandate of Section 52-A of the N.D.P.S. Act which according to the applicant has not been done. He further points out that sample size as collected has differed from the sample size as indicated in the report dated 31.10.2022. He lastly argues that the applicant has no criminal history and is in custody since 26.7.2022 and only witnesses has been examined so far, as such he may be enlarged on bail.

5. Sri S M Singh Royekwar, learned counsel for the CBN opposes the bail application by arguing that substantial quantity of morphine weighed more than commercial quantity, which is 250 gms in the case of morphine was apprehended from the applicant. He further argues that notification dated 23.12.2022, would not apply, as the goods were apprehended from the applicant on 26.7.2022. As regards discrepancies made in the sampling and testing he argues that when the sample are recovered, they are in moistened condition and because of loss of moisture the weight can vary.

6. Considering the arguments raised at bar, as the alleged recovery is more than commercial quantity, the test of Section 37 has to be satisfied. The scope of Section 37 of NDPS Act came up for consideration before the Supreme Court in **Mohd Muslim @ Hussain v. State (NCT of Delhi); 2023 LiveLaw (SC) 260** wherein, interpreting Section 37, the Supreme Court observed as under:

"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. "

7. The mandate of Section 52A of NDPS Act has also not been followed and the effect of not following the mandate of Section 52A was dealt with by the Supreme Court in the case of **Yusuf @ Asif v. State; Criminal Appeal No.3191 of 2023** decided on **13.10.2023** wherein the Supreme Court has also noticed the mandatory directives of the Hon'ble Supreme Court in the case of **Union of India Vs. Mohan Lal and Another (Supra)** in which it has been observed as under:

"16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated."

8. In the present case, prima facie, the mandate of Section 52-A has not be followed as prescribed in the **Union of India Vs. Mohan Lal and Another (Supra)**. Considering the discrepancy in the sample made and there is no likelihood of the trial being concluded in the near future, as such based upon these two infirmities, prima facie view can be formed that the prosecution may not be able to establish its case against the applicant. It is clarified that this observation is only for the

purposes of consideration of bail and would not have any adverse effect on trial. In respect of the second condition specified under Section 37, as the applicant has no criminal antecedents, in view of the law as laid down in the case of ***Ranjitsing Brahmajeetsingh Sharma Vs. State of Maharashtra & Anr: AIR 2005 Sc 2277***, the second set of Section 37 is also satisfied in the case of the applicant.

9. In view of the reason recorded as above, the applicant, who is in jail since 26.7.2022 is enlarged on bail. Accordingly, the bail application is allowed.

10. Let the applicant **Noor Mohammad** be released on bail in the abovesaid first information report number on his furnishing personal bonds and two reliable sureties 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 offences 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 :- 20.9.2024

Anuj Singh