

Court No. - 12

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 11588 of 2022

Applicant :- Nand Kumar

Opposite Party :- State Of U.P. Thru. Addl. Chief Secy. Deptt. Of Home Lko.

Counsel for Applicant :- Brijesh Kumar Pandey, Ambrish Kumar, Devendra Verma, Dhananjai Kumar Tripathi, Dr. Shailendra Sharma, Kajol, Shaquiel Ahmad, Shitesh Jha, Shiv Pal Singh

Counsel for Opposite Party :- G.A.

Hon'ble Pankaj Bhatia, J.

1. Heard learned counsel for the applicant as well as learned A.G.A. and perused the record.
2. The applicant seeks enlargement on bail in FIR No.579 of 2022, under Sections 8/20 of the NDPS Act, Police Station Nanpara, District Bahraich.
3. In terms of the FIR, allegedly on the basis of a search carried out on the applicant, 2 kg 500 grams of Charas was recovered from the bag carried out by the applicant, out of which, a sample of 100 grams was taken and was sealed in a white cloth and was sent for examination.
4. The submission of the Counsel for the applicant is that the recovery was shown from the bag kept in the car allegedly driven by the applicant, however, neither the recovery was effected in the presence of any independent witness nor before a Gazetted Officer, as such, the entire recovery became suspect. He further argues that sampling was not done in terms of the mandate of Section 52-A of the NDPS Act, as such, there was a clear violation of law. He places reliance on the judgment of Hon'ble Supreme Court rendered in the case of *Yusuf alias Asif vs State; AIR 2023 SC 5041*.
5. As regards the criminal antecedents, it is argued by the Counsel for the applicant that applicant has one criminal case under NDPS Act, which was less than the commercial quantity and the applicant was enlarged on bail in the said case vide order dated 31.08.2021, which is on record as Annexure-7 to the bail application. The other two cases against the applicant are under the IPC and the Goondas Act and the applicant has

been exonerated in the case registered under Goonda Act vide judgment which has been placed on record. He thus argues that the applicant should be enlarged on bail.

6. Learned A.G.A. vehemently opposed the bail prayer by arguing that as the recovery is more than the commercial quantity, the test of Section 37 of NDPS Act has to be satisfied. He also draws my attention to the FSL report, which is placed on record as CA-1 to the counter affidavit, which is to the effect that the goods sent were found to be Charas. He thus argues that the bail application should be rejected, moreso, the applicant has one criminal history under the NDPS Act.

7. The Counsel for the applicant in rejoinder argues that as per the FIR, the sample was drawn and sealed in a white cloth whereas the FSL report, relied upon by the learned A.G.A., demonstrates that the sample was found to be wrapped in a paper, which rendered the entire process of sampling further bad in law. It is further argued that the trial has not even started and the applicant is languishing in jail since 29.08.2022.

8. Considering the submissions made at the bar and the fact that the recovery is more than the commercial quantity, the twin test prescribed under Section 37 of the NDPS Act has to be satisfied. The scope of Section 37 of the NDPS Act came up for consideration before the Hon'ble Supreme Court in the case of **Mohd Muslim @ Hussain v. State (NCT of Delhi); 2023 LiveLaw (SC) 260** wherein the Supreme Court has 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."

9. Testing the submission of the Counsel for the applicant on the touchstone of the interpretation of Section 37 of the NDPS Act given by the Hon'ble Supreme court and extracted above, *prima facie*, in the present case, the recovery was not effected in the presence of a Gazetted Officer and there were no independent witness to the search. Further the manner of sampling as prescribed under Section 52-A was not followed, the effect of which has been explained in the case of *Yusif @ Asif (Supra)* in para 16, which reads 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."

10. Considering the discrepancies noted above in the report that the sample was found wrapped in a paper whereas as per the FIR, the same was sealed in a cloth, which *prima facie*,

indicates discrepancies by the prosecution, thus, on the basis of the discrepancies noted above, a view can be formed that the prosecution may not be able to establish the offence as alleged against the applicant.

11. It is clarified that these observations are tentative for the consideration of the bail application and would not influence the trial, thus, the first of the twin condition is satisfied in favour of the applicant.

12. As regards the second of the twin condition, in the sole case against the applicant, the applicant is on bail for the alleged offence for a quantity less than the commercial quantity, as such, the second of the twin test is also satisfied.

13. For the reasons stated above coupled with the fact that the trial has not even started and the applicant is in custody since 29.08.2022, I am of the view that the applicant is entitled to be released on bail. Accordingly, the bail application is ***allowed***.

14. Let the applicant ***Nand Kumar*** be released on bail in the aforesaid first information report number on his furnishing personal bonds and two reliable sureties of the like amount 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 :- 12.3.2024
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