HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU
(through video conferencing)

Reserved on: 17.12.2020
Pronounced on: 23.12.2020

Bail App No.96/2019
CrlM No.1642/2020

Sunny Kumar and another ...Petitioner(s)

Through:- Mr. Rakesh Chargotra, Advocate

V/s

State of J&K ...Respondent(s)

Through:- Mr. Aseem Sawhney, AAG

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. The petitioners have filed the instant application for grant of bail in FIR No.29/2015 for offences under Sections 8/21/22/23/25/29/27A of NDPS Act of Police Station, Kour.

2. Briefly stated, the case of the prosecution is that on 07.05.2015, police of Police Station, Khour received an information from reliable sources that accused Preeto Devi and Ajit Kumar had stored/dumped some contraband in their residential houses situated at Khour for the purpose of smuggling and on the basis of this information, the police raided the house of aforesaid-Preeto Devi and during search, eight (08) packets of heroin and currency in the amount of Rs.8,44,500/- were recovered from underneath the compound of the house. Besides this, another sum of Rs.15000 and 09 mobile phones of different makes were also recovered from the flower bed in the compound of the house of said accused. It is the further case of the prosecution that on the basis of disclosure made by accused-Preeto Devi,

five (05) more packets of heroin and a sum of Rs.4,49,400/- were recovered from the possession of the accused-Ajit Kumar. During the course of investigation of the case, it was found that the afore-named two accused were part of a large conspiracy in which besides Preeto Devi and Ajit Kumar, Mangal Singh S/o of Karan Singh, Mangal Singh S/o Kartar Singh, Mandeep Singh and petitioners herein were a part. These persons had established links with Pakistani smuggler, namely Arif Choudhary and obtained heroin from him. It was also found that all the above named accused, including petitioners herein, were involved in illegal sale and purchase of narcotic substances/contraband. Thus, after investigation of the case, offences under Sections 8/21/22/23/25/27A/29 of NDPS Act and 489-C RPC were found established against all the accused, including petitioners herein, and the charge-sheet was laid before the Court on 28.10.2015. The trial of the case before the trial Court is stated to be in progress.

3. Petitioners in the instant bail application have mainly contended that five material witnesses have been examined by the trial Court till date and all of these witnesses have turned hostile to the case of the prosecution and, as such, petitioners are entitled to grant of bail. It is further contended that the witnesses, who, as per the prosecution case, had deposed against the petitioners during investigation of the case, stand examined by the trial Court and they have not supported the prosecution case. Therefore, there is no chance of petitioners' conviction in the instant case. On this ground, it urged that the petitioners are entitled to grant of bail.

4. The respondent has resisted the bail application on the ground that most of the prosecution witnesses are yet to be examined by the trial

Court and, as such, at this stage, it cannot be stated that the petitioners are not guilty of the offences of which they have been charged. It has been further contended that the petitioners are involved in commission of offence under Section 27A of NDPS Act and besides this, commercial quantity of contraband has been recovered from co-accused with whom the petitioners have hatched a conspiracy, as such, the rigor of Section 37 NDPS Act is applicable to the case of the petitioners.

5. I have heard learned counsel for the parties and perused the record of the case including the trial Court record.

6. It appears that the petitioners, after recording of statements of five prosecution witnesses, had applied for grant of bail before the learned trial Court but the same was dismissed by the learned trial Court vide its order dated 29.03.2019 on the ground that most of the prosecution witnesses are yet to be examined and that on the basis of the statements of the witnesses, who have been examined, the Court cannot come to the conclusion that there are no reasonable grounds for believing that the accused/petitioners are not guilty of offences of which they have been charged.

7. It also appears from the trial Court record that vide order dated 28.07.2016, the accused, including the petitioners herein, have been charged with offences under Sections 8/21/22/23/25/27A/29 NDPS Act and 489-C RPC. Admittedly, the order framing charges has acquired finality and the trial of the case is going on before the learned trial Court.

8. The petitioners are alleged to be a part of conspiracy under which the accused are alleged to have indulged in illicit trade of narcotic

drugs including its financing. During investigation of the case, commercial quantity of contraband/drug has been recovered from the possession of co-accused. Therefore, there can be no two opinions about the fact that the rigor of Section 37 NDPS Act applies with full force to the case of the petitioners.

9. In order to determine whether the conditions for grant of bail in a case where rigor of Section 37 of NDPS Act gets attracted, are fulfilled in the instant case, it is necessary to notice the provisions contained in Section 37 of NDPS Act, which reads as under:-

> *"37. **Offences to be cognizable and non-bailable**. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)---*
>
> *(a) every offence punishable under this Act shall be cognizable;*
>
> *(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—*
>
> *(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and*
>
> *(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.*
>
> *(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."*

10. A perusal of the aforesaid provision reveals that a person accused of offence under the NDPS Act cannot be released on bail during trial, unless mandatory conditions provided in Section 37 of NDPS Act are satisfied. These conditions are; (i) there must be reasonable ground for believing that accused is not guilty of such offence and (ii) that he is not likely to commit any offence while on bail.

11. The Supreme Court has, in the case of **State of Kerala etc. v. Rajesh etc., 2020 SCC Online SC 81**, while interpreting the provisions contained in Section 37 of NDPS Act, observed as under:-

> *"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.*
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> *21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are*

> *sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."*

12. In light of the aforesaid enunciation of law on the subject and on the basis of material on record, this Court has to consider whether there is substantial probable cause for believing that the accused/petitioners are not guilty of the alleged offence. As the Supreme Court in the aforesaid case has clearly stated that the expression "reasonable grounds" appearing in Section 37 of NDPS Act contemplates something more than *prima facie* ground. It is in this backdrop, the material on record of the trial Court needs to be analyzed.

13. The trial Court record shows that the prosecution has, out of 38 cited witnesses, examined as many as eight (08) witnesses. Out of these, four witnesses have turned hostile and they have not supported the prosecution case. The main thrust of the argument of the learned counsel for the petitioners is that except statements of these four witnesses recorded by the police during investigation, none of the other witnesses examined by the Investigating Agency during investigation of the case connect the petitioners herein with the alleged commission of the offences. Therefore, once these four witnesses have resiled from their statements recorded during investigation of the case, even if other prosecution witnesses support the

case of the prosecution, it will be improbable to record a conviction against the petitioners herein.

14. The meticulous examination of the material collected by the Investigating Agency during investigation of the case, including statements of the witnesses recorded under Section 161 Cr.P.C., reveals that the aforesaid argument of the learned counsel for the petitioners is misconceived. Besides the aforesaid four prosecution witnesses, who have turned hostile, there are atleast as many as 11 (eleven) more prosecution witnesses, who have, in their statements recorded under Section 161 Cr.P.C., deposed about the involvement of the petitioners herein in the conspiracy. The statements of these 11 witnesses are yet to be recorded. In these circumstances, it cannot be stated that because the aforementioned four prosecution witnesses have turned hostile, it will be improbable for the prosecution to prove its case against the petitioners.

15. In the face of the nature of the material on record, this Court is unable to persuade itself to record a finding that there are reasonable grounds for believing that accused/petitioners are not guilty of offences with which they have been charged.

16. Apart from the above, gravity of the offence in the case at hand is of alarming proportions. It is a case where petitioners along with co-accused are alleged to be indulging in illicit trade of narcotics/contraband including its financing, which has cross border contours. In such like matters, the Court while considering bail application of an accused is required to strictly adhere to the parameters prescribed under Section 37 of NDPS Act. The Supreme Court in the case of **Union of India v. Ram**

Samujh, (1999) 9 SCC 429, while considering this aspect of the matter, has elaborated as under:-

> *"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier v. Chief Secy., Union Territory of Goa [(1990) 1 SCC 95) as under:*
>
> > *24. With deep concern, we may point out that the organized activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, Parliament in its wisdom, has made effective provisions by*

introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

17. In view of the aforesaid discussion, it is clear that the petitioners have been unable to make out a case for grant of bail at this stage. The application is, therefore, dismissed being without any merit.

(Sanjay Dhar)
Judge

Jammu
23.12.2020
Vinod.

Whether the order is speaking : Yes
Whether the order is reportable : Yes

HIGH COURT
JAMMU & KASHMIR

VINOD KUMAR
2020.12.24 10:27
I attest to the accuracy and
integrity of this document