

**207 IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM-M-29033-2021

Date of Decision: 1st December, 2021

Akshay Kumar @ Kuss

... Petitioner

Versus

State of Punjab

... Respondent

CORAM : HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present : Mr. Harshit Jain, Advocate for the petitioner.

Mr. Amit Mehta, Sr. DAG, Punjab for the respondent-State.

AVNEESH JHINGAN , J.(Oral)

1. This petition under Section 439 Cr.P.C. is filed seeking regular bail in FIR No.69, dated 28.05.2021, under Sections 22 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act'), registered at Police Station City Dhuri, District Sangrur.

2. As per the FIR on 28th May, 2021, police party during patrolling near shed of the grain market, saw a person standing near the car bearing registration No. DL-5C-D-4807 and one transparent polythene bag was lying on the bonnet of the car. On seeing the police party, he got perplexed and threw away the polythene bag. The apprehended person disclosed his name as Akshay Kumar @ Kuss (petitioner). From him recovery of 1580 tablets of Alprasaft (Alprazolam) and 300 tablets of Tramadol Hydrochloride was made.

3. Learned counsel for the petitioner submits that petitioner is not the owner of the car. No recovery was made from the conscious possession

of the petitioner. Petitioner is in custody since 28th May, 2021.

4. Learned State counsel contends that recovery is of commercial quantity. Petitioner was earlier involved in FIR No. 15, dated 29.01.2018, registered under Section 21 of the Act in which he was convicted. He relies upon restrictions imposed by Section 37 of the Act.

5. Section 37 of the Act is reproduced as below:-

“ Offence 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].

6. In case of commercial quantity under Section 37(1)(ii) twin

Conditions are required to be fulfilled under the Act. Firstly that there

should be a reasonable ground for Court to believe that the accused is not guilty of the offence and secondly that he is not likely to commit any offence while on bail. Section 37(2) of the Act provides that the limitations imposed under Section 37(1) (b) of the Act for grant of bail are in addition to the limitations under the Code of Criminal Procedure.

7. It would be relevant to cite following decisions of Supreme Court:-

In **Union of India Vs. K.A. Najeeb**, AIR 2021 SC 712, while dealing with Section 43(D) (5) of the Unlawful Activities (Prevention) Act, 1967 (for short “UAPA Act”) held that provisions of Section 37 of the Act are more stringent. Section 43(D) (5) of UAPA Act is quoted below:

“ 43D. Modified application of certain provisions of the Code.

- (1) XX XX XX XX
- (2) XX XX XX XX
- (3) XX XX XX XX
- (4) XX XX XX XX

(5) *Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release: Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.”*

8. The relevant para of **K.A. Najeeb's case (supra)** is quoted below:-

“20. Yet another reason which persuades us to enlarge

the Respondent on bail is that Section 43-D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS. Unlike the NDPS where the competent Court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such pre-condition under the UAPA. Instead, Section 43-D (5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc.”

9. In **State of Kerala Versus Rajesh, AIR 2020 SC 721**, it was held:-

“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 Cr.P.C., 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.

1. 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 objects 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. ”

22. *We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the Act which is a sine qua non for granting bail to the accused under the Act.”*

10. **Union of India through Narcotics Control Bureau, Lucknow Vs. Md. Nawaz Khan, 2021 All SCR (CrI.) 1706,** is a case where contraband was concealed under the bonnet near the wipers of the car and it was held by Supreme Court that factum of absence of possession of contraband by the accused in itself cannot be sole ground for grant of bail.

11. Under Section 37 of the Act both the twin conditions are required to be fulfilled whereas in the present case neither of the condition is fulfilled.

12. Learned counsel for the petitioner has not been able to point out anything to this Court so as to come to conclusion that the petitioner is not guilty of the offence. The fact that polythene bag was thrown and petitioner was not in physical possession of contraband would not be enough to conclude that petitioner is not guilty. As per the case set up by the prosecution the conduct of the petitioner that he threw the polythene bag on seeing the police which was recovered immediately from the spot containing contraband is an indication of consciousness of the petitioner about the contents of the polythene bag. The petitioner was earlier involved in the NDPS case for which he was convicted. The second condition that he is not likely to commit any offence while on bail itself is clouded by the

antecedents of the petitioner.

13. The contention that recovery was not from conscious possession of the petitioner is noted to be rejected in view of decision of Superme Court in **Md. Nawaz Khan's case (supra)**.

14. In view of the stringent provisions of the Act, no case is made out for grant of regular bail.

15. The petition is dismissed.

16. However, it is clarified that observations made hereinabove are for the purpose of dealing bail petition and shall not be construed as an expression of opinion on the merits of the case.

(AVNEESH JHINGAN)
JUDGE

1st December, 2021
Parveen Sharma

Whether reasoned/speaking	Yes/No
<i>Whether reportable</i>	<i>Yes/No</i>