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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 28.05.2021

Pronounced on: 03.06.2021

+ **BAIL APPLN. 1177/2021**

HARESH RAWAL

..... Petitioner

Through: Mr. Dharmender Rana &
Ms. Vaishnavi K., Advocates

Versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through: Mr. Subhash Bansal, Senior Standing
Counsel for NCB with Mr. Shashwat
Bansal, Advocate

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. The present Petition has been filed seeking bail in the case arising out of C.C. No. VIII/59/DZ/2020, registered at NCB, R.K. Puram, under Section 8/20(b)/ 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (*henceforth referred to as the "NDPS Act"*), which is pending trial.

2. Petitioner is aggrieved by orders dated 29.02.2021 and 23.03.2021 passed by the learned trial court, vide which his applications seeking bail

have been dismissed. Vide present petition, petitioner is seeking bail in the present case.

3. The brief facts of the present case, as noted in the impugned complaint, are that on 18.12.2020, a secret information was received that one Nepali National of small built wearing yellow colour clothes will come near Gate No. 1 Metro Station East of Kailash, New Delhi between 1800-1900 hours and he might be carrying narcotics drugs for the purpose of delivery of the same to his client. Upon receipt of said information, a raiding team was constituted and after collecting seal of Narcotics Control Bureau DZU-3, testing kit, IO Kit and other necessary articles used for search and seizure proceedings, reached the spot at about 1800 hours. The raiding team tried to join independent witness by contacting two/three persons from the public but none agreed by stating their genuine problems. The surveillance mounted near Gate No.1 of the metro Station observed that one person wearing yellow colour sweat shirt whose description was matching with the secret information, carrying black colour bag on his shoulder came out and met another person wearing black colour jacket. The person who was wearing yellow colour shirt handed over a small packet to the person wearing black colour jacket, who in turn gave some amount in cash to him. At this point of

time both of them were apprehended by the NCB Team and they were apprised about their identity, secret information and purpose of visit.

4. During preliminary enquiries, the person wearing yellow sweat shirt disclosed his name as Madan Lama, r/o Nepal and staying at Sant Nagar, East of Kailash and second person wearing black colour jacket introduced himself as Haresh Rawal, r/o Punjabi Bagh, New Delhi. Madan Lama accepted that he was carrying *charas* in his bag, which he used to sell to his clients. He opened his bag in which 46 small zip lock polyethene packets and Rs. 12,000/- were found. Besides, one packet was also found in the possession of Haresh Rawal. Thus, total 47 packets were recovered.

5. Haresh Rawal (petitioner herein) accepted that he came to the spot to purchase *charas* from Madan Lama and he had handed over Rs. 9500/- to him for the same.

6. Out of 47 packets recovered, 22 packets were containing small disk circular shape substance, 09 packets were containing substance in small sticks shape and rest 16 packets were containing substance in the shape of small stones.

7. The substance of 22 packets was tested individually and found positive for *charas*. Since substance of 22 packets was found similar in

colour, texture and shape as well as the fact that same was found positive for *charas* therefore substance of all 22 packets was collected in a polythene and weighed and it was found to be 215 grams. The said polythene was tied with string and converted in cloth *pulanda* Mark-A.

8. The substance of 9 packets was tested individually and found positive for *charas*. Since substance of 9 packets was found similar in colour, texture and shape as well as the fact that same was found positive for *charas*, therefore, substance of all 9 packets was collected in a polythene and found to be 95 grams. The said polythene was tied with string and converted in cloth *pulanda* Mark-B.

9. The substance of 16 packets was tested individually and found positive for *charas*. Since substance of 16 packets was found similar in colour, texture and shape as well as the fact that same was found positive for *Charas* therefore substance of all 16 packets was collected in a polythene and found to be 165 grams. The said polythene was tied with string and converted in cloth *pulanda* Mark-C.

10. Thereby, in total 475 grams *charas* was recovered from the 47 zip lock polythene packets. Thereafter, the black colour bag, concealing material, the currency notes of Rs.9500/- found in the hand of accused

Madan Lama and Rs. 12,000/- found in his bag were all marked, sealed and other procedural formalities were completed.

11. During further investigation, seizure memos in respect of two mobile phones No. 9871967226 and 9311295909 recovered from accused Madan Lama; scooty bearing No. DL6SAP8OS0 and two mobile phones Nos. 8178012030 & 9582741767 recovered from Haresh Rawal were prepared.

12. Thereafter, notice under Section 67 of NDPS Act was issued to Madan Lama and Haresh Rawal. During investigation of the case, accused Madan Lama tendered his voluntary statement under Section 67 of NDPS Act, wherein he admitted his involvement in drug trafficking and sale/ purchase of the narcotics drugs. He also disclosed that he came to the spot along with recovered contraband and he sold one packet containing *charas* to the co-accused Haresh Rawat for Rs.9500/- and they were apprehended by the NCB officers at the spot. During search and seizure proceedings, 475 grams *charas* and Rs. 21,500/- were recovered. Besides, he also disclosed about other persons, namely, Kalpna and Saroj Bhujel, who were actively involved with him in illegal trafficking of contraband and provided their mobile numbers.

13. Similarly, present petitioner in his voluntary statement under Section 67 of NDPS Act disclosed that he came to spot to purchase contraband from Madan Lama. He had purchased one packet from Madan Lama and given Rs. 9500/- to him as the sale consideration of the contraband. He further disclosed that during search and seizure proceedings 475 grams *heroin* and Rs. 21,500/- were recovered.

14. Petitioner was arrested on 19.12.2020 and after 03 days police custody, he was sent in judicial custody on 22.12.2020 and since then he is behind bars.

15. Learned counsel for the petitioner submitted that the alleged recovery from the possession of petitioner is one packet containing 10 gm. of contraband and, therefore, it is covered under 'small quantity' of NDPS Act and so, there is no embargo under Section 37 of NDPS Act to release petitioner on bail.

16. Further submitted by learned counsel for petitioner that the alleged recovery has been made without informing petitioner of his right to be searched before Gazetted Officer or Magistrate and without serving notice under Section 50 of NDPS Act. Further urged that the disclosure statement of petitioner under Section 67 of NDPS Act was recorded under threat and

coercion by NCB officials, to which he had retracted on the first available opportunity and so, it has not sanctity.

17. Learned counsel also submitted that the alleged recovery of 01 packet from petitioner was not separately weighed or sampled and was rather mixed with 46 packets recovered from the bag of co-accused prior to drawl of samples for chemical analysis. Therefore, it cannot be ascertained that the packet allegedly recovered from the possession of the petitioner contained narcotic substance, i.e. *charas* and further, since samples were drawn after more than 50 days of the alleged recovery, it is in violation of procedure laid under NCB Standing Order 1/88 and Government of India, Ministry of Finance Standing Order 1989/19 and Section 52A of NDPS Act.

18. It was next submitted by learned petitioner's counsel that there are no public witnesses to corroborate the prosecution story and that the chats produced by the NCB are messages exchanged between friends. There is no conclusive evidence of weight and chemical analysis of the contraband recovered and also that 'small quantity' of *charas* allegedly recovered cannot be meant for further sale.

19. Lastly, it was submitted by learned counsel for petitioner that learned trial court in order dated 23.03.2021 while dismissing petitioner's second

bail application has observed that *transaction was still in process and therefore, it cannot be inferred that the case against the petitioner is only for one packet*, however, the said observation cannot sustain in view of the fact that as per story put-fourth by NCB, the transaction was complete and apart from Rs.9,500/- which he had allegedly handed over to the co-accused, Rs.910/- were also recovered in his personal search. Thus, this petition deserves to be allowed and petitioner be released on bail.

20. On the other hand, learned Standing Counsel for NCB opposed the present petition and submitted that petitioner along with co-accused Madan Lama was involved in the sale-purchase of contraband and he was apprehended at the spot while exchanging *charas* for money and in total 475 gm. of *charas* was recovered from accused persons. The petitioner in his statement recorded under Section 67 of NDPS Act on 19.12.2020 revealed his intention to purchase 07 packets from co-accused and had paid Rs.9,500/- to him for the same.

21. Learned Standing Counsel next submitted that the public persons present at the spot gave genuine reasons not to become witness to the proceedings. Moreover, the mobile data of chats recovered from petitioner reveals that he has been involved in the illegal trafficking of contraband for

money for the last few years.

22. Learned Standing Counsel also submitted that the trial court has rightly dismissed petitioner's bail application twice and since petitioner has admittedly committed grave offence, he has no case on merits and this petition deserves to be dismissed.

23. The contentions raised by both the sides were heard at length and the material placed on record has been carefully perused.

24. In the present case, 46 small zip lock polythene packets containing contraband were recovered from the bag of co-accused Madan Lama and 01 packet was recovered in possession of present petitioner. In total, 475 gm. contraband/ heroin was recovered in this case.

25. Petitioner has claimed that prior to search and seizure proceedings, he was not served with Notice under Section 50 of the NDPS Act. On the other hand, stand of NCB is that personal search of accused was not carried out, as 01 packet containing contraband recovered from petitioner was in his hands while exchanging it for money and the remaining 46 packets were recovered from the bag of co-accused and, therefore, notice under Section 50 of the Act was not required to be given. This has so been observed by the court below while dismissing petitioner's bail application. Further, the evidentiary value

of petitioner's statement recorded under Section 67 of the Act cannot be pre-judged at this stage. Moreover, question regarding call detail and chats, will be also tested during trial.

26. Consequently, without going into the merits of the prosecution case at this stage, what is required to be seen is whether on the face of material placed on record, a case for grant or refusal of bail is made out.

27. In the present case it is not disputed that one packet recovered in the hands of petitioner contained 10 gm. of contraband, which falls within the category of 'small quantity'. Thus, the *prima facie* role attributed to the petitioner in the present case appears to be that he had purchased one packet containing 10 gm. *charas*, which essentially is 'small quantity'.

28. A Division Bench of this Court in ***Minni Khadim Ali Khun Vs. State NCT of Delhi*** 2012 SCC OnLine Del 2657 has dealt with the aspect of grant of bail in case of recovery of 'small quantity' of contraband and held that where the recovered contraband is 'small quantity', the offence is bailable.

29. The substance recovered in this case is not of commercial quantity. Thus, the bar of Section 37 of NDPS Act is not applicable. Moreover, petitioner is in judicial custody since 19.12.2020. Charge sheet in this case

has been filed but Charge is yet to be framed and trial will take substantial time. Accordingly, this Court is of the considered opinion that petitioner deserves to be released on bail.

30. Consequently, without commenting on the merits of the case, the petitioner is directed to be released on bail forthwith upon his furnishing personal bond in the sum of Rs.25,000/- with one surety in the like amount, to the satisfaction of the Trial Court/ Duty Magistrate, while making it clear that any observation made herein shall not influence the prosecution case during trial.

31. The petitioner shall not directly or indirectly influence any witness and shall appear before the trial court as and when directed.

32. A copy of this order be transmitted to the Trial Court and Jail Superintendent concerned for information and compliance.

(SURESH KUMAR KAIT)
JUDGE

JUNE 03, 2021

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