

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

(101)

CRM-M-37270-2021

Date of Decision :11.02.2022

Rekha

....Petitioner

Versus

State of Haryana & ors.

....Respondents

CORAM : HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Arjun Sheoran, Advocate, for the petitioner.
Mr. Neeraj Poswal, AAG, Haryana.

AMOL RATTAN SINGH, J. (Oral)

On 09.09.2021, the following order has been passed by
this Court:-

“By this petition, filed under the provisions of Section 438 of the Cr.P.C, the petitioner seeks the concession of anticipatory bail, upon FIR no.278, dated 16.08.2021, having been registered at Police Station Sadar Hansi, District Hansi, alleging therein the commission of an offence punishable under Section 20 of the NDPS Act.

Learned counsel for the petitioner submits that the petitioner is disabled to the extent of a 46% locomotor disability (of the right limb), as per the disability certificate Annexure P-3; and that she has two children, 4 years and 5 years old, with the allegation against her being based only on an alleged disclosure statement made in police custody, even as per the reply filed by the State on behalf of the State before the learned Addl. Sessions Judge, Hisar (copy Annexure P-5), where the petitioner had filed a similar petition before

that court.

Notice of motion is issued to the respondent-State, with Mr. Neeraj Poswal, learned AAG, Haryana, accepting notice at the asking of the court.

He submits that as per his instructions, as already noticed in paragraph 7 of the order of the learned Addl. Sessions Judge, Hisar (copy Annexure P-4), it was not just a disclosure statement but that the petitioner and the person who was arrested with 20.5 k.gs. of ganja (as per the case of the investigating agency), were in constant telephonic conversation with each other.

As regards that issue, a gazetted officer is directed to file a reply to the petition, annexing therewith all call details records between the petitioner and the person who was arrested with the aforesaid quantity of ganja, i.e. Surrender alias Mini.

The Civil Surgeon, Hisar, is ordered to be impleaded as respondent no.2 in the petition, with the Registry directed to carry out the necessary correction in the memo of parties.

Notice is issued to the Civil Surgeon, Hisar, also with Mr. Neeraj Poswal, learned AAG, Haryana, accepting notice on behalf of her/him also, on the asking of the court.

The Civil Surgeon is directed to file an affidavit stating therein as to whether the disability certificate, Annexure P-3, issued on 19.03.2021 by the "Issuing Medical Authority, Hisar", is an authentic certificate or not, because it is seen that

the following particulars are given in the said certificate:-

“Shri Rekha son of Shri Dhupa, date of birth 01/01/1986, Age 35, Male...”

Thus, the petitioner, who is admittedly a female, has been described as “Shri Rekha” and “son of Shri Dhupa” and eventually has been shown to be a male.

If any other certificate has been interpolated to show it to be that of the petitioner, obviously criminal proceedings would need to be initiated against the petitioner in that respect; but if the certificate has actually been issued to the petitioner herself, then the issuing medical authority needs to be put to task for issuing an irresponsible certificate.

If the affidavit of the Civil Surgeon is not filed, she/he shall be personally present in court on that date.

In the meanwhile, as presently at least there is no call details record between the petitioner and the prime accused, and the only allegation even as per the reply filed before the learned Addl. Sessions Judge, Hisar is that it was only on the disclosure statement (allegedly) made by such accused, that the petitioner has been implicated, the petitioner is directed to join investigation within one week from today and upon her so joining, if she is sought to be arrested, she shall be released on bail, on her furnishing adequate bail and surety bonds to the satisfaction of the arresting officer/Ilaqa Magistrate.

She shall also comply with all conditions stipulated in Section 438(2) of the Cr.P.C.

If the investigating officer does not actually join the petitioner in investigation, she would appear before the learned Ilaqa Magistrate immediately, who would then summon the arresting officer and direct him to join her in investigation, in terms of the order of this court.

Adjourned to 28.10.2021.”

Thereafter, with another report of the PGIMER having been received, it was seen that the petitioner, as per the said report, had a disability only on the right lower limb though to the extent of 83% thereof and therefore, otherwise she cannot be said to be handicapped in any manner that would enable this Court to draw an inference that she was not even capable of having committed the offence in question.

As regards the incorrect/erroneous certificate issued by the medical officer in the hospital concerned at Hissar, the Additional Principal Secretary, Department of Health, Government of Haryana, has stated that disciplinary proceedings have been initiated against the medical officer concerned for the same. Consequently, that matter was left to rest as regards this Court, in these proceedings.

On the merits of the case, as recorded in the order dated 17.01.2022, learned State counsel had pointed to the affidavit filed by the DSP, Narnaund, dated 13.10.2021, that other than a disclosure statement made, of her co-accused (Surinder) from whom 20.5 k.gs. of *ganja* was recovered (as per the case of the investigating agency),

there were also found to be telephone calls exchanged between him and the petitioner on 15-16th August, 2021, he having been arrested on 16.8.2021, with the FIR having been also registered on that day.

Consequently, he has submitted that with not just a disclosure statement made in police custody but also call details exchanged with the person from whom commercial quantity of *ganja* was recovered, the bar contained under Section 37 of the NDPS Act, 1985 would operate against the petitioner being admitted to bail.

Learned counsel for the petitioner on the other hand had earlier cited a judgment of the Supreme Court in **Nikesh Tarachand Shah Vs. Union of India & anr.**, (2018) 11 SCC 1, to submit that the bar contained in the said provision of the NDPS Act would not apply where an accused was applying for bail under the provisions of Section 438 Cr.P.C and would apply only to a case where a petition is filed under the provisions of Section 439 Cr.P.C thereof.

Prima facie at least this Court had not agreed with that contention, with the following observation recorded on that date:-

Prima facie at least I find no ground to agree with that contention, in view of the fact that it would put a person who has already been arrested and is facing trial to complete disadvantage qua a person who has not been arrested but against whom a prima facie case is made out.

Of course, Section 37(1)(b)(ii) of the said Act confers jurisdiction on a court to even so admit the accused to bail upon the court recording reasons that the accused would not appear to be

guilty of having committed the offence itself.

This Court already having observed hereinabove, obviously, in the case of the present petitioner, I would find that not possible at this stage.

Any way, to enable the learned counsel for the petitioner to refer to the aforesaid judgment and for learned State counsel to refer to any other judgment that he wishes to, adjourned to 11.2.2022.

Today, learned counsel very fairly has pointed to a judgment of a coordinate Bench of this Court in **Bikram Singh Majithia Vs. State of Punjab**, (CRM-M No.54968 of 2021), decided on 24.01.2022, wherein it was held on the basis of various judgments cited, that it would not be possible to hold that the bar contained in Section 37 of the Act, 1985, would not apply to a bail petition filed under the provisions of Section 438 Cr.P.C.

It is to be noticed that learned counsel for the petitioner also has again very fairly submitted that the judgment of coordinate Bench has been upheld by the Supreme Court in **Bikram Singh Majithia Vs. State of Punjab**, SLP (Crl.) No.759/2022, except that the petitioner therein has been given a specific time frame within which he is to surrender.

That being so, though of course it is noticed by this Court that the quantity of *ganja* recovered from the petitioner is only marginally above commercial quantity (with such quantity starting above 20 Kgs), yet, in the circumstances I would find no ground to

entertain this petition any further, with the said bar to obviously operate and consequently, the petition is dismissed. Therefore, the interim order also stands vacated.

However, it is made absolutely clear that all observations made in any order passed in this petition is only in the context of a petition filed under the provisions of Section 438 Cr.P.C and whether or not the petitioner is eventually found guilty by the investigating agency itself, would be wholly on the evidence gathered by it; and thereafter with the competent court to decide the correctness of any report filed under the provisions of Section 173 Cr.P.C or otherwise, wholly on its own merits.

11.02.2022
monika

(AMOL RATTAN SINGH)
JUDGE

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