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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 31.10.2022
Pronounced on: 15.11.2022

+ **BAIL APPLN. 1150/2022**

ANUJ KUMAR UPADHYAY Petitioner

Through: Mr. Sanjay Madan, Advocate.

versus

STATE NCT OF DELHI Respondent

Through: Mr. Manoj Pant, APP for the
State with SI Vishan Kumar,
Crime Branch.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

1. By way of the present application under Section 439 of Code of Criminal Procedure, 1973, the petitioner seeks grant of regular bail in case FIR bearing no.111/2016 registered under Sections 20/25/29 of the NDPS Act, 1985 at Police Station Crime Branch, Delhi.

2. Briefly stated, as per the case of prosecution, on receipt of secret information on 05.07.2016, SI Jai Prakash was informed that one Daya Shankar Rai @ Shankar Yadav, who is residing in Molarband Extention, Badarpur Border, Delhi and is a permanent resident of Bihar, procures *ganja* from Odisha via Moradabad, UP, and traffics the same along with his associate namely Anuj, who is a taxi driver. He was also informed that they will traffic *ganja* from Moradabad, UP in taxi of Anuj having Regn. No. DL-1YE-6453, at around 8:45 AM to 9:15 AM, near Railway track Bhairo Marg, Pragati

Maidan, Delhi. The said information was reduced into writing, a team was deployed near the place of information, and at the instance of the secret informer, two persons namely Anuj Kumar Upadhyay, aged about 30 years, and Daya Shankar, aged about 42 years were apprehended with Taxi no DL-1YE 6453, at about 6.00AM. A formal search of both the accused persons as well as their Taxi was conducted and 80 Kilograms *ganja* was recovered from the car, which was kept in four plastic gunny bags, each plastic bag containing 20 kilogram of *ganja*. Out of these four bags, three were in the boot space of the car and one bag was lying on the back seat of the car, held by co-accused Daya Shankar. Samples were drawn, and the contraband along with the samples was seized separately. Pursuant to this, the present FIR was registered. Samples of the contraband were sent to FSL, Rohini, Delhi and the report received was positive. On interrogation, co-accused Daya Shankar disclosed that he had visited the jungle in Kotpad, Odisha and had booked the *ganja* from one Nar Singh, who had delivered the same in Moradabad, UP through one Harun. Thereafter, he along with accused/applicant Anuj had gone to Moradabad in applicant's taxi for carrying *ganja* to Delhi. He also disclosed that he had brought *ganja* from Moradabad several times. Co-accused Harun, earlier declared as Proclaimed Offender, was arrested later on.

3. Learned counsel for the accused/applicant states that the applicant has been in judicial custody for more than six years. It is further argued that petitioner was not in 'conscious possession' of *ganja* and he was merely a driver of the taxi and thus, had no role to

play in possession of contraband or any other offence under NDPS Act. Learned counsel for applicant has also placed reliance on the judgment of Apex Court in *Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731*. Reliance has also been placed on several other judgments passed by Coordinate benches of this Court.

4. *Per contra*, learned Additional Public Prosecutor for the State submits that the allegations against the present applicant are serious in nature. It is stated that the applicant was in constant touch with the main accused Daya Shankar and both the accused persons had travelled between Moradabad and Delhi on several dates, including 15.05.2016, 16.05.2016, 13.06.2016, 14.06.2016 and 05.07.2016. It is also averred by the learned APP for the State that the applicant was found in conscious possession of 80 kilograms of *ganja*.

5. I have heard the learned counsels and perused the material on record.

6. After having given thoughtful consideration to the documents placed on record, this Court is of the opinion that this is a case where recovery of 80 kg of *ganja*, which is commercial quantity, has been made from the accused/applicant. The definite embargo under Section 37 of the Act has to be kept in mind in cases under NDPS Act, in view of judgment of *State of Madhya Pradesh v. Kajad, (2001) 7 SCC 673*, which clarifies that negation of bail is the rule and granting of bail is an exception under Section 37 of NDPS Act. Twin conditions have to be satisfied before granting bail in a case of recovery of commercial quantity of narcotic substance; first being an opportunity given to the prosecutor to oppose the application for bail, and secondly, the

satisfaction of the court that there is reasonable ground for believing that accused is not guilty of offences he is charged with and for the satisfaction that he will not commit any such offence while on bail.

7. In *State of Kerala v. Rajesh (2020) 12 SCC 122*, it was observed as under:

18. The jurisdiction of the Court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. It can be granted in case there are reasonable grounds for believing that accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. At this juncture, a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and non bailable. It reads thus:

*"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 subsection (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."

8. As observed by the Hon'ble Supreme Court in case of ***Union of India v. Prateek Shukla (2021) 5 SCC 430***, the provisions of Section 37 of NDPS Act have to be applied strictly at the time of deciding bail application of an accused. It has also been observed by the Apex Court in case of ***State v. Lokesh Chadha (2021) 5 SCC 724*** that the judgment of ***State of Kerala v. Rajesh (supra)*** has to be followed while deciding bail application under NDPS Act.

9. The Apex Court in ***NCB v. Mohit Aggarwal 2022 SCC OnLine SC 891***, while explaining the meaning of 'reasonable grounds' under Section 37(1)(b) of NDPS Act, has held as under:

"14. To sum up, the expression "reasonable grounds" used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail."

10. The arguments of the learned counsel that the accused is in judicial custody for more than six years at this stage can also be of no help to him. In this regard, it will be pertinent to refer to the judgment delivered by Three-judge bench of the Apex Court in case of *Sheru v. Narcotics Control Bureau, Crl. Appeal Nos. 585-586/2020 arising out of SLP (Criminal) Nos. 2249-2250/2020*, wherein though the accused had been in judicial custody for almost eight years, the Court expressed that mere passage of time cannot be a ground for grant of bail under NDPS Act. However, since the situation was different due to Covid-19 pandemic, the Apex Court had granted bail to the accused therein, but with a clarification that the same shall not be treated as a precedent. The observations of the Apex Court are as under:

"We have given a thought to the matter and there is no doubt that the rigors of Section 37 would have to be met before the sentence of a convict is suspended and bail granted and mere passage of time cannot be a reason for the same. However, we are faced with unusual times where the Covid situation permeates. We are also conscious that this Court has passed orders for release of persons on bail to de-congest the jail but that is applicable to cases of upto seven years sentence.

In the given aforesaid facts and circumstances of the case, we consider it appropriate to enlarge the appellant on bail on terms and conditions to the satisfaction of the Trial Court.

At the instance of the learned Additional Solicitor General, we clarify that the order has been passed in the given facts of the case and not to be treated as a precedent."

11. The attention of this Court was also drawn towards the judgment of Hon'ble Supreme Court in case of *Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731* to contend that in view of directions passed in same, bail be granted to the applicant since he has been in judicial custody for more than half of the total punishment that may be imposed upon him. However, it will be pertinent to refer to para 16 and 18 of the said judgment, which reads as under:

“16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order...”

18. We dispose of the petition insofar as it relates to the State of Maharashtra. But we are told that the situation is equally grave, with varying degrees, in certain other States like the States of Andhra Pradesh, Assam, Kerala, Karnataka, Gujarat, Orissa, Bihar, West Bengal, Uttar Pradesh and Madhya Pradesh. We direct notices to issue to these States through their Chief Secretaries to furnish information in the pro forma appended hereto to enable this Court to decide if similar action is called for. The information must be furnished within 4 weeks duly verified to be correct by an officer of the Department concerned not below the rank of a Deputy Secretary...”

(emphasis supplied)

In view of the aforesaid observations of the Hon'ble Supreme Court, this Court is unable to accept the argument that applicant is entitled to bail as per the decision in *Supreme Court Legal Aid Committee (supra)* as well as *Sheru v. Narcotics Control Bureau (supra)*.

12. The present case is one where heavy quantity of contraband was recovered from the car of the present applicant. Further during the investigation, it was also uncovered that several such transactions have taken place in past, running through different states in the country. In light of such facts and circumstances, merely because the applicant has been in custody for a long duration cannot be the sole ground for releasing him on bail by totally ignoring the mandate and restrictions imposed under Section 37 of NDPS Act and the seriousness of the offence.

13. At this stage, no ground for bail is made out against accused/applicant. Accordingly, the application stands rejected.

14. However, considering that 17 witnesses are yet to be examined by the learned Trial Court and the accused is in judicial custody for the more than six years, the learned Trial Court is requested to expedite recording of evidence in the present case and conclude trial within six months.

15. A copy of this order be forwarded to the learned Trial Court for information and compliance.

SWARANA KANTA SHARMA, J

NOVEMBER 15, 2022