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

CRM-M-881-2023

Date of Decision: 13.01.2023

Nasa Ulgaba

..... Petitioner

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. Yashpal Thakur, Advocate,
for the petitioner.

Ms. Lavanya Paul, AAG, Punjab.

JASGURPREET SINGH PURI, J. (ORAL)

The present is a second petition filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the petitioner in case bearing FIR No.325 dated 05.12.2018, under Section 22 of the N.D.P.S. Act, 1985, registered at Police Station City Kharar, District SAS Nagar (Mohali).

It has been submitted by learned counsel for the petitioner that it is a case where the petitioner, who is a foreign national, has faced incarceration for more than 4 years and he was arrested by the police on 05.12.2018 and the charges in the present case were framed on 29.07.2019 and thereafter, about 56 adjournments have been granted and only three witnesses have been examined till date. He further submitted that about 3½ years have elapsed after the framing of charges and the number of times

bailable warrants were issued by the trial Court to the official witnesses, who have themselves set the criminal law into motion but they failed to appear for deposing with the result that the petitioner had to face incarceration for more than 4 years for no fault of his. He also submitted that the petitioner is not involved in any other case and as per the allegation, the police party had apprehended him along with 500 grams of *Heroin* which although fall in the category of commercial quantity under the NDPS Act but the bar contained under Section 37 of the NDPS Act will not apply in the present case because of the following reasons:-

1. A perusal of the FIR and the police proceedings would show that when the police party had detained the petitioner then an offer was given in pursuance of the provisions under Section 50 of the NDPS Act but bare reading of the police proceedings itself, the Vernacular of the same is at Page No.76 of the Paper-book, would show that when the offer was given to the petitioner that he has got a right to be searched either from the S.I. himself or from a Gazetted Officer or from a Magistrate. Learned counsel for the petitioner has submitted that on the face of it, this offer was a defective offer and totally contrary to the provisions under Section 50 of the NDPS Act because the offer for three persons have been given which includes the S.I. himself is not sustainable under the law. He also submitted that it is a settled law that when there is a blatant violation of Section 50 of the NDPS Act then the entire recovery gets vitiated. He

also referred to the judgment passed in “*State of Rajasthan Vs. Parmanand & another*”, 2014(5) SCC 345 in this regard.

2. He submitted that for about 56 times the trial Court has adjourned the case and more than 3½ years have elapsed after framing the charges and number of times bailable warrants were issued vide table made in Para No.9 of the petition with the result that the petitioner is facing incarceration for more than 4 years for no fault of his. There was no justification from those police officials, who had themselves set the criminal law into motion for not deposing before the Court and the trial Court was constrained to pass various orders pertaining to summoning of the official respondents by way of bailable warrants. In this context, the learned counsel for the petitioner has relied upon the latest judgment of the Hon'ble Supreme Court passed in “*Satender Kumar Antil Vs. Central Bureau of Investigation and another*”, 2022(10) SCC 51, to contend that the right under Article 21 of the Constitution of India was seriously *jeopardized* especially considering the long custody of the petitioner which is more than 4 years as of today.

3. The petitioner is not involved in any other case and has got clean antecedents.

On the other hand, Ms. Lavanya Paul, learned DAG, Punjab has submitted that it is correct that the petitioner is in custody since 05.12.2018

and charges were framed on 29.07.2019 which is more than 3½ years ago, but only three witnesses have been examined till today. She further submitted on instructions from A.S.I. Harminder Singh, that it is also correct that the petitioner is not involved in any other case. However, she has opposed the grant of regular bail to the petitioner on the ground that the recovered quantity from the petitioner falls in the category of commercial quantity under the NDPS Act, and therefore, the prayer of the petitioner is hit by the bar contained under Section 37 of the NDPS Act.

I have heard the learned counsel for the parties.

The petitioner is a foreign national and is stated to be in custody since 05.12.2018, which is more than 4 years and the charges in the present case were framed on 29.07.2019, which is 3½ years ago. About 56 adjournments were granted by the learned trial Court as per the learned counsel for the petitioner and the same has been shown by way of tabulated form in Para 9 of the petition and it would show that for number of times bailable warrants were issued against the official witnesses, who failed to depose and till now only three witnesses have been examined.

On a query being raised to the learned State counsel as to what is the justification with regard to the same, she was not able to justify the same even on taking instructions from the official, who is present in Court.

Apart from the above, a perusal of the police proceedings and FIR would show that the S.I., CIS Staff, Kharar, when detained the petitioner made an offer to the petitioner as to whether he wants himself to be searched from three persons i.e. S.I. himself or the Magistrate or the Gazetted Officer. In this way, options have been given to the petitioner for

getting searched from three persons and that too from the person, who had detained him of the level of Sub Inspector. Therefore, on the face of it, there was not only a violation of Section 50 of the NDPS Act but rather it forfeits the objective of the safeguards which have been provided under the NDPS Act. Reliance made by the learned counsel for the petitioner in Satender Kumar Antil's case (supra) and State of Rajasthan Vs. Parmanand & another's case (supra) is well-placed.

Hon'ble Supreme Court in Satender Kumar Antil's case (supra) also considered the menace of repeated adjournments which affects the rights of the under-trials in the context of Article 21 of the Constitution of India. Although, the petitioner is a foreign national but Article 21 of the Constitution of India would apply not only to the citizens of India but even to those, who are foreign nationals. Therefore, the reliance made on the aforesaid judgment is well-placed.

Apart from the above, the total custody of the petitioner is more than 4 years and he is stated to be having clean antecedents and is not involved in any other case. Although this Court does not wish to go into the merits of the present case since the trial is pending but for the purpose of considering the grant of regular bail to the petitioner and also considering the effect of Section 37 of the NDPS Act, the aforesaid two aspects deserves to be considered in true perspective.

Due to the aforesaid facts and circumstances, this Court is of the view that there are *prima facie* reasons to believe that the petitioner is not guilty of offence at least at this stage. So far as the second ingredient with regard to the likelihood of the petitioner repeating the offence is

concerned, it is neither the case of the State nor it has been so argued by the learned State counsel that in case the petitioner is released on bail, then he may abscond or flee from justice or may repeat the offence particularly when he is stated to be not involved in any other case.

Therefore, this Court is of the view that both the ingredients for making a departure from the bar contained under Section 37 of the NDPS Act remain satisfied.

In view of the aforesaid facts and circumstances of the case, this Court deems fit and proper to grant bail to the petitioner. Consequently, the present petition is allowed and the petitioner is ordered to be released on bail on furnishing bail bond/surety bond to the satisfaction of the trial Court/Duty Magistrate concerned, if not required in any other case **with an added condition that the petitioner shall surrender his passport before the Investigating Agency/Court, if not already surrendered.** The said surrender of the passport would not become an impediment for making an appropriate application in future before the learned trial Court for release of the same, if so required and in accordance with law

However, anything observed hereinabove shall not be treated as an expression of opinion on merits of the case and is only meant for the purpose of decision of present petition.

13.01.2023

Bhumika

(JASGURPREET SINGH PURI)
JUDGE

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| 1. Whether speaking/reasoned: | Yes/No |
| 2. Whether reportable: | Yes/No |