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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-7379-2023

Decided on: 16.02.2023

Ajay Kumar @ Kaku

.... Petitioner

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. D.N. Ganeriwala, Advocate
for the petitioner.

Ms. Akshita Chauhan, DAG, Punjab.

JASGURPREET SINGH PURI, J. (ORAL)

The present is the second petition filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the petitioner in case FIR No.22 dated 03.02.2021, under Section 21 of the NDPS Act, registered at Police Station STF Phase-4, District Mohali (SAS Nagar).

It has been submitted by learned counsel for the petitioner that the petitioner is in custody since 22.02.2021, which is almost two years. He further submitted that now only one witness has been examined by the learned trial Court and that witness is only a person who had sent the samples to the FSL and none of the persons, who were part of the police party or recovery witness, have been examined. He also submitted that it is a case where an FIR was registered against the co-accused, namely, Ankush, who was allegedly caught on the spot with 355 grams of *Heroin* and on whose disclosure statement, the name of the petitioner was nominated in the present case. He

further submitted that the petitioner was earlier involved in some other cases under the NDPS Act and that was the reason, the petitioner has been falsely implicated in the present case. He also submitted that there is no sufficient material available with the prosecution to connect the petitioner with the present offence except for the disclosure statement of the aforesaid co-accused, which is otherwise not admissible in evidence in view of the judgment passed by the Hon'ble Supreme Court in “*Tofan Singh Vs. State of Tamil Nadu*”, 2021(1) RCR (Criminal) 1. He further submitted that mere fact that the petitioner is involved in some other cases under the NDPS Act, cannot become a ground for denial of the bail to the petitioner especially considering the fact that he has already faced incarceration for almost two years. He has referred to the zimni orders passed by the learned trial Court after framing of the charges to show that for two times, the prosecution witnesses have been summoned through non-bailable warrants and in fact the prosecution witnesses, who are the police officials, have failed in their duties to depose before the Court and that was the reason as to why the trial Court had to summon by way of issuance of warrants against them. He submitted that in view of the aforesaid facts and circumstances, the petitioner may be considered for the grant of regular bail.

On the other hand, Ms. Akshita Chauhan, DAG, Punjab, has submitted that it is correct that the petitioner is in custody for almost two years and only one witness has been examined till date and the witness is the person, who had taken the sample to the FSL but none of the persons, who were part of the police party and who had apprehended the co-accused, has been examined. She further submitted that the name of the petitioner was nominated on the basis of disclosure statement of the aforesaid co-accused, namely,

Ankush, who was apprehended at the spot and during investigation, various call details have been noted between the co-accused and the present petitioner. She has opposed the grant of regular bail to the petitioner on the ground that the recovery from the co-accused falls under the category of commercial quantity under the NDPS Act, 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.

On a query being raised to the learned State counsel that as to whether there was any recovery effected from the present petitioner or not, to which she has submitted on instructions from ASI Gulshan Kumar, who is present in the Court today that no recovery has been effected from the petitioner.

On another query being raised to the learned State counsel that as to whether there is any sufficient evidence available to connect the petitioner with the present offence except for the disclosure statement of the co-accused to which she submitted on instructions that there are certain telephone calls between the petitioner and the co-accused.

This Court is of the view that mere fact there were certain phone calls between the petitioner and the co-accused cannot become a ground for denial of bail to the petitioner, since it can be seen at the time of evidence with regard to the admissibility and reliability of those phone calls. So far as the applicability of Section 37 of the NDPS Act is concerned, no recovery has been effected from the petitioner but the same has been allegedly effected from the co-accused, which falls in the commercial quantity. The petitioner has already faced incarceration for almost two years and his name was nominated on the basis of the disclosure statement of the aforesaid co-accused.

In view of the aforesaid totality of the aforesaid circumstances, this Court is of the view that the bar contained under Section 37 of the NDPS Act will not apply in the present case since no recovery has been effected from the petitioner. Therefore, this Court is of the view that considering the long custody of the petitioner which is almost two years, the petitioner is entitled for the grant of regular bail especially in the light of Article 21 of the Constitution of India.

Consequently, the present petition is allowed. The petitioner shall be released on regular bail subject to the appropriate terms and conditions to the satisfaction of the trial Court/Duty Magistrate concerned, if not required in any other case.

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

16.02.2023*Bhumika***(JASGURPREET SINGH PURI)
JUDGE**

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