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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-47561-2022
Date of decision: 10.08.2023

JAJ SINGH

...Petitioner

VERSUS

STATE OF PUNJAB

...Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present:- Mr. N. S. Sodhi, Advocate
for the petitioner.

Mr. Sarabjit Singh Cheema, DAG, Punjab.

JASGURPREET SINGH PURI, J. (Oral)

1. The present petition has been filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the petitioner in FIR No.298 dated 16.11.2021, under Sections 15, 29, 61, 85 of the NDPS Act, registered at Police Station Sadar Fazilka, Distict Fazilka, Punjab.

2. Learned counsel for the petitioner has submitted that the petitioner is in custody from 16.11.2021, which is almost 1 year and 8 months and charges in the present case were framed in February, 2023 and till date, about 6 months have elapsed but no prosecution witness has been examined. He submitted that as per the prosecution, on the basis of a secret information, there was an alleged recovery of 90 kgs. of poppy husk from two co-accused including the petitioner and the recovery was allegedly effected from the canter. He further submitted that the

petitioner is not having any criminal antecedents and is not involved in any other case and it was only because of political rivalry that he has been falsely implicated in the present case. During the course of arguments, he has referred to Annexure P-3, which is a non-consent memo. He further submitted that in the present case, the police officer gave an offer to both the accused jointly and it was a case of a joint offer. He has referred to last part of Annexure P-3 to show that on one offer, both the accused had signed. He further submitted that the very purpose of Section 50 of the NDPS Act can be defeated once a joint offer is given as it creates confusion with regard to apprising the accused with regard to the right to be searched by the Gazetted Officer or a Magistrate. He has referred to a judgment of Hon'ble Supreme Court in *State of Rajasthan versus Parmanand and another, 2014(2) RCR (Criminal) 40* and while referring to the same he has submitted that in case there is a joint offer, it would amount to non-compliance of Section 50 of the NDPS Act. He further submitted that even otherwise also the petitioner had already faced incarceration of about 1 year and 8 months and he is not having any criminal antecedents. The trial of the case is not going fast since till date not even a single witness has been examined despite the fact that charges were framed in February, 2023 and, therefore, the petitioner may be considered for grant of regular bail.

3. On the other hand, Mr. Sarabjit Singh Cheema, DAG, Punjab has opposed the grant of bail on the ground that even if there was a joint offer but since both the accused had signed on the same one offer, the law laid down by the Hon'ble Supreme Court in *Parmanand's case (supra)* will not apply because in the facts and circumstances of the aforesaid judgment as only one of the accused had signed the non-consent memo and he also represented the other co-accused.

He has submitted that the recovery from both the accused in the present case including the petitioner was 90 kgs. of poppy husk, which falls in the category of commercial quantity because as per the NDPS Act, the commercial quantity is 50 kgs. and, therefore, the prayer of the petitioner is hit by the bar contained under Section 37 of the NDPS Act. So far as the custody of the petitioner is concerned, it is correct that the petitioner is in custody for about 1 year and 8 months and he is not having any criminal antecedents and is not involved in any other case. He further submitted that even otherwise also the recovery was not effected from the person of the co-accused including the petitioner but was from the canter and, therefore, the provisions of Section 50 of the NDPS Act will not apply.

4. I have heard the learned counsel for the parties.

5. The petitioner is in custody for about 1 year and 8 months and the charges were framed in February, 2023 and till date no prosecution witness has been examined. The petitioner is stated to be not involved in any other case and not having any criminal antecedents. Learned counsel for the petitioner has relied upon a judgment of Hon'ble Supreme Court in *Parmanand's case (supra)* to contend that it was a case of a joint offer and, therefore, the offer was bad in law since it was against the spirit of Section 50 of the NDPS Act. On the other hand, learned State counsel has submitted that the provisions of Section 50 of the NDPS Act will not apply in the present case since no recovery was effected from the conscious possession of the co-accused including the petitioner and also that since both the accused including the petitioner had signed the memo, the aforesaid judgment of the Hon'ble Supreme Court as relied upon by learned counsel for the petitioner will not apply.

6. However, this Court is of the view that as per the ratio of judgment passed in Parmanand's case (supra), it is the rightful procedure which is required to be followed since these are the minimum safeguards available to the accused against the possibility of false involvement. The communication of the right has to be clear, unambiguous and to an individual and it must not create any confusion. Para No.14 of the aforesaid judgment is reproduced as under:-

“14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval. It bears repetition to state that on the written communication of the

right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.”

7. This Court is of the view that the contention raised by learned State counsel is not tenable in view of the spirit of the judgment passed by Hon'ble Supreme Court in **Parmanand's case (supra)**. So far as the second argument raised by learned State counsel that the provisions of Section 50 of the NDPS Act will not apply because there was no recovery from the person of the petitioner and the co-accused is concerned, the same is also not sustainable in view of the fact that once the police officer initiates and adopts the procedure under Section 50 of the NDPS Act and an offer is made undisputedly, then it is the duty of the police officer to have complied with the provisions of Section 50 of the NDPS Act in strict sense. Even otherwise also, the petitioner has also faced incarceration of about 1 year and 8 months and he is stated to be having no criminal antecedents.

8. The Hon'ble Supreme Court in **Dheeraj Kumar Shukla versus The State of Uttar Pradesh (Special Leave to Appeal (Crl.) No.(s) 6690 of 2022)**

has observed as under:-

3. It appears that some of the occupants of the 'Honda City' Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

9. Recently, the Hon'ble Supreme Court in **Rabi Prakash Versus State of Odisha, Special Leave to Appeal (Crl.) No.4169 of 2023** has also discussed the effect of Section 37 of the NDPS Act in such like cases of long custody. The relevant portion of the aforesaid judgment contained in para No.4 is reproduced as under:-

“4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

10. Therefore, considering the aforesaid facts and circumstances of the case, this Court is of the view that the bar contained under Section 37 of the NDPS Act will not apply to the present case in the light of Article 21 of the Constitution of India.

11. Consequently, the present petition is allowed. The petitioner shall be released on regular bail subject to furnishing bail bonds/surety bonds to the satisfaction of the learned trial Court/Duty Magistrate concerned.

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

10.08.2023
Chetan Thakur

(JASGURPREET SINGH PURI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No