



2024:DHC:8762



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

% **Date of order: 13th November, 2024**

+ **BAIL APPLN. 2223/2024**

SHADAB KHAN

.....Petitioner

Through: Mr. Akshay Bhandari, Mr. Kushal
Kumar, Mr. Anmol Sachdeva, Ms.
Megha Saroa and Mr. Janak Raj
Ambavat, Advocates

versus

NARCOTICS CONTROL BUREAU

.....Respondent

Through: Mr. Subhash Bansal, Senior Standing
Counsel for NCB with Mr. Shashwat
Bansal, Advocate (Through VC)

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant bail application has been filed on behalf of the applicant under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter "CrPC") (now Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023) seeking regular bail in complaint case no. VIII/42/DZU/21 registered under Sections 22(c)/23(c)/29 of the Narcotic Drugs and Psychotropic Substances, Act, 1985 (hereinafter "NDPS") at Police Station –Narcotics Control Bureau (hereinafter "NCB").

2. As per the prosecution, on 26th July, 2021, secret information was



2024:DHC:8762



received by Sh. JP Singh, Investigating Officer, NCB-DZU that a parcel bearing no. 8007134192 containing narcotics and psychotropic substance destined to United States is lying at DHL Express Pvt. Ltd.

3. Thereafter, the information was reduced into typing and was put before Assistant Director, NCB- DZU who marked the same with the direction to take necessary actions as per the law under the NDPS Act. The raiding team was constituted and they, along with the field-testing kit and all the requisite items required for search and seizure proceedings, reached DHL Express Pvt. Ltd., 71/3 Rama Road, Near Kirti Nagar, New Delhi at about 16.05 Hrs.

4. It is stated that the raiding team met one of the employees of the aforesaid courier company and after disclosing their identity, one Mr. Mustafa Raza agreed to become an independent witness. Thereafter, the suspected parcel with way Bill bearing No. 8007134192 was brought before the NCB team and the parcel was examined. The parcel was in the form of *Khaki* Cardboard box on which the details in the form of an invoice and way Bill were pasted.

5. Thereafter, the parcel was opened and upon opening the said carton box, six cylindrical shaped rolls of golden coloured laces were recovered. Upon removing the golden-coloured lace, a cotton thread was seen, on further removing it, strips of Tramadol Tablets were found concealed in it under which the plastic frame of roll was found. Similarly on checking the remaining rolls, same sort of packing was found in which Tramadol Tablets were concealed in similar fashion. The details of the quality and quantity are



2024:DHC:8762



– Total $595 \times 10 = 5950$; Name of tablet – NRx Tramadol Hydrochloride Tablets “OL – TRAM” (100 mg) manufactured by HAB Pharmaceuticals and Research Limited.

6. The weight of the 10 tablets was taken, it was found to be 3.5 Grams. By assumption and calculation there were 595 strips in total and there will be a total of 5950 tablets. Total weight of 5950 tablets came out to be 2.083 Kgs. The raiding team de-stripped the tablets and the emptied the same in a small pouch along with the remaining 594 strips were then put into a transparent polythene packet and its mouth was tied with the help of a plastic *sutli*. The seizure report dated 27th July, 2021 was prepared and thereafter, the seizure was sent to *Malkhana*.

7. The proceeding under Section 52A of the NDPS was compiled by the Investigating Officer (hereinafter “IO”) for drawing of samples from the seized case property on 18th August, 2021 before the learned Reliever Metropolitan Magistrate for sampling of the recovered contraband having 595 strips bearing batch no 964-09, that is, 5950 tablets in total. Two samples, marked as Mark A & A2, of one strip of 10 tablets each were drawn by the IO. During the investigation, the prosecution issued a notice under Section 67 of the NDPS to Mr. Rajesh Gupta on 25th August, 2021 and his statement was recorded on dated 1st September, 2021.

8. On 2nd September, 2022, Mr. Rishabh Tandon (co-accused) was intercepted at Lucknow and his statement under Section 67 of the NDPS was recorded. It is stated that Mr. Tandon tendered his statement voluntary wherein he disclosed that he received the aforesaid parcel from Mr. Shadab



2024:DHC:8762



Khan (co-accused/applicant herein) and booked the same. He also disclosed other incriminating facts and allegedly admitted his involvement with the applicant herein in the commission of present crime.

9. In furtherance of the investigations and information disclosed by the co-accused Mr. Tandon, the present applicant was intercepted at Lucknow on 2nd September, 2022 and in pursuance of the notice under Section 67 of the NDPS, Mr. Shadab Khan (applicant herein) tendered his voluntary statement wherein he admitted his involvement with the co-accused Mr. Tandon and one Mr. Sharik Khan pursuant to which the applicant herein and co-accused Mr. Tandon were arrested.

10. During the investigation, notices under Section 67 of the NDPS were issued in the name of Mr. Sharik Khan but he did not join the investigation and the learned Trial Court issued proclamation order under Section 82 of the CrPC. Thereafter, on 27th February, 2023, the present complaint was registered by the NCB. Following the same, charges were framed against the accused vide order dated 18th May, 2023 under Sections 22(c), 23(c) and 29 of the NDPS.

11. Consequently, the applicant approached the Court concerned seeking regular bail which was dismissed vide order dated 16th May, 2023. Hence, the present petition.

12. Learned counsel appearing on behalf of the applicant submitted that there has been no recovery from the applicant of any contraband and thus, the allegations levelled against the applicant are misconceived and baseless.

13. It is submitted that the applicant was merely arranging a car loan for



2024:DHC:8762



his cousin namely Mr. Shaik Khan and accordingly, Mr. Khan had visited the applicant on 13th July, 2021. At the time of his visit, he told the applicant that his friend Mr. Mohd. Jafar works for one Ms. Priyanka Singh as her office clerk and needs to send the said courier to USA and since his friend is unwell, he was sending the courier on his behalf and requested the applicant to send the same as he would be travelling and did not have time to send the said courier.

14. It is submitted that the applicant was told by Mr. Khan that the courier needs to be sent on the Aadhar Card of Mr. Jafar as if his employer realizes that he has made someone else send the courier, he would lose his employment.

15. It is submitted that on 13th July, 2021, Mr. Khan had forwarded the address to the applicant on Whatsapp on which the said courier had to be sent. Further, the prosecution has completely ignored the said material and made a case against the applicant that he had received the parcel on 20th July, 2021 to send the same to the USA.

16. It is submitted that the applicant had not even sent the said parcel and only upon being reminded by Mr. Khan, he sent the same on 20th July, 2021 by requesting his friend, i.e., Mr. Tandon to send the same as the applicant had to return home early.

17. It is submitted that applicant was not aware of the contents of the said parcel and the only evidence to support that the applicant was aware of the said contents is the disclosure statement which is inadmissible. Further, there is no money transaction between the applicant and Mr. Khan after the said



2024:DHC:8762



parcel was sent except for one transaction of Rs. 2000/- on 30th June, 2021, to support the allegation that the applicant was engaging in sending couriers containing the narcotics with Mr. Khan on a commission basis.

18. It is submitted that the only transaction between the applicant and Mr. Khan, before the said parcel was sent is of Rs. 2,000/- on before the said parcel was even received by the applicant and the said money was sent to the applicant to arrange the car loan for Mr. Khan.

19. It is submitted that the only allegation against the applicant is that he had handed over the parcel to the main accused Mr. Tandon to send the same to the USA. It is further submitted that perusal of the data extracted from the mobile phone of the applicant would show that when the courier company had asked for a clear copy of the Aadhar card and Pan card, the applicant was willing to provide his own mobile number to the courier company, however his cousin instructed him not to give his mobile number. The said aspects shows that the applicant was not aware of the contents in the parcel and cannot be said to be in conscious possession.

20. It is submitted that as per the panchnama dated 26th July, 2021, the de-stripped tablets along with the other tablet strips was put into a small plastic pouch along with the other tablets, which was further put into a transparent polythene packet and then its mouth was tied with using a plastic nylon *sutli*. However, when the case property was produced before the Court concerned, it categorically records that upon opening the *pullanda* which was Mark - A, it was found to be containing a transparent polythene having 595 strips of tablets. Further the weight of the tablets is not mentioned and the only



2024:DHC:8762



evidence regarding the weight of tablets is based upon the assumption of the NCB, however, no actual measurement of the weight of the alleged contraband was carried out. Therefore, there is no evidence against the applicant implicating him in the offence involving commercial quantity under the NDPS.

21. Therefore, in view of the foregoing submissions, it is prayed that the applicant may be released on bail.

22. *Per Contra*, the learned senior standing counsel appearing on behalf of the NCB vehemently opposed the instant application submitting to the effect that the same may be dismissed being devoid of any merits.

23. It is submitted that in the present case, commercial quantity of drugs/contraband has been seized and the present applicant was involved in the illicit trafficking of the narcotics medicines, and in illegal diversion of the contraband in huge quantity, and actively involved in the commission of the crime covered under the NDPS and hence, there is a bar of Section 37 of the NDPS.

24. It is submitted that the statutory presumption under Sections 35 and 54 of the NDPS is against the accused. Furthermore, it has been held in a catena of judgment that whether any prejudice has been caused by the sampling procedure, it can only be established during the trial before the Court concerned, who, after consideration of evidence can only determine the same.

25. It is submitted that mere delay in compliance of the sampling and seizure procedure cannot be a ground for grant of bail. The applicant herein



2024:DHC:8762



has to show the prejudice caused on account of the non-compliance of Section 52A of the NDPS and in the present case, the applicant has failed to show or even give a whisper of any prejudice being caused to him due to the delay in complying Section 52A of the NDPS.

26. Therefore, in view of the foregoing submissions, it is prayed that the instant application may be dismissed.

27. Heard learned counsel appearing on behalf of the parties and perused the material placed on record.

28. The crux of the applicant's contention is that he was not in conscious possession of the narcotics in question and no *prima facie* case is made out against him. There is non-compliance of Section 52A of the NDPS which prescribes for procedure and disposal of seized narcotic drugs and psychotropic substances. It has been further contended that the applicant has been in judicial custody since 2nd September, 2022 and he may be released on bail as he will not violate the terms of the bail imposed upon him.

29. In rival submissions, learned senior standing counsel has vehemently opposed the present application on the ground that mere assertion of delay in compliance of Section 52A of the NDPS cannot be a ground for bail as held by the Hon'ble Supreme Court and this Court in a catena of judgments.

30. Insofar the law *qua* the assertion of 'conscious possession' is concerned, it is to be noted that the same is a question of fact which is to be determined on the basis of peculiar factual situation of each case. The same was also observed by the Hon'ble Supreme Court in ***Madan Lal v. State of H. P.*, (2003) 7 SCC 465**. In the said case, it was also held by the Hon'ble



2024:DHC:8762



Court that once possession is established, burden is on the accused to prove that it was not a conscious possession. Relevant paragraphs of the same are as under:

“..19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression “possession” is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja [(1979) 4 SCC 274 : 1979 SCC (Cri) 1038 : AIR 1980 SC 52] to work out a completely logical and precise definition of “possession”



uniformly applicable to all situations in the context of all statutes.

23. The word “conscious” means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in Gunwantlal v. State of M.P. [(1972) 2 SCC 194 : 1972 SCC (Cri) 678 : AIR 1972 SC 1756] possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

25. The word “possession” means the legal right to possession (see Heath v. Drown [(1972) 2 All ER 561 : 1973 AC 498 : (1972) 2 WLR 1306 (HL)]). In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness [(1976) 1 All ER 844 : 1976 QB 966 : (1976) 2 WLR 361 (QBD)]).”

31. In the present case, the learned counsel for the applicant has submitted that the applicant was oblivious to the content of the package while it was in his possession and such a circumstance *dehors* the definition of “conscious possession”.

32. Upon perusal of the material placed on record including the Status Report, it is observed by this Court that during the investigation, it was unearthed by the investigating agency that from the mobile phone of the co-accused Mr. Shadab Khan, the tracking ID of the parcel in question, as



2024:DHC:8762



well as documents belonging to the other co-accused Mr. Sharik Khan, were recovered, and then the parcel in question was handed over to Mr. Tandon (co-accused).

33. Furthermore, during investigation, it was found by the investigating agency that there is a call detail record between the applicant, Mr. Tandon, and Mr. Sharik Khan. Additionally, location of both the individuals, i.e., the applicant and Mr. Tandon can be traced near the booking center at the relevant time. Also, the Aadhar card and Pan card attached to the parcel in question, belonging to one Mr. Mohd. Jafar, have been found to be invalid as well.

34. This Court is of the view that under Section 35 of the NDPS, the legislature has stated that there is a presumption of “conscious possession” when an individual is found in possession of prohibited substances and the burden of proof to negate the said presumption lies with the accused.

35. In the instant case, the quantity recovered from the applicant is 2.083 KG which is a “commercial quantity” under the Act, which significantly increases the gravity of the offense and further strengthens the presumption against the applicant.

36. Therefore, from the facts and circumstances arising from the complaint filed by the NCB, it appears that the applicant had the knowledge of the contents of the parcel in question and thus, was in conscious possession of the parcel in question. Moreover, although the applicant has questioned the ‘conscious possession’ of contraband recovered, he has failed to bring on record any submission to prove otherwise, and thus, this Court



does not find any merit in the assertion that the applicant was not in a conscious possession to grant him bail.

37. Moving further, the applicant has contended that the respondent failed to comply with the mandate of Section 52A of the NDPC which prescribed for a particular timeline and procedure to be followed for the disposal of the narcotics recovered and thus, the same is a ground for grant of bail.

38. With regard to the above, this Court is of the considered view that merely asserting that there is a delay and no proper procedure was followed by the investigating agency, it cannot be a cogent ground for grant of bail as the same is merely a technical ground and in order to seek bail, the applicant must show as to how the lapse in following the provisions of Section 52A of the NDPS has caused any prejudice to him. This ground coupled with other factors may be taken into consideration to grant bail, however, embargo under Section 37 of the NDPS has to be borne in mind.

39. It is also noteworthy that, *firstly* non-compliance of Section 52 of the NDPS, in itself, cannot render the actions of the investigating officer null and void and *secondly*, whether non-compliance of rules, in cases involving commercial quantity, could be a ground for grant of bail, will have to be examined considering the nature of violation of such standing procedure and consequences thereof. This Court finds support in ***M. Prabhulal vs. Assistant Director, (2003) 8 SCC 449***, wherein, the Hon'ble Supreme Court declined to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure.

40. The offense in question involves the alleged possession and



2024:DHC:8762



trafficking of a "commercial quantity" of narcotics, specifically 2.083 kg of Tramadol tablets. The NDPS treats offenses involving commercial quantities with utmost severity due to their grave implications for public safety and societal well-being. Drug trafficking endangers communities and promotes addiction and social decay, particularly affecting vulnerable populations.

41. In the instant case, a huge commercial quantity of prohibited narcotics has been recovered and as the chargesheet has already been filed, the said ground may be taken before the learned Court concerned. However, in light of the facts of the instant case, the same cannot be dealt with as a ground to seek bail as mere non-compliance of Section 52A of the NDPS does not vitiate the trial. The said view was also taken by a Co-ordinate Bench of this Court in *Arvind Yadav v. Govt. (NCT of Delhi)*, 2021 SCC OnLine Del 3619. Therefore, keeping in mind the above discussions, this Court does not find any merit in the instant contention.

42. Summarily stated, it is pertinent to note that the quantity of psychotropic substance recovered in the present case constitutes as commercial quantity and the non-compliance with Section 52A of the NDPS Act does not vitiate the proceedings at the trial stage. Alleged non-compliance or procedural lapses under Section 52A cannot serve as basis for granting bail, as these issues are matters for consideration during the trial or after its conclusion.

43. The NDPS is a specialized law with stringent provisions for the handling, control, and punishment of drug-related offenses. This Act operates on a principle of deterrence, and Section 37 of the said Act



2024:DHC:8762



specifically lays down rigorous conditions for granting bail in drug-related offenses and the burden to satisfy these conditions lies on the accused, given the grave threat that narcotic offenses pose to society at large.

44. Therefore, it is pertinent to mention that in ***Union of India v. Mohd. Nawaz Khan, (2021) 10 SCC 100***, the Hon'ble Supreme Court observed that bail may be cancelled if it was granted without following the requirements specified under Section 37 of the NDPS Act.

45. Under Section 37 of the NDPS, an accused in a commercial quantity case is only entitled to bail if there are 'reasonable grounds to believe' that they are not guilty of the offense and are unlikely to commit any offense upon release.

46. Based on the facts presented, this Court finds that the applicant has not met this threshold. The first bail dismissal order dated 9th April, 2024 records that the present accused was *prima facie* in regular contact with other co-accused.

47. There is a substantial risk that the applicant, if released, may continue engaging in similar illicit activities or may attempt to interfere with witnesses or the investigation process, considering the organized nature of narcotic offenses.

48. Further, as per the material on record, the learned Trial Court has issued proclamation order under Section 82 of the CrPC against one of the co-accused namely Mr. Sharik Khan, therefore, there is an apprehension of flight risk against the instant applicant as well.

49. Moreover, the applicant's suspicious conduct, including the



2024:DHC:8762



formatting of his phone, further supports the allegation that he deliberately destroyed potential evidence. The forensic report, which indicates that the applicant's device was corrupted, substantiates claims of evidence tampering, suggesting a deliberate attempt to obstruct justice. Thus, the embargo under Section 37 of the NDPS is clearly applicable to the facts of the instant case.

50. It is pertinent to note that this case is in a premature stage of trial. The evidence gathered, including the search and seizure proceedings, is yet to be tested through judicial scrutiny. Any procedural lapses alleged by the applicant relating to search and seizure are issues that fall squarely within the domain of the Trial Court's jurisdiction.

51. It would be inappropriate for this Court to address or preemptively adjudicate these technical matters at the bail stage, as they must be determined based on a full examination of evidence during trial proceedings. Granting bail on these grounds would undermine the purpose of the NDPS and could jeopardize the ongoing investigation and trial.

52. Therefore, keeping in view the aforesaid facts and circumstances as well as the discussion on law, this Court is not inclined to grant bail to the present applicant at this stage.

53. Accordingly, the instant petition stands dismissed along with the pending applications, if any.

54. It is made clear that the observations made hereinabove shall not be construed as an expression of this Court on the merits of the case.



2024:DHC:8762



55. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

NOVEMBER 13, 2024
gs/ryp/mk

Click here to check corrigendum, if any

Signature Not Verified

Digitally Signed By: PRAVEER
KUMAR BABBAR
Signing Date: 19.11.2024
19:49:44

BAIL APPLN. 2223/2024

Page 16 of 16