

Duni Chand S/O Chittar Dev R/O Ward No.2 vs Union Territory Of Ladakh Through ... on 17 February, 2023

Author: Mohan Lal

Bench: Mohan Lal

S. No. 3

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Bail App No. 281/2022

Reserved on:-30.11.2022

Pronounced on:-17.02.2023

Duni Chand S/o Chittar Dev R/o Ward No.2,
Village Chong PO Jallugrn Tehsil Bhunter
District Kullu Himachal Pradesh (Presently
lodged at District Jail Choglamsar, Leh Ladakh)
through his mother Lubhdi Devi

....Petitione

Through :- Sh.GaganBasotra, Sr. Advocate with
Sh. Rishabh K. Sharma, Advocate

V/s

1. Union Territory of Ladakh through Incharge
Police Station, Leh.
2. Jail Superintendent, Disgtrict Jail, Leh.
Through:- Sh. Vishal Sharma, DSGI.
- 1.

....Respondent(

Coram: HON'BLE MR.JUSTICE MOHAN LAL, JUDGE

ORDER

17---02--2023

1. Petitioner has sought regular bail in terms of Section 439 of the Code of Criminal Procedure in case FIR No. 235/2020 dated 29.10.2020 for the commission of offences punishable under Sections 8/20 of the Narcotic Drugs and Psychotropic Substances Act 1985 (for short the "NDPS Act"). It is averred, that petitioner neither committed any offence nor he has any link with the commission of any offence but Police Station Leh District Leh arrested him on 29.10.2020 and implicated him in a false and frivolous case without adopting due course of law and in violation of the guidelines laid down by the Hon'ble Supreme Court. It is averred, that police allegedly recovered Charas weighing 8Kg 190 grams from the petitioner during course of investigation and after completion of investigation has filed the charge-sheet/challan before the Court of learned Principal Sessions Judge Leh on 29.12.2020 which is now pending disposal. It is averred, that the learned Principal Sessions

Judge, Leh (for short the trial Court) charge-sheeted the petitioner, prosecution was directed to lead evidence to prove the charge and the prosecution in turn had examined six (6) material witnesses which include S.I. Regzin Gurmet, HC Tashi Dorjay and Tsewang Stobdan (Numberdar), who are witnesses to the scene of occurrence, seizure memo of alleged recovery of the charas and arrest as gathered from the challan, the other witnesses which stand examined are, HC Tsewang Dorjay, HC Tsewang Yangjor and Feroz Ahmad Khan (Mechanic who opened the tail lights of the Bolero car bearing No. HP34E- 1400 from where the alleged contraband was recovered). It is moreso averred, that all the prosecution witnesses which stand examined are witnesses to the scene of occurrence as such, are material witnesses meaning thereby, their evidence would play crucial role in the conviction or acquittal of the petitioner; that the evidence till date led by the prosecution is the evidence of material witnesses and the aforesaid witnesses namely S.I. Rigzin Gurmet & Head Constable Tashi Dorjay had deposed that there was a prior information with the police about the vehicle and it is also established that the police has not complied with the mandatory provisions of the NDPS Act, 1985 including the provisions under section 42 which is quite apparent from the record which further establishes that the petitioner was falsely implicated in the aforesaid case, the Apex Court in *Sarija Banu V State*, (2004) 12 SCC 266 has held, that the provisions of section 42 are mandatory and non compliance of which is a relevant factor to be taken in account while considering bail application, therefore, the petitioner had applied for grant of regular bail before the trial Court on 22.12.2021, the same was dismissed/rejected inter alia on the ground that, in view of the commercial quantity allegedly recovered from the petitioner, the rigor of Section 37 of the Act is applicable and no bail can be granted regardless of the fact that there was no material available on record, there was no evidence to support the charges framed against the petitioner. It is averred, that on account of death of the father of the petitioner on 23.08.2021, the learned trial court granted interim bail to the petitioner from 23.08.2020 till 10.09.2020 and directed him to surrender before jail superintendent Leh on 10.09.2020, the order of the learned trial court was duly complied, that again on 26.07.2022 petitioner was granted temporary bail for 20 days w.e.f 28.07.2022 till 16.08.2022 for performing the rituals (Barkhi) of his father as required according to the Hindu beliefs and customs and directed to surrender before Superintendent, District Jail, Leh on 16.08.2022, petitioner has no criminal antecedents and is implicated for the first time in this false and frivolous case, thus, on account of having the clean record and being the first time roped in a false case, it can be believed that the petitioner in all likelihood would never commit any offence if granted bail which further satisfies the condition under section 37(1)(b)(ii) of the NDPS Act, petitioner is the only son of his parents and being the sole bread earner for the family is behind the bars for more than one and half years which is adding to the trauma and agony of the mother of petitioner who is not in good state of health and requires continuous care but due to the unjustified and unlawful incarceration of petitioner, she is residing all alone at home and there is no one to take care of her as the father of the petitioner already died on 23.08.2021, that the petitioner is ready to furnish bail and personal bonds to the satisfaction of the Court and is ready to abide by all the terms and conditions which this Court may imposed while admitting him to bail, moreso, the petitioner shall not tamper the prosecution evidence and will remain present before the trial Court on each and every date of hearing.

2. Respondents, per contra by filing objections, have vehemently opposed the bail on the grounds, that on 29.10.2020 around 1720 hours SHO Police Station Leh, received a reliable information that one

driver namely Duni Chand S/o Chittar Dev R/o Tehsil Kolod Bo 2 Chhowang Himachal Pradesh is heading towards Leh from Himachal Pradesh in a vehicle Bolero bearing Registration No. HP341/1400 carrying large quantity of psychotropic substances "CHARAS" in the same vehicle, it was also learnt from the undisclosed sources that the accused had desire to gain high profits by illegally selling the said charas among likeminded people in Leh and its adjoining areas, during the course of investigation a case FIR 235/2020 U/S 8/20 NDPS Act was registered in Police Station Leh and the vehicle involved was seized on spot, during the course of investigation when the seized vehicle was being checked by the mechanic and while opening the speaker fixed at the rear body which was red and black in color and having "OXI" written on it and the back lamp of the vehicle are filled with huge quantity of illicit contraband (Charas) which was checked before the Executive Magistrate 1st Class and the weight of the illicit contraband was found to be 8.190 kg out of which samples were drawn and sealed and seized on the spot. It is contended, that during the course of further investigation, statement of witnesses were recorded under section 161 Cr.PC and seized illicit contrabands sample were sent to FSL for expert opinion and from the FSL report, charas has been detected, accordingly section 8/20 NDPS Act was found to be proved against the accused, after completion of the investigation by the investigating officer on 29.12.2020, charge sheet (chalan) was produced before the Hon'ble Court and the matter is subjudice, the case is under trial and at a crucial stage and the trial Court while rejecting the bail has rightly held that the evidence cannot be appreciated at this stage while statement of important witnesses including the I.O are yet to be recorded. It is, moreover, contended, that if the petitioner is released on bail, there is every possibility of the evidence being tampered, there is a statutory embargo as contained in section 37 of the NDPS Act 1985 for granting bail to the accused as huge Commercial quantity for Charas has been seized from the conscience possession of the petitioner and if the petitioner is released on bail, he may flee to other state/place and may not turn for prosecution and may escape clutches of law even he may indulge in similar drug crime with their available contacts in and out of the State, there are no reasonable grounds in this case to come to a conclusion that the petitioner is not guilty of an offence under NDPS Act 1985 to get relief of enlargement on bail in as much as the seized contraband is of commercial quantity, the offence so committed is very heinous and against the society at large and involves harsh punishment and therefore, in order to restore the confidence of general public in the administration of justice system, the present petition deserves to be dismissed.

3. Sh. Gagan Basotra, learned senior counsel for the petitioner while recapitulating the grounds urged in the bail application, has vehemently sought release of petitioner on bail by projecting arguments, that the petitioner neither committed any offence nor he has any link with the commission of any offence but despite that the Police of Police Station Leh District Leh has arrested the petitioner on 29.10.2020 and implicated him in a false and frivolous case FIR No.235/2020 for the commission of offences punishable under Sections 8/20 of NDPS Act, 1985 without adopting due course of law and in violation of the guidelines laid down by the Hon'ble Supreme Court. It is argued, that the police has allegedly recovered the Charas weighing 8Kg 190 grams from the petitioner, challan is pending trial and till date the prosecution had examined six (6) material witnesses viz: S.I. Regzin Gurmet, HC Tashi Dorjay and Tsewang Stobdan (Numberdar), the above-stated witnesses are witnesses to the scene of occurrence, seizure memo of alleged recovery of the charas and the other witnesses which stand examined are HC Tsewang Dorjay, HC Tsewang

Yangjor and Feroz Ahmad Khan and all the prosecution witnesses which stand examined are witnesses to the scene of occurrence, and there is bundle of contradictions in their statements which cannot prove the prosecution case. It is more so argued, that putting the petitioner to the violation of mandatory provisions of Section 37 of the NDPS Act would amount to travesty of justice, petitioner is lying in incarceration for the last more than one and half year, for no fault of his. To support his arguments, learned counsel for the petitioner relied upon the judgments, (i) Abdul Majeed Lone vs Union Territory of J&K [Special Leave to Appeal (Crl.) No. 3961/2022, Arising out of B.A No. 78/2021], (ii) Chinku Gupta vs State of UP [Jail Appeal No. 2811 of 2016], (iii) Intelligence Officer, N.C.B, Jammu vs Vijay Kumar [CRAA No. 37/2017].

4. Sh. Vishal Sharma, learned DSGI for respondents per contra has strenuously argued and sought dismissal of bail application on the grounds, that the petitioner has committed very heinous offence as the commercial quantity of 8.190 kg of charas has been recovered from vehicle driven by the accused in question was, therefore, rigor contained u/s 37 of NDPS Act applies with full vigor in the case in hand against petitioner. It is argued, that very recently, Hon'ble Supreme Court has held that even if commercial quantity of Charas is not recovered from the possession of co-accused, but was to be handed over/delivered to him, the mandate of Section 37 of the Act applies and the accused is not entitled to bail. It is more so argued, that the petitioner is involved in commission of offences which carries punishment of imprisonment upto life, it is settled law that when the accused is facing trial, in the bail application detailed examination of evidence and elaborate documentation of the merits of the case are to be indicated, if the Public Prosecutor opposes the bail to a person accused of offence carrying rigor of Section 37 of the NDPS Act the Court if proposes to grant bail to such accused, twin conditions are to be mandatory satisfied viz; (i) that the Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence, and (ii) that the person is not likely to commit any offence while on bail and Hon'ble the Supreme Court in so many cases has come down heavily and reversed the orders of High Courts granting bail without satisfying the twin mandatory conditions. It is vehemently argued, that drug addict is a social melody which eats into vitals of the society, drug trafficking not only eats the economy of the Country but spoils the youth of the nation, as punishment in the case in hand is upto life imprisonment there is every apprehension that applicant/accused will abscond and give a slip to law thwarting the course of justice.

5. I have heard learned counsel for the parties, bestowed my thoughtful consideration to the material aspects involved in the case, have gone through the relevant law on the subject matter very carefully and considered the ratios of judgments relied by learned Counsel for the petitioner.

6. Now, I would like to appreciate the decisions in regard to grant or refusal of bail under the provisions of Section 37 of NDPS Act.

In 2017(2) DRUGS CASES (NARCOTICS) 158 H.P. HIGH COURT SHIMLA [Kuldeep Chand Manda....Petitioner Versus State of Himachal Pradesh....Respondent], Hon'ble High Court of Himachal Pradesh Shimla, rejected bail of the accused found in possession of 1990 grams of commercial quantity of contraband [charas 1390 grams & opium 600 grams] by holding, that at the stage of bail detailed examination of evidence and merit of case are not to be undertaken and the

drug abuse is a social malady, in paras 8, 9 & 10 of the judgment held as under:-

(8) It has been categorically held by the Hon'ble Apex Court that courts exercising the bail jurisdiction normally do and should refrain from indulging in elaborate reasoning in their orders in justification of grant or non-grant of bail.

For in that manner, the principle of "presumption of innocence of an accused" gets jeopardized; and the structural principle of "not guilty till proved guilty" gets destroyed, even though all same elements have always understood that such views are tentative and not final, so as to affect the merit of the matter. Reference in this regard can be made to Kashi Nath Roy vs. State of Bihar (1996) 4 SCC 539, wherein the Hon'ble Supreme Court has held as follows:-

"6. As embedded in the criminal jurisprudence obtaining in this country, courts exercising bail indulging in elaborate reasoning in their orders in justification of grant or non-grant of bail. For, in that manner, the principle of [presumption of innocence of an accused] gets jeopardized; and the structural principle of [not guilty till proved guilty] gets destroyed, even though all same elements have always understood that such views are tentative and not final, so as to affect the merit of the matter. Here, the appellant has been caught and exposed to a certain adverse comment and action solely because in reasoning he had disclosed his mind while granting bail. This may have been avoidable on this part, but in terms not such a glaring mistake or impropriety so as to visit the remarks that the High Court has chosen to pass on him as well as to initiate action against him, as proposed. (9) It is further to be remembered that at the stage of dealing with the cases regarding bail, a detailed examination of evidence and elaborate documentation of the merits of the case are not to be undertaken. The court is not required to discuss the merits and demerits of the case at this stage. It is only required to satisfy itself with (i) the nature of accusation and the severity of the punishment in case of conviction and the nature of supporting evidence; (ii) reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant and (iii) prima facie satisfaction of the court in support of the charge and any order dehors such consideration suffers from non-application of mind. When all the three parameters are taken into consideration, it is prima facie established that the nature of accusation against the petitioner and the severity of punishment for which he has been charged is extremely grave and serious. Moreover the apprehension of the respondent that in case the petitioner is let off on bail, it will be difficult to produce his presence since he is resident of Delhi cannot be said to be ill-founded. In fact, one of the considerations for grant of bail is also to secure the presence of the accused. (10) The drug abuse is a social malady. The drug addicts eat into the vitals of the society, but drug trafficking not only eats into the vitals of the economy of the country but illicit money generated by drug trafficking is often used for illicit activities.

The constitution Bench of the Hon'ble Supreme Court in State of Punjab Vs. Baldev Singh (1999) 6 SCC 172 has observed as follows:-

"(4) Drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism.

There is no doubt that drug trafficking, trading and its use, which is a global phenomena and has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. It has the effect of producing a sick society and harmful culture. Anti-drug justice is a criminal dimension of social justice. The United Nations Conventions Against Illicit Trafficking In Narcotic Drugs & Psychotropic Substances which was held in Vienna, Austria in 1988 was perhaps one of the first efforts, at an international level, to tackle the menace of drug trafficking throughout the comity of nations. The Government of India has ratified this convention".

Ratio of the judgment (Supra) makes it manifest, that the court exercising the bail jurisdiction normally should refrain from indulging in elaborate reasoning, discussing the merit and de-merits of the case & detailed documentation of evidence.

In 2017 (4) Crimes 384(SC) SUPREME COURT OF INDIA [Union of India--Appellant Versus Niyazuddin Sk. and Anr--Respondent], Hon'ble Supreme Court while setting aside the order of the High Court granting bail to the accused indicted for the allegations of possessing commercial quantity of contraband and the High Court not discussing the two mandatory conditions appearing in section 37 of the Act viz;(1) the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence &(2) the person is not likely to commit any offence on bail, while rejecting bail to the accused, in paras 7,8&9 of the judgment held as under:-

(7) Section 37 of NDPS Act contains special provisions with regard to the grant of bail in respect of certain offences enumerated under the said section. They are:-

(1) In the case of person accused of an offence punishable under section 19.

(2) Under section 24.

(3) Under section 27A and (4) Of offences involving commercial quantity.

The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under section 37 of the NDPS Act, in case, the court proposes to grant bail to such person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Cr. PC or any other enactment,(1)thecourt must be satisfied that there is reasonable ground for believing that the person is not guilty of such offence; (2)that person is not likely to commit any offence while on bail.

(8) There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail. (9) Hence, we are stratified that the matter needs to be considered afresh by the High Court. Impugned order is set aside and the matter is remitted to the High Court for fresh consideration. It will be open to the parties to take all available contentions to the High Court.

Ratio of the judgment (Supra) sets the controversy to rest, that where there are allegations/accusations regarding the possession of commercial quantity of contraband by the accused, the court while granting bail must be satisfied, (i) that there are reasonable grounds for believing that accused person is not guilty of such offence and (ii) he is not likely to commit such offence on bail, and if these two conditions are not satisfied by the court, the accused is not entitled bail in terms of section 37 of NDPS Act.

In 2018 (5) Supreme 705 SUPREME COURT OF INDIA [Satpal Singh--Appellants Versus The State of Punjab--Respondents], Hon'ble Supreme Court while rejecting bail of an accused indicted for the allegations of possessing commercial quantity of contraband in head note C& para 15 of the judgment held as under:-

(c) Narcotic Drugs and Psychotropic Substances Act, 1985 -

Section 37, 22 and 29 - Instantly quantity of drug commercial

- Order could not be passed by High Court u/s 438 or 439, Cr.PC without reference to section 37 and without entering a finding on the required level of satisfaction - Impugned order set aside.

15. Be that as it may, the order dated 21.09.2017 passed by the High Court does not show that there is any reference to Section 37 of the NDPS Act. The quantity is reportedly commercial. In the facts and circumstances of the case, the High Court could not have and should not have passed the order under Sections 438 or 439 Cr.P.C. without reference to Section 37 of the NDPS Act and without entering finding on the required level of satisfaction in case the Court was otherwise inclined to grant the bail. Such a satisfaction having not been entered, the order dated 21.09.2017 is only to be set aside and we do so.

Ratio of the judgment (Supra) further makes the legal proposition abundantly clear, that a court inclined to grant bail to an accused indicted for the allegations of possessing of commercial quantity of contraband has to satisfy itself in regard to the mandatory requirements of, (i) that there are reasonable grounds for believing that accused person is not guilty of such offence, & (ii) he is not likely to commit such offence on bail, and where such a satisfaction having not been entered the bail order is bad and non-est in the eyes of law.

The decisions in "Kuldeep Chand Manda's Case" [2017(2) DRUGS CASES (NARCOTICS) 158 H.P. HIGH COURT SHIMLA], "Niyazuddin Sk's Case" [2017 (4) Crimes 384(SC) SUPREME COURT OF INDIA] & "Satpal Singh's Case" [2018 (5) Supreme 705 SUPREME COURT OF INDIA] (Supra) make the legal proposition abundantly clear and also settles the legal controversy at rest, that in case of the accusations against accused regarding possession of commercial quantity of the contraband, the

court has to render findings regarding, (i) the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence & (ii) the person is not likely to commit any offence on bail, and if these conditions are not satisfied by the court, the accused is not entitled bail.

It is apt to mention here, that Hon'ble Supreme Court in a case law titled N.C.B versus Krishan Lal [AIR 1991 S.C 588] handed down/held that "Unless conditions prescribed under section 37 of NDPS Act are not fulfilled, the court has no discretion to relax these conditions in order to give the benefit of bail to an accused". It is trite law by the authoritative pronouncement by Hon'ble Supreme Court of India in a case law reported in, AIR 2007 S.C 451 (Rajesh Ranjan Yadav alias Pappu Yadav v.s CBI through its Director), the Hon'ble Supreme Court held, "that the interest of society outweighs the individual interest of a person, and the longer period of imprisonment cannot be a ground for grant of bail".

7. Perusal of the Section 37 & ratios of judgments (Supra) settles the legal controversy that before granting bail u/s 37 of NDPS Act, the Court is to give an opportunity to oppose the application by the Public Prosecutor and the Court is to satisfy itself, (i) that there are reasonable grounds for believing that the accused is not guilty of the offence under the Act and (ii) the Court is further satisfied that the accused is not likely to commit the offence while on bail. Section 37 makes it manifestly clear that where the Court prima-facie found the involvement of the accused then the bail is not to be allowed. In the case in hand, accused/petitioner has been found in possession of 8 Kgs and 190 gms of Charas which is of commercial nature, therefore, rigor of Section 37 of NDPS Act is attracted with full force. It is trite law, that at the stage of dealing with cases regarding bail a detailed examination of evidence and elaborate documentation of merits of the case are not to be undertaken and as in the case in hand this Court prima-facie finds the involvement of the accused then the bail is not to be allowed/granted to him. On these considerations and in view of the aforesaid discussion, I am of the considered opinion, that there are accusations against petitioner/accused for possessing commercial quantity of Charas, therefore, at this stage no finding can be rendered, (i) that there are reasonable grounds for believing that accused is not guilty of such offence, & (ii) he is not likely to commit such offence on bail. Courts cannot lose sight of the fact that the menace of the crime of smuggling of contraband drugs is on increase and therefore, the perpetrators of the crime who are destroying the society and younger generations rendering them incapacitated by falling prey to drug abuse, must be dealt with iron hands. The crime alleged against applicant is against the society, and by his criminal activities, he is spoiling the young generation of the country. Such types of offences are to be dealt with severity and with heavy hands. Showing leniency in such matters would be really a case of misplaced sympathy. The criminal act of applicant operating in a manner as the smuggler of contraband Charas, is destructive, and is aimed to destroy the social fiber of the country, therefore, curtailment of his liberty is reasonable and rigor contained u/s 37 is applicable with full vigor. The act of applicant is not only shocking but outrageous in contours. The granting of bail to the applicant would lead to the danger of the course of justice being thwarted. I, therefore, hold that this is a fittest case where, "Jail" and not "Bail", is the appropriate remedy. The case laws relied upon by learned counsel for petitioner are distinguishable and inapplicable to the facts of the case in hand. The bail application being misconceived under law, is disallowed, rejected and dismissed.

8. Disposed of accordingly along with connected CM(s), if any.

(Mohan Lal) Judge Jammu 17.02.2023 Vijay Whether the order is speaking? Yes/No Whether the order is reportable? Yes/No