

Nizamuddin Ahmed Taja S/O Ahmad Taja vs The Union Of India And Anr on 12 January, 2024

Author: Prithviraj K. Chavan

Bench: Prithviraj K. Chavan

2024:BHC-AS:2962

1026-2022-BA=.d

Uday S. Jagtap

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 1026 OF 2022

Nizamuddin Ahmed Taja S/o Ahmad Taja .. Applicant

Vs.

The Union of India & Anr. .. Respondents

.....
Mr. Niranjan Mundargi i/b Agastya Desai for the applicant
Mr. M.G. Patil, APP for the respondent - State
Mr. Shreeram Shirsat, Special Public Prosecutor a/w Ms. Tanvi Mate
a/w Mr. Nhishad Mokashi for respondent no.1
.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

DATED : 12th JANUARY, 2024 P.C.

1. Applicant - Nizamuddin Ahmed Taja has been arrested by the Narcotic Control Bureau on 15.06.2021 since he was found in possession of commercial quantity of 12 kgs. of Charas which was found being illegally trafficked in his Eeco Taxi bearing Registration No. MH-01-CV-2808 along with another accused. The raid was conducted by the respondent pursuant to a tip off which was reduced into writing. The co-accused - Shabbir Usman Shaikh was found accompanying the applicant in his car. The car was 1 of 13 1026-2022-BA=.doc intercepted by the NCB around 14.30 hours near Arjun Ali Toll Plaza, Padga, Tehsil- Bhiwandi, Dist. Thane.

2. Usual procedure of offering personal search by the members of the raiding team as well as Section 50 of the NDPS Act has been followed. The applicant refused to get his personal search effected before the Gazetted Officer. The contraband was found in the back side of the taxi in a sky-blue

coloured bag containing 12 packets with a brown tape. Upon being asked, the co-accused - Shabbir Shaikh revealed that it was Charas which was being carried to deliver someone in Mumbai. After investigation, a charge-sheet has been filed in the Special Court. An application moved for release on bail by the applicant came to be rejected by the Special Judge on 12.08.2021.

3. Mr. Mundargi, learned Counsel for the applicant took me through the record by emphasizing that the applicant has been falsely implicated in this case who is a poor taxi driver and was unaware as to how the contraband has been carried by the co-accused in his car. He further stated that there is non-compliance of mandate of Section 52A of the NDPS Act. He also submits that 2 of 13 1026-2022-BA=.doc the contraband alleged to have been recovered has been tampered with by the prosecution. He further contends that rigours of Section 37 of the NDPS Act would not be attracted in the given case as there are reasonable grounds to believe that the applicant is not guilty of the alleged offence.

4. Mr. Shirsat, learned Special Public Prosecutor while strongly objecting the application seeking bail contends that the applicant was found in conscious possession of the commercial quantity of contraband along with the co-accused and, therefore, there would be no question of compliance of Section 52A of the NDPS Act even though Investigating Agency was diligent enough to make the applicant aware of his right to be searched in the presence of nearest Gazetted Officer or by the nearest Magistrate. Mr. Shirsat has also invited my attention to the call detail records indicating frequent conversation between the applicant and the co-accused as well as the statement recorded under Section 67 of the NDPS Act. He placed reliance on a judgment of the Hon'ble Supreme Court in the case of Union of India, through Narcotics Control Bureau Luknow Vs. Mohd. Nawaj Khan, (2021) 10 SCC 100 as well as in the case of Union of India Vs. Ajay Kumar Singh @ Pappu, (arising 3 of 13 1026-2022-BA=.doc out of SLP (Cri.) No.2351 of 2023) and Narcotics Control Bureau Vs. Mohit Aggarwal 2022 SCC Online SC 891.

5. Mr. Mundargi pointed that the information note dated 15.06.2021 indicates that the respondent had received an information about trafficking of a commercial quantity of contraband in one Eeco Taxi being Registration No. MH-01-CV- 2808, which was intercepted between 14.00 hours to 15.30 hours pursuant to which the said Eeco Taxi was intercepted and searched. It revealed that the first accused who was sitting in the back seat of the car was in possession of commercial quantity of contraband. Mr. Mundargi would argue that applicant being an innocent driver was not expected to know kinds of goods were possession of the passenger sitting in the rear seat. He also raised a question as to how the date of panchanama as well as the date of summon to the applicant under Section 67 of the NDPS Act could be issued simultaneous on the same day. It is pertinent to note that though panchanama of interception and seizure of the contraband was conducted on 15.06.2021 and even Notice under Section 67 of the NDPS Act was issued on the same day, it does not ipso facto mean that there is some reason to suspect the genuineness of the 4 of 13 1026-2022-BA=.doc investigation at this stage.

6. Mr. Mundargi would argue that there is no due compliance of Section 50 of the NDPS Act, in the sense, the notice reveals that the applicant had signed beneath a sentence which reads "I do not need any Gazetted Officer or Magistrate and any NCB Officer can take their search". Counsel would

say that if it is in respect of the applicant then it ought to have been written by the applicant himself and it should not have been typed by the Investigating Officer of the respondent. At this stage, I do not find any substance in the said submission, for, the applicant is said to be literate who had put his signature in English after having understood the purpose of the Notice issued under Section 50 of the NDPS Act.

7. Next, Mr. Mundargi made a futile attempt to point out that the Certificate under Section 52A(2) of the NDPS Act issued by the Metropolitan Magistrate suffers from irregularities, in the sense, after drawing the samples for being sent to the Forensic Science Laboratory, they were not duly sealed by the concerned Metropolitan Magistrate. In short, the Counsel submits that there is no due compliance of Section 52A(3) of the NDPS Act.

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8. Mr. Shirsat, on the other hand, pointed out that there has been a due compliance which is evident from the Test Report dated 01.10.2021 indicating that the samples which were received by the Chemical Examiner were found to be with a Facsimile / Description of the seal/s on the sample packet. It is not the requirement of law that the sample should contain Facsimile seal of the Metropolitan Magistrate. In fact, Certificate under Section 52A(2) bears rubber seal of the Metropolitan Magistrate.

9. The applicant appears to have feigned innocence as regards trafficking of illicit narcotic substance which is evident from his statement recorded by the respondent wherein he categorically stated that he knew the first accused from one year and he had been accompanying the first accused for trafficking Charas in the past also. It is needless to go into the minutes details of his statement which reveals his complicity with the co-accused in trafficking the contraband in the past also. Suffice it to say that the applicant had stated before the NCB Officer that on the earlier occasion, accused

- Shabbir Shaikh had paid him Rs.4,000/- for trafficking 5 kgs. of Charas from Sanpada to Mumbai, which was received by the applicant from a person who had approached him on a bike. He 6 of 13 1026-2022-BA=.doc further states that some times he consumes Cannabis.

10. There are call detail records indicating continuous conversation between the first accused and the applicant on the date of interception of the car and seizure of the contraband.

11. In case of Mohit Aggarwal (surpa), on the basis of secrete information received by the officer of the NCB on 09.01.2020, one parcel had been booked by a person from Agra named Gaurav Kumar Aggarwal which was, to be delivered to Manoj Kumar at Ludhiana , Punjab. It was stored at the godown of a courier company at village Samalkha, Kapasehra, New Delhi. When the NCB team conducted a raid and searched, suspected parcel was identified and opened in the presence of two independent witnesses 50,000 Tramadol tablets weighing 20 kgs. were recovered. As the tablets contained in the suspected parcel had been mis-declared and were without any valid bill, seizure proceedings were initiated by the Officials of the NCB. The Supreme Court in para 6, 7, 15, 17, 18 and 19 observed thus :-

"6. In his statement recorded under Section 67 of the NDPS Act, the respondent herein disclosed that he had been illegally selling and purchasing the said tablets and 7 of 13 1026-2022-BA=.doc capsules from Promod Jaipuria. The respondent was taken into custody on 11 th January, 2020. He moved two applications for grant of bail before the learned Special Judge, NDPS. Both the said applications were vehemently opposed by the appellant-NCB and were rejected by the Special Judge, NDPS. Aggrieved by the order dated 21 st July, 2020, whereby his second bail application was dismissed, the respondent filed a petition under Section 439 of the Code of Criminal Procedure, 1973 3 for grant of bail which has been allowed by the impugned order passed by the learned Single Judge of the High Court.

7. Arguing for the appellant-NCB, Mr. Jayant K. Sud, learned Additional Solicitor General, submitted that while passing the impugned order granting bail to the respondent, the High Court has erred in observing that no incriminating material was recovered by the NCB officials at his residence. He stated that the High Court has completely overlooked the fact that it was on the basis of the disclosures made by the respondent himself that huge quantities of narcotic drugs and injections were seized from the godown of the co-accused, Promod Jaipuria who was subsequently arrested by the Department; that the High Court has committed a grave error by not applying the terms and conditions imposed under Section 37 of the NDPS Act; that the offence committed by the respondent falls under the category of recovery of commercial quantity of narcotic drugs and in the light of the embargo placed in Section 37 of the NDPS Act, the respondent ought not to have been admitted to bail and that this is a case of constructive/conscious possession of the contraband substances as the respondent was an active participant in a organized gang that was involved in smuggling of drugs. Lastly, it was stated that there was sufficient circumstantial evidence available against the respondent which would disentitle him for being admitted to bail.

15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the 8 of 13 1026-2022-BA=.doc Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.

17. Even dehors the confessional statement of the respondent and the other co-accused recorded under Section 67 of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant-NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to

justify that he was not guilty of such an offence under the NDPS Act. We are not persuaded by the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he has been charged. Such an assumption would be premature at this stage.

18. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act.

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19. As a result of the aforesaid discussion, the present appeals are allowed and the impugned order releasing the respondent on post-arrest bail, is quashed and set aside. The bail bonds of the respondent are cancelled and he is directed to be taken into custody forthwith."

12. In the case of Ajay Kumar Singh (supra), the facts are more or less identical. In the said case, pursuant to an information received by the Directorate of Revenue Intelligence (DRI) on 11.01.2021 that a huge quantity of narcotics "Ganja" is likely to be transported in a truck from Bhadrachalam (Andhra Pradesh) to Jaunpur (Uttar Pradesh) via Varanasi. When it was apprehended, the person driving the truck introduced himself as Om Prakash Yadav, resident of Uttar Pradesh and the other person in the truck introduced himself as Amit Yadav. Initially, both of them denied transportation of Ganja and informed that truck is loaded with cattle feed. Consequently, it was revealed that they were transporting 1005 packets of varying size containing Ganja. It was found that both the accused knew the respondent - accused and that they had connived with the him to transport illicit Ganja. They were in direct contact with the respondent - accused all through on his mobile number, which has been unfurled from the complaint / FIR and the statement of the aforesaid three accused recorded under Section 67 of the NDPS Act. The Supreme Court observed that in 10 of 13 1026-2022-BA=.doc light of the above, it does not seem to be good and sufficient reason for granting bail to the respondent accused. Para 15 to 17 of the said judgment read thus :-

"15. For the sake of convenience Section 37(1) is reproduced hereinbelow:-

"37. Offences to be cognizable and non-bailable.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

16. In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.

17. The quantity of "ganja" recovered is admittedly of commercial quantity. The High Court has not recorded 11 of 13 1026-2022-BA=.doc any finding that the respondent-accused is not prima facie guilty of the offence alleged and that he is not likely to commit the same offence when enlarged on bail rather his antecedents are indicative that he is a regular offender. In the absence of recording of such satisfaction by the court, we are of the opinion that the High Court manifestly erred in enlarging the respondent-accused on bail."

13. In case of Mohd. Nawaz Khan (supra) while setting aside the order of the High Court granting bail to the appellant in the alleged offences under Sections 8, 21, 27-A and 29 of the NDPS Act a huge contraband of morphine weighing about 3.300 kg. has been recovered from the vehicle. It is observed that while granting bail, the High Court lost sight of the following crucial circumstances (i) huge contraband of morphine weighing 3.300 kg. were recovered from the vehicle (ii) respondent was admittedly travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh and (iii) the complaint tabulates the call data records of the cell phones used by the accused. The accused persons were found to have been in touch with each other and a flow-chart has been set out in the complaint. Para 30 of the judgment reads thus:-

"30. The following circumstances are crucial to assessing whether the High Court has correctly evaluated the application for bail, having regard to the provisions of Section 37:

(i) The respondent was travelling in the vehicle 12 of 13 1026-2022-BA=.doc all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused.

(ii) The complainant notes that the CDR analysis of the mobile number used by the respondent indicates that the respondent was in regular touch with the other accused persons who were known to him;

(iii) The quantity of contraband found in the vehicle is of a commercial quantity; and

(iv) The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused."

14. Having taken into account the dicta of Hon'ble Supreme Court in the aforesaid judgments and the material on record, the applicant is not entitled to be released on bail.

15. Consequently, the application is rejected.

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