

# **Aleem (Mohd. Aleem) @ Sadhu vs Union Of India Thru. Zonal Director Ncb ... on 18 April, 2024**

**Author: Pankaj Bhatia**

**Bench: Pankaj Bhatia**

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Neutral Citation No. - 2024:AHC-LK0:30567

Court No. - 12

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 5245 of 2023

Applicant :- Aleem (Mohd. Aleem) @ Sadhu

Opposite Party :- Union Of India Thru. Zonal Director Ncb Lko. Unit Lko.

Counsel for Applicant :- Ayodhya Prasad Mishra A.P. Mishra, Anil Kumar Pandey, Ayush Shukl

Counsel for Opposite Party :- Sajeet Singh

Hon'ble Pankaj Bhatia, J.

1. Heard learned counsel for the applicant, Sri Sajeet Singh, learned counsel for the respondent and perused the material brought on record.

2. In terms of the complaint against the applicant, it was alleged that on the basis of a search carried out on 30.05.2019 at Lucknow, a person namely Mohd. Islam was arrested and was alleged of illegally possessing 5.5 KG Morphine. He was arrested on the spot and subsequently a Case Crime No. 22 of 2019 was registered against him. A complaint was subsequently was filed against him on 22.11.2019 and the investigation was kept open. It bears from the complaint filed by the Narcotics Control Bureau (in short "NCB") that as the complaint with regard the various persons was pending, a request was made to the court to issue non bailable warrant of arrest as they were not responding to the summons issued for giving statement under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter being referred to as 'NDPS Act'), in response to which, a non bailable warrant was issued on 22.11.2022, which was executed by the NCB but could not succeed in procuring the presence of the present applicant. It was also alleged that after the

person from whom the possession was shown was arrested on 30.05.2019, the said person gave a statement under Section 67 of the NDPS Act alleging that he used to supply the said goods to the applicant as well as two other persons. All these facts were mentioned in the complaint filed against the said accused on 22.11.2019. Subsequently, it was alleged in the complaint that the applicant and the other co-accused were booked for another offence by the police in FIR No. 50 of 2023, an FIR No. 533 of 2022 and they were taken into custody. It was also alleged that an application for production warrant was moved against the applicant and the other co-accused, which was allowed on 04.02.2023 and in response to the said, the applicant and the other co-accused were produced before the Special Court on 16.02.2023 based upon the production warrant and thereafter, the applicant was formally arrested in the present case on 16.02.2023. It is further alleged that on 17.02.2023, an application was moved before the Special Court for permission to record the statement, which was allowed and based upon the said, the statement of the applicant was recorded under Section 67 of the NDPS Act, wherein the applicant admitted his guilt. In terms of the said confessional statement, a supplementary complaint was filed against the applicant, for which, the present bail application is being filed.

3. The counsel for the applicant argues that after the statement was recorded against him by the co-accused as alleged, the applicant was linked with three other cases. He further argues that in two of the said cases, no recovery was shown against the applicant and the applicant was linked with the said two cases based upon the statements of the co-accused under Section 67 of the NDPS Act. He further argues that in the three of the cases saddled against the applicant beside the present case, he has been enlarged on bail vide orders which are on record. He lastly argued that the applicant was implicated based upon the statement under Section 67 of the NDPS Act alone without there being any other evidence to corroborate the allegations and the said statements are not admissible in view of the law laid down in the case of Tofan Singh Vs. State of Tamilnadu : AIR 2020 SC 5592. coupled with the fact that the applicant has no criminal history of an offence prior to the offence in question, he may be enlarged on bail as he is in custody since 20.02.2023 and only one witness has been examined so far.

4. The counsel for the NCB strongly opposed the bail application filed on behalf of the applicant by arguing that in the present case recovery from the co-accused was 5.5 KG Morphine, which is far above the commercial quantity prescribed. He further argues that not only the applicant was the kingpin and was abetting the entire crime, he was involved in the other cases also as is evident from the fact that three cases have been instituted against him. He further argues that in view of the bar created under Section 37 of the NDPS Act, the bail application should be rejected. He further draws my attention to the second limb of the twin condition prescribed under Section 37 of the NDPS Act to argue that the conduct of the applicant is evident from the fact that he was involved in three other cases, which fact needs to be considered by this Court while deciding the present bail application. In short, the submission of the counsel for the NCB is that considering the fact that the recovery is more than the commercial quantity, the bail application should be rejected particularly in the view of the conduct of the applicant and his involvement in the other cases.

5. In the light of the submissions made by the parties as recorded above, it is well established that while considering the bail application particularly for an offence where the alleged recovery is more

than the commercial quantity, the test of Section 37 of the NDPS Act has to be satisfied.

6. Section 37 of the NDPS Act came up for interpretation before the Hon'ble Supreme Court in the case of Mohd Muslim @ Hussain vs. State (NCT of Delhi) reported in 2023 Live Law (SC) 260, to the following effect (paragraphs 18, 19 and 20) :-

"18. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is "not guilty of such offence" and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws ? be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction

which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India vs. Ratan Malik<sup>19</sup>). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having 19 (2009) 2 SCC 624 regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail."

7. The effect of statement under Section 67 of the NDPS Act was also considered by the Supreme Court in the case of Tofan Singh Vs. State (Supra), wherein it was specifically dealt that the same is not admissible in evidence particularly without any material to corroborate the allegation.

8. Considering the first test prescribed under Section 37 of the NDPS Act, taking into account the fact that in the complaint filed against the applicant, apart from relying upon the two statements, one given by the co-accused and other given by the applicant, no other material is shown as material to substantiate the allegation against the applicant. Considering the fact that the statement under Section 67 of the NDPS Act in itself is not admissible in evidence, this Court can form a reasonable view that based upon the Section 67 of the NDPS Act statement alone, the prosecution may not be able to establish the offence against the applicant. It is clarified that these observations are tentative for the purpose of deciding the present bail application and would have no effect on the trial.

9. As regards the second test, in view of the submission of the counsel for the respondent that the conduct of the applicant is to be seen particularly when the linking of the applicant in the three cases is related to the recovery, which are more than the commercial quantity. He places reliance on the order passed by the Supreme Court in the case of State By the Inspector of Police Versus B. Ramu, arising out of SLP (Crl) No. 8137 of 2022, 2024 INSC 114, wherein the Supreme Court has observed as under:-

"9. A plain reading of statutory provision makes it abundantly clear that in the event, the Public Prosecutor opposes the prayer for bail either regular or anticipatory, as the case may be, the Court would have to record a satisfaction that there are grounds for believing that the accused is not guilty of the offence alleged and that he is not likely to commit any offence while on bail.

10. It is apposite to note that the High Court not only omitted to record any such satisfaction, but has rather completely ignored the factum of recovery of narcotic substance (ganja), multiple times the commercial quantity. The High Court also failed to consider the fact that the accused has criminal antecedents and was already arraigned in two previous cases under the NDPS Act.

11. In case of recovery of such a huge quantity of narcotic substance, the Courts should be slow in granting even regular bail to the accused what to talk of anticipatory bail more so when the accused is alleged to be having criminal

antecedents.

12. For entertaining a prayer for bail in a case involving recovery of commercial quantity of narcotic drug or psychotropic substance, the Court would have to mandatorily record the satisfaction in terms of the rider contained in Section 37 of the NDPS Act."

10. In reply to the said submission, the counsel for the applicant strongly states that in two of the other three cases, the applicant was linked with the offence in question based upon the statements alone under Section 67 of the NDPS Act and he is on bail. As regards Crime No. 50 of 2023, he places reliance on the order passed by this Court enlarging the applicant on bail vide order dated 13.02.2024, wherein the Court had occasion to deal with the discrepancies in the form of manner of, sampling and the non following of mandate of Section 52-A of the NDPS Act as well as discrepancies in the FSL reports. There is another aspect in the present case, the present case pertains to recovery effected from the co-accused on 30.05.2019 in all the other cases in which the applicant was linked are subsequent to the said offence, on which, he has been enlarged on bail.

11. Considering the reasoning as contained in the bail order dated 13.02.2024 and adopting the same in the present case as well as noticing the fact that in two other cases, the applicant was linked based upon the statement under Section 67 of the NDPS Act alone without there being any recovery effected from him, the second test as provided under Section 37 of the NDPS Act is also satisfied in favour of the applicant. As regards, the order of the Supreme Court in the case of State by the Inspector of Police Vs. B. Ramu (Supra), the Supreme Court had not decided any issue and had made observations that the Court should be slow in granting the bail, where recoveries of commercial quantity are alleged multiple times. In the present case, recovery against the applicant was alleged only in one case being Case Crime No. 50 of 2023 and in other three cases, no recovery was allegedly effected from the applicant. Thus, on all these aspect, the applicant has satisfied both the tests.

12. In view of the reasoning as recorded above, I am of the view that the applicant is entitled to be released on bail. Accordingly, the bail application is allowed.

13. Let the applicant Aleem (Mohd. Aleem) @ Sadhu be released on bail in NCB Case No. 22 of 2019, Criminal Case No. 3478 of 2019, under Sections 8/21/27A/29/60(3) of N.D.P.S. Act, Police Station N.C.B., District Lucknow, on his furnishing personal bonds and two reliable sureties each in the like amount to the satisfaction of the court concerned with the following conditions:

(a) The applicant shall execute a bond to undertake to attend the hearings;

(b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and

(c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him

from disclosing such facts to the Court or to any police officer or tamper with the evidence.

Order Date :- 18.4.2024 Arun