

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Pronounced on : 22.11.2022

Bail App No. 301/2022

Phool Chand

.....Petitioner(s)

Through: Mr. Jagpaul Singh, Advocate.

Vs

..... Respondent(s)

Narcotics Control Bureau

Through: Mr. Sumant Sudan, Advocate vice
Mr. Vishal Sharma, DSGI.

Coram: HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

ORDER

1. The petitioner-accused seeks bail in the complaint filed by the respondent against the petitioner herein and Muzaffar Ahmed Bhat for offences under Section 8/22/29 NDPS Act.
2. The case set up by the prosecution in the complaint is that on 18.03.2020 the naka was laid near Sarore Toll Plaza, Samba by the Narcotics Control Bureau as the information was received by the Bureau that Muzaffar Ahmed Bhat son of Haju Noor Mohd. Bhat is to visit Sopore from New Delhi via Jammu with huge quantity of narcotics i.e. Spasmo Proxyvon plus capsules

and the said person is travelling in a bus of which registration number is given in the complaint. The bus when approached the naka on 18.03.2020 at about 6.30 A.M. the Bureau officials approached the driver of the bus and thereafter the accused was also found to be in possession of a bag. The bag was seized and 12,960 capsules were recovered from the bag belonging to the accused Muzaffar Ahmed Bhat. The statement of said accused was recorded by the concerned officer and in the said statement he disclosed that he had purchased the narcotics from Phool Chand son of Faquir Chand. The statement of the petitioner-accused Phool Chand was recorded by the NCB on 10.08.2020 wherein he is stated to have mentioned that he supplies the drugs to the accused Muzaffar Ahmed Bhat. On the completion of the investigation, the complaint came to be filed against both the accused. The charges stand framed against the accused persons under Sections 8/22/29 NDPS Act. The statement of one prosecution witness, namely, Mohd. Nawab has been recorded so far and is on record. The scanned record of the case is annexed with the file.

3. Learned counsel appearing for the accused has argued that except for the so called statement recorded of the petitioner and the accused Muzaffar Ahmed from whom the drug has been allegedly recovered by the respondent there is no other evidence which connects the accused with the commission of offence. The statement of the petitioner recorded in terms of Section 67 of the NDPS Act has no legal force and, therefore, the respondent cannot bank upon the same against the petitioner.
4. Mr. Sumant Sudan, learned Advocate appearing for the respondent has argued that the provisions of Section 37 of the NDPS Act get attracted in the

present case and, therefore, the petitioner is not entitled to bail on that ground alone. It is also argued that in addition to the statements of the petitioner and the co-accused in the case there is telephonic record available with the prosecution which shows that both the accused were in constant touch with each other and were in trade of narcotics.

5. It is suffice to mention herein that the bail application moved by the petitioner before the trial court stands dismissed vide order dated 17.08.2022.
6. The perusal of the complaint filed by the respondent reveals that the petitioner-accused has been roped in the case on the basis of the statements recorded of the petitioner as well as the other accused Muzaffar Ahmed. As per prosecution, the contraband has been seized from co-accused Muzaffar Ahmed. The court is prima facie in agreement with the argument of counsel for the petitioner that the statements of the accused persons are hit by the judgment of the Hon'ble Apex Court cited in (2021) 4 SCC 1 titled 'Toofan Singh vs. State of Tamil Nadu' wherein the court in more than clear terms held that the statement recorded in terms of Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the Act as the officers who are vested with powers under Section 53 of the NDPS Act are police officers within the meaning of Section 25 of the Evidence Act. In view of the said verdict the statements by the accused persons recorded in terms of Section 67 of the NDPS Act cannot be the mere reason for disallowing the bail unless other circumstances also call for rejection of bail. It is also profitable to note herein that the Hon'ble Supreme Court in case reported 2022 Live Law (SC) 878 titled 'Union of India (NCB) Etc. Vs. Khalil Uddin Etc.' has relied upon the earlier judgment of the court

to hold that the rigour of law as laid down by the court in Toofan Singh's case was applicable even at the stage of grant of bail. The statement of the accused is not admissible against the co-accused is trite proposition of law. The perusal of the statement of the petitioner before NCB does not mention that he had supplied the contraband to the co-accused Muzaffar Ahmed for the occurrence which took place on 18.03.2020 and apparently appears to have made general statement that he used to supply the contraband to Muzaffar Ahmed in consideration for money. The statement as recorded of the petitioner does not disqualify him for bail on the ground of his statement.

7. The counsel appearing for the respondent has vehemently argued that in addition to the statements of the accused persons the call records of the mobile of both the accused confirm the fact that they were in constant touch with each other and deal in the sale and purchase of the contraband. The quantity of contraband seized from the co-accused is the commercial one. The above facts lead to the involvement of the petitioner-Phool Chand in the case. He has relied upon the Khalil Uddin's case (supra). The court is of the view that this Authority of the Apex Court does not aid the respondent as the court cancelled the bail of the appellants on entirely different facts and circumstances of the case.
8. In 2022 SCC OnLine SC 47 titled 'State by (NCB) Bengaluru vs. Pallulabid Ahmed Arimutta and another along with connected matters, the Supreme Court while granting the bail to some of the accused persons noted that the accused were not found to be in possession of commercial quantity of contraband, the statement of the accused or co-accused recorded under Section 67 of the NDPS Act shall be inadmissible in evidence. The court

while granting bail to some of the accused also took into consideration the argument of the State that CDR details of some of the accused is part of evidence and points towards the involvement of the accused in the case. The court, however, did not dismiss the bail petition of the accused on the aforesaid ground and held that the call records of the mobile can be examined at the stage of trial.

9. The call records of the mobiles will ultimately nail the petitioner-accused in the present case is a matter of trial. Merely because Section 37 of the NDPS Act comes into play in the case in hand as the commercial quantity of contraband is involved it does not mean that the accused cannot be entitled to bail whatever may be the circumstances that may borne out from the record. There is no dispute with the proposition that the accused who seeks bail for offence involved in commercial quantity cannot be granted bail on his mere asking and the rigour of clause (1) (b) (ii) of Section 37 of the NDPS Act has to be met by the accused. The words 'reasonable grounds' for believing that the accused is not guilty of offence under Section 19 or Section 24 or Section 27 and also for offences involving commercial quantity and is not likely to commit any offence while on bail has been interpreted by the Apex Court in 2022 AIR SC 3444 titled 'Narcotics Control Bureau vs. Mohit Aggarwal' wherein the court held that reasonable grounds would mean credible, plausible and grounds for the court to believe that the accused persons is not guilty of the alleged offence. The court further held that the court is not required to record a finding that the accused person is not guilty. In addition to the above, the court is also required to be satisfied that the accused person is unlikely to commit any offence while on bail. The reliance by the

respondent on the judgment of Mohit Aggarwal (supra) does not support the respondent as far as granting of bail to the accused in the present case is concerned. In that case the court allowed the appeal of the NCB and set aside the bail granted by the High court on the ground that it was on the disclosure of the address and location by the accused that the narcotics were recovered from the co-accused. The court also took note of the fact that the call records of the respondent-accused showed that he was in touch with the co-accused.

10. In case titled 'Mashooq Ahmad Beigh vs. Union Territory of J&K & Ors. [CRM (M) No. 99 of 2022 and connected bail application] decided on 10.08.2022, this High court refused bail to the accused on the ground that the accused was owner of the vehicle from which contraband substance was recovered, the co-accused made statement which was admissible in evidence under Section 27 of the Act and that there was telephonic record to show that the accused was in constant touch with the co-accused. The bail rejected by the courts in the aforesaid two authorities is on the circumstances that emerged from the prosecution case after investigation.
11. It is also not the case of the prosecution that the accused Phool Chand is facing charges under the NDPS Act in any other case. The court cannot for purpose of bail hold that the accused is likely to commit offence if granted bail.
12. The mere severity of punishment under Section 8/22/29 NDPS Act should not weigh with the court if the circumstances placed on record do otherwise make out a case for bail in favour of the accused. The present case is one where on the basis of the circumstances that are brought on record and elucidated above the court is of the view that the petitioner-accused Phool

Chand is entitled to bail.

13. Accordingly, the application is allowed and the accused is granted bail in the complaint in hand subject to furnishing of two surety bonds and personal bond to the tune of Rs.1 lac each to the satisfaction of the trial court. The accused shall appear before the trial court during trial without fail unless exempted by the trial court for any particular date of hearing. He shall not try to contact the prosecution witnesses in any manner. He shall also surrender the passport, if he holds any, before the respondent. The accused shall provide particulars of his residence and also mobile number to the respondent. In case the petitioner without any reasonable cause fails to appear before the trial court during trial the trial court shall be at liberty to cancel the bail and proceed against the accused according to law. It is made clear that any observation made in the order is confined to disposal of the bail application only.

14. Disposed of.

(Puneet Gupta)
Judge

Jammu
22.11.2022
Pawan Chopra

Whether the order is speaking : Yes
Whether the order is reportable : Yes