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**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

**BEFORE
HON'BLE SHRI JUSTICE DEEPAK KUMAR AGARWAL**

ON THE 5th OF DECEMBER, 2022

MISC. CRIMINAL CASE No. 56923 of 2022

BETWEEN:-

**NAIM KHAN S/O SHRI MAJEED KHAN, AGED ABOUT 34
YEARS, NEAR RAZA MASJID PURVI MUSTAFABAD
LONI, GHAZIABAD (UTTAR PRADESH)**

.....APPLICANT

***(SHRI DEEPENDRA SINGH KUSHWAH- ADVOCATE FOR THE
APPLICANT)***

AND

**THE STATE OF MADHYA PRADESH INCHARGE POLICE
STATION NOORABAD, DISTRICT MORENA (MADHYA
PRADESH)**

.....RESPONDENT

***(MS. KALPANA PARMAR - PANEL LAWYER FOR THE RESPONDENT-
STATE)***

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सत्यमेव जयते
*This application coming on for hearing this day, the court passed the
following:*

ORDER

This is the first bail application u/S.439 Cr.P.C filed by the applicant for grant of bail. The applicant was arrested on 22.03.2022 in connection with Crime No.59/2022 by Police Station Noorabad, District Morena (MP) for the offence punishable under Sections 8/20 of NDPS Act. After investigation charge-sheet has been filed.

In brief, the prosecution case is that on 22.03.2022 in between between 2.30- 7.45 P.M., Police Inspector Aarti Charate of Police Station Noorabad on getting secret information searched Car No.7C K2938 that in the said vehicle

cannabis ganja is transporting. Along with Police force, he reached on the spot Gwalior-Morena Road Takiri Tiraha. Aforesaid car was detained. Aforesaid car was driven by present co-accused Hasan Khan resident of Ghaziabad. Along with him present applicant accused Naim Khan was sitting. Aforesaid vehicle was searched. From the Dicky of the aforesaid car, 50 packets were found to be cannabis ganja. From one packet of aforesaid contraband was taken out for examination. On physical examination, it was confirmed that it was cannabis. From the aforesaid 50 packets, cannabis ganja was took out and in one plastic sheet it was spread over and thereafter filled in two packets By electric weighing machines aforesaid packets were weighed. From one bag, they were weighed 61 kg.900 grams and in another bag 38 kg.300 grams, total 100 kg. 200 grams was found. From both the packets 100-100 grams cannabis were took out for sample purposes. For the aforesaid cannabis, they could not justify their possession. Aforesaid cannabis was seized. Applicant accused along with other co-accused was arrested after doing formalities on the spot. In the night 8.30 P.M. Crime No.59/2022 by Police Station Noorabad, District Morena (MP) for the offence punishable under Sections 8/20 of NDPS Act was registered. Sample was sent for chemical examination. As per chemical report, it was found as cannabis. After investigation, charge-sheet has been filed.

Learned Advocate for the applicant submitted that during seizure and sampling of cannabis ganja mandatory provision has not been followed because as per F.I.R. in Dicky 50 packets cannabis was found. As per mandatory provision of law from each packet, sample has to be drawn. Despite mandatory provision, from all 50 packets cannabis was took out and spread over in plastic sheet. Thereafter, in two packets 100-100 grams sample were taken. In this

situation, allegation of prosecution that in all 50 packets cannabis was there cannot be assumed. It is further contended that co-accused Hasan Khan has been enlarged on bail by this Court vide order dated 30th of November, 2022 passed in MCRC No. 55359 of 2022. On such premises, learned counsel for the applicant prayed for bail.

Learned Counsel for the State vehemently opposed the application and prayed for its rejection.

From the side of applicant-accused, it has been submitted that investigating agency committed gross negligence during investigation because before taking sample of each packets, they mixed the contraband kept in 50 packets. In fact, they had to take the sample from each packets. In support of contention, learned counsel for applicant-accused has relied on judgment passed by **High Court of Judicature For Rajasthan At Jodhpur in CrLMB 5643/2019 (Laal Singh Vs. State of Rajasthan)** on 16.05.2019 in which the same facts were taken into consideration. In that case SHO Police Station Arnod District Pratapgarh seized 1264 kg and 800 gm poppy husk contained in 57 bags. Seizure Officer first mixed all the poppy husk contained in 57 bags, on a tarpaulin and thereafter took two samples of 1 kg from bag No.1. The Apex Court in **Netram Vs. State of Rajasthan reported in 2014 (1) CrLR (Raj.) 163** has held that if the samples from each bag containing poppy husk/poppy straw have not been collected and test by U.N.Kit has not been conducted on each bag and if the Seizure Officer has taken out some quantity of narcotic drug from each bag and after mixing the same has taken out some portion for sample, then, the same is not in conformity with the Standing Instruction No.1/88 issued by the Narcotics Control Bureau, New Delhi, particularly, Instruction No.1.7 and, as such, it cannot be said that the narcotic

contraband recovered in the matter is of commercial quantity or above. Learned counsel for the applicant placed a reliance upon **Criminal Misc. Bail Application No.9660/2021 (Omprakash Verma Vs. State of UP)** passed by High Court of Judicature at Allahabad, Lucknow Bench wherein para 6 and 11, it has been held:-

"6. Learned counsel for the applicant has submitted that the general procedure for sampling provided in Standing Order No. 01 of 1989 dated 13.06.1989 has not been complied by the opposite party. He has relied upon clause 2.1 to 2.8 of the aforesaid standing order quoted herein below :-

"2.1 All drugs shall be classified, carefully, weighed and sampled on the spot of seizure.

2.2 All the packages/containers shall be numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the persons from whose possession the drug is recovered and a mention to this effect should invariably be made in the panchnama drawn on the spot.

2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4 In the case of seizure of a single package/container, one sample

in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container.

2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects the packages/container may be carefully bunched in lots of 10 package/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of, 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6 Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7 If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample the in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot. 11. The Apex Court in case of Noor Aga v. State of Punjab (2008) 16 SCC 417 , has held in paragraphs 123, 124 and 125 that the standing order in dispute and other guidelines issued by the authority having legal sanction are required to be complied by the arresting authorities. For ready reference the aforesaid paragraphs are quoted hereinbelow:-

"(123) Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, visavis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefore, it becomes obligatory on the part of the sub ordinate authorities to comply therewith.

(124) Recently, this Court in *State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr.*³, following the earlier decision of this Court in *Union of India v. Azadi Bachao Andolan*⁴, held that statutory instructions are mandatory in nature.

(125) Logical corollary of these discussions is that the guidelines such as those present in the Standing Order can not be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse interference against them to the effect that had such evidence been produced, the same would have gone against the prosecution."

Heard learned counsel for the rival parties at length and perused the record.

Looking to the aforesaid facts and circumstances of the case, without commenting upon the merits of the case, this Court is of the opinion that the application should be allowed and by allowing the application it is ordered that

if the applicant furnishes cash security of **Rs.1,00,000/- along with bail bond of Rs.25,000/- (Rupees twenty five thousand only)** with one solvent surety in the like amount to the satisfaction of the trial Court, he should be released on bail. He will present during trial before the trial Court on each and every date. In case of any default, **cash security of Rs.1,00,000/- shall be forfeited** without giving any notice.

Application stands allowed and disposed of.

Copy of this order be sent to the trial Court concerned for compliance.

Before parting with the case, this Court depreciated the investigation done by Seizing Officer without following the aforesaid mandatory provisions of the Act. Due to lapse in the procedure for taking the sample of seized cannabis on the part of Seizing Officer Aarti Charate on which allegation against accused persons of possessing commercial quantity of contraband have been seized, the Inspector General of Chambal Range is directed to make an enquiry and submit the report regarding non-fulfillment of mandatory provisions of the Act while taking sample of contraband by the aforesaid Seizing Officer, **within a period of two months** from the date of receipt of certified copy of this order before the Principal Registrar of this Court.

Certified copy as per rules.

(DEEPAK KUMAR AGARWAL)
JUDGE