

Court No.- In Chamber

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 18303 of 2020

Applicant :- Wali Hassan

Opposite Party :- State of U.P.

Counsel for Applicant :- Siddhartha Mishra, Ali Hasan, Istiyaq Ali, Rakesh Kumar Yadav, Rakesh Kumar Yadav

Counsel for Opposite Party :- G.A.

Hon'ble Chandra Kumar Rai, J.

1. Heard Mr. Daya Shankar Mishra, learned Senior Advocate assisted by Mr. Abhishek Mishra, learned counsel for the applicant and learned A.G.A. for the opposite party-State.
2. The present criminal misc. bail application has been filed on behalf of applicant- Wali Hasan to release him on bail in Case No.1392 of 2019, under Sections 8, 20, 29, 60 and 3 of N.D.P.S. Act, Police Station- Baradari, District- Bareilly.
3. Learned Senior Counsel on behalf of the applicant submitted that sub-Inspector lodged a first information report on 17.11.2019 against the applicant and two others with the allegation that on the basis of information received, first informant seized a truck on 17.11.2019 at 12:45 hours, which was alleged to be driven by applicant and carrying 91 packets of Ganja weighting about 201 K.G. He further submitted that 91 packets of alleged contraband (Ganja) in 8 Bags (Bora) was alleged to be recovered from inside of truck but only 1 packet weighting 1 K.G. (Ganja) out of 91 Packets was sent for chemical examination so utmost 1 K.G. can be said to be Ganja but remaining 200 K.G. cannot be said to be Ganja or any other contraband unless there is proper sampling and its chemical examination. He further submitted that it is not mentioned in the

recovery memo that from each 91 packets, sample of alleged contraband (Ganja) was taken and sent for chemical examination, as such, the procedure of sampling adopted by the police authority is in violation of Standing Order / Instruction No.1 of 1989 dated 13.6.1989 issued by the Government of India under Section 52 A of N.D.P.S. Act. He has placed reliance upon Clause 2.1 to 2.8 of Standing Order / Instruction No.1 of 1989, which are as follows:

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 in case of seizure of more than one 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.

4. He next submitted that there is no evidence on record regarding taking of samples as provided in standing order / instructions mentioned above, as such, taking of proper sample is highly doubtful.

5. On the point of sampling of contraband, learned counsel placed reliance upon following judgments and orders:

(i) Phool Chand Ali Vs. Union of India reported in 2020 O Supreme (All) 797.

(ii) Om Prakash Verma Vs. State of U.P. reported in 2022 O Supreme (All) 323.

(iii) Amrik Singh Vs. State of U.P. order dated 9.1.2014 passed in Criminal Appeal No.1106 of 2013

(iv) Gaunter Edwin Kircher Vs. State of Goa reported in (1993) 3 SCC 145

6. Learned counsel for applicant further submitted that standing instruction and the guidelines issued by the authority having legal sanction are required to be strictly followed by the police / arresting authorities as held by the Apex Court in the case of Noor Aga Vs. State of Punjab (2008) 3 JIC 640 (S.C.), the paragraph nos.123, 124 and 125 of the judgment are as follows:

123. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-à-vis 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 therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

124. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] 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 cannot 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 inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

7. Learned counsel further submitted that if power is given under the Act / statute / Rules to do a certain thing in a particular way, the thing must be done in that way or not at all. The other method are forbidden. On this point, learned Counsel placed reliance upon the case of *Taylor Vs. Taylor [(1875) 1 Ch.D 426, 431]* , *Ramchandra vs. Govind AIR 1975 SC 915* *Chettiam Vettil Ahamad Vs. Taluk Land Board (1979) 3 SCR 839*, *Shivcharan Sharma Vs. Union of India and Others 1981 A.L.J. 641* and *A.R. Antalay Vs. Ramdas Srinivas Nayak and Another 1984 2 SCC 500* wherein Hon'ble Court have held that failure to comply with the provisions made for doing a particular act renders the action nonest.

8. Learned counsel further submitted that vide order dated 31.8.2020, this Court has directed learned A.G.A. to file counter affidavit, accordingly, counter affidavit has been filed in this case but there is no categorical averment in the counter affidavit that sampling was done according to standing order / instruction. He further submitted that this Court vide order dated 6.9.2021 directed the counsel for applicant to inform the Court about the status of the trial, accordingly, supplementary affidavit

was filed by applicant on 13.9.2021 annexing the certified copy of the order sheet in order to demonstrate that trial has not been concluded and prosecution has not produced any witness in the Court, therefore, custody of the applicant is against the provision of Article 21 of the Constitution of India. He further submitted that trial is still pending.

9. Learned counsel lastly submitted that applicant has no other criminal antecedents and is languishing in jail since 17.11.2019.

10. On the other hand, learned A.G.A. submitted that search was made in accordance with law and total 91 packets weighting 201 K.G. contraband was recovered from which sample has been taken and sent for chemical examination, in which, it was found that sample weighting 1 K.G. was Ganja. He further submitted that investigation was conducted in free and fair manner, accordingly, charge sheet was submitted against the applicant under Sections 8, 20, 29, 60, 3 of N.D.P.S. Act. He further submitted that although it is admitted that applicant has no criminal history but accused applicant is a man of criminal nature, as such, is not entitled to be released on bail, otherwise it will be harmful to the society. On the point of compliance of Standing Order / instruction no.1 of 1989 and its averment in any document (F.I.R., recovery memo or in the counter affidavit before this Court), learned A.G.A. could not satisfy the Court that compliance of standing order / instruction was made in respect to sampling of alleged contraband from 91 packets.

11. In reply, learned counsel for the applicant submitted that the applicant is in custody from more than 2 ½ years and trial is

still pending and there is fair chance of acquittal of the applicant on the ground mentioned above, so applicant is entitled to be released on bail. On the point of custody, learned counsel for the applicant placed reliance upon a case arising out of N.D.P.S. Act in which point of sampling etc. were involved and the Apex Court has released the accused on bail in which accused (Raja Chandrasekharan) remained in custody for over a period of two years, the reference of the case is as follows:

Bharat Chaudhary Vs. Union of India with Raja Chandrasekharan Vs. the Intelligence Officer reported in *2021 O Supreme (SC) 811*.

12. The Court while considering the provisions of Section 37 of the N.D.P.S. Act finds that State was granted time to reply and the State has filed counter affidavit, which has been taken into consideration. So far as other conditions is concerned, it will be relevant to mention that the Apex Court in the case of *Union of India vs. Shiv Shankar Keshari (2007) 7 SCC 798* as well as in *Union of India Vs. Rattan Malik (2009) 2 SCC 624* has held that court while considering the bail application with reference to section-37 of the Act is not called upon the record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about existence of such grounds. It is further material to state that the applicant has no criminal history which is not disputed by the State.

13. Considering the submissions of both the parties and keeping in mind the twin conditions of Section 37 of N.D.P.S.

Act and perusing the evidence on the record, it is very much established that sampling was done contrary to the Standing Order / Instruction No.1 of 1989 dated 13.6.1989, which are mandatory in nature, as such chances of applicant conviction is weak on the basis of sampling of contraband done in the present matter as well as on the basis of the ratio of the judgment in the case of *Union of India vs. Shiv Shankar Keshri (supra)* larger mandate of Article 21 of the constitution of India without expressing any opinion on the merit of the case, I am of the view after applying section 37 of the N.D.P.S. act that the applicant is entitled to be released on bail.

14. Let the applicant- *Wali Hassan* involved in aforesaid case be released on bail on their furnishing a personal bonds and two heavy sureties each in the like amount to the satisfaction of the Court concerned with the following conditions:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court

shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

Order Date :- 7.6.2022

Rameez