

HIGH COURT OF HIMACHAL PRADESH**Judge: Vivek Singh Thakur, J.****Date of Decision: : 11-12-2023**

Case No.: Cr.M.P. (M) No. 1636 of 2023

Rakesh Kumar**Vs.****State of Himachal Pradesh****Legislation and Rules:**

Section 439 of the Code of Criminal Procedure (Cr.P.C.)

Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)

Section 52A of NDPS Act

Subject: Bail application under Section 439 Cr.P.C. in connection with FIR for offences under NDPS Act related to the recovery of charas.**Headnotes:**

Bail Application and NDPS Act Compliance: Petitioner Rakesh Kumar sought bail under Section 439 Cr.P.C. for offences under the NDPS Act related to the recovery of charas. Key arguments centered on alleged procedural violations in the seizure and sampling of narcotic substances and the legality of obtaining Call Detail Records, asserting violation of Article 21 of the Constitution. [Paras 1, 10, 12-14]

Recovery and Investigation Details: Charas recovery from co-accused Kushwind led to the petitioner's involvement based on financial transactions and Call Detail Records. The petitioner was suspected of partnering with Kushwind in the narcotics trade. [Paras 3-6, 22, 27]

Previous Bail Applications and Current Contentions: Petitioner's previous bail applications were dismissed. Current contentions included procedural lapses in evidence handling, violation of privacy rights, and financial transactions being unrelated to the crime. [Paras 8-9, 13, 21]

State's Opposition to Bail: The State argued against bail, emphasizing the serious nature of the crime, the advanced stage of the trial, and the

substantial financial transactions suggesting involvement in the offence. The State also contested the procedural lapse claims. [Paras 22, 26-28, 32]

Decision: The Court declined to comment on the procedural aspects of the NDPS Act, which are to be assessed at trial. It considered the quantity of narcotics, the stage of the trial, and the gravity of the offence. Ultimately, the Court found no merit in the petition and dismissed the bail application. [Paras 31, 33-34]

JUDGMENT

Vivek Singh Thakur, J. (Oral) - Petitioner has approached this Court seeking bail under Section 439 Code of Criminal Procedure (in short 'Cr.P.C. '), in FIR No.76 of 2021, dated 8.4.2021, registered in Police Station Bhunter, District Kullu, H.P., under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

2. Status reports stand filed. Record was also made available.

3. As per status report on 7.4.2021, Police Party during checking of a Volvo Bus, apprehended one Kushwind (co-accused) on suspicion to check his bag. On checking, from the bag 6.528 Kilograms charas in the shape of Chapaties and balls were recovered. The same was seized. On the basis of rukka sent to the Police Station, FIR was registered in Police Station, Bhunter, District Kullu H.P..

4. On 8.4.2021, an application under Section 52A of NDPS Act was preferred before the Chief Judicial Magistrate, Lahaul Spiti at Kullu, and complying with procedure prescribed, representative samples were drawn in presence of Magistrate and inventory was certified, photographs were taken and certified by the Magistrate and application was disposed of vide order dated 8.4.2021.

5. During interrogation, Kushwind disclosed that he was transporting charas to Delhi which belonged to Rakesh Kumar (petitioner). On the basis of Call Details Record involvement of Rakesh Kumar was suspected, however, Rakesh Kumar was not traceable, as he was absconding after arrest of Kushwind and in these circumstances challan was prepared and presented in the Court on 3.7.2021.

6. According to status report, Rakesh Kumar could be arrested on 6.8.2021 and during investigation and interrogation, it was found that Kushwind and Rakesh Kumar were partners in purchase of charas recovered from Kushwind, and Rakesh Kumar had paid the amount to Kushwind through cheques worth Rs. 11,00,000/- during months of February and March, 2021. The said transaction of amount was through bank. The cheques were encashed by Kushwind under his signatures. Supplementary challan with respect to petitioner Rakesh Kumar was also presented in the Court.

7. As per respondent-State, except 1 witness, all witnesses have been examined and for recording remaining one witness matter has been listed on 12.1.2024.

8. Petitioner had approached the Special Judger-II Kullu by filing bail application No. 275 of 2021, titled as Rakesh Kumar Vs. State of H.P. for enlarging him on bail, but the said application was dismissed on 3.12.2021.

9. Petitioner had approached this Court also by filing Cr.M.P.(M) Nos. 411 of 2022, 1105 of 2022 and 110 of 2023, which were dismissed as withdrawn vide orders dated 21.3.2022, 1.8.2022 and 13.3.2023, respectively.

10. By way of instant petition, petitioner is seeking his enlargement on bail on the ground that there is procedural breach of right to privacy by taking Call Detail Records, which is violative of Article 21 of the Constitution of India and thus such evidence is illegal in toto, as there is no other evidence on record to involve the petitioner in commission of offence, therefore, petitioner is entitled for bail.

11. Second ground taken for enlarging the petitioner on bail is remoteness and vagueness in the financial transactions between the petitioner and Kushwind because these transactions form no reasonable nexus as to the abetment of crime.

12. Prayer for bail has also been made on the basis of delay in trial causing serious financial impact, loss of family consortium and subjecting the petitioner to face unnecessary incarceration. It has been further contended that a false story has been concocted by the Police that petitioner was absconding after arrest of Kushwind. It has been contended that no inquiry or procedural step were taken to arrest the petitioner, as required under law.

13. It has been further contended that there are serious lapses in compliance of procedure under Section 52A of NDPS Act and samples have not been drawn in terms of provisions notified in Standing Order No. 1 of 1989, specifically contained in Section II, dealing with General Procedure for Sampling, Storage, etc. which read as under:-

'2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 gram in respect of all narcotic drugs and psychotropic substances 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/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.'

14. It has been further contended that procedure adopted by the Investigating Agency is also not in consonance with the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022, notified on 23.12.2022. It has been contended that there is violation of provision of Standing Order No. 1 of 1989, rendering alleged recovery of charas under cloud.

15. To substantiate the aforesaid plea with respect to sampling, learned counsel for the petitioner has also referred Chapter 8 dealing with Sampling and Sealing, contained in Drug, Law Enforcement Field Officers' Handbook, Narcotics Control Bureau, Ministry of Home Affairs Government of India.

16. Learned counsel for the petitioner, on this ground has also referred an Article on Sampling of Narcotic Drugs and Psychotropic Substances under the NDPS Act, 1985 written by one Devabrata Kalita.

17. Referring pronouncements of Supreme Court in **Noor Aga Vs. State of Punjab, (2008) 16 SCC 417**, it has been canvassed that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon so that sanctity of physical evidence in such cases remains intact.

18. It has been argued on behalf of petitioner that Chapatis and balls of charas were required to be mixed with each other to make it homogeneous mixture and thereafter samples were to be drawn. It has been contended that no such procedure has been adopted by concerned Magistrate and, therefore, quantity of entire recovered contraband cannot be taken into consideration to connect it with the State FSL Report. Further that for violation of mandatory procedure, the quantity of charas alleged to have been recovered is to be taken equal to the quantity sent for chemical analysis, which is about 25 grams and, therefore, it has been claimed that there is likelihood of acquittal of petitioner or in any case if he is to be convicted, he can be sentenced only for recovery of 24-25 grams of charas, whereas he has already spent 2 years 4 months in custody and thus, it has been canvassed that petitioner is entitled for bail on this count.

19. To substantiate the plea for enlarging the petitioner on bail, learned counsel for the petitioner has referred judgment dated 29.5.20203 passed by co-ordinate Bench of this Court in Cr.M.P. (M) No. 1105 of 2023, titled as Pankaj Vs. State of H.P.; judgment dated 7.8.2023 passed by Division Bench of this High Court in Cr. Appeal No. 136 of 2021, titled as Sanju Vs. State of H.P. and connected matter; and judgment dated 1.8.2022 passed by Division Bench of this High Court in Cr. Appeal No. 427 of 2019, titled as Jhallo Ram Vs. State of H.P., wherein for non compliance of procedure prescribed under Standing Order/NDPS Act in drawing sample, accused therein have been acquitted.

20. Referring order dated 8.4.2021, passed by Chief Judicial Magistrate Lahul Spiti at Kullu, and the photographs taken at the time of drawing samples on filing of application by the prosecution, it has been contended that all chapaties and balls of charas were put together, but not mixed homogeneously and, therefore, sample drawn from such situation is not a representative sample of alleged contraband recovered from Kushwind.

21. In aforesaid circumstances, prayer has been made to enlarge the petitioner on bail.

22. It has been contended on behalf of petitioner that nothing has been recovered from the possession of petitioner and on the basis of transaction of amount, coupled with Call Detail Record, he has been arrayed as an accused whereas the amount so paid by petitioner to Khushwind was a donation to a Temple which was to be accounted for, however, for involvement and arrest of petitioner, he could not reflect the said amount in his Income Tax Return, and in these circumstances the said transaction cannot be said to be payment of amount for purchase of charas. It has been further submitted that about Rs. 11,00,000/- was also paid through bank by the petitioner to one Hari Mohan Dass, but the said Hari Mohan Dass has not been made accused nor closure report has been filed with respect to the said Hari Mohan Dass. Further that though prosecution had suspected the complicity of Hari Mohan Dass in the case, but he was never interrogated and neither he has been discharged under Section 169 Cr.P.C. nor closure report has been filed in the said FIR.

22. Learned Additional Advocate General has submitted that judgments in Cr .Appeal No. 136 of 2021 and Cr. Appeal No. 427 of 2019 have been passed at the time of final adjudication of matter by appreciating evidence on record in Criminal Appeal, but not at the time of adjudication of bail application. He has further submitted that in bail application, appreciation of material on record is not to be done on merit by the Court considering the bail application and no comment on merits are warranted by the Court, adjudicating bail application, with respect to evidence before the Trial Court, particularly when trial is at advanced stage. He has further submitted that any findings returned by this Court, may be prima facie in present petition, but have impact on the trial which may hamper interest of prosecution or even of the accused person and, therefore, learned Additional Advocate General has submitted that petitioner, who is involved in commission of heinous crime, damaging society at large, is not entitled for bail, particularly when trial is about to complete in near future.

23. Learned Additional Advocate General has submitted that there is no dispute about ratio of law propounded in Noor Agas' case but finding therein have been returned by the Court at the time of adjudication of appeal after appreciating the entire evidence before it, which is not expected from the Court adjudicating the bail application.

24. Learned Additional Advocate General has submitted that orders in Cr.M.P. (M) No. 1105 of 2023, decided on 29th May, 2023 by co-ordinate Bench of this Court as well as order passed by Rajasthan High Court in **Om Praksh Bishnoi Vs. Union of India through NCB, 2019 SCC OnLine Raj**

1280, have been passed according to the facts and circumstances involved in those cases.

25. Learned Additional Advocate General has further submitted that there is suspicious transaction of about 222,00,000/- within 2-3 month, i.e. January, February and March, 2021 and there is no explanation in this regard and further that it is highly unbelievable that within span of two months, petitioner had donated Rs. 22,00,000/-, but forget to claim benefit on account of donation at the time of filing Income Tax Return.

26. It has been further submitted by learned Additional Advocate General that plea of petitioner that due to arrest he could not reflect transaction in Income Tax Return as donation, is also not sustainable for the reasons that transaction was made in February to March, 2021 and Income Tax Return was to be filed by 30th July, 2021, whereas petitioner has been arrested in August, 2021 and, therefore, it indicates that it is afterthought with intention to justify the transaction of Rs. 11,00,000/- to Kushwind. It has also been submitted that on what count such huge donation was offered by the petitioner to Kushwind and Hari Mohan Dass, is also a mystery, particularly within two months immediately prior to recovery of charas.

27. It has been further contended that petitioner has not been involved only on the basis of Call Detail Report, but there are transactions of substantially huge amount from the petitioner to Khushwind as well a Hari Mohan Dass, which are sufficient to construe involvement of the petitioner in commission of offence, particularly when after arrest of Khushwind, petitioner had eloped and not only this Hari Mohan Dass is not traceable till date and, therefore, it has been submitted that it cannot be said that there is not even remote link between the recovery of charas from Kushwind and amount paid by the petitioner Rakesh Kumar to Kushwind. It has been further contended that there was/is no enmity between Kushwind and Rakesh Kumar and, therefore, there was no occasion for Kushwind to implicate Rakesh Kumar by making statement before the Police regarding ownership and transportation of charas.

28. It has been submitted by learned Additional Advocate General that procedural lapse in complying the procedure under Section 52A, if any, is to be established by the petitioner/accused during trial and the Trial Court has to assess the evidentiary value thereof by taking into consideration entire material before him alongwith other evidence on record and, therefore, learned Additional Advocate General has submitted that on this ground petitioner cannot be enlarged on bail.

29. It is claim of the Additional Advocate General that contraband has been recovered from one container/package and, therefore, there is no occasion or reason for the Magistrate or Investigating Agency to record that recovered contraband was mixed and made homogeneous.

30. It is further claim of learned Additional Advocate General that Standing Order as well as Rules in reference, recovery of contraband from one container does not warrant to follow the procedure provided for contraband recovered from different containers or packages. According to learned

Additional Advocate General, poly transparent wrappers cannot be considered as different packages of the contraband. According to him entire contraband was recovered from the possession of petitioner which was kept in one container only.

31. Taking into consideration the entire material on record, it would not be appropriate to comment upon the procedure adopted by the Magistrate at the time of proceedings under Section 52A of NDPS Act, particularly when the Magistrate has recorded that representative sample was drawn from the recovered contraband and this aspect has to be assessed by the Trial Court at the time of final adjudication of the matter.

32. With respect to delay, it has been contended by learned Additional Advocate General that there is no inordinate delay in completion of trial because trial is likely to be completed within reasonable period of three years and for recovery of huge quantity of charas and evidence of involvement of petitioner therein, petitioner is not entitled for bail, as he has been found involved in commission of heinous crime damaging the society as well as Nation.

33. Keeping in view period of detention in comparison to the contraband recovered and the stage of trial, I do not find it a fit case to enlarge the petitioner, at this stage, on bail on the ground of his period of detention.

34. In light of aforesaid discussion, I do not find any merit in the petition and accordingly, the same is dismissed.

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