

**HIGH COURT OF PUNJAB AND HARYANA****Bench: HON'BLE MR. JUSTICE DEEPAK GUPTA****Date of Decision: 16.01.2024**

CRM-M-44787 of 2023

**Sanjay Upadhya .....Petitioner****Vs.****State of Punjab .....Respondent****Legislation:**

Sections 20, 29, 25, 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)

**Subject:**

Bail petition under Section 439 C.P.C. in a case involving illegal possession and sale of ganja.

**Headnotes:**

Regular Bail – NDPS Act – Denial of regular bail in case involving the recovery of ganja – Petitioner involved in illegal sale of ganja, caught in the act of filling pouches with ganja – Recovery of 30 Kg ganja and 1384 empty pouches from the petitioner – Bail denied due to the gravity of the offence and petitioner's criminal history in NDPS-related cases. [Para 1, 2.1, 2.2, 12, 15]

NDPS Act Compliance – Contention of non-compliance of Section 42 of the NDPS Act by the petitioner – Petitioner's argument of the recovered material not falling within the definition of 'ganja' under the NDPS Act – Court's interpretation that seeds accompanied by flowering tops fall within the definition of 'ganja' – FSL report indicating the presence of Tetrahydrocannabinol in the recovered material – Petitioner's contention found without merit. [Para 3.1, 6, 7, 9, 11]

Case Law References – Reliance on various judgments by both parties – Discussion of cases relevant to the definition and recovery quantity of ganja

under the NDPS Act – Court distinguishes the present case based on the nature of recovered material and precedents. [Para 3.2, 10, 12, 13, 14]

Decision – Considering the petitioner's involvement in multiple NDPS cases and previous convictions – Court finds the petitioner to be a habitual offender in drug trafficking – Bail petition dismissed based on the seriousness of the offence and the petitioner's criminal history. [Para 15, 16]

### **Referred Cases:**

- Arun Kumar Azad and others Vs. State of Haryana and others, 2021(3) RCR (Criminal) 398 [Punjab and Haryana HC]
- Shri Hari Mahadu Valse Vs. The State of Maharashtra, Law Finder Doc Id #1874112 [Bombay HC]
- Isham Singh Vs. State of Haryana – CRMM-43302 of 2016 decided on 08.12.2016 [Punjab and Haryana HC]
- Ashok Kumar Vs. State of Haryana, 2021(2) DC (Narcotics) 33 [Punjab and Haryana HC]

### **Prabhakar**

**Tewari Vs. State of U.P. And another –  
Law Finder Doc Id #1670858 [Supreme  
Court of India]**

\*\*\*\* **DEEPAK**

**GUPTA, J.**

By way of present petition filed under Section 439 C.P.C., petitioner prays for his release on regular bail in case FIR No.112 dated 03.06.2022 registered under Sections 20, 29, 25, 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') at Police Station S.T.F. Phase-4, SAS Nagar, Mohali.

2.1 As per prosecution allegations, on 03.06.2022, ASI ParamJit Singh along with SI Gurcharan Singh and other police official of S.T.F. Ludhiana were present near Bapu Market, Village Lohara, when secret information was received to the effect that petitioner – Sanjay Upadhya along with his son Sonu Kumar and son-in-law Aklesh Kumar was jointly doing the illegal

business of sale of ganja since long time. It was further informed that Sonu Kumar and Aklesh Kumar had been sent by the petitioner on an Activa to supply ganja to his customers and that the said Sonu and Aklesh were sitting on Activa waiting for their customers and if raid is conducted, they can be apprehended. Statutory compliance of Section 42 of the NDPS Act was made by sending special report to the Senior Police Officers.

2.2 FIR was lodged. The Police party reached at the informed place, where co-accused Aklesh and Sonu Kumar were found sitting on an Activa. After making compliance of Section 50 of the NDPS Act, search was conducted. 2 Kg. of ganja was recovered from their joint possession kept in a polythene under the seat of the Activa. Both of them were arrested on 03.06.2022 and during interrogation, co-accused Aklesh disclosed that he and co-accused Sonu Kumar had gone to supply the ganja and at that time, present petitioner was making pouches of ganja in the house of Aklesh and that some ganja was lying in his house. Pursuant to this disclosure statement of the co-accused Aklesh Kumar, Police party reached his house, where petitioner – Sanjay Upadhyaya was found filling pouches of ganja at the upper floor of the house. He was arrested. The ganja kept in the pouches was filled in two bags and was found to be 30 Kgs. Said ganja along with 1384 empty pouches were taken into possession.

3.1 It is contended by learned counsel for the petitioner that there is non-compliance of Section 42 of the NDPS Act; that contraband confiscated by the prosecution does not fall within the purview of Section 2(iii)(b) of the NDPS Act, because ganja is flowering of fruiting tops of Cannabis Plant (excluding seeds and leaves) and that in the present case, as per the FSL report, the recovered material is “greenish brown-coloured flowering tops dried along with the seeds”. Learned counsel contends that confiscated material cannot be termed as ganja as a whole and it was a mixture and that seeds are liable to be excluded from the total weight and if that weight is excluded, the recovered material will be less than 20 Kg falling in the noncommercial category.

3.2 Learned counsel has relied upon ***Arun Kumar Azad and others Vs. State of Haryana and others, 2021(3) RCR (Criminal) 398 [this court];***

***Shri Hari Mahadu Valse Vs. The State of Maharashtra, Law Finer Doc Id #1874112 [Bombay HC]; and Isham Singh Vs. State of Haryana – CRMM-43302 of 2016 decided on 08.12.2016 [this court].***

3.3 Learned counsel also contends that petitioner is in custody for the last more than 01 year & 07 months and that the trial may take long time to conclude. Though learned counsel concedes that the petitioner is also involved in other cases pertaining to the NDPS Act but has referred to a judgment of Hon'ble Supreme Court in ***Prabhakar Tewari Vs. State of U.P. And another – Law Finder Doc Id #1670858***, in order to contend that pendency of the other criminal cases cannot be a basis for refusal of bail.

4.1 Strongly opposing the bail petition, learned State Counsel contends that recovered material is 'flowering of fruiting tops of the Cannabis plant', which has been defined as a "ganja" within the meaning of Section 2 (iii)(b) of the NDPS Act. Learned State Counsel relied upon a judgment of this Court ***Ashok Kumar Vs. State of Haryana, 2021(2) DC (Narcotics) 33***.

4.2 Learned State Counsel further drawn attention towards the custody certificate to contend that petitioner is already a convict in two cases pertaining to the NDPS Act; whereas, he is facing trial in four other cases pertaining to the NDPS Act. Learned State Counsel also submits that the petitioner is thus a habitual drug trafficker and in all these circumstances, he does not deserve to be given the benefit of bail.

5. I have considered the submissions of both the sides and have appraised the record.
6. The FSL report (copy Annexure P.2) would reveal that three parcels of 250 grams each were sent to it for the purpose of analysis. The samples were of "greenish brown-coloured flowering tops dried along with seeds". On analysis of the contents of parcels, following report has been made by the FSL: -

*"The contents of parcels 1-A, 2-A and 3-A under reference have been analyzed separately by chemical, TLC and Instrumental analysis. On the basis of analysis, **presence of Tetrahydrocannabinol and other cannabinoids, Cystolythic hair and 18.95%, 19.20% of resin extract, Ganja has been found present in the contents of the parcels 1-A, 2-A and 3-A.**"*

7. As it is the contention of Ld. Counsel for the petitioner that the afore-said material as analysed by the FSL is not ganja, let the legal position be noticed. Section 2(iii)(b) of the NDPS Act reads as under: -

*“(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated”*

8. It is, thus, clear on bare perusal of the afore-said definition of ‘ganja’ that seeds and leaves are excluded from definition of ganja, only when the same are not accompanied by the tops.

9. In the present case, no doubt that material recovered from the petitioner included the seeds but the same were accompanied by flowering tops dried of the cannabis plant and, therefore, prima-facie the seeds accompanied by the flowering tops would fall within the definition of ‘ganja’ and entire weight of the material is to be taken into consideration in order to know the total weight of the contraband recovered.

10. A similar question was also considered by a co-ordinate Bench of this Court in **Ashok Kumar’s Case (supra)** and it was held as under: -

*“16. In the FSL report the contraband recovered was mentioned to be greenish brown vegetative material having flowering, fruiting tops/seeds etc. and it was also mentioned therein that on analytical techniques applied the tests were positive for the presence of tetrahydro cannabidiol and*

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*cannabidiol; characteristics trichomes of ganja were present; and tests were positive for presence of ganja in the samples. [Section 2\(iii\)\(b\)](#) of the NDPS Act defines ganja as "the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated". As per the definition of ganja contained in [Section 2\(iii\)\(b\)](#) of the NDPS Act, the seeds and leaves are excluded from definition of ganja only when the same are not accompanied by the tops. No doubt in the present case the contraband recovered from the petitioners included the seeds and leaves but the same were accompanied by the flowering/fruiting tops of the cannabis plant. Therefore, in the present case prima facie seeds and leaves accompanied by the flowering/fruiting tops of the cannabis plant would fall in the definition of ganja and weight of the same would not be liable to be excluded from the total weight of the contraband recovered on the basis of definition of ganja. Therefore, the quantity of the contraband allegedly recovered from the petitioners cannot be said to fall in the category of non-commercial quantity on the ground of the same being less than 20 kilograms by excluding assumed weight of seeds and leaves and the petitioners are not entitled to grant of bail on this ground. In these facts and circumstances of the case the*

observations in [Roshan Kumar Vs. State of Haryana](#) : 2019(3) R.C.R. 10 of 14 CRM-M-7998-2020 CRM-M-9957-2020 (Criminal) 692; [Sudhir Vs. State of Haryana](#) : 2008(4) R.C.R. (Criminal) 385 and Manu Kumar (Manukumar M) and others Vs. State of Karnataka : 2018(1) DC (Narcotic) 434 relied upon by learned Counsel for the petitioners are not of any help to the petitioners so far as the question of grant of regular bail to the petitioners is concerned.”

11. In view of the afore-said legal position, the contention of learned counsel for the petitioner to the effect that the entire recovered material cannot be considered to be ganja or that seeds are required to be excluded for the purpose of knowing the total weight, is without any merit. 12. As far as **Arun Kumar Azad's case (supra)**, referred by learned counsel for the petitioner is concerned, in that case, only ganja patti was recovered and so the same was held to be not a cannabis plant. In **Isham Singh's case (supra)**, the recovered material was only greenish brown vegetative material, which was yet to be dried and processed and so, the same was observed to be not falling within the definition of ganja.

13. In **Shri Hari Mahadu Valse's case (supra)**, the seized material contained the green leaves, flower buds and seeds weighing approximately 71 kg. 190 grams. The chemical analysis report showed that material forwarded for analysis contained flowering buds with piece of stalks, stems, leaves and seeds, without quantifying weight of the flower tops. In the circumstances, Bombay High Court took the view that prima-facie, there was a doubt as to whether ganja seized from the warehouse of the accused was of commercial quantity or not.
14. As already observed that in the present case, it is the greenish brown-coloured flowering tops dried along with seeds, which have been recovered from the petitioner and so, having regard to the legal position explained by this Court in **Ashok Kumar's case (supra)**, no advantage can be given to the petitioner for the contrary view taken by Bombay High Court in **Shri Hari Mahadu Valse's case (supra)**, wherein doubt has been expressed as to whether the total weight is to be taken into consideration.
15. Apart from above, the latest custody certificate dated 11.01.2024 as placed on record by learned State Counsel would reveal that though the petitioner is in custody in the present case for the last 01 year 07 months and 18 days but he is involved in four more cases pertaining to the NDPS Act. Not only this, his conviction has already been recorded in two other cases, both pertaining to the NDPS Act. These details contained in the custody certificate in itself are sufficient to show that the petitioner is a habitual offender dealing in drug

trafficking. Even at the time of conducting raid, he was found making pouches of ganja, as apart from 30 kg. of ganja, as many as 1384 empty pouches were recovered from him.

16. Considering the totality of circumstances of the case as above, but without commenting anything further on the merits of the case, this Court is not inclined to grant benefit of bail to the petitioner. As such, the present petition is dismissed.

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