

HIGH COURT OF RAJASTHAN**Bench: Justice Anil Kumar Upman****Date of Decision: 20th April 2024**

Case No.: S.B. Criminal Miscellaneous II Bail Application No. 2857/2024

APPELLANT(S): Mukesh Kumar Khedar**VERSUS****RESPONDENT(S): State of Rajasthan****Legislation:**

Sections 8, 21, and 22 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act

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

Articles 20 and 21 of the Constitution of India

Subject: Second bail application under Section 439 Cr.P.C. following the arrest of the petitioner for offences punishable under Sections 8, 21, and 22 of the NDPS Act.**Headnotes:**

Bail Application – NDPS Act – Second bail application filed after chargesheet submission – First bail application dismissed with liberty to reapply post chargesheet – Alleged false implication and fabrication of evidence by police – CCTV footage and purchase bills not considered by Investigating Officer – Fair investigation not conducted – Bail granted with conditions – Further investigation directed due to defective investigation [Paras 1-19].

Fair Investigation – Constitutional Rights – Emphasis on fair and transparent investigation as part of constitutional rights under Articles 20 and 21 – Investigation must ascertain truth without bias – Reference to Vinay Tyagi vs. Irshad Ali and Babubayi vs. State of Gujarat [Paras 13-16].

Defective Investigation – Further Investigation Ordered – Investigation by original officer found to be biased and incomplete – New investigation directed to competent officer not below the rank of Additional Superintendent

of Police – Instructions for expeditious completion within three months [Paras 17-18].

Decision: Second bail application allowed – Petitioner to be released on bail upon furnishing bonds – Further investigation ordered due to defective initial investigation – Proceedings before the trial court to be stayed until completion of further investigation** [Paras 10-19].

Referred Cases:

- Vinay Tyagi vs. Irshad Ali, 2013 (5) SCC 762
- Babubayi vs. State of Gujarat, 2010 (12) SCC 254
- Vinubhai Haribhai Malaviya vs. State of Gujarat, [2019] 0 AIR (SC) 5233

Representing Advocates:

For Petitioner: Mr. Kapil Gupta, Mr. Om Prakash Kharra, Ms. Nidhi Sharma, Mr. Chitransh Saxena, Mr. Adarsh Singhal

For Respondents: Mr. M.K. Sheoran, PP, Mr. Mahendra Singh Bajiya, Drugs Control Officer, Sikar, Mr. Pawan Kumar, SI, SHO PS Balara, Sikar, Mr. Mahendra Singh, Seizure Officer, PS Laxmangarh, Sikar

ORDER

(Reportable)

1. This is second bail application under Section 439 Cr.P.C. filed on behalf of the petitioner who has been arrested on 09.08.2023 in connection with FIR No.419/2023 Police Station Reengus, Sikar for offences punishable under Sections 8, 21 and 22 of the NDPS Act.

2. Learned counsel for the petitioner submits that the previous bail application (No.12357/2023) filed on behalf of the petitioner was dismissed as withdrawn by this Court vide order dated 12.12.2023 with liberty to renew the prayer for bail after filing chargesheet in the matter. After conclusion of

investigation, charge-sheet has been filed in this matter and thus, the petitioner has filed this second bail application.

3. Learned counsel submits that the accused petitioner has falsely been implicated in this case. He submits that the petitioner is qualified Pharmacist and running medical store namely Unique Medical at Reengus on the strength of requisite certificate and license issued in favour of the petitioner by Rajasthan Pharmacy Council. It is contended that on 21.05.2023, the petitioner placed a purchase order for 100 bottles of Monocoff Plus Syrup (Batch No.TBHW044) from Lifecare Pharma. Those goods (cough syrup) were sent to the petitioner by Lifecare Pharma through courier on 10.06.2023 along with the bills/invoice (Annex.5). As per the prosecution case, by effect of notification dated 02.06.2023 issued by the Ministry of Health and Family Welfare, manufacturing, sell and distribution of Chlopheniramine Maleate plus Codeine Syrup has been prohibited. Learned counsel contends that the petitioner received the drugs in pursuance of the purchase order therefore, the drugs was found in his medical store. Learned counsel submits that the petitioner has not sold even a single bottle of recovered drugs after the notification dated 02.06.2023, which shows his bonafide.

4. Learned counsel submits that the incident narrated by the police in the FIR is false and fabricated. He contends that the alleged recovery of contraband was not made at the place where it has been shown in the chargesheet. The true and real fact is that the recovery was made by the police from the medical store of the petitioner whereas in the chargesheet, recovery has been shown effected at Azad Chowk, Reengus. Narrating the actual sequence of the occurrence, learned counsel contends that on 08.08.2023, at 10:02:46 PM, a police van came at the medical store of the petitioner which is situated near Govt. Hospital, Reengus which is far away from the Azad Chowk. At 10:05:40 PM, the police van left the medical store. At 10:13:14 PM, the police van again came to the medical store and entered into the medical store of the petitioner and recovered the alleged cough syrup. After staying there for about 10-11 minutes, the police van departed the medical store. At about 10:29:45 PM, Constable Ajay Kumar along with the petitioner in red colour of Verna Car of the accused petitioner, went Azad Chowk, Reengus which is 2 Kms. away from the shop of the petitioner and all formalities were completed at Azad Chowk. The CCTV footage submitted by the father of the petitioner to the IO, clearly reveal that on 09.08.2023 at

01:26 AM, the police van and a white colour Eco Sports Car, belonging to Drug Inspector Manvendra Singh Bajiya, again came and stopped in front of the medical store of the petitioner. The red colour varna car of the petitioner is also seen coming there at the same time in the CCTV footage. While as per the prosecution case, during routine checking, on 08.08.2023 at 11:55 PM, the police intercepted the petitioner and the co-accused Gaurav Kaushik in a red colour varna car (No.RJ 14 CR 9760) at Azad Chowk, Reengus and during checking, 100 bottles of cough syrup namely Chlorpheniramine maleate codeine phsphae syrup (100 MI each) were recovered. Learned counsel submits that the father of the petitioner has also submitted a detailed representation along with CCTV footage and the bills issued by the Lifecare Pharma in favour of the petitioner but Investigating Officer did not pay any heed to it and without considering these documents, he has filed the charge-sheet simply saying that no CCTV footage were provided to him. It is also contended by learned counsel for the petitioner submits that the bills submitted to the IO, were also not taken into consideration by him. The IO denied the bills while saying that at the time of recovery, the bills were not produced by the petitioner. Lastly, learned counsel submits that the petitioner is behind the bars since 09.08.2023 and trial will take long time in its conclusion. The petitioner does not have any criminal antecedents. He thus, prays that the instant bail application may be accepted.

5. Per contra, learned Public Prosecutor vehemently and fervently opposes the bail application. Under the instructions of Mr. Mahendra Singh Bajiya, Drugs Control Officer, Sikar, Mr. Pawan Kumar, SI, SHO PS Balara and Mr. Mahendra Singh, Seizure Officer, PS Laxmangarh, learned Public Prosecutor submits that the recovery was made on Azad Chowk, Reengus and that the police team never went to the shop of the petitioner. However, the Investigating Officer fails to give any answer as to the occurrence recorded in the CCTV footage.

6. At this stage, learned counsel for the petitioner submits that the medical shop of the petitioner is in left side of the shop No.4 of Gadwal Digital Studio which is situated in front of Govt. Hospital, Reengus Mortuary Room. The shop belongs to Omprakash Gadwal where the CCTV Cameras are installed but in the morning, at 09:09:23 AM, the Seizure Officer Mahendra Singh came to the said studio and directed the shop owner to delete the CCTV footage but no investigation has been conducted in this regard.

7. I have heard and considered the submissions advanced at bar and have gone through the material available on record.

8. Section 37 of the NDPS Act does not create an absolute embargo for grant of bail. Further, while considering an application for grant of bail, it is not required for the Court to record positive finding that the accused is not guilty. The only requirement of law is that the Court would look at the material in a broad manner and reasonably see whether the accused's guilt may be proved. The satisfaction which courts are expected to record i.e, the accused may not be guilty is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the material collected during investigation.

9. Having regard to the overall facts and circumstances of the case and considering the arguments advanced at bar, and the fact that the petitioner is having requisite certificate and drug license to run the medical store, which is not in dispute; the petitioner has not disposed of or sold even a single bottle of the drug in question, which he purchased through bills so also considering the fact that the father of the petitioner submitted a detailed representation along with copy of the bills and relevant CCTV footage to the IO, which was not properly considered by the IO as well as looking to the period of custody of the accused petitioner and absence of criminal antecedents, I am of the considered opinion that the conditions contained in Section 37 of the NDPS Act are fully satisfied in the present matter. In view of above, I deem it just and proper to allow the present bail application.

10. This second bail application is accordingly, allowed and it is directed that accused-petitioner Mukesh Kumar Khedar S/o Shri Suwalal Khedar arrested in connection with FIR No.419/2023 PS Reengus, District Sikar shall be released on bail provided he furnishes a personal bond in the sum of Rs.1,00,000/- (Rupees One Lac Only) together with two sureties in the sum of Rs.50,000/- (Rupees Fifty Thousand Only) each to the satisfaction of the learned Trial Court with the stipulation that he shall appear before that Court and any court to which the matter is transferred, on all subsequent dates of hearing and as and when called upon to do so.

11. After hearing the arguments advanced by learned counsel for the petitioner and learned Public Prosecutor and perusing the material available on record, this Court is of the prima facie opinion that fair and proper investigation has not been conducted in this matter. The IO has not considered the important material (CCTV footage and bills etc) produced by the father of the petitioner by way of detailed representation. This Court being a constitutional court cannot shut his eyes towards defective investigation, which can/should be cured by directing further investigation in the matter. This Court cannot ignore the shortcomings of the investigation, pointed out by the petitioner's counsel.

12. Our Criminal system works on the well-established ethics or principle which says, let the hundred of criminals be let out, but a single innocent should not be punished or held guilty. To achieve this goal, courts expects from the prosecution to prove his case beyond the all reasonable doubts. The Constitution of India grants equal rights and opportunities for every person. Article 21 i.e. right to life and personal liberty have been interpreted by the Apex Court in broad manner in the light of rights available to the accused person during the course of investigation as well as trial.

13. Fair trial and investigation are part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, the basic requirement of rule of law is that the investigation must be fair, transparent and in accordance with law. The investigating agency cannot not be permitted to conduct an investigation in a tainted and biased manner so as to take away the fundamental principle that every person accused of any crime is considered innocent until proven guilty.

14. In India, the responsibility of investigation is bestowed upon the police. More specifically, an Investigating Officer is appointed to investigate the crime. An Investigating Officer performs a variety of functions for the police. Chapter XII of The Code of Criminal Procedure, 1973 (and Chapter XIII of the NEW Bharatiya Nagarik Suraksha Sanhita, 2023) casts a number of duties on an Investigating Officer, some of which include Investigating the crime, recording statements, collecting evidence, making arrests, interrogation, filing of chargesheet, among others. In the field of law, it is a common notion that the Investigating Officer's primary responsibility is to finish the investigation

swiftly and efficiently so that a chargesheet can be filed before a Magistrate. But this is only half the truth. The Investigating Officer's primary responsibility in a fair and just society is to ascertain the truth. The most important factor to keep in mind while investigating the crime is to bring out the real truth and be mindful of every step taken towards the completion of an investigation. The Hon'ble Supreme Court in Vinay Tyagi vs. Irshad Ali reported in 2013 (5) SCC 762, addressed the question "What ultimately is the aim or significance of the expression "fair and proper investigation" in criminal jurisprudence?" It has a twin purpose: Firstly, the investigation must be unbiased, honest, just and in accordance with law; Secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication." Arresting a person means to take away their fundamental rights



enshrined under Part III of the Indian Constitution. It means that this power with the police should be used with caution and only after a fair assessment of circumstances. Hence the law lays down several rules and limitations for the Investigating Officers to limit arbitrary use of power. But it is often seen how the police abuse their power and arrest the wrong person hastily, or even commit brutality on the accused. This brings the role of law into the spotlight. Law aims to safeguard the rights of people. Similarly law also grants some rights to the accused while they are in police custody. There are several rights enshrined under The Code of Criminal Procedure, 1973, such as Section-50 which casts a duty on the police officer to tell the accused the grounds of arrest when the arrest has been made without a warrant. Section 50-A casts a duty on the police officer to inform of the arrest to the family, friends or other important people of the accused. Many other rights are available to the accused under Chapter 5 of The Code of Criminal Procedure, 1973. The Apex Court in the case of Babubayi vs. State of Gujrat report in 2010 (12) SCC 254, went on to say "It is also the duty of the Investigating Officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The Investigating Officer should be fair and conscious as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The Investigating Officer "is not merely to bolster up a prosecution case with such evidence as may enable the court to record conviction but to bring out the real unvarnished truth". One such right available to the accused is the production of evidence to prove their innocence. Even if a document has been supplied by the accused, it is still the Investigating Officer's responsibility to obtain the same. This kind of requirement stems from the possibility that the document will influence the accused's guilt or innocence. This is extremely vital to the working of a fair and just police force and justice system. If the Investigation Officer investigates the crime with a mindset of filing the chargesheet as quickly as possible, the case automatically tilts against the accused. Principles of Natural Justice require the police to not be biased and consider every evidence available, irrespective of the fact if it helps the accused's case or not. It should be a common practice that the Investigating Officer should not shut his eyes to any evidence which the accused brings to his notice. Only then can an investigation be fair, swift and efficient. Investigating Officers must realize their vital role in the field of criminal justice system is twofold, bringing out the truth and producing an accused to the courts.





15. It is settled proposition of law that if at any time, when the defective investigation comes to light during the course of any trial or inquiry then, same may be cured by directing further investigation and for this purpose, any appropriate writ or direction under Article 226 of the Constitution of India or under inherent jurisdiction available to the High Court under Section 482 Cr.P.C. may be issued and in the present case, unfair/biased investigation is apparent from the conduct of the IO because documents annexed with the petition including CCTV footage captured in the cameras clearly indicate that State Police is working for own interest for the reasons best known to them. It is also apposite to mention here that in this case detailed representation was submitted by the father of the petitioner including bills with regard to purchase of the drugs under license issued in favour of the petitioner by the competent authority, but no investigation was done on the representation simply saying that no video CD has been submitted along with representation which is incorrect from the face of the record. Further, no proper investigation was conducted in respect of bills of purchase of drugs seized in this matter and simply it has been mentioned that at the time of seizure no bills were produced.

16. Thus, it is clear that fair investigation has not been done and prima facie, it is established that police acted in the partial manner to shield real culprits therefore, in these circumstances, this matter is required to be further investigated by the other competent officer to gather the truth which is the prime duty of the investigating agency. I fortify my view from the judgment passed in Vinubhai Haribhai Malaviya vs State of Gujarat reported in [2019] 0 AIR (SC) 5233 wherein it has been held as under:-

"27. Ram Lal Narang v. State (Delhi Administration) (1979) 2 SCC 322, is an early judgment which deals with the power contained in Section 173(8) after a charge-sheet is filed. This Court adverted to the Law Commission Report and to a number of judgments which recognised the right of the police to make repeated investigations under the Code of Criminal Procedure, 1898. It then quoted the early Supreme Court judgment in H.N. Rishbud v. State of Delhi AIR 1955 SC 196 case as follows:

“17. In H.N. Rishbud v. State of Delhi [AIR 1955 SC 196: (1955) 1 SCR 1150: 1955 Cri LJ 526] this Court contemplated the possibility of further investigation even after a Court had taken cognizance of the case. While noticing that a police report resulting from an investigation was provided in Section 190 CrPC as the material on which cognizance was taken, it was pointed out that it could not be maintained that a valid and legal police report was the foundation of the jurisdiction of the court to take cognizance. It was held that where cognizance of the case had, in fact, been taken and the case had proceeded to termination, the invalidity of the precedent investigation did not vitiate the result unless miscarriage of justice had been caused thereby. It was said that a defect or illegality in investigation, however serious, had no direct bearing on the competence of the procedure relating to cognizance or trial. However, it was observed:

“It does not follow that the invalidity of the investigation is to be completely ignored by a Court during trial. When the breach of such mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for.”

This decision is a clear authority for the view that further investigation is not altogether ruled out merely because cognizance of the case has been taken by the court; defective investigation coming to light during the course of a trial may be cured by a further investigation, if circumstances permit it.”

17. In the backdrop of the aforesaid discussion and since presently, this Court is having the roster of 482 Cr.P.C., in order to meet the ends of justice, this Court deems it fit to exercise inherent powers under Section 482 Cr.P.C. and direct further investigation in the matter. Accordingly, the Superintendent of Police, Sikar is directed to assign further investigation of this case to a competent officer, who shall be not below the rank of Addl. Superintendent of Police. The IO to whom further investigation would be entrusted shall conclude the investigation expeditiously and submit the result of further investigation within three months from the date of receipt of copy of this order. Needless to say that the newly appointed Investigating Officer shall collect the entire evidence to unearth the truth. Till submission of the result of further investigation, proceedings before the learned trial court shall be kept in abeyance.

18. A copy of this order shall be transmitted forthwith to the Superintendent of Police, Sikar for necessary compliance.

19. With the aforesaid observations and directions, this second bail application is allowed.

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