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IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on: 15.07.2024*

+ **BAIL APPLN. 3603/2023**

RAFIQUE KHAN

..... Applicant

versus

NCB

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Aditya Aggarwal, Mr. Naveen Panwar,
Ms. Kajal Garg, Mr. Manas Agarwal & Ms.
Shivani Sharma, Advs.

For the Respondent : Mr. Shashwat Bansal, Adv. (through VC)

**CORAM
HON'BLE MR JUSTICE AMIT MAHAJAN**

JUDGMENT

1. The present bail application is filed under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeking grant of regular bail in Crime File No. VIII/81/DZU2021 under Sections 8/20/25/29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereafter 'NDPS' Act) registered with Narcotics Control Bureau (hereafter 'NCB').



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2. The present complaint was initially registered with Delhi Police being FIR No. 471/2021, and the same was later transferred to Narcotics Control Bureau.

3. It is alleged that on 29.09.2021, a secret information was received stating that the two persons, namely Raju and Rafique (the present applicant), who are indulged in drug trafficking in various states will be coming to Delhi on 29.09.2021, at around 11:30-12:30 pm at night in a truck bearing no. RJ-01-GA-7154 carrying concealed contraband 'GANJA' hidden in a secret compartment made for the said purpose.

4. On the basis of said secret information one truck bearing Reg. No. RJ-01-GA-7154 was intercepted at outer ring road, Naraina flyover, by the Delhi Police and two persons, namely, Raj Kishore @ Raju and Rafique Khan (the present applicant) were apprehended. It is alleged that on the search of the truck, after the removal of the covering sheet (tripal) it was found that the truck was filled with wooden logs and on removal of the said logs a secret chamber was found.

5. It is alleged that upon opening the secret chamber 126 packets wrapped with brown tape were found which were transferred into 42 white bags (katta), weighing a total of 661 kg of contraband / GANJA. The said contraband / GANJA was seized and both persons were arrested.



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6. Thereafter, notice under Section 50 of the NDPS Act was served and the legal rights were explained to the accused and the applicant and co-accused Raj Kishore asked for their personal search to be conducted before a Gazetted Officer to which the said information was sent to the police Station and ACP Sh. Suman Pushkarna, reached the spot and the personal search of the applicant and the co-accused was conducted but no incriminating material was found.

7. During investigation, the documents (RC, fitness/pollution certificate) of the truck were handed over by the applicant, which were in the name of one, Bahadur Singh, and the same were also seized.

8. The learned Counsel for the applicant submitted that the applicant had falsely been implicated in the present case. He submitted that there is non-compliance of Section 42 of NDPS Act on the ground that despite, the Delhi Police, having prior information with respect to the applicant bringing concealed contraband in vehicle bearing No. RJ-01-GA-7154, along with the timing and location, no valid search warrant was obtained.

9. He submitted that police had prior knowledge of the truck number in which applicant would bring the concealed contraband, even then, neither any search warrant was obtained nor any reason to believe was ever recorded for not obtaining the search warrant thereafter.



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10. He submitted that there is complete violation of standing order 1/88 and 1/89 dated 13.06.1989, since 126 packets of *GANJA* were recovered which were transferred into 42 white bags / *kattas* when the proceedings under Section 52- A were carried and two samples were drawn from the 42 white bags / *katta* which confirmed the contraband as *Ganja*.

11. He submitted that even though nothing was recovered from the personal search of the applicant, however, the same ACP who had authorized the operation was called when the applicant agreed to exercise his rights for being searched before a Gazetted Officer in furtherance of the notice under Section 50 of the NDPS Act.

12. He submitted that the ACP / Gazetted Officer on whose instructions the raiding party is formed cannot be called as an independent witness and in support of his contention has placed reliance on the judgement passed by a co-ordinate bench of this Court in the of ***Mohd. Jabir v. State of NCT of Delhi : 2023 SCC OnLine Del 1827.***

13. He submitted that the complaint in the present case was filed by the Narcotics Control Bureau on 28.03.2022, the applicant was arrested on 30.09.2021, and is in custody for more than two and a half years. The learned Counsel relied upon the observations of the Hon'ble Supreme Court in ***Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine 352.***



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14. He submitted that given the applicant clean antecedents, and deep roots in the society, there is no possibility of the applicant influencing the witnesses and therefore, no purpose would be served by keeping the applicant in further incarceration.

15. He submitted that the secret information was received at the Police Station at around 09:00 p.m. that the applicant will be coming in a truck filled with concealed contraband at around 11:30 p.m. - 12:30 a.m., *via* Dhaula Kuan. Pursuant to the secret information, at about 12:00 midnight the said truck was intercepted.

16. He submitted that as per the secret information the investigating agency had prior knowledge of the approximate timing as to when the applicant will be bringing the truck with the alleged contraband, when will he be passing through one of busiest roads in Delhi and yet failed to produce any independent witness(es).

17. He submitted that there are no independent witnesses in the present case and thus the story of the prosecution comes under the shed of suspicion. He further submitted that no endeavor was made by the prosecution to photograph or videotape the recovery either.

18. The learned Counsel for Narcotics Control Bureau has opposed the grant of present bail application. He submitted that on 30.09.2021 the applicant tendered his voluntary statement, wherein he disclosed that he was working with Bahadur Singh who telephonically directed him to take the truck to one Shera who will load the alleged contraband *Ganja* in the truck.



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19. He submitted that the offence is grave and commercial quantity of the contraband (*GANJA*) has been recovered from the secret compartment made in the truck being driven by the applicant and hence the embargo of Section 37 of the NDPS is attracted.

20. He submitted that a request for CAF/CDR of mobile connection No. 8955191935 recovered from the applicant was made and it was found that the said number was in contact with co-accused persons namely, Raj Kishore, Bahadur Singh and Shera. He submitted that there is connectivity of present applicant with other accused persons through the CDR which corroborates the disclosure statement.

21. He submitted that the learned Trial Court had dismissed the applicant's bail application *vide* order dated 15.09.2023, due to the embargo under Section 37 of the NDPS Act.

22. He submitted that Hon'ble Supreme Court in the case of *State of Kerala Etc. v. Rajesh Etc. : 2020 SCC Online SC 81* has categorically interpreted the mandate and rigours of Section 37 NDPS Act, and thereby denied bail to accused.

23. He submitted that there is substantive evidence on record, that is, the recovery of commercial quantity of contraband of 661 Kgs Ganja from the truck, driven by the applicant; voluntary statements of the applicant with respect to knowledge of the contraband being loaded and driven by him and; the corroboration of CDR with the accused persons, are reasonable grounds under Section 37 (1)(b)(ii) of



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the NDPS Act for believing that the accused is *prima facie* guilty of the said offence.

24. He lastly submitted that Section 37 of the NDPS Act does not provide any leniency in grant of bail to accused in the cases where commercial quantity of contraband is seized and placed its reliance on the judgements passed by the Hon'ble Supreme Court in context of limitation of bail under Section 37 of the NDPS Act. [*Collector of Customs v. Ahmadaliya Nodira : (2004) 3 SCC 549 & Union of India v. Rattan Malik : 2009 2 SCC 624*].

25. He submitted that non-compliance of procedural requirements, if any, is to be tested during the course of the trial. In this regard, he placed reliance on the judgment of Coordinate Bench of this Court in *Gauri Shankar Jaiswal v. Narcotics Control Bureau : 2023 SCC OnLine 3327*.

26. He submitted that the defences of the applicant in regard to any procedural anomalies would be a matter of trial.

Analysis

27. Arguments were heard in detail from the learned counsel for the parties.

28. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a *prima facie* case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and



gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc.

29. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfill the conditions stipulated in Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

“37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting of bail.”

30. The accusation in the present case is with regard to the recovery of commercial quantity of contraband. Once the rigours of Section 37 of the NDPS Act are attracted, as provided under the Section, the Court can grant bail only when the twin conditions stipulated in



Section 37(1)(b) of the NDPS Act are satisfied in addition to the usual requirements for the grant of bail – (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; and (2) That the person is not likely to commit any offence while on bail.

31. The learned counsel for the applicant submitted that a liberal interpretation of Section 37 of the NDPS Act must be taken into account by the Court in the present case on the following grounds:

- a) Improper compliance of the notice served under Section 50 of the NDPS Act in so far as when the applicant asked for his search to be conducted before the nearest Gazetted Officer, the same ACP who had authorized the raid / search operation was called.
- b) Non-joinder of independent witnesses by the prosecution and no photography and videography, when the recovery / search was conducted in a public place.
- c) Delay in trial.

32. Section 50 of the NDPS Act outlines the conditions under which a search of a person is to be conducted, specifying that such a search must be performed in the presence of a Gazetted Officer or a Magistrate if the individual so requests. This provision is intended to safeguard the rights of individuals and ensure the fairness and integrity of the search process. In the case of *Bantu vs. State Govt of NCT of Delhi*: **2024:DHC:5006**, this court by a separate judgment while



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noting that the judgment passed by a coordinate bench of this Court in the case of *Mohd. Jabir v. State (NCT of Delhi)* (*supra*), is under consideration before the Hon'ble Apex Court, has held that the essence of Section 50 of the NDPS Act— to inform the suspect of his right to be searched before the Gazetted Officer or a Magistrate — was communicated to the accused person, and any failure / infirmity in strictly adhering to the provision should not undermine the overall compliance if no prejudice is shown. Hence, while the wording is correct, the ultimate focus remains on whether the suspect's rights were adequately protected, a question to be resolved during trial.

33. It was observed that prejudice to the applicant is to be seen by the procedural lapse in such a case. In the present case, *prima facie*, the applicant has not been able to establish any prejudice caused to him. Infirmities in the procedure, if any, will be tested in the course of trial.

34. In the present case, the accused was duly informed of his statutory right to be searched before the Gazetted Officer or a Magistrate, as stipulated under Section 50 of the NDPS Act and the applicant had exercised his right to be searched before a Gazetted Officer.

35. Since no recovery is affected from the personal search of the applicant and the alleged contraband was recovered from a concealed compartment in the truck, the issue of non-compliance of Section 50 of the NDPS is of no relevance at this stage.



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36. It is pertinent to note that in the complaint filed by the Respondent /NCB it was noted that the concerned officer of Delhi Police while departing the police station, for the alleged raid, had made a DD entry No. 8, whereby the secret information was reduced into writing and the same was forwarded to the higher authority, that is the ACP in the present case.

37. As per the prosecution, the ACP was himself present during the search, therefore the question of non-compliance of Section 42 of the NDPS act cannot be argued. Be that as it may, the contention whether provision of Section 42 of the NDPS Act have been complied or not is a matter of trial and cannot be looked into at this stage.

38. The Hon'ble Supreme Court while dealing with a similar issue in the case of ***Union of India through Narcotics Control Bureau, Lucknow v. Md. Nawaz Khan, Criminal Appeal No. 1043 of 2021 [Arising out of SLP (Crl.) No. 1771 of 2021]***, has held as under:

“29. In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial.”

39. It is also contended by the learned counsel for the applicant that though the recovery was allegedly made at a busy place, the same is



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not supported by any public witness. This Court in the case of *Bantu v. State Govt of NCT of Delhi* (*supra*), observed that while the testimony of the police witness is sufficient to secure conviction if the same inspires confidence during the trial, however, lack of independent witnesses in certain cases can cast a doubt as to the credibility of the prosecution's case.

40. It was held that when the Investigating Agency had sufficient time to prepare before the raid was conducted, not finding the public witness and lack of photography and videography in today's time cast a doubt on the credibility of the evidence.

41. A bald statement has been made, as stated in the chargesheet filed, that a few passersby were asked to take part in the police action, however, they refused to join the investigation and left the spot citing legitimate compulsion of their journey.

42. In the present case, no notice was served on the people under Section 100(8) of the CrPC and neither any effort was made to jot down the names or details of such passers-by. The secret information was received almost two hours prior to the applicant being apprehended. It is peculiar that the Investigating Agency was unable to associate even a single public witness at the same time, especially since the prosecution had prior secret information and the applicant and co-accused were apprehended at Outer Ring Road, Naraina Flyover, in one of the busiest roads in Delhi.



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43. It is also pertinent to note that the investigating agency was also unable to procure/ place on record any CCTV footage since the alleged recovery was made from a truck on one of the busiest roads in Delhi and there are many CCTV surveillance cameras placed at multiple road crossings / carriage ways.

44. This Court in *Bantu v. State Govt of NCT of Delhi* (*supra*), had noted that the Hon'ble Apex Court, way back in the year 2018 in the case of *Shafhi Mohd. v. State of H.P.* (*supra*), after taking note of the technological advancements, had passed certain directions. The Hon'ble Apex Court emphasized the role of audio-visual technology in enhancing the efficacy and transparency in the Police investigations.

45. This Court also noted that realizing the need of change in time, the Legislature has now passed the Bharatiya Nagarik Suraksha Sanhita, 2023 ('**BNSS**'), where the practice of photography and videography has now been made mandatory as part of the investigation.

46. This Court further noted that the procedure prescribed in NCB Handbook which has been adopted by the Delhi Police may be argued to be not binding, however, it cannot be denied that the same has been prescribed as the best and crucial practice for obtaining evidence in order to avoid the allegation in regard to foul play.

47. Thus, while it is true that the effort, if any, made by the prosecution to have the search conducted in the presence of the



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independent witnesses would be tested during the course of trial and the same may not be fatal to the case of the prosecution, however, the benefit, at this stage, cannot be denied to the accused / applicant. Undoubtedly, the search in the present case was conducted at a busy public place. It is not the case of the prosecution that no CCTV were installed around the area where raid/search was conducted. It is also not the case that equipments were not available to videograph and photograph the search/seizure. It cannot be denied that almost every person today carries a smart phone with a camera installed in it.

48. The applicant has also challenged the procedure of sampling in the present case. It was contended by the applicant that the law on drawing the samples as expounded in Standing order No.1/88 has been contravened by the prosecution. In the present case 126 packets were recovered which were transferred into 42 white-coloured bags. He submitted that during the proceedings under Section 52 A the samples were taken from 42 white coloured bags before the magistrate and not from the 126 packets individually.

49. The applicant is alleging non-compliance of standard encapsulated in paragraph 1.7(a) of the Standing Order No. 1/88. The same provides that it is advisable to draw a sample from each packages/container in case of seizure of multiple packages/containers.

50. Insofar as the argument regarding improper procedure of sampling is concerned, this Court in the judgement passed in the case of *Sovraj v. State*: **2024:DHC:5009**, adverting to a catena of



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judgments, has held that that the accused persons cannot be allowed to go scot free on minute irregularities in procedure of sampling especially when the prosecution has not had the opportunity to furnish an explanation. It was held that the alleged violation in manner of mixing of seized substances and whether the same has caused any prejudice to the applicant would be a matter of trial.

51. In the present case, *prima facie*, the applicant has not been able to establish any prejudice by the alleged irregular procedure of sampling. Prejudice caused to the applicant by the infirmities in the procedure of drawing samples, if any, will be tested during the course of the trial.

52. Delay in trial and long period of incarceration is also an important factor which has to be kept in mind while considering the application for Bail.

53. The applicant has been in custody since 30.09.2021. The complaint was filed on 28.03.2022, since then a lot of time has passed and there is no likelihood of the Trial being completed in near future.

54. The grant of bail on account of delay in trial cannot be said to be fettered by the embargo under Section 37 of the NDPS Act. The Hon'ble Apex Court, in the case of *Mohd. Muslim v. State (NCT of Delhi)* (*supra*) has observed as under:

“ 21. ...Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil *supra*). Having regard to these factors the court is of the opinion that



in the facts of this case, the appellant deserves to be enlarged on bail.

22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

*23. The danger of unjust imprisonment, is that inmates are at risk of “prisonisation” a term described by the Kerala High Court in *A Convict Prisoner v. State*²¹ as “a radical transformation” whereby the prisoner:*

“loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes.”

24. There is a further danger of the prisoner turning to crime, “as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal”²² (also see Donald Clemmer's ‘The Prison Community’ published in 1940²³). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata : immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily.”



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55. The Hon'ble Apex Court in ***Rabi Prakash v. State of Odisha*** :2023 SCC OnLine SC 1109, while granting bail to the petitioner therein held as under :

“4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent - State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

56. The Hon'ble Apex Court in ***Badsha SK. v. The State of West Bengal*** (order dated 13.09.2023) passed in **Special Leave Petition (Crl.) 9715/2023**, granted bail to the petitioner wherein who had been in custody for more than two years with the trial yet to begin.

57. Similarly, in ***Man Mandal & Anr. v. The State of West Bengal*** **Special Leave Petition (Crl.) 8656/2023** decided on 14.09.2023, the petitioner therein had been in custody for almost two years and the Hon'ble Apex Court found that the trial is not likely to be completed in the immediate near future. The petitioner was, therefore, released on bail.

58. In ***Dheeraj Kumar Shukla v. State of U.P.*** :2023 SCC OnLine SC 918, the Hon'ble Apex Court released the petitioner therein on bail, and observed as under:



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“3. It appears that some of the occupants of the Honda City” Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

59. A Coordinate Bench of this Court in ***Gurpreet Singh v State of NCT of Delhi :2024:DHC:796***, considered the effect of delay and observed as under:

“16. In addition to the above, only 2 (two) out of 22 witnesses have been examined by the prosecution, and that too partially, though more than three and a half years have passed since the arrest of the applicant. It may be true that the reason for the delay in the conclusion of the trial may be for various factors, may be not even attributable to the prosecution, like Covid 19 pandemic and restricted function of the Courts, however, as long as they are not attributable to the applicant/accused, in my view, the applicant would be entitled to protection of his liberty under Article 21 of the Constitution of India. Delay in trial would, therefore, be one of the consideration that would weigh with the Court while considering as application filed by the accused for being released on bail.”

60. From the foregoing, it is evident that despite the stringent requirements imposed on the accused under Section 37 of the NDPS Act for the grant of bail, it has been established that these requirements do not preclude the grant of bail on the grounds of undue



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delay in the completion of the trial. Various courts have recognized that prolonged incarceration undermines the right to life, and liberty, guaranteed under Article 21 of the Constitution of India, and therefore, conditional liberty must take precedent over the statutory restrictions under Section 37 of the NDPS Act.

61. In such circumstances, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail on the grounds of absence of independent witnesses and prolonged delay in the trial.

62. The applicant is also stated to be of clean antecedents. Therefore, I am satisfied that are reasonable grounds for believing that the applicant is not likely to commit any offence while on bail.

63. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹25,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

- a. The applicant shall join and cooperate with the further investigation, if any, as and when directed by the IO;
- b. The applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times;
- c. The applicant shall, upon his release, provide his address where he shall be residing after his release, and



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shall not change the same without informing the concerned IO/SHO;

- d. The applicant shall appear before the learned Trial Court on every date of hearing;
- e. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- f. The applicant shall not leave the country without the permission of the learned Trial Court.

64. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

65. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the trial and also not be taken as an expression of opinion on the merits of the case

66. The bail application is allowed in aforementioned terms.

AMIT MAHAJAN, J

JULY 15, 2024