

*** "REPORTABLE"**
HIGH COURT OF DELHI AT NEW DELHI

+ BAIL APPL. NO. 2449/2008

Date of decision : 16.01.2009

HARISH JOSHI Petitioner
! Through : Mr. Dinesh Mathur, Sr. Adv.
with Mr. Vikas Gupta, Adv.

Versus

\$ D.R.I. Respondent
^ Through : Mr. Satish Aggarwal, Adv.
IO Alkesh Rao,
Asstt. Director Nilank Kumar,
DRI .

%

CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

J U D G M E N T

ARUNA SURESH, J.

1. On receipt of specific intelligence by the officers of Directorate of Revenue Intelligence (hereinafter referred as 'DRI') that one person would come in a Tata Indica Car bearing Registration No. UP 14-AK-

0505 carrying narcotic drugs concealed in a suitcase which would be transferred to another person who would also come to the designated place of delivery of drugs i.e. opposite DLF Golf Course, Gurgaon at about 6.00 P.M. on 8.9.2008, surveillance was organized near DLF Golf Course. At about 6.30 P.M. the said vehicle while coming from Delhi when did not stop near the DLF Golf Course, was followed by DRI officers. The said Tata Indica car took a right turn after reaching the red light and after about 500 meters took a left turn and entered into a lane. The said vehicle stopped near the petitioner/accused who seemed to be waiting for the said car. DRI officers continued to stay in their own car and watched from some distance that a person had alighted from the said Tata Indica Car and talked to the petitioner and when DRI officers tried to intercept the said car, the person who had come out of the car managed to escape whereas petitioner got inside the car which took U-turn and sped away towards Delhi.

2. The said vehicle was finally intercepted and

stopped by the DRI officers opposite Shiv Murti, near Mahipal Pur, New Delhi at around 7.30 P.M. The DRI officers looked inside the car but did not find anything incriminating on or underneath the seats of the car. Thereafter, on the asking of the DRI officers, the driver of the car opened the dickey of the car wherein a black coloured zipper trolley suitcase was found. DRI officers also inquired about the identity of the person who was sitting inside the car. One of the occupants was the petitioner. However, the driver of the car expressed his ignorance if any narcotics drugs were being carried in the car. The petitioner is alleged to have admitted that he had to take delivery of the suitcase containing 5 kg heroin concealed therein lying in the dickey of the car. The person who was successful in running away was identified as Sanjay.

3. A notice under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as 'Act') was issued to the petitioner and other co-accused persons before

conducting their personal search as well as search of the suitcase and the car. Petitioner and other co-accused persons expressed in writing that they did not want presence of a Magistrate or a Gazetted officer for their personal search or for search of the vehicle or the suitcase. Thereafter, petitioner along with other co-accused were taken to CGO Complex, New Delhi. There the Indica Car was searched; the suitcase was taken out from dickey of the car along with other documents pertaining to the vehicle. On opening the suitcase and its careful examination in the presence of the petitioner and other accused persons revealed that the said suitcase contained old and used clothes and on removing base fabric of the suitcase a sunmica sheet was found affixed and after removing the said sheet, five packets wrapped with transparent tape were found placed on another sunmica sheet attached to the base of the said suitcase. The packets were found to contain heroin each packets weighing 1.070 kg., 1.070 kg., 1.075 kgs., 1.074 kgs. and 1.078 kg. respectively.

4. Thereafter, other formalities like taking out sample, sealing the case property etc. were completed. Panchnama was prepared on 9.9.2008 which was signed by the accused persons and panch witnesses as well as intelligence officer and the accused persons were arrested. The Intelligence officer also recorded statement of the accused persons including the petitioner under Section 67 of the Act.
5. Petitioner has filed this petition under Section 37 of the NDPS Act read with Section 439 Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') seeking his release on bail. The bail application is vehemently opposed by the respondent department.
6. Mr. Dinesh Mathur, senior counsel appearing for the petitioner has argued that the Investigating Agency has not complied with the mandatory provisions of Section 50 of the Act as notice under Section 50 of the Act is pre-requisite before conducting search of any person under the

provisions of Sections 41, 42 or 43 of the Act and the search was not conducted by a Magistrate or a Gazetted officer.

7. Notice under Section 50 of the Act allegedly served upon the petitioner was not in accordance with law. It is also argued that DRI officers did not offer their search to the accused persons thereby violating the provisions of the said Section. It is also submitted that DRI officers had searched the vehicle at the spot where it was intercepted but nothing incriminating was found in the car or underneath the car seats.
8. It is further submitted by learned counsel for the petitioner that the alleged declaration of petitioner to the fact that he was to take delivery of the suitcase containing 5 kg of heroin concealed therein and lying in the dickey of the Indica Car in which he was travelling, was obtained by the DRI officers on the spot and the petitioner was arrested before notice under Section 67 of the Act was served upon him, as the said notice was served

upon the petitioner on 9.9.2008. Therefore, the petitioner was also in custody when notice under Section 67 of the Act was served upon him and his statement was recorded. The notice under Section 67 of the Act was therefore served upon the petitioner as a mere formality in view of the fact that inquiry had already been made about the contents of the bag and no further investigation was required. It is submitted that statement of the petitioner recorded under Section 67 of the Act while in custody is in complete contravention of law.

9. It is further submitted by learned counsel for the petitioner that as per the panchnama, DRI officers had left the office along with witnesses at 4.45 P.M. on 8.9.2008 for the spot and they stopped the Indica Car at about 6.30 P.M. The vehicle was finally intercepted at about 7.50 P.M.; whereas Petitioner was actually abducted from the compound inside the colony of DLF Exclusive Apartment, Gurgaon at about 7.00 P.M. for which a report being DD No.38 dated 8.9.2008 was lodged

by Surender Kumar, Supervisor of the said Apartment with Police Station Sushant Lok at about 8.15 P.M. It is alleged that timing of the entire episode of abduction and the event as narrated in the panchnama are contemporary and in view of the said coinciding, two views are possible.

10. It is submitted that the timing of abduction and the alleged interception of car at about 7.50 P.M. by the DRI officers, clearly indicate that petitioner was lifted from his house and was falsely implicated in this case.
11. It is further argued that Indica Car was allegedly intercepted and stopped across Shiv Murti and from the place where the petitioner got into the car to reach to Shiv Murti, the vehicle had to first come on the M.G. road and from there it had to cross Toll Plaza. Indica Car could not have crossed Toll Plaza without paying the toll tax. Surprisingly, the DRI officers who were chasing the Indica Car could not even intercept or stop the said vehicle before it

could cross Toll Plaza, especially when the Car must have stopped for a few minutes to pay the toll tax. Therefore, according to the petitioner, the entire story of the prosecution regarding the information and chase of the car, its interception across Shiv Murti is full of dents and is not believable.

12. It is also submitted that DRI officers did not take any assistance of the local police, which under normal circumstances, should have been taken. The alleged two witnesses to the panchnama had accompanied the DRI officers from their office itself and are not independent witnesses.
13. It is further argued that statement of the petitioner recorded under Section 67 of the Act tantamounts to confession made to a police official and therefore cannot be proved against the petitioner for the offence allegedly committed by him. The statement made under Section 67 of the Act was retracted by the petitioner. Therefore, he has prayed that petitioner be released on bail.

14. Section 25 of the Indian Evidence Act has to be read with Section 67 of the Act for considering admissibility of the statement made by the petitioner to the police under Section 67 of the Act.
15. Mr. Satish Aggarwal, learned counsel appearing for the respondent department has argued that petitioner is an NRI and is permanent resident of Canada and was staying at Gurgaon in a rented premises. The investigation is at its initial stage. The petitioner himself admitted in his statement recorded under Section 67 of the Act that he was to take delivery of the contraband from Sanjay near Radison Hotel but, thereafter, he changed the place of delivery and asked Sanjay to meet him at DLF Gold Link and also disclosed that he would be standing and waiting in a lane and when the car reached the place where he was stay, Sanjay got down and ran away and he sat in the car. Therefore, as per his confessional statement, the petitioner was found in possession of 5 kg of heroin packed in five separate bags.

16. It is further argued by learned counsel for the respondent department that by virtue of provisions contained in Section 37 of the Act, petitioner is not entitled to be released on bail because for releasing the petitioner on bail, additional requirement of Section 37 besides the conditions as laid down under Section 167 Cr.P.C. and 437 Cr.P.C. are required to be complied with. Heroin recovered was of commercial quantity and therefore provisions of Section 37 of the Act are applicable to the facts and circumstances of this case, which, restricts the power of the court to release the petitioner on bail.

17. It is submitted that petitioner had made a statement under Section 67 of the Act voluntarily, without fear, pressure or threat and was written by him in his own hand-writing and that the alleged retraction by the petitioner was nothing but an afterthought and based on legal advice. It is urged that DD No.38 regarding abduction recorded at Police Station Sushant Lok, Gurgaon was found without substance and it was closed by the

concerned police officials on 9.9.2008 after investigating officers of the said DD made inquiries from officers of DRI.

18. It is also submitted that petitioner was got medically examined by the doctor of Dr. Ram Manohar Lohia Hospital, New Delhi before he was produced in the court. It is prayed that under the circumstances, petition deserves dismissal.
19. Jurisdiction of the court to grant bail for an offence under NDPS Act is circumscribed by the provisions contained in Section 37 of the Act. This Section starts with non obstante clause and has an overriding effect over the provisions regulating bail contained in Cr.P.C. This section makes offence cognizable and non bailable. A person accused of offence punishable under Section 19 or Section 24 or 27-A and also for offence involving commercial quantity is not entitled to be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release and/or where the Public Prosecutor

opposes the application, the Court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. These limitations on grant of bail specified in the Section are in addition to the limitations prescribed under the Cr.P.C. Section 37 of the Act reads as follows:-

“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 opposes 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.]”

20. Thus, the two limitations for grant of bail provided under Section 37 of the Act are (i) an opportunity to the Public Prosecutor to oppose bail application and (ii) the satisfaction of the court that there are reasonable grounds for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The limitations on grant of bail come only when the question of granting bail arises on merits. The second condition is twofold, firstly, the court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and, secondly, that he is not likely to commit any offence while on bail. These two conditions are cumulative and are required to be

fulfilled and in no manner can be treated as alternative.

21. Emphasis is on the words 'reasonable grounds'. Reasonable grounds means that court should be satisfied something more than prima facie grounds. There must be substantial probable causes for believing that the accused is not guilty of the alleged offence. In other words, the provision requires existence of such facts and circumstances as are sufficient in themselves for justified satisfaction of the court that the accused is not guilty of the alleged offence. Reference is made to '***N.R. Mon vs. Md. Nasimuddin, 2008 (3) JCC (Narcotics) 170***', in the said case it was observed:-

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are : the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence, and that

he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence....."

Reference is also made to '***Union of India vs. Ram Samujh & Anr., (1999) (9) SCC 429***' and '***Babua Alias Tazmul Hosssain vs. State of Orissa, (2001) 2 SCC 566***'.

22. The abovesaid provisions are mandatory in nature and are required to be adhered to by the Court. Accused who are involved into drug trafficking are responsible for the death of number of innocent young victims who are vulnerable and it causes deleterious effects and deadly impact on the society. These persons, even if released temporarily

on bail, there is every possibility and probability that these persons would continue their nefarious activities or trafficking or dealing in narcotics, intoxicants clandestinely, may be because of large stake and illegal profit.

23. At the same time, Section 37 of the Act has to be construed in a pragmatic manner and no such construction can be given to the Section in such a way so as to negate the right of a party to obtain bail, which is otherwise, a valuable right for practical purposes. For considering application for grant of bail, a detailed reasoning may not be necessary to be assigned in the order but must demonstrate application of mind, atleast in serious cases, as to why an applicant has been granted or denied privilege of bail. (Reference is made to '***State of Uttaranchal vs. Rajesh Kumar Gupta***', ***2006 (3) JCC [Narcotics] 178***').

24. Section 37 of the Act in no manner suggests that an accused in custody must wait till the time the trial of the case is taken up to satisfy the court that

there are reasonable grounds for believing that he is not guilty of such offence, provided, the necessary material was available on record for the court to conclude that the satisfaction as required under the Section was met. The Court is not to give a finding that accused is not guilty, or guilty, which is to be recorded after the conclusion of the trial, whereas the satisfaction as required under the Section has to be arrived at by the court before the conclusion of the trial, may be at any stage of the investigation or in due course of the trial itself.

25. The court, therefore, cannot shirk its responsibility by postponing the consideration of the fact whether reasonable grounds exist for believing that the accused is not guilty till the stage of actual trial. If materials are shown to exist on the basis of which court can feel satisfied that there are reasonable grounds for believing that the accused is not guilty, the Court should not take recourse to any other alternative other than recording its necessary satisfaction. The court has also to express its satisfaction that accused is not likely to commit any

offence while on bail. For that purpose criminal antecedents of the accused can also be considered by the court. Reference is made to '***Satyendra Sah vs. State of Bihar, 1996 (1) Crimes 267 (H.C.) Patna High Court***'.

26. Keeping in mind the provisions of Section 37 of the Act as analysed above, for grant of bail for an offence under the Act, I shall now proceed with the present application on its merits.
27. About 4.863 kg. (in net) heroin concealed in a suitcase was recovered from the dickey of Tata Indica Car bearing registration No. UP 14-AK-0505. The samples of the recovered substance were sent to Central Revenues Control Laboratory, New Delhi for quantitative test. Each of the samples gave positive test for Diacetylmorphine (Heroin) and total purity test was 55.34% average. Thus, the heroin recovered is of commercial quantity. The provisions of Section 37 of the Act are applicable to this case which are mandatory to be considered by this court while considering this bail application.

Public Prosecutor has been given an opportunity to oppose the application for release of the petitioner on bail and has been heard at length. Therefore, first condition contained in Section 37 (1) (b) of the Act is complied with.

28. Now it is to be seen whether, there are reasonable grounds for this court to believe that petitioner is not guilty of an offence under the Act and also that he is not likely to commit any offence while on bail.

29. One of the apprehensions of the respondent-department is that petitioner being NRI and permanent resident of Canada, there is every likelihood that he would abscond, if released on bail. Undisputedly, the passport of the petitioner has already been seized by the intelligence officer. Therefore, under these circumstances, the fear expressed by the learned counsel for the respondent department that petitioner would jump bail, if released being NRI is without any substance.

30. Section 41 of the Act confers powers on a

Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class so empowered by the State Government to issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under this Act. He can also issue warrants for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence. This Section also provides that any officer of Gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government who has such personal knowledge or information given by any person, may authorise any officer subordinate to him, but superior in rank to a peon, sepoy or a constable, to arrest such a person or search a building,

conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place. Such authorized an officer has all the powers of an officer acting under Section 42 of the Act.

31. Section 42 of the Act empowers such an officer to enter into, search, seize and arrest without warrant or authorization if he has reason to believe that search warrant or authorization cannot be obtained without affording opportunity of the concealment of evidence or facility for the escape of an offender, may enter and search such building, conveyance or place at any time between sunset and sunrise. Section 43 of the Act speaks of power of seizure and arrest in public place.

32. Section 50 of the Act lays down conditions under which search of a person has to be conducted. Provisions of Section 50 of the Act are mandatory in nature and therefore, breach of the condition vitiates the trial, as non compliance would result non relevance of search and consequent seizure of

goods. After a person is arrested and before a search is conducted, it is mandatory to inform the accused that he has a right to be searched in presence of a Gazetted officer or a Magistrate. Accused is entitled to benefit of acquittal if there is failure to comply with the provisions.

33. Section 50 of the Act which refers to conditions under which search of person shall be conducted, provides in its sub-Section (1) that when officer duly authorized under Section 42 is about to search a person under the provisions of Sections 41, 42 or 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Magistrate or Gazetted Officer. Sub-section (2) prescribes that if such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or Magistrate referred to in sub-section (1). It, thus follows that a mandate of the said provision is required to be strictly observed by the officer intending to search a suspect of possessing drugs by informing him of his right to be searched in the presence of the

Gazetted Officer or a Magistrate. (***Narcotic Drugs and Psychotropic Substances in India, (Second Edition), by R.P. Kataria***).

34. Bare reading of Section 50 of the Act therefore shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or container or bag or premises or luggage of such person because, luggage does not form part of a person. Wherein the luggage of the accused is a subject matter of search, provisions of Section 50 of the Act would not apply and in such like circumstances it is not legally required by an officer to make an offer to the accused for search in presence of a Gazetted officer or a Magistrate.
35. In '***Madan Lal & Anr. vs. State of H.P. , (2003) 7 SCC 465***', a car was intercepted by the raiding party who had prior information that the said car carried charas and the driver of the said car and other accused persons were found sitting and an option was given to the accused persons as to whether they wanted to be searched by a

Magistrate or by him and appellant consented to the search by Jainarain and on personal search nothing incriminating was found on their person. However, on search of the car, a bag was found to contain a steel doloo containing charas and it was submitted that mandatory requirement of Section 42 and 50 were not complied with. It was held that Section 50 would apply only in case of a personal search of a person and it does not extend to search of a vehicle or a container or a bag or premises and therefore the contention regarding non compliance of Section 50 of the Act was found without any substance. Reference is also made to ***State of Himachal Pradesh v. Edward Samual Chareton, 2001 CrLJ, 1356***, and ***'Rajendra v. State of Madhya Pradesh, 2004 (13) AIC 35 (SC)***, and ***'Gurbax Singh v. State of Haryana, 2001 (3) SCC 28***'.

36. In the present case, as per panchnama, DRI officers served notice under Section 50 of the Act to the petitioner and other accused persons in the presence of the witnesses, Shri Raj Kumar and Shri

Omvir and the petitioner and other accused persons expressed their option in writing on the said notice that they did not require presence of a Magistrate or a Gazetted officer either during their personal search or during rummaging of the Indica Car or during search of the said suitcase which was lying in the dickey of the car and that any officer of DRI could conduct such searches. DRI officers conducted search of the Indica Car resulting into recovery of one black coloured zipper trolley suitcase from the dickey of the car, documents pertaining to the registration and insurance of the vehicle and DRI officers subsequently conducted search of the suitcase in their office at CGO Complex, New Delhi. The said suitcase was found to contain some old clothes and it was from the bottom of the suitcase heroin was recovered after removing its base fabric of the suitcase and the synmica sheet. Since DRI officers conducted search of vehicle and not personal search of the petitioner and other co-accused person, the plea that notice under Section 50 of the Act was not

duly served upon the petitioner is without any substance and is not tenable especially when notice was served upon the petitioner and co-accused persons and they had given their option in writing that they did not want any search to be conducted by a Magistrate or a Gazetted Officer and any of the DRI officers present there could conduct their search.

37. Section 67 of the Act empowers the Investigating Officer to call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder or require any person to produce or deliver any document or thing useful or relevant to the enquiry. He has also the power to examine any person acquainted with the facts and circumstances of the case.

38. The intelligence officer served notice upon the petitioner and other accused persons under Section 67 of the Act and called upon them to appear before him on 9.9.2008 at 3.15 P.M. in his

office. This notice is dated 9.9.2008 and was stated to have been served upon the petitioner and the other accused persons while they were in custody of the DRI officers. Therefore, this notice was a mere formality. It was in custody, the statement of the petitioner was recorded under Section 67 of the Act. Statement is purported to have been written by the petitioner himself in his own hand and under his signatures. Grouse of the petitioner is that this statement was never made by him voluntarily. He was pressurized and coerced to write the said statement while in custody, which is in complete violation of law. The said statement was specifically retreated by the petitioner. Learned counsel for the respondent-department has submitted that the retraction was not valid as when the petitioner was produced before the Magistrate for remand, he never made any such statement to the Magistrate retracting his statement under Section 67 of the Act.

39. Confessional statement though retracted at the subsequent stage can be used against the person

making it if the court is satisfied that it was not obtained by threat, duress or coercion, but the prudence and practice requires that the court should seek assurance by getting corroboration from other evidence adduced by the prosecution and it is only if it gets general corroboration from other independent source that such statement can form basis for conviction of the accused. Statement recorded under Section 67 of the Act by the DRI officers is not hit by the provision of Section 25 of the Evidence Act as the statement in the present case is not made to a police officer, but to a person who was acting under special statute. Statement of the petitioner, recorded by the DRI officer while he was in custody prima facie cannot be considered voluntary. In cases under the NDPS Act, prosecution is entitled to rely upon the statement of the accused recorded during investigation. However, what generally is done by the Investigating Officer in such cases is to procure statement may be by assault, illegal detention and fear of continued detention. Law does not permit

such type of practice, though Intelligence officer can certainly rely upon the statement made by the accused voluntarily.

40. Whether statement of the petitioner recorded under Section 67 of the Act was made voluntarily without any coercion or pressure of any kind is a question to be examined by the court at the trial of the case. There is no other corroborative evidence except statement of co-accused persons recorded under Section 67 of the Act. Therefore, the statement of the petitioner made under Section 67 of the Act is a very weak piece of evidence gathered by the prosecution against the petitioner, especially when it was recorded while petitioner was in custody of the Intelligence officer.

41. As per the information with the DRI officers, narcotic drugs concealed in a suitcase were to be transferred near DLF Golf Course, Gurgaon at around 6.00 P.M. on 8.9.2008. DRI officers along with panch witnesses left the office at 4.45 P.M. for the designated place of delivery of drugs. It was

around 6.30 P.M. vehicle UP 14-AK-0505 was spotted on the road side in front of the Golf Course coming from Delhi side. Since the vehicle did not stop at the designated place, it was chased by the DRI officers. The Tata Indica Car allegedly stopped after taking a right turn and another left turn in a lane near an elderly person i.e. the petitioner. The occupants of Tata Indica Car did not notice that they were being chased even after the DRI officers stopped their car at some distance. One of the occupants Sanjay allegedly got down from the vehicle and talked to the petitioner. When officers of the DRI tried to intercept and apprehend the said car, accused Sanjay who got down from the car managed to run away in a nearby lane. Whereas knowing it well that they were being chased, petitioner chose to sit in the Tata Indica Car and the vehicle took a U turn and sped away towards Delhi at a high speed. Why could not the DRI officers immediately intercept the car which admittedly took U-turn, cross them and sped towards Delhi is not known. Interestingly, the

vehicle crossed DLF Golf course, Gurgaon, went to M.G. road and from there to G.T. Road National Highway No.8 for coming to Delhi and it was accordingly chased by the DRI officers. Conspicuously, occupants of Indica Car could get themselves cleared at toll tax plaza after paying the toll tax, but the DRI officers even then could not intercept the vehicle and they continued to chase the vehicle till they reached within the territorial jurisdiction of Delhi i.e. opposite Shiv Murti, near Mahipal Pur, New Delhi. There they did check the inside and dickey of the car. Petitioner on questioning allegedly admitted that the suitcase present in the dickey contained heroin, but no further proceedings were conducted there. Petitioner and other occupants of the car along with Tata Indica Car were brought to the CGO complex where search of the suitcase and other proceedings were conducted and the petitioner along with other accused persons was arrested.

42. Interestingly, when petitioner was being allegedly chased by DRI officers, one DD No.38 was got

recorded by Surinder Kumar, Security officer /Supervisor of DLF Exclusive Apartment, Gurgaon with Police Station Sushant Lok, District Gurgaon, RTI Branch by giving written application to the fact that he along with Virender, Head Guard, Manjeet Singh, Security Guard and Satish Parashar, Security Guard were on duty at Exclusive Main Gate and at about 7.00 P.M. Harish Joshi, resident of the apartment was roaming near the Pawan Dhari, when one Indica Car having registration No.UP-14 AK-505 came there which was occupied by two other persons besides the driver. This vehicle was followed by one Qualis Car bearing No. DL-2C-AC-8252 of white colour which was occupied by 7/8 boys. Those persons got down from the vehicle and they forced the petitioner and the three occupants of the Indica Car to accompany them, on which Surinder Kumar made an inquiry as to why they were quarreling, and one of those boys informed him that they were from CBI and took away the occupants of the India Car as well as the petitioner. This fact is not disputed by the

respondent department. It is also not disputed that on receipt of information from the respondent department on 9.9.2008 at about 10.15 P.M. regarding the arrest of the petitioner in a case related to drugs and he had already been produced before the court of ACMM, Patiala House, New Delhi. Inspector Hariom, who was investigating the complaint of abduction of the petitioner, closed further investigation in the said DD. Under these circumstances, even the place of apprehension and arrest of the petitioner is in jeopardy.

43. When Tata Indica Car reached the place where the petitioner was allegedly standing in a lane near Golf Course, Gurgaon, it was already having two occupants besides the driver, namely, Sanjy and Anil Mohan and was already carrying 5 kg. of heroin concealed in a suitcase kept in its dickey. Petitioner was not carrying anything with him when he occupied the car. Sanjay, the co-accused who was actually carrying the narcotic drugs with him and was the person who got down from the car, allegedly talked to the petitioner and ran away

from the spot on seeing the DRI officers has not been arrested by the Intelligence officer till date.

44. Learned counsel for the respondent has tried to state that Sanjay could not be arrested as his whereabouts or address is not known. This submission is belied from the statement of co-accused Anil Mohan recorded under Section 67 of the Act. In the said statement Anil Mohan disclosed that he knew Sanjay very closely as he had met him in March, 2007 in Dasna Jail, Ghaziabad, U.P. as he was locked up for one month and Sanjay was undergoing sentence in a robbery case. He had again met Sanjay in the court of Collector, Raj Nagar, Ghaziabad, U.P. Lastly Sanjay had talked to him on telephone on 9.9.2008. Intelligence officer had enough clues to trace out the whereabouts of Sanjay, may be from the court record or the jail record maintained by Dasna Jail where he had suffered sentence. The fact remains that this casual approach of the Investigating Officer has resulted into main culprit successfully running away from law.

45. Therefore, under these circumstances, it becomes doubtful if at all petitioner was consciously in possession of the heroin especially when a complaint was lodged at Police Station Sushant Lok almost simultaneously indicating that at the relevant time when the alleged incident took place, petitioner was present in the complex of DLF Exclusive Apartment, Gurgaon.
46. Tata Indica car was allegedly spotted at about 6.30 P.M., vehicle was intercepted opposite Shiv Murti at about 7.30 P.M. i.e. within one hour of the surveillance mounted by DRI officers. The timings of the incident and the episode of alleged abduction are contemporary. There is no mismatch in the timings and therefore, under these circumstances both views are possible. The factual narration of incident, the manner in which Tata Indica car was chased by DRI officers and the route which was allegedly followed by Tata Indica to come to Delhi; prima facie do not inspire confidence in the court, though they may not be improbable.

47. In '*Sarija Banu @ Janarthani @ Janani vs. State through Inspector of Police, 2005 (9) SCALE 604*', where in similar circumstances a telegram was sent by one person to the Home Secretary, Government of Tamil Nadu with copy to Govt. of Tamil Nadu and another to the Commissioner of Police, Chennai and other police officials informing that police party had illegally entered into the house occupied by the appellants and had taken them into custody and their whereabouts were not known and it was feared that their life might be in danger and an immediate action was requested to be taken to safeguard their lives and no such action was taken, the court was pleased to grant bail to the appellants observing that from these facts it appeared that something happened on a particular date i.e. on 9.3.2003 (in the said case) for which a telegram was sent, as to the whereabouts of the appellant were not known. This was relevant factor for granting bail. In this case, as already discussed above, a complaint about abduction of the petitioner was lodged at

Police Station Sushant Lok, Gurgaon by the Security Guard/Supervisor of the said apartment where petitioner was residing as a tenant at the time which coincided with the time of the incident in question.

48. Petitioner has placed on record copies of certain media reports appearing in different papers of 9th September and 10th September respectively. Learned counsel for the petitioner has also referred to some talks which took place between Commissioner of Police Gurgaon who had also reached the spot for purposes of investigation and various TV channel reports which were immediately reported from the spot after interview of the eye witnesses to emphasise that petitioner has been falsely implicated in this case. Be that as it may, media reports, the interview of the Commissioner of Police as to who the petitioner is and also various reports appearing in different TV channels cannot be looked into by this court while considering this bail application. They are all defences available to the petitioner which he is

entitled to raise at the relevant stage of trial.

49. Under these circumstances, I am of the view that there are reasonable grounds for believing that petitioner is not guilty of an offence under the Act. Petitioner is not involved in any other offence nor was involved in any offence prior to his arrest in this case. He is a businessman running his business in India and across the world. Therefore, there is no likelihood of his committing any offence while on bail.

50. Hence, bail application is allowed, petitioner is ordered to be released on bail on his furnishing personal bond in the sum of Rs.1,00,000/- (Rupees one lac only) with two sureties in the like amount each having immovable properties in Delhi to the satisfaction of the trial court subject to the condition that he shall not leave the NCT of Delhi without the leave of the court and in case he is permitted to leave NCT of Delhi, he shall keep the intelligence officer fully informed about his whereabouts and his latest address. His passport

shall not be returned back to him under any circumstance till the trial of the case is over. He shall report to the Intelligence Officer on First and Third Monday of every month at 10.00 A.M. and shall cooperate in the investigation of the case and shall not in any manner try to influence or temper with the investigation.

Attested copy of the order be sent to the trial court as well as to the State through special messenger.

(ARUNA SURESH)
JUDGE

January 16, 2009
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