

Court No. - 12

**Case :- CRIMINAL MISC. BAIL APPLICATION No.
-11543 of 2023**

Applicant :- Jamil Akhtar Miyan

Opposite Party :- Union Of India Thru. Directorate Of
Revenue Intelligence Zonal Unit Lko.

Counsel for Applicant :- Anil Kumar Pandey

Counsel for Opposite Party :- Digvijay Nath Dubey

Hon'ble Pankaj Bhatia,J.

1. Rejoinder affidavit filed today is taken on record.
2. The present application has been filed by the applicant seeking bail in D.R.I. Case Crime No. 23 of 2022, under Section 8/22(c)/28/29 of N.D.P.S. Act, challaned by Directorate of Revenue Intelligence, Zonal Unit, Lucknow, District Lucknow.
3. The facts in brief are that on the basis of a search carried out a recovery memo was prepared on 16.12.2022, in which it was recorded that on the basis an information received, a team was constituted on 16.12.2022 after receiving an information that two persons including the applicant were traveling on a Bus bearing No. UP 78 FN 2644 carrying contraband. The said bus in question was apprehended at 3.15 AM while the same was coming from Sitapur. On the basis of information received, two persons sitting as passengers one of them being an applicant were sitting in the bus and after they confessed that they were carrying contraband, they were informed about their

personal search and the said two persons expressed their wish to be searched in the presence of a gazetted officer. The said two persons also requested that the search be carried out at a safe place, as such, the said two persons along with their baggage were brought to the office of the Directorate of Revenue Intelligence (DRI), Lucknow, where they reached by 4 AM and in the presence of a gazetted officer, search was conducted. During the search of the applicant, it was stated that from the search a mobile phone and Rs.2318/- were recovered which were returned to them and thereafter from the goods being carried by both of them, in one of the bag some clothes, shoes etc were there and in the other bag, HDPE bags were kept, when the said bag was opened 10 packets were recovered, each of the said packet contained some powder, which appeared to be psychotropic substance, on weighing each packet weight was about 1 KG, thus 10 packets i.e. 10 KG were recovered from the one of the bag being carried by the said two accused. The said packets were marked from P-1 to P-10 and from each packet small quantity of powders were taken and were mixed and on the basis of test done, the same was found to be having traces of "Methaqualone". After taking samples 10 packets were kept in a plastic bag and were marked as B-1 and the bags, etc were marked B-2 and thereafter they were seized. The statement of the applicant was also recorded. It was also recorded that the 10 packets were valued at Rs.1 Crore each and thus, the total offending goods were tentatively valued as Rs.10 Crores. The goods found, *prima facie*, being psychotropic substance were liable to confiscation in terms of Section

60 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to "N.D.P.S. Act") and were seized in terms of powers under Section 42/43 of the N.D.P.S. Act. An inventory was also prepared. The signature of the two accused were also obtained in the recovery memo.

4. In the light of the said, in the present bail application, it is argued by the learned counsel for the applicant that both the search and seizure were an eye wash and the applicant is being falsely implicated in the present case. It is argued that the mandate of Section 50 of the N.D.P.S. Act has not been complied with. It is further argued that there is non compliance of Section 55 & 57 of the N.D.P.S. Act as necessary information was not given to Higher Authorities within 48 hours. It is further argued that the samples drawn were contrary to the process of sampling provided under notification no. 1 of the 1988 and 1 of 1989 and the same were not sent to the FSL within the time prescribed in the said notifications. The independent witnesses referred in the recovery memo are said to be the persons of the Department as their names appears in several other cases as independent witnesses. It is further argued that in the sample drawn, the quantity was mentioned that 5 grams which allegedly was drawn and sent to the F.S.L, whereas in the report of the F.S.L sample weight was mentioned as 7.5 grams. It is further argued that in terms of the report of the FSL, "Methaqualone" was not found and the sample was found as Alprazolam powder. It is further argued that the mandate of Section 52A of the NDPS Act was not followed as the Magistrate was not informed with regard to drawing

of the sample and the preparation of the inventory. It is further argued that the applicant has no criminal antecedent and apart from the statement in the recovery memo, no evidence in the form of journey ticket, etc was shown with respect to the applicant. The bail application of the applicant was rejected by the Court below, as such, present bail application has been filed.

5. In short, the submission of the counsel for the applicant is that there is a non compliance of mandatory provisions relating to search, seizure and sampling under the NDPS Act as well as violation of the notifications.

6. In the reply to the said submission, Sri Digvijay Nath Dubey who appeared on behalf of the D.R.I., Lucknow argues that the submissions made by the counsel for the applicant are liable to be rejected in as much as the bag carried by the said two persons, from which the contraband was recovered, does not require the following of mandate of Section 50 of the N.D.P.S. Act. It is further argued that in terms of call detail record they were in constant talk with the persons, who supplied the goods. As regards the FSL report, it is submitted that although the weight of the sample is shown as two samples of 5 grams each, the weight of samples referred to in the FSL report is with plastic pouch, thus the weight of plastic pouch if taken into account does not reveal any discrepancy. It is argued that the receipt of the sample in the laboratory on 26.12.2022 is on account of transport delay, which can not be attributed to the respondent. He argues that the powder in question was *prima facie* believe to be Methaqualone, however, the same was found to be Alprazolam, which is also a

contraband notified under the NDPS Act. It is interesting to note that in reply to the argument of violation of Section 52-A of the NDPS Act, it is argued that Section 52-A of the N.D.P.S. Act is a provision, which is to be followed at the time of destruction of the goods and not before that.

7. In support of the arguments, the counsels of the both the sides have placed reliance on the judgment of the Supreme Court in the case of **Union of India Versus Mohan Lal and Other (2016) 3 Supreme Court Cases 379**, while the counsel for the applicant relies upon paragraph 15 of the said judgment, the counsel for the respondent places reliance on paragraph 13 of the said judgment . The counsel for the applicant also places reliance on the judgment of the Supreme Court in the case of **Yusuf @ Asif Versus State 2023 INSC 912**.

8. To test the said submissions as recorded above, for the purposes of deciding this Bail application, *prima facie*, the recovery of the bag was in the presence of the said two persons as per the recovery memo, thus both the applicant and the co-accused can be said to be in conscious position and there is no material to disbelieve the recovery memo on that count. As regards the non following the mandate of Section 50 of the NDPS Act, it is very well settled that in view of the law explained by the Supreme Court in the case of **Ranjan Kumar Chadha Vs. State of Himachal Pradesh 2023 Live law (SC) 856**, wherein the Supreme Court had considered the mandate of Section 50 of the NDPS Act and recorded that the provisions of Section 50 of the NDPS Act are mandatory only in the case of personal search and not in the case of search of some baggage, which may be

carried by the person, thus in view of the law laid down in the case of **Ranjan Kumar Chadha (Supra)**, the submission with regard to violation of Section 50 of the N.D.P.S. Act deserves to be rejected.

9. To test the third submission of the counsel for the applicant with regards to non following the mandate of Section 52 A and its effect on trial and its consideration for grant or rejection of Bail. On one hand counsel for applicant argues that the samples were not drawn in presence of a magistrate and no certification was obtained, on the other hand it is argued by DRI that there is no need to observe the mandate of Section 52 A at the time of drawing samples and the mandate of Section 52 A is to be followed at the time of destruction of goods section 52 A is quoted herein below:-

"52A. Disposal of seized narcotic drugs and psychotropic substances.—3 [(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.] (2) Where any 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such

4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of— (a) certifying the correctness of the inventory so prepared; or (b) taking, in the presence of such magistrate, photographs of 5 [such drugs, substances or conveyances] and certifying such photographs as true; or (c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn. (3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application. (4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of 1 [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

10. section 52 A came up for consideration in cases of ***Union of India Vs. Mohan Lal (supra)*** and ***Yusuf vs State (supra)***.

The Supreme Court in case of ***Union of India Vs. Mohan Lal (Supra)*** observed as under:-

"13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

15. It is manifest from [Section 52A \(2\)\(c\) \(supra\)](#) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under [Section 53](#) who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of [Section 52- A](#) requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other

words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to [Section 52-A\(4\)](#) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of [Section 52-A](#) above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.”

The said issue was clarified in para 16 and para 17 further explained the position with regard to the manner of sampling are as follows:-

"16. Sub-section (3) of [Section 52-A](#) requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to

approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to [Section 52-A\(4\)](#) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of [Section 52-A](#) above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."

11. The said position dealt in ***Union of India Vs. Mohan Lal (supra)*** case was further explained by the Supreme Court in the case of ***Yusuf @ Asif Vs. State (Supra)***, wherein Supreme Court relying upon the judgment in the case of ***Union of India Versus Mohan Lal (Supra)*** and analyzing the mandate of Section 52A of the N.D.P.S. Act observed as under:-

"12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub section (1) shall prepare its inventory with details and the

description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under subsections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate.

No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn."

12. The Supreme Court went ahead and analyzed the non following of mandate of Section 52A of the N.D.P.S. Act and its effects on the trial by recording as under :

"16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated."

13. Thus, in view of the law laid down in the case of **Union of India Versus Mohan Lal (Supra)** and clarified in the case of **Yusuf @ Asif Vs. State (Supra)**, the non drawing of sample in the presence of the Magistrate would vitiate the trial.
14. In the present case, it has been admitted that the sampling process was not done in the presence of the Magistrate, which according to the counsel for the respondent is to be done at the time of destruction of goods. The said argument of the respondent is in ignorance of the law as explained in the case of **Union of India Versus Mohan Lal (Supra)** and **Yusuf @ Asif Vs. State (Supra)**. Thus, I have no hesitation in holding that *prima facie* the mandate of Section 52A of the N.D.P.S. Act was not followed in the present case.
15. Considering the mandate of Section 37 to be followed while deciding Bail applications, the scope and true import of Section 37 was explained in the case of **Mohd. Muslim @ Hussain Versus State (NCT of Delhi) 2023 LiveLaw (SC) 260** in respect of interpretation of Section 37 NDPS Act and the two

restrictions placed therein, wherein the Supreme Court has held hereunder:

"13. When provisions of law curtail the right of an accused to secure bail, and correspondingly fetter judicial discretion (like Section 37 of the NDPS Act, in the present case), this court has upheld them for conflating two competing values, i.e., the right of the accused to enjoy freedom, based on the presumption of innocence, and societal interest - as observed in Vaman Narain Ghiya v. State of Rajasthan¹¹ ("the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal...."). They are, at the same time, upheld on the condition that the trial is concluded expeditiously. The Constitution Bench in Kartar Singh v. State of Punjab made observations to this effect. In Shaheen Welfare Association v. Union of India again, this court expressed the same sentiment, namely that when stringent provisions are enacted, curtailing the provisions of bail, and restricting judicial discretion, it is on the basis that investigation and trials would be concluded swiftly. The court said that Parliamentary intervention is based on:

"a conscious decision has been taken by the legislature to sacrifice to some extent, the personal liberty of an undertrial accused for the sake of protecting the community and the nation against terrorist and disruptive activities or other activities harmful to society, it is all the more necessary that investigation of such crimes is done efficiently and an adequate number of Designated Courts are set up to bring to book persons accused of such serious crimes. This is the only way in which society

can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods."

14. In a recent decision, while considering bail under the [Unlawful Activities Act \(Prevention\) Act, 1967](#), this court in [Union of India v. K.A. Najeeb](#)¹⁴ observed that:

"12. Even in the case of special legislations like the [Terrorist and Disruptive Activities \(Prevention\) Act, 1987](#) or the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act") which too have somewhat rigorous conditions for grant of bail, this Court in [Paramjit Singh v. State \(NCT of Delhi\)](#), (1999) 9 SCC 252], [Babba v. State of Maharashtra](#), (2005) 11 SCC 569 and [Umarmia v. State of Gujarat](#), (2017) 2 SCC 731 enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians."

15. The court concluded that statutory restrictions like Section [43-D\(5\)](#) of the [UAPA](#), cannot fetter a constitutional court's ability to grant bail on ground of violation of fundamental rights."

18. The facts in this case reveal that the recovery of ganja was made on 28.09.2015, from the four co-accused, including Nitesh Ekka. The present appellant was arrested at the behest, and on the statement of this Nitesh Ekka. The prosecution has relied on that statement, as well as the confessional statement of the present appellant; in addition, it has relied on the bank statements of Virender

Singh @ Beerey, who allegedly disclosed that money used to be transferred to the appellant. As against this, the prosecution has not recovered anything else from the appellant; its allegation that he is a mastermind, is not backed by any evidence of extensive dealing with narcotics, which would reasonably have surfaced. The prosecution has not shown involvement of the appellant, in any other case. Furthermore, he was apparently 23 years of age, at the time of his arrest. It is an undisputed fact that two co-accused persons (who also, were not present at the time of raid and from whom no contraband was recovered) - the accused (Virender Singh @ Beerey) who allegedly transferred money to the appellant's account as payment for the ganja, and the accused (Nepal Yadav @ Tony Pahalwan) from whom the original insurance papers and registration certificate of the car from which contraband was seized, was recovered¹⁸ - have both been enlarged on bail. The appellant has been in custody for over 7 years and 4 months. The progress of the trial has been at a snail's pace : 30 witnesses have been examined, whereas 34 more have to be examined.

19. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is “not guilty of such offence” and that he is not likely to commit any offence while on bail. What is meant by “not guilty” when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, Cr) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the

court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice : even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws - be balanced against the public interest.

20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material

on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act."

16. In view of the above in the present case a prima facie, view can be formed for the grant of bail that the prosecution may not be able to establish the offence based upon the the sampling which prima facie does not comply with mandate of Section 52A of the NDPS Act. Thus the first test of Section 37 N.D.P.S. Act is satisfied.

17. As regards, the second of twin conditions specified under Section 37 of the N.D.P.S. Act, as the applicant has no criminal antecedent, the second of the twin condition is also satisfied in view of law laid down in the case of **Ranjitsing Brahmajeetsing Sharma Versus State of Maharashtra and Another, (2005) 5 SCC 294.**

18. In view of the above, I am of the view that the applicant is entitled to be released on bail. Accordingly, the bail application is **allowed**. Needless to add that the observations made above are only for the purposes of deciding the present bail application and will not have any effect on trial.

19. Let the applicant **Jamil Akhtar Miyan** be released on bail in Case Crime No. 23 of 2022, under Section 8/22(c)/28/29 of N.D.P.S. Act, challaned by

Directorate of Revenue Intelligence, Zonal Unit, Lucknow, District Lucknow, on his furnishing personal bonds and two sureties, who are the resident of Lucknow to the satisfaction of the Court concerned with the following conditions:

- (a) The applicant shall execute a bond to undertake to attend the hearings;
- (b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and
- (c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

Order Date :- 11.1.2024

Arun