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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Judgment delivered on: 12th January, 2016

+ **BAIL APPLN. 58/2016**

FATIMA Petitioner

Represented by: Mr. Aditya Aggarwal and
Ms. Tanya Aggarwal,
Advocates.

Versus

STATE GOVT OF NCT OF DELHI Respondent

Represented by: Mr. Ashish Dutta, Additional
Public Prosecutor for the State
with SI Rizwan, P.S.
Seelampur.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

Crl.M.A. No.450/2016 (for exemption)

Exemptions allowed, subject to all just exceptions.

Accordingly, the application is allowed.

BAIL APPLN. 58/2016

1. Vide the present petition, the petitioner seeks bail in case bearing FIR No.01/2015 registered at Police Station Seelampur, Delhi, for the offences punishable under Sections 21/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act').

2. The present petition has been filed on the ground that PW4, ASI Beg Raj Singh was Incharge of the recovery team. The said witness in his cross-examination stated that none of the members from the recovery team informed the petitioner that it was her legal right, if she desired, to get herself searched in the presence of any gazetted officer or Magistrate.

3. Learned counsel appearing on behalf of the petitioner submits that recovery was effected in violation of mandatory provisions of Section 50 NDPS Act. Thus, there is a strong case for acquittal of the petitioner as in absence of mandatory provisions of aforesaid Section, the recovery becomes illegal.

4. Learned counsel further submits that though PW4, ASI Beg Raj Singh deposed that place of recovery was a crowded area as there was a marked and heavy traffic and the public persons were available, however, he had not asked any public person to join the raiding team. Therefore, non-association of public persons would make the case of the prosecution doubtful thereby entitling the petitioner for acquittal.

5. Learned counsel further submits that the petitioner is an illiterate lady, she has no knowledge of her rights under Section 50 NDPS Act and that she has no past antecedents of any criminal case. Thus, she is entitled for bail. Moreover, conditions of Section 37 NDPS Act are fulfilled for the reason that keeping in view the evidence on record, there is likelihood to acquit the petitioner.

6. Per contra, case of the prosecution is that 280 grams heroin was recovered from green coloured polythene carried by the petitioner. Therefore, provisions of Section 50 NDPS Act are not applicable in this case as the recovery was not effected from bodily search of the petitioner and that the contraband was recovered from a polythene. PW4, ASI Beg Raj Singh made efforts to associate public persons to search and seizure proceedings but they did not agree. Moreover, absence of public person is not a ground to disbelieve the case of the prosecution as the police officers are competent witnesses and in the absence of any motive for false implication of the petitioner, their deposition cannot be appreciated with myopic eyes.

7. It is pertinent to mention here that after her arrest, the petitioner moved an application before the learned Trial Court for bail, however, the same was dismissed vide order dated 07.01.2015. Thereafter, the petitioner approached this Court vide Bail Application No.164/2015, which was dismissed vide order dated 16.04.2015. After that, the petitioner approached the Supreme Court by way of Special Leave to Appeal (Crl.) No(s).3773/2015, however, the said appeal met with the same fate.

8. After examination of six prosecution witnesses out of nine witnesses, the petitioner filed another application for bail before the learned Trial Court. The same has been dismissed vide order dated 26.10.2015. Hence the present petition.

9. In support of his case, learned counsel for the petitioner has relied upon the following cases:-

A. Pre-trial bail:-

- i) Wernli Mnonika Barbara Vs. State; 121 (2005) DLT 420;
- (ii) Satyendra Sah @ Churabhu Sah Vs. State of Bihar; 1995 (2) PLJR 387;
- (iii) Baram Khan @ Chotu Khan Vs. State of Haryana; 1992 (3) Recent Criminal Reports 323;
- (iv) Trinath Dadsena Vs. State of Chhattisgarh; 2003 (5) Criminal CC 285;

B. Independent Witnesses:-

- (v) Jai Singh Vs. The State of Haryana, 1996 CrLJ185;
- (vi) Jeevraj Ram Vs. The State of Rajasthan, 1991(1)WLN 53;
- (vii) Lal Kishore Vs. State of H.P., 2015 STPL (Web) 1508 HP;

C. Non-compliance of section 50 of the NDPS Act:-

- (viii) Rakesh @ Shankar Vs. State, 2014 (1) JCC 13;
- (ix) State of Rajasthan Vs. Parmanand, (2014) 5 SCC 345;
- (x) Myla Venkateswarlu Vs. State of Andhra Pradesh (2012) 5 SCC 226;
- (xi) Parveen Singh @ Kalia Vs. State of NCT of Delhi, 2011(121)DRJ166.

D. Scope of Section 37:-

- (xii) Union of India Vs. Ratan Malik; 2009 CrLJ 3042;
- (xiii) Dadan Singh Vs. State of U.P.; 1993 CrLJ 1785;

(xiv) Mari Appa Vs. State of M.P.; 1990 MPLJ 621; and

(xv) Radha Kishan Vs. State; 2000 CrL LJ 4090.

10. The learned Trial Court has recorded that in order to be entitled to bail in a case relating to commercial quantity of any narcotic drugs and psychotropic, the accused should satisfy the twin embargo provided under Section 37 of the NDPS Act. The Court must be satisfied that there are reasonable grounds for believing that she is not guilty of such offence and that she is not likely to commit any offence while on bail.

11. The present petition has been mainly filed on two grounds, firstly, violation of provisions of Section 50 NDPS Act and secondly, non-joining of independent witnesses.

12. Aforementioned both the issues were considered by the Trial Court and recorded that case of the prosecution is that on 31.12.2014 at 10.00 p.m. at Old G.T. Road, Opposite Court Market, Shastri Park, Delhi, the petitioner was found carrying a green polythene containing 280 grams heroin without any license or permit, which is punishable under Section 21 (c) NDPS Act. FSL report has confirmed presence of 17.3 % Diacetylmorphine (DAM) in the representative sample. The recovery of the contraband was effected from the polythene carried by the petitioner. This fact has been proved by PW4 ASI Beg Raj Singh, who was the Incharge of the raiding team. He stated that one green colour *theli* made up of cloth was recovered from the right hand of the petitioner. PW2 L/Ct. Renu also stated that she found one green

colour cloth *theli* in the right hand of the petitioner. Thus, it is clear that the recovery of contraband was effected from a green colour polythene which the petitioner was carrying in her right hand. Accordingly, the learned Trial Court opined that provisions of Section 50 of the NDPS Act are not applicable to the said recovery and dismissed the bail application of the petitioner.

13. Keeping in view the discussion noted above, facts and circumstances of the case and the fact that only three witnesses remain to be examined, at this stage, I am not inclined to admit the petitioner on bail.

14. Accordingly, the present petition is dismissed.

15. A copy of this order be given *dasti* to the learned counsel for the parties.

**SURESH KAIT
(JUDGE)**

JANUARY 12, 2016
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