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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ BAIL APPLN. 1854/2017

DEEPAK SINGH

..... Petitioner

Through Mr. M.A. Niyazi, Adv. with Ms
Anamika Ghai Niyazi, Adv.

versus

STATE

..... Respondent

Through Mr. Rajat Katyal, APP for the State

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

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31.10.2018

The petitioner has been accused for offences in case FIR No. 70/2016 under sections 20/29 NDPS Act, Police Station Crime Branch, Delhi. He seeks bail as he has already spent two and half years in incarceration and two witnesses have already been examined; the remaining witnesses are policemen and government officials.

He contends that the personal search and the alleged recovery of contraband was not made from the appellant in the presence of a Gazetted Officer or a Magistrate; hence the entire proceedings against the petitioner is vitiated in view of the judgment of the Supreme Court in *Arif Khan @Agha Khan vs. State of Uttarakhand* 2018(6) SCALE 456 which has held that recovery of contraband should be made from the accused in the presence of a Magistrate or a Gazetted Officer and other than this, the proceedings under section 50 NDPS Act, 1985 will

render baseless the allegation of recovery of the contraband from the accused. The learned counsel for the petitioner refers to paras 25 to 30, which read as under:-

"25. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband "Charas" does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of Vijaysinh Chandubha Jadeja (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas " was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an

admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but none of them deposed that the search/recovery was made in presence of any Magistrate or a Gazetted Officer. 30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal".

In the aforesaid circumstances, the petitioner is enlarged on bail on his furnishing a personal bond in the sum of Rs.20,000/- with one surety of the like amount to the satisfaction of the Trial Court concerned, subject to the following conditions:-

- (i) the petitioner will regularly appear on each and every date of hearing to be fixed by the Trial Court concerned;
- (ii) the petitioner will not try to influence, contact or meet the complainant and prosecution witnesses in any manner;
- (iii) the petitioner will not leave the country without prior permission of the Court and the passport, if any, shall be deposited with the Trial Court concerned; and
- (iv) in case of change of his new address or contact number, the petitioner will promptly intimate to the SHO/IO of the case and intimate the Trial Court.

The petition stands disposed-off in the above terms.

Nothing stated in this order shall be deemed to be an adjudication on the merits of the case.

A copy of this order be given *dasti* to the learned counsel for the parties under the signature of the Court Master.

NAJMI WAZIRI, J

**OCTOBER 31, 2018/b
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