

**IN THE HIGH COURT OF PUNJAB AND
HARYANA
AT CHANDIGARH**

CRM-M-4842-2019

Date of decision : 21.02.2019

Narinder Singh @ Nanku

.....Petitioner

Versus

State of Punjab

.....Respondent

* * * *

CORAM : Hon'ble Mr. Justice Gurvinder Singh Gill

* * * *

Present: Mr. Vipul Jindal, Advocate
for the petitioner.

Ms. Ruchika Sabherwal, AAG, Punjab.

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Gurvinder Singh Gill, J.

1. The petitioner seeks grant of regular bail in case registered vide FIR No.298 dated 22.08.2015 under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985, Police Station A Division, District Amritsar.
2. The allegations, in nut-shell are that on 22.08.2015 when a police party headed by ASI Rajinder Singh was present in front of Guru Nanak Bhawan City Centre, Amritsar in connection with patrolling and checking, then one person was seen coming on foot from the side of Baba Phulla Singh Road, who was carrying a polythene packet in his right hand and who upon noticing the police party got nervous and tried

to throw away the polythene packet. The said person was apprehended by the police officials and upon inquiry, the said person disclosed his name as Narinder Singh @ Nanku. Upon checking of the polythene packet, intoxicating powder was recovered. Two samples weighing 10 grams were separated and the remaining was found to weigh 130 grams. It is further the case of prosecution that upon chemical examination of the sample, the same was found to contain "Diphenoxylate Hydrochloride".

3. The learned counsel for the petitioner, while pressing upon his case for grant of bail to petitioner, has broadly made the following submissions:
 - (i) that since as per the report of Forensic Science Laboratory, the quantity of active ingredient i.e. "Diphenoxylate Hydrochloride" was found to the extent of 3.41% only and that 3.41% of the recovered contraband works out to about 5 grams only which is much less than the 'commercial quantity', therefore section 37 of the Act would have no application and thus keeping in view the meager quantity of recovered contraband, the petitioner deserves the concession of bail;
 - (ii) that since in the present case, the samples were drawn at the place of recovery itself and not before the Magistrate, therefore, no sanctity can be attached to the same more particularly in view of the dictum of Hon'ble Supreme Court in Union of India vs. Mohan Lal, 2016(1) RCR (Criminal) 858;
 - (iii) that since in the present case a personal search of the petitioner was also conducted and no offer in terms of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985(hereinafter being referred to as 'NDPS Act') had been extended to him before conducting his personal search, therefore, the entire recovery, even though from a packet stands vitiated.

Learned counsel in order to hammer forth his aforesaid submission places reliance upon 2014(2) RCR(Criminal) 40, State of Rajasthan Vs. Parmanand.

4. Opposing the petition, learned State counsel has submitted that present case being a case of search and recovery of contraband from a bag, Section 50 of NDPS Act would not have any application. The learned State counsel has further submitted that as regards the percentage of active ingredients of “Diphenoxylate Hydrochloride”, it is well settled that it is the weight of entire recovered contraband which has to be taken into account and not just of the active ingredient. It has further been submitted that Section 52-A of NDPS Act has not been violated in any manner.
5. I have considered rival contentions addressed before this Court. As far as the contention of learned counsel for the petitioner to the effect that only the weight of active ingredient of the recovered contraband is to be taken into account, I am afraid the aforesaid contention cannot be accepted in view of note (4) inserted vide notification dated 18.11.2009 to earlier notification dated 19.10.2001 defining “commercial quantities” of various contrabands. The said note (4) reads as follows:-

“(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salt of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

6. Thus, irrespective of the lesser percentage of active ingredient in the

recovered contraband, the weight of the entire contraband has to be considered and the present case being a case of recovery of 150 grams of “Diphenoxylate Hydrochloride”, the same would fall within the category of “commercial quantity”, attracting provisions of section 37 of the Act.

7. The next contention of the learned counsel to the effect that sample having been drawn at the spot, no sanctity can be attached to the same also cannot be accepted as Section 52-A NDPS Act deals with disposal of the recovered contraband wherein it has been provided that the Magistrate would draw sample in his presence which can later on be used as a “primary evidence” while the bulk of contraband may be destroyed. The procedure prescribed under provisions of section 52-A does not strictly pertain to drawing samples for the purpose of chemical-examination. Thus, if the Investigating Officer has drawn samples at the spot, the same can not be said to be violative of provisions of Section 52-A of NDPS Act.

8. The third contention raised by learned counsel pertains to non-compliance of section 50 of the Act. The petitioner had been apprehended by the police when he tried to throw away a polythene packet held by him in his right hand upon noticing the police party. It was search of the polythene bag which led to recovery of 150 grams of “Diphenoxylate Hydrochloride”. Since search of a bag carried by accused in his hand would not qualify to be termed as a 'personal search', therefore, Section 50 of the NDPS Act have no application.

No doubt, after recovery of the contraband had been effected from bag,

a personal search of the accused was also conducted which did not yield recovery of any contraband and nor of any other objectionable item like fire-arm etc. or any personal item like jewellery, licence, etc. and regarding which a separate memo was prepared, but such like search is conducted of every person who is arrested by the police so as to make an inventory of articles recovered from the accused at the time of his arrest. Section 51 Cr.P.C, dealing with search of arrested persons reads as under:

51. Search of arrested person.

- (1) Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the Person arrested cannot furnish bail, and whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail, the officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing- apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.
- (2) Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.

9. Apparently the personal search was conducted in compliance of procedure mandated under aforesaid provisions, as would also be evident from perusal of search memo, the translated gist of which reads as follows:

“In front of the witnesses mentioned below personal
search of accused Narinder Singh aforesaid was

conducted as per Rules. From him jewelry, case or any other expensive object was neither recovered nor taken in police possession.”

10. In case of recovery of an article from personal search, which can be said to be related to the offence in question, the same would be taken into possession by the police being case property. In case of recovery of an article which has no relation with the offence in question and possession whereof is otherwise not impermissible, the accused is entitled for its return at appropriate stage. Thus, if nothing objectionable was recovered from personal search in the present case, which in any case was conducted subsequent to recovery of contraband from bag, the omission to extend an offer in terms of Section 50 of the NDPS Act, would be rendered insignificant. Had any contraband been recovered from such personal search, then certainly the absence of offer in terms of Section 50 of the NDPS Act, could have rendered the recovery doubtful. However, recovery from a bag already effected prior to such personal search would remain unaffected by the personal search which is in the nature of usual “*Jamatalashi*” conducted by the police at the time of arrest of accused in terms of Section 51 of Cr.P.C. It may here be mentioned that in *Parmanand's case*(supra), it was personal search which had been conducted first and that too without extending any offer in terms of section 50 NDPS act and thereafter bag was searched.
11. A Division Bench of Calcutta High High Court, after discussing a plethora of judgements in *2017(1) RCR(Criminal) 282 Sarwan Ram*

State of West Bengal held that non-compliance of Section 50 cannot be a ground for consideration of bail application and that bar under Section 37 will operate. It was held that even if there is *prima-facie* breach of the provisions of Section 50, the prosecution ought to be given an opportunity to establish its case at the trial. The relevant extract reads as follows:

“12. We have referred to several orders passed by Coordinate Benches, which have been cited by Mr. Kabir, in which breach of the provisions of Section 50 was a factor which influenced the decision of the Bench in granting bail to the accused persons. As observed by the Supreme Court in the case of ***Union of India v. Shiv Shanker Kesari* [2007(4) R.C.R. (Criminal) 186 : (2007)7 SCC 798]**, the satisfaction which we should reach for granting bail while considering Section 37 of the 1985 Act, the expression "reasonable grounds" would mean something more than *prima facie* grounds.

'It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient themselves to justify recording of satisfaction that the accused is not guilty of the offence charged'.

Two other authorities of the Supreme Court, *Superintendent, Narcotics Central Bureau v. R. Paulsamy* (AIR 2000 SC 3661) and *Intelligence Officer Narcotics Control Bureau v. Sambhu Sankar and Anr.* [2001(1) R.C.R.(Criminal) 740 : (2001)2 SCC 562] mandate strict adherence to the provisions of Section 37 of the 1985 Act. While allegations have been made on behalf of the petitioners in these cases of violation of mandatory provisions relating search and consequent seizure, following the judgment of the Constitution Bench of the Supreme Court in the case of Baldev Singh (supra), and the Referee Judge's opinion in the case of Hussain & Anr. (supra) as also the opinion of a Coordinate Bench in the case of Rakibul Sk. @ Islam (supra), we cannot hold a mini-trial now to decide if the provisions of Section 50 of the 1985 Act have been breached or not. As regards the large body of authorities cited on this point, we do not think detailed analysis of individual petitions in the light

of these ratios is warranted at this stage. Even if the materials in the case diary reveals *prima-facie* breach of the provisions of Section 50 of the 1985 Act, sub-paragraph (5) of paragraph 55 in the case of Baldev Singh (supra), which we have reproduced earlier in this judgment, requires that prosecution ought to be given an opportunity to establish its case at the trial. On facts, in none of the petitions we have found the breach alleged to have been committed to be so notorious that at this stage we can anticipate that prosecution shall fail at the trial on the points raised before us. So far as the orders of Coordinate Benches are concerned in which similarly charged accused persons have been granted bail, we do not think these orders can form precedents. Grant of bail is discretionary power of the Court and exercise of such discretion requires examination of the materials in each case at the point of time the petitioners seek bail.”

12. Furthermore, since it is a case of recovery of commercial quantity of the contraband, the fetters imposed Section 37 of the NDPS Act would also come into play as the facts *prima facie* point that the accused has committed an offence by possessing the contraband and there is nothing on record to show if released on bail he would not commit any offence again. Thus, no case for grant of bail is made out.
13. The petition, is sans merit and is hereby dismissed.
14. It is, however, clarified that none of the observations made above shall be construed to be an expression on merits of the main case.

(GURVINDER SINGH GILL)
JUDGE

21.02.2019
Gaurav Sorot

Whether reasoned / speaking?
Whether reportable?

Yes / No
Yes / No