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

+ **BAIL APPLN. 903/2019**

DEEPAK PANDEY

..... Petitioner

Through

Mr. Maninder Singh with Ms. Aekta Vats, Mr. A. Aora, Mr. D. Takiar, Mr. Sanklap Kohli and Mr. Vikram Kalra, Advs.

versus

STATE

..... Respondent

Through

Mr. Hirein Sharma, APP for State
SI Surender Singh, Spl. Cell

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

ORDER

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01.11.2019

Vide the present petition, the petitioner/accused seeks direction thereby to be released on regular Bail in the case bearing SC No. 9251/2016, pending before the learned Special Judge/NDPS, Patiala House Courts, New Delhi in FIR No. 45/2015, registered at Police Station-Special Cell, New Delhi, for the offences punishable u/s20/21/22/29/61/85, NDPS Act and subsequently Sections 468/471/474, IPC were added in the chargsheet.

The present petition is a second bail application and the earlier bail application before this Court bearing bail application No.2257/2017 vide order dated 20.08.2017 was disposed of by directing the Trial Court to complete the trial expeditiously not beyond nine months.

On the above said direction, petitioner withdrew the bail application.

It is also not in dispute that till date the trial has not been completed nor the Trial Court Judge has sought any extension of time.

The case of the petitioner is that upon receiving information from a source, it was revealed that the members of a Narcotic Syndicate, whose names were later identified as Paramjeet Singh @Tinku, Deepak Pandey the petitioner herein, Devender Pal Singh Sawhney @ Bobby and 3-4 Nigerian nationals, had been allegedly indulging in Inter-State Trafficking of drugs including heroin in Delhi and Punjab. For the alleged surveillance, SI Rakesh had been deputed to monitor the investigation.

Further case of the prosecution is that on 28.06.2015, on the basis of some information, reduced into writing by SI Rakesh, Paramjeet Singh @ Tinku allegedly received supply of Heroin from a Nigerian national and further, he would supply the same to someone in Ludhiana, Punjab.

SI Rakesh had informed Inspector Attar Singh about the same and Inspector Attar Singh allegedly got the said information verified and informed ACP/Spl. Cell/NR, telephonically. The ACP gave telephonic directions to take action as per Law. To this effect, DD. No. 11, at 9PM, was recorded on a separate piece of paper and put up before the ACP. During the raid, no Public Witness wanted to join the investigation.

However, on the alleged surveillance/information, Paramjeet Singh @ Tinku was arrested around 10.20PM. Search was conducted on him and 1.5kg of Heroin was recovered from Paramjeet Singh @Tinku's bag and the same was allegedly sealed with the seal of SI Rakesh. The said Paramjeet Singh @ Tinku, had disclosed that he had been trafficking in drugs for the past 2- 3 years and that he was allegedly the Carrier for Deepak Pandey, the Petitioner herein, since January 2015. Paramjeet Singh @ Tinku further disclosed that the Petitioner led a Narcotic Syndicate and was the, "*Kingpin*", of the same. Accordingly, Paramjeet Singh @Tinku was

formally arrested on 29.06.2015, at 2.30AM and thereafter Paramjeet Singh was produced by SI Parveen Kumar along with the rest of the Raiding Party, before Inspector Attar Singh and ACP Sandeep Byala.

As per the directions of Inspector Attar Singh and ACP Sandeep Byala, SI Raj Singh was deputed to lead a team to Ludhiana during the intervening night of 28.06.2015 and 29.06.2015 to trace the Petitioner. SI Raj Singh authorized a Raiding Team and departed from the Office of the Special Cell at 4.15 AM on 29.06.2015. On the basis of the alleged disclosure of Paramjeet Singh @ Tinku, the Raiding Party entered the residence of the Petitioner i.e. Flat No. A/2, Le Palm Apartments, Basant City, Ludhiana, Punjab. The Petitioner along with his family members was present at his residence.

SI Raj Singh interrogated the Petitioner who was being evasive but when the raiding party persisted him with their questions, the Petitioner allegedly told them that one Navin Chopra @ Dev, was in Ludhiana and that Navin Chopra was sitting in a white Santro Car outside his Society.

Accordingly, notice U/S 50 of the NDPS Act was served upon the Petitioner and that he was informed of his legal rights. However, nothing incriminating was recovered from the petitioner or from his residence

The Petitioner disclosed that Paramjeet Singh @ Tinku was his Carrier and he was coming to deliver 1.5 kg of Heroin to him on that day in Ludhiana, Punjab.

The Petitioner was arrested U/S 29 of the NDPS Act, after the grounds of his arrest were explained to him. He disclosed that he had kept 500gm of Heroin in his alleged rented accommodation i.e. 79A, Passi Nagar, Ludhiana, Punjab and the same was allegedly recovered.

Further case of the prosecution is that they reached Delhi at around 7.30PM and the Petitioner was produced for interrogation at around 9PM.

After completing the investigation, the Ld. Trial Court framed Charges against the Petitioner U/S 21/29, NDPS Act.

Learned counsel for petitioner submits that this is a case where the alleged surveillance had been on-going for a reasonably long period of time to curb inter-state drug trafficking and the alleged investigation of the case was initiated on obtaining of information from a source. This case is not one of "*Chance Recovery*".

The case of the Prosecution is loosely based as a case of having had alleged specific source information, that the Co-Accused person namely, Paramjeet Singh @ Tinku would have in his possession 1.5kg of Heroin and would be present at the spot.

He further submits that the entire case of the Prosecution is a sham in which the Petitioner has been made a scape-goat and a victim of circumstances.

It is also submitted that on the basis and nature of the alleged source information, it would have been natural for the Raiding Team to take a Search Warrant/valid Authorization when they had the opportunity to do the same, as it is their own case that the alleged source information was given by SI Rakesh to Inspector Attar Singh. After the said Inspector verified the Source Information, he telephonically informed ACP Sandeep Byala. In between this alleged exercise, there seems to be ample time to arm both SI Rakesh and SI Raj Singh to conduct the raids, searches, seizures and arrests and all proceedings emanating therefrom, with proper, written and valid Authorization.

Learned counsel for petitioner submits that Sections 41, 42 & 50 of the NDPS Act are mandatory, however, in the present case have not been complied with by the Prosecution, which is fatal to the Prosecution and could ultimately lead to the acquittal of the Petitioner on this ground alone.

From the scheme of the NDPS Act, it is seen that in cases of previous information with the authority, the search and seizures of Narcotics Drugs or Psychotropic Substances or the arrest of the concerned persons can be effected either by an empowered officer or by an officer authorized by the empowered officer.

U/S 41(2) of the NDPS Act, any gazetted Officer of police i.e. any Officer of or above the rank of Assistant Commissioner of Police (ACP) is an empowered Officer and may himself arrest any person or search a building, conveyance or place. If the ACP does not himself search or arrest, etc., he may authorize any other officer, superior in rank to that of a Constable, to conduct such search, arrest, seizure, etc.

However, in the present case, the ACP has not given any such authorization to either SI Rakesh or SI Raj Singh to make arrests of Paramjeet Singh @ Tinku or the Petitioner. Therefore, neither the raid nor seizures or arrests, in the present case, have been conducted by any empowered officer i.e. the Officer of the requisite gazetted rank.

Further, there is no specific authorization for the arrest of any person or for conducting search of any place in favour of any of the Officers and this is the only reason that there is no authorization in favour of SI Raj Singh, to arrest the Petitioner, that has been placed in the List of Documents given with the Charge-Sheet.

To strengthen his arguments, learned counsel for petitioner has relied

upon the case of, "**Directorate of Revenue Intelligence vs. Manjinder Singh**" 2014 SCC Online Del 319, CrI. L.P. No. 310/2013, decided on 23.01.2014, this Court had observed that the provisions of Sections 41 & 42 of the NDPS Act, had not been complied with, since the Investigating Officer (IO) did not possess a valid authorization to effect the seizure.

The relevant para 10 of the said judgment is reproduced as under:-

"10As regard the non-compliance with provisions of Sections 41 and 42 of the NDPS Act, the submission of Mr. Aggarwala is that since the seizure was effected from a vehicle in transit in a public place, Section 43 of the Act that would at best apply and not Sections 41 and 42. As pointed out by the learned trial court, since the interception took place upon receipt of specific intelligence and not by way of chance recovery and by assembling a team of officers, it was a mandatory requirement to comply with Sections 41 and 42 of the NDPS Act. The reliance placed in this regard by Mr. Aggarwala on the decisions in Ramesh Kumar Rajput v. State 11 (2008) DLT (CrI) 828 and Directorate of Revenue Intelligence v. Mohammad Nisar Holia (2008) 2 SCC 370 is to no avail since both the decisions are distinguishable on facts. In any event, in the latter case a distinction was drawn between recovery from a public place on receipt of specific information in advance and a recovery by chance. The rigours of the law might not apply. In the present case, however, the recovery from the vehicle on a public highway was not as a matter of pure chance but on specific advance information and therefore the requirements of Sections 41 and 42 of the NDPS Act had to be complied with."

In the case of, "**State of Punjab vs. Balbir Singh**", (1994) 3 SCC 299, the Hon'ble Supreme Court has, in Para 25, of the Judgment discussed the provisions U/S 41 & 42 of the NDPS Act and the noncompliance thereof.

The same is reproduced as follows: -

" 25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions

Of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41 (1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned

therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search

would not per se be illegal and would not vitiate the trial. The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41 (2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

Learned counsel for the petitioner further submits that the observations made by the Hon'ble Supreme Court in the aforesaid judgments, the Courts cannot shut its eyes from the glaring infirmities apparent on the face of the record. If the compliance of mandatory provisions of Law is not reflected on the face of the record, the Court may afford an opportunity to the Prosecution to prove its case, however, the

Court may not before hand presume, to the prejudice of the accused that the Prosecution would prove something which is not apparent in the Charge-Sheet.

Thus, the Petitioner deserves to be granted bail on this ground only.

Regarding the compliance of Section 50 of NDPS Act, it is argued by learned APP that notice under Section 50 NDPS Act was served upon Deepak Pandey in this regard. He was made to understand the contents of notice and meaning of Gazetted Officer and Magistrate. He did not express his desire to be searched before any Gazetted Officer or Magistrate or be searched by any member of police raiding party and police vehicle prior to his own search. He himself recorded this in his reply.

He further submits that since nothing was recovered from the petitioner in search, therefore, notice of Section 50 had become irrelevant at that stage. He further submits that compliance of Section 41&42 has been complied with. Regarding the information of the substances to be recovered from the petitioner, he conveyed the same to Inspector concerned and thereafter brought to the notice of the ACP who authorised the concerned SI to go to Ludhiana, Punjab and take steps as per law.

Learned APP submits that in this regard DD no.11 (a) was recorded. However, the said DD has been disputed by learned counsel for the petitioner and submits that there is no discussion in the chargesheet regarding the said DD.

In view of the submission made by learned counsel for the petitioner, I am leaving my opinion open with respect of Section 41&42 of the NDPS Act as the matter is pending before the learned Trial Court, however, it is not in dispute that compliance of Section 100 (4) Cr.P.C. has not been

complied with.

It is submitted that nowhere in the chargesheet it is mentioned that Section 100 (4) of the Cr.P.C as mandated under Section 50 of NDPS Act has been complied with, therefore, in view of the above, without commenting upon the merits of the case, I am of the opinion that the petitioner has made his case fit for bail.

Accordingly, he shall be released on bail on his furnishing personal bond in the sum of ₹25,000/- with two sureties of the like amount to the satisfaction of the Trial Court.

Application stands allowed and disposed of.

Copy of this order be transmitted to the Jail Superintendent and the Trial Court concerned for compliance.

Order *dasti* under the signatures of the Court Master.

SURESH KUMAR KAIT, J

NOVEMBER 01, 2019

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