

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

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**Reserved on : 27.09.2021**

**Pronounced on : 14.12.2021**

+ **BAIL APPLN. 3955/2020**

GULJAR

..... Petitioner

Through: Mr. Sumit Sharma, Advocate

versus

NCB

.... Respondent

Through: Mr. Subhash Bansal, Sr. Standing  
Counsel with Mr. Shashwat Bansal,  
Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE RAJNISH BHATNAGAR**

**ORDER**

**RAJNISH BHATNAGAR, J.**

1. The present bail application has been filed by the petitioner under Section 439 Cr.P.C. read with Section 37 of the NDPS Act seeking regular bail in case titled as N.C.B. Vs. Rafik & Ors., S.C. No. 107/2018 registered under Sections 20/29 of the NDPS Act at P.S. NCB pending before Sh. Sh. Ajay Kumar Jain, Special Judge (NDPS), Patiala House, New Delhi.

2. Briefly stated, the facts of the case are that on 05.11.2017, a secret information was received by IO Rajiv Sehrawat, NCB that accused Rafik and Gulzar (present petitioner) will arrive at Nizamuddin railway station for going to Mumbai with bags carrying huge quantity of charas. Thereafter on the direction of Superintendent, raiding team was constituted. On reaching railway platform, the raiding team checked the platform and noticed at around 1530 hours that suspect Rafik and Gulzar (present petitioner) were going to Mumbai by train No. 12954.

3. Thereafter in presence of independent witnesses accused Rafik and petitioner Gulzar were stopped along with the third person accused Ramdev who was carrying the trolley bag. Accused Ramdev disclosed that he is a travel agent and the bag which he was carrying was of Rafik. Rafik also disclosed that trolley bag was his bag. Nothing incriminating was recovered from the personal search of accused persons however on opening the trolley bag and removing the cardboard brown colour 27 packets concealed in the bottom of trolley bag were recovered. The packets were containing charas having total weight of 6.2 Kg. On preliminary inquiry, accused Rafik disclosed that the said charas was given to him by accused Jay Haresh resident of Kullu and one Neel Chand Neelu.

4. Thereafter on 06.11.2017 at about 05.45 AM, NCB team of Chandigarh apprehended accused Jay Haresh, and in his statement/s 67, he disclosed that he had purchased 1 kg of charas from Neel Chand and Purushottam @ Kalu, and used Rafik and Gulzar (present petitioner) as his carriers and deposited the money from illicit selling charas in bank accounts of Neel Chand and Ramesh Kumar.

5. Thereafter statement of Ramesh Kumar u/s 67 was recorded in which he disclosed that accused Jay Haresh is doing illegal charas trafficking with his father and his father had also sent charas to Mumbai for Jay Haresh and Jay Haresh deposited sales money in the account of his father and in his own account. Thereafter, on the basis of their statements and recovery effected from co-accused Rafik, petitioner Gulzar and Ramdev, were arrested.

6. Accused Rafik and petitioner Gulzar in their statements disclosed that accused Rafik was having mobile number 9816171284 and the said mobile number was found to be in contact with mobile no. 9811572489 belonging to accused Gaurav Kumar. Accused Rafik admitted that the said number belongs to Gaurav Kumar. Accused Gaurav Kumar also in his retraction statement admitted that the said mobile number was his and it was found to be in the name of Sanjay Raj, father of accused Gaurav Kumar. Accused Rafik admitted that mobile no. 973541856 belongs to Neel Chand and the said mobile

number was found to be in contact with mobile nos. 9816171284 9811572489 belonging to Rafik and Gaurav Kumar. The mobile number of Ramdev was found to be in contact with accused Rafik. Accused Jay Haresh Somaiya disclosed that mobile nos. 8527729534 and 9818277386 were provided by accused Ramdev, though they were issued on other person's identity.

7. Accused Jay Haresh in his statement u/s 67 disclosed that mobile no. 9857171756 belongs to Gulzar (present petitioner). Accused Rafik in his statement u/s 67 admitted that mobile no. 8433574919 belongs to accused Jay Haresh. The CRCL report gave positive test for charas. Accused Neel Chand despite sending notices u/s 67 did not appear thereafter warrants were obtained and later on he was declared PO. However, during investigation accused Gaurav Kumar was found to have taken three packets of charas from accused Rafik on 05.11.2017 but no connection was found with respect to recovery of 6.2 kg charas. On completion of investigation, the complaint was filed.

8. I have heard the Ld. counsel for the petitioner, Ld. Sr. Standing Counsel for the respondent (NCB) perused the Status Report and also perused the records of this case.

9. It is submitted by the Ld. counsel for the petitioner that the raid was conducted on the basis of secret information but no search

authorization was taken from any gazetted officer, therefore, he argues that there is violation of Section 41 and 42 of the NDPS Act.

10. It is further submitted by the Ld. counsel for the petitioner that as per the own case of the prosecution no recovery has been effected from the person of the petitioner or from pithoo bag carried by him but the recovery was effected from co-accused Rafik, so in these circumstances it cannot be said that the petitioner was in conscious possession of the alleged charas.

11. The Ld. counsel for the petitioner further submitted that there is complete violation of Section 50 of the NDPS Act. He further submitted that as per CRCL report the purity percentage of the contraband comes to around 10.3% which is around 638.8 gram which is less than the commercial quantity hence, embargo of section 37 does not apply. It is further submitted by the Ld. counsel for the petitioner that the petitioner is in J.C. since 05.11.2017 and that two co-accused namely Ramesh Kumar and Jai Haresh Somaiya have been granted bail by Delhi High Court. He further submitted that co-accused Gaurav Kumar and Ram Dev have been discharged by the Ld. Trial Court.

12. On the other hand, it is submitted by the Ld. Sr. Standing Counsel for the respondent (NCB) that commercial quantity of charas has been recovered and rigors of section 37 applies. He further submitted that the petitioner has been charged for offence U/s 20(b) (ii)

(C) NDPS Act with the aid of Section 29 NDPS Act. He further submitted that the petitioner has made statement/s 67 NDPS Act which shows that he had knowledge of the contraband which was being carried in the bag by co-accused Rafik and he has taken sufficient money for the same, therefore, it cannot be said that the petitioner was not in conscious possession of the contraband in question and there is presumption U/s 35 and 54 NDPS Act in favour of the prosecution which can only be rebutted at the time of the trial. Ld. Sr. Standing Counsel for the respondent (NCB) has relied upon *Karan Sharma Vs. UOI and others*, Crl. petition No. 962/2017 dated 02.02.2018 wherein the Delhi High Court held that in terms of note 4 of notification, the entire mixture of drug and not its concentrated form is to be seen for the purpose of determination as, to what has been recovered from the petitioner was small quantity or commercial quantity.

13. It is further submitted by the Ld. Sr. Standing Counsel for the respondent (NCB) that the petitioner has himself refused to be searched in the presence of a gazetted officer or magistrate and even otherwise the compliance of section 50 was not necessary in the case of the petitioner as the recovery of contraband was from the trolley bag of accused Rafik.

14. In the instant case, the charges have been framed on 17.01.2020 and the Ld. trial court had discharged two persons namely Gaurav

Kumar and Ramdev and charges were framed against the petitioner as mentioned hereinabove but the said order on charge has not been challenged by the petitioner till date. As far as the question of parity is concerned, the role of the petitioner is not on footings with that of the other two accused persons namely Ramesh Kumar and Jai Haresh Somaiya who have been admitted to bail by this Court.

15. The petitioner had approached this Court for bail by moving bail application No. 551/2020 which was listed before the same bench which had granted bail to co-accused Jai Haresh Somaiya. The above mentioned bail application of the petitioner finally came up for hearing before the said Bench on 18.09.2020 and the petitioner has withdrawn the bail application No. 551/2020. Nothing has been brought on record by the counsel for the petitioner as to what are the change in circumstances since then.

16. As far as the contention of the Ld. counsel for the petitioner that there is complete violation of Section 41 and 42 of the NDPS Act is concerned, this contentions is liable to be rejected as this relates to violation of the procedural aspects which can only be looked into during the course of trial and cannot be deeply analyzed at the stage of bail.

17. As far as the question of non compliance of Section 50 of NDPS Act, as raised by the counsel for the petitioner is concerned, reliance

can be placed upon *State of Punjab Vs. Baljinder Singh* Criminal appeal Nos. 1565-66 of 2019 dated 15.10.2019 in which it has been held as under:

*"14. The law is thus well settled that an illicit article seized from the person during personal search conducted in violation of the safe-guards provided in Section 50 of the Act cannot by itself be used as admissible evidence of proof of unlawful possession of contra-band. But the question is, if there be any other material or article recovered during the investigation, would the infraction with respect to personal search also affect the qualitative value of the other material circumstance.*

*15. At this stage, we may also consider following observations from the decision of this Court in **Ajmer Singh vs. State of Haryana**:*

*"15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of 6 [(2010) 3 SCC 746] the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted*

*officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in Madan Lal v. State of H.P. [(2003) 7 SCC 465]. The Court has observed: (SCC p. 471, para 16) "16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises. (See Kalema Tumba v. State of Maharashtra (1999) 8 SCC 257), State of Punjab v. Baldev Singh [(1999) 6 SCC 172] and Gurbax Singh v. State of Haryana [(2001) 3 SCC 28]). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance."*

*16. As regards applicability of the requirements under Section 50 of the Act are concerned, it is well settled that the mandate of Section 50 of the Act is confined to "personal search" and not to search of a "vehicle or a container or premises."*

18. From the above, it is clear that there is no requirement of complying with section 50 of the NDPS Act as the same is only restricted to personal search. However, in the instant case the petitioner has refused to be searched before the gazette Officer or Magistrate.

19. Looking into the facts and circumstances of this case and the fact that the total recovered Charas is 6.2 Kg which is a commercial quantity so rigors of Section 37 of NDPS Act definitely applies in this case.

20. Under Section 37(1)(b)(ii), the limitations on the grant of bail for offences punishable under Sections 19, 24 or 27A and also for offences involving a commercial quantity are :

(i) The Prosecutor must be given an opportunity to oppose the application for bail; and

(ii) There must exist 'reasonable grounds to believe' that (a) the person is not guilty of such an offence; and (b) he is not likely to commit any offence while on bail.

21. The standard prescribed for the grant of bail is 'reasonable ground to believe' that the person is not guilty of the offence. Interpreting the standard of 'reasonable grounds to believe', a two-judge Bench of **Supreme Court** in *Union of India Vs. Shiv Shanker Kesari (2007) 7 SCC 798* held that:

**"7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means 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 in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.**

8. The word “reasonable” has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word “reasonable”.

“7. ... In Stroud's Judicial Dictionary, 4th Edn., p. 2258 states that it would be unreasonable to expect an exact definition of the word ‘reasonable’. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy.”

(See Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar [(1987) 4 SCC 497] (SCC p. 504, para 7) and Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. [(1989) 1 SCC 532]

[...]

10. The word “reasonable” signifies “in accordance with reason”. In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd. [(2003) 6 SCC 315]

11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”

**(emphasis supplied)**

22. Based on the above, the test which is required to be applied while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit an offence while on bail. Looking into the seriousness of the

offence punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed.

23. As far as the arguments of the Ld. counsel for the petitioner regarding the absence of recovery of contraband from the possession of the petitioner is concerned, it cannot be said to be a ground for the non application of parameters of Section 37(1)(b) of NDPS Act in view of the judgment passed by the Supreme Court in the case titled as ***Union of India Vs. Rattan Mallik (2009) 2 SCC 624*** and merely absence of possession does not mitigate the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act.

24. For the reasons noted hereinabove, the application lacks merit and the same is, therefore, dismissed.

25. Nothing stated hereinabove shall tantamount to the expression of any opinion on the merits of this case.

**RAJNISH BHATNAGAR, J**

**DECEMBER 14, 2021**

*Sumant*