

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

+ **BAIL APPLN. 3826/2021**

Reserved on : 08.12.2021

Date of Decision : 15.12.2021

IN THE MATTER OF:

JOHRI

..... Petitioner

Through: Ms. Sushma Sharma, Advocate.

Versus

THE STATE

..... Respondent

Through: Ms. Neelam Sharma, APP for State.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The present bail application has been filed under Section 439 Cr.P.C. read with Section 482 Cr.P.C. on behalf of the applicant seeking regular bail in FIR No. 38/2016 registered under Sections 21/29/61/85 of the NDPS Act at P.S. Special Cell (SB), Delhi.

2. Learned counsel for the applicant has contended that the applicant is in custody since 26.06.2016 and the charge sheet having been filed, he is no longer required for any investigation. She further submits that though the recovery of contraband is alleged to have taken place from the polythene bag held by the applicant, reading of the FIR would show that after searching the polythene bag,

personal search of the applicant was also conducted and hence, Section 50 of the NDPS Act is applicable. It is also contended that there was violation in the present case of mandatory provision of Section 50 of the NDPS Act, as the applicant's denial to be searched before a Magistrate or Gazetted Officer was not recorded. In support of her submissions, learned counsel placed reliance on the decisions of the Supreme Court in State of Rajasthan v. Parmanand & Another reported as **(2014) 5 SCC 345** and Dilip and Another v. State of M.P. reported as **(2007) 1 SCC 450**.

Learned counsel further contended that the search and seizure in the present case were carried out in violation of Sections 41(2) and 42 of the NDPS Act, inasmuch as *SI Sandeep Kumar* was not an authorized person to conduct the same. In this regard, reliance is placed on DD No. 21 dated 23.06.2016. Lastly, it is submitted that till date, only 6 witnesses have been examined out of total 28 witnesses cited by the prosecution and the applicant is not involved in any other case.

3. Ms. Neelam Sharma, learned APP for the State, on the other hand, has vehemently opposed the bail application. She submits that the recovery effected from the applicant relates to '*commercial quantity*' of *heroin* and thus, the bar under Section 37 of the NDPS Act is applicable to the present case. She further submits that as the stated contraband was recovered from a bag and not from the body of the applicant, Section 50 of the NDPS Act is not applicable. She also submits that from the Reply given by the applicant to the notice issued to him under Section 50 of the NDPS Act, it can be inferred that he had waived off his right to be searched before a Magistrate/Gazetted Officer.

Learned APP further contends that there was no violation of Section 41(2) of the NDPS Act in the present case, as *SI Sandeep Kumar* was duly authorized

by the concerned ACP to apprehend the accused persons and conduct their search and seizure. The information was recorded by *SI Sandeep Kumar* vide DD No. 21 and the same bears the endorsement of the concerned ACP. She also contended that the CDR of the applicant and other accused persons, along with transcripts, have been placed on record of the Trial Court and as per the FSL report, the voice sample of the present applicant has matched. In support of her submissions, learned APP placed reliance on the decisions in Durand Didier v. Chief Secretary, Union Territory of Goa reported as **(1990) 1 SCC 95**, State of Kerala and Others v. Rajesh and Others reported as **(2020) 12 SCC 122** and Union of India through Narcotics Control Bureau, Lucknow v. Md. Nawaz Khan reported as **2021 SCC OnLine SC 782**.

4. I have heard learned counsels for the parties and perused the material placed on record.

5. A reading of the FIR would show that mobile numbers of various persons, including the present applicant, were kept on surveillance and lawfully intercepted. During monitoring, it was revealed that one *Ganesh Haldhar @ Mota Bhai*, along with *Manik Bishwas*, used to bring *heroin* from West Bengal to *Bareilly*, U.P. and Delhi from one *Sameer*. The consignment used to be handed over to various persons, including the present applicant, *Bhagwan Singh*, *Mujahid* etc. in *Bareilly*, U.P., and other persons, including *Islam*, in U.P. and Delhi.

On 23.06.2016, a secret information was received by *SI Sandeep Kumar* that *Ganesh Haldhar* and *Manik Bishwas* would come to Delhi to hand over big consignment of *heroin* to the applicant beneath *Gokulpuri Flyover, Delhi* between 07:30 p.m. to 08:30 p.m. The secret informer was produced before *Inspector Attar Singh*, who satisfied himself with the information and thereafter informed the concerned ACP. Subsequently, the information was written in *Roznamcha* vide

DD No. 21, a copy of which was given to *Inspector Attar Singh*, who gave the same to the ACP concerned. On apprehension of the applicant, notice under Section 50 of the NDPS Act was given to him and other accused persons.

As per the prosecution case, a total of 4 kgs of *heroin* was recovered from the accused persons. Out of 4 kgs, 2 kgs were recovered from the polythene bag held by the applicant, 1 kg from accused/*Ganesh Haldhar* and 1 kg from accused/*Manik Bishwas*. The concerned ACP, who is an empowered officer under the NDPS Act, is yet to be examined in the trial.

6. In Durand Didier (Supra), the Supreme Court has noted the adverse effects of illicit drug-trafficking in the following terms:-

“24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.”

7. On the issue of non-compliance with Section 42 of the NDPS Act, reference may be had of the decision in Karnail Singh v. State of Haryana reported as **2009 (8) SCC 539**, wherein a Constitution Bench of the Supreme Court was faced with the issue whether compliance of Section 42 NDPS Act is mandatory or not. While answering the reference, the Court held as under:—

“35. ...(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

(emphasis added)

8. The ratio in Karnail Singh (Supra) was later applied by the Supreme Court in Md. Nawaz Khan (Supra) and the view taken was reiterated while deciding the issue arising therein.

9. Before rendering an opinion of the facts of the present case, reference is also taken of the decision by a Constitution Bench of the Supreme Court in Vijaysinh Chandubha Jadeja v. State of Gujarat reported as **(2011) 1 SCC 609**, where it was observed that any dispute regarding whether there was failure to comply with the mandatory provision of Section 50 of the NDPS Act shall be a matter of trial. In view of the position of law outlined therein and considering the fact that the relevant prosecution witnesses are yet to be examined, the contention

raised on behalf of the applicant regarding non-compliance of mandatory provisions of Sections 41(2) and 50 of the NDPS Act need not be gone into by this Court at this stage.

10. In addition, the Supreme Court in State of Kerala and Others v. Rajesh and Others reported as (2020) 12 SCC 122, has elucidated the limitations prevailing on the exercise of power to grant bail in cases registered under the NDPS Act and further, that the twin conditions under Section 37 of the Act need to be satisfied before granting bail to a person accused of offence thereunder—

“19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail,

its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.”

11. It is thus apparent that in view of Section 37 of the NDPS Act, enlargement of any person on bail is subject to the satisfaction of the twin conditions noted in Rajesh (Supra). This Court is of the opinion that the twin conditions contemplated under Section 37 of the NDPS Act are not satisfied in the present case at this stage.

12. Keeping in view the aforesaid; the fact that 2 kgs of *heroin* are stated to have been recovered from the applicant and the further fact that the trial is at initial stage and the relevant prosecution witnesses are yet to be examined, the bail application is dismissed.

13. However, at the same time, considering that the FIR in the present case relates to the year 2016, the concerned Trial Court is requested to expedite the trial.

14. Needless to state that nothing observed hereinabove shall amount to an expression on the merits of the case and shall not have a bearing on the trial of the case.

15. A copy of this order be communicated electronically to the concerned Trial Court.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 15, 2021

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