

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
(CIRCUIT BENCH AT JALPAIGURI)**

Present:

The Hon'ble Justice Subrata Talukdar

and

The Hon'ble Justice Krishna Rao

CRM (NDPS) 243 of 2022

In Re: - An application for bail under Section 439 of the Code of Criminal Procedure in connection with NDPS Case No. 62 of 2020 arising out of Sahebganj P.S. Case No. 331/20 of 2020 dated 7.8.2020 under Section 21 (C)/29 of the NDPS Act, 1985.

And

In the matter of: **Rahul Miah @ Rahul@ Rahul Miya**

...Petitioner

-Vs. -

The State of West Bengal

For the Petitioner : Mr. Arjun Chowdhury

For the State : Mr. Aditi Sankar Chakraborty, Ld. APP
Mr. Sourav Ganguly

Heard on : 08.09.2022

Judgment on : 13.09.2022

Krishna Rao, J.:

1. The petitioner has filed the instant application for grant of bail under Section 439 of the Code of Criminal Procedure in connection with Sahebganj Police Station Case No. 331 of 2020 dt. 7th August, 2020 under section 21(C)/29 of the NDPS Act, 1985 pending before the Learned Court of Additional Sessions Judge, 1st Court, Sadar Cooch Behar being NDPS Case No. 62 of 2020.

2. The petitioner was arrested along with the co-accused on 7th August, 2020 while possessing 200 bottles Phensedyl New Cough Linctus 100 ml. each which is above commercial quantity by the Police attached to Sahebganj, Police Station. The contraband was seized by Sub-Inspector Avishek Lamba while checking surprise Naka at Abutara Rail gate observing all formalities. On the complaint of the Sub Inspector, Avisekh Lamba the above case was registered and the police has started investigation. On completion of investigation, police of P.S. Sahebanj filed charge sheet for the offence under section 21(c)/ 29 of the Narcotics Drugs and Psychotropic Substance Act, 1985 (in short herein after called as “NDPS Act, 1985”).

3. Mr. Arjun Choudhary, Ld. Advocate representing the petitioner submits that, the Police has acted in violation of the provisions of Section 50 and 52A of the NDPS Act, 1985. Learned Counsel for the petitioner relied upon the Judgment reported in (2016) 3 SCC 379 (*Union of India -versus-*

Mohanlal & Another), 2015(2) CRIMES 633 (Cal HC) (*Hanip Seikh –Versus- The State of West Bengal*) and unreported judgment passed in *Criminal Appeal No. 543 of 2008*, dt. 03.01.2019 (*Nirmal Kumar Jana @Nirmal Jana –versus- State of West Bengal*) and submitted that, the mandatory requirement of identification of the contraband seized, its quality and quantity, mode of packing, marks and other identifying particulars which are relevant under the NDPS Act, 1985 have not been followed. Learned Counsel further contended that, the police did not make any prayer before the Learned Judge or the Magistrate for preparing and making inventory as envisaged under the said Act. According to Mr. Choudhary, since the police did not comply with the procedure as has been prescribed under the mandatory provisions of Section 52A of the NDPS Act, 1985, the petitioner should be enlarged on bail.

4. Learned Counsel appearing for the petitioner submits that police has completed investigation and submitted charge sheet and trial is started and during trial four witnesses have been examined by the prosecution and none of the witnesses have stated anything against the petitioner and seizure is not proved.
5. Mr. Aditi Sankar Chakraborty, Learned APP with Mr. Sourav Ganguly appearing for the State has relied upon the unreported judgment passed by Rajasthan High Court in Criminal Misc. Bail Application No. 3122 of 2021 (*Ramchandra –versus- The State of Rajasthan*) and submitted that the steps required to be taken under section 52A of the NDPS Act, 1985,

are post seizure steps. The same does not invalidate the seizure nor does the same have any effect on the article seized.

- 6.** Learned APP submits that the police has completed investigation and submitted charge sheet and trial has been started. Out of 13 witnesses, 4 witnesses have been examined. As regard the complainant and seizure witnesses, are yet to be examined. Learned APP further submits that Laboratory Analysis Report has also received from the concerned authority and the same will be submitted before the Ld. Court by way of supplementary charge sheet.
- 7.** Now, the questioned arose in the instant application whether noncompliance of the provisions of Section 52A of the NDPS Act, 1985, by the police, entitle the petitioner to get bail?
- 8.** The Police of P.S. Sahebanj arrested the petitioner along with co-accused on 7th August, 2020 while conducting Naka Checking at Abutara rail gate as the petitioner was carrying 200 bottles of Phensedyl New Cough Linctus 100 ml. each bottle and the said 200 bottles were seized from the joint possession of the accused persons and Marked as Exhibit - 'A'. The police had taken sample of from the seized narcotics and marked the same as Exhibit - 'A-1' and Exhibit - 'A-2' for sending the same to the State Drugs Control and Research Laboratory for obtaining report. It is inform to this Court that now the analysis report is received with the

positive report and the police will submit the said report by way of supplementary charge sheet.

9. Section 52A of the NDPS Act, 1985 as has been referred by the parties is as follows : s

“52-A. Disposal of seized narcotic drugs and psychotropic sub-stances. --

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence].”

10. The Judgment referred by the Counsel for the petitioner in the case of Mohanlal (Supra) has considered Section 52A of the NDPS Act, 1985. It is observed as follows :-

“15. It is manifest from [Section 52-A\(2\)\(c\)](#) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under [Section 53](#) who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of [Section 52-A](#) requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the

Magistrate and the entire exercise has to be certified by him to be correct.

17. *The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to [Section 52-A\(4\)](#) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of [Section 52-A](#) above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."*

- 11.** In the case of Haniph Seikh (Supra) referred by the petitioner the Hon'ble Division Bench of this Court held that :

"24. *We find that Section 52A of the NDPS Act which is a mandatory provision was not complied with by the NCB Officers at the time of conducting search and seizure.*

We also cannot shut our eyes in respect of non-compliance of Section 52A of the said Act which is mandatory one. This provision was inserted in the Act by the legislature with an intention to prevent 'substitution' of articles seized by the concerned officer or the department. But we find in the present case the intention of the legislature has been violated."

- 12.** In the case of unreported judgment of Nirmal Kumar Jana @ Nirmal Jana (Supra) the Ld. Single Judge of this Court held that :

"16. *Let us now examine as to whether the next and equally important limb of the [NDPS Act](#), 1985 of [Section 52A](#) has been complied with or not.*

17. *What has shocked the conscience of the court is that the seized drug was supposed to have been kept in the police malkhana and retrieved therefrom for being sent to the forensic laboratory. PW6 & 7 in their evidence do not indicate in*

their evidence whether the malkhana and register book were inspected, seized and produced in court and as to how and in fact more importantly what in fact was sent to the forensic laboratory. This has remained a complete mystery.

18. *If that was not enough, the samples were sent to the Forensic Laboratory after a period of three months of the seizure of the drugs. The method and manner of taking samples, the quantity of the samples and the packaging details etc. for the purpose of sampling as mandated under [Section 52A](#) of the NDPS Act have not seen the light of the day. There is no evidence in that regard. The importance of the same has been discussed albeit briefly in a judgment rendered by a Division Bench of this court in the case of *Tej Bahadur Singh & Anr. Vs. Narcotic Control Bureau* and another reported in 2000 (1) CHN page 803. At paragraph 16 the Division Bench has discussed as follows :*

"16. In view of the discussions made above we are of the view that the provision of Section 52A of the N. D. P. S. Act is mandatory provision inasmuch as the said provision was inserted in the Act with a definite purpose, i.e., to prevent substitution of articles seized by the concerned officer or the department. We are also of the opinion that non-compliance of the provision of Section 52A makes the entire search and seizure vitiated. The prosecution has failed to prove as to how the sample packets, which were admittedly in the custody of the N. C. B. officers till 13.7.95, when the same was produced before the court and permission was granted by the court for sending the same for chemical analysis, could be received by the office of the P. W. 1 on 12.7.95. In such circumstances, there is every doubt as to whether the sample prepared by P. W. 2 at the time of seizure in respect of which he prepared the Test Memo was received by P. W. 1. P. W. 1 might have received some other packet other than the sample packet prepared by P. W. 2 and P. W. 1's test report/finding relates to articles which were not seized from the appellants. In our opinion such benefit of doubt must go in favor of the accused appellants."

19. *The reference to a small discussion in the aforesaid paragraph is made only for the reason that in the instant case there is a direct and flagrant violation of a vital provision of the 1985 Act being [Section 52A](#). Volumes of dicta have been laid down by the Hon'ble Supreme Court in this regard which need not be referred to at this stage.*

20. *In the light of the above and the analysis of the facts that have emerged in the instant case one must invariably come to the conclusion that by reason of a failure a compliance of Section 42 the prosecution crippled its case and the non compliance observed of Section 52A has completely demolished it."*

13. In the case of unreported judgment of Ramchandra (Supra) referred by the Counsel for the State, the Ld. Single Judge of Rajasthan High Court held that :

"11. *Now so far as the submission on behalf of the accused that so far as the [NDPS Act](#) is concerned, it carries a reverse burden of proof under [Sections 35 and 54](#) and therefore if the informant who himself has seized the offending material from the accused and he himself thereafter investigates the case, there shall be all possibilities of apprehension in the mind of the accused that there shall not be fair investigation and that the officer concerned shall try to prove his own version/seizure and therefore there shall be denial of the "fair investigation" enshrined under [Article 21](#) of the Constitution of India is concerned, it is required to be noted that whether the investigation conducted by the informant concerned was fair investigation or not is always to be decided at the time of trial. The informant/investigator concerned will be cited as a witness and he is always subject to cross-examination. There may be (22 of 26) [CRLMB-3122/2021] cases in which even the case of the prosecution is not solely based upon the deposition of the informant/informant-cum-investigator but there may be some independent witnesses and/or even the other police witnesses. As held by this Court in catena of decisions, the testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principal of law that without corroboration by independent witnesses his testimony cannot be relied upon. [See [Karamjit Singh v. State \(NCT of Delhi\)](#) (2003) 5 SCC 291]. As observed and held by this Court in [Devender Pal Singh v. State \(NCT of Delhi\)](#) (2002) 5 SCC 234, the presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefor."*

14. In the Order passed by the Coordinate Bench of this Court dt. 26th August, 2020 in CRM No. 4858 of 2020 (Rabiul Sardar @ Robiul Sardar –

versus- State of West Bengal), Order dt. 12th March, 2021 in CRM No. 464 of 2021 (Md. Kalim – versus- State of West Bengal) and Order dt. 8th October, 2021 passed in CRM No. 1761 of 2021 with CRM No. 3754 of 2021 (Manotosh Ghosh -versus- The State of West Bengal) held that the procedure engrafted in Section 52A of the NDPS Act, 1985 is a post seizure exercise to ensure prompt destruction of narcotics substances so that the seized material may not be misused. In case of non-compliance of such requirement does not affect the legality of seizure which precedes such exercise. Impact of its failure, therefore may be assessed in the course of trial in the light of the other materials on record including the possibility of physical production of seized materials during trial. The question whether Section 42 or 52A of the NDPS Act, 1985 has been complied with or not is a question of fact which is required to be decided at the time of trial.

- 15.** Section 52A has been introduced into the statute by the Act 2 of 1989 with effect from 29th May, 1989. One of the objects of the Act 2 of 1989 is to provide pretrial disposal of seized goods. Section 52A has laid down the procedure for disposal of seized narcotic drugs and psychotropic substances. The legislature being conscious of and having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage, space and other relevant consideration, has provided for disposal of the same prior to the conclusion of trial. The seized contraband is vital pieces of evidence. If the same is allowed to be destroyed prior to the trial, without suitable mechanism being provided for the evidence value of the seized goods at the trial, the same will be

affect the result of the trial, such situation is taken care of by Section 52A of the NDPS Act, 1985.

16. The procedure as laid down under Section 52A of the NDPS Act, 1985 is followed for the purpose of preparation of inventory, the photographs of the contraband seized and the list of samples prepared under Sub-Section (2) and certified by the Magistrate, the same shall become primary evidence in respect of the said offence. It has facilitated the treatment of such evidence as primary evidence. It has overridden the provisions of the Indian Evidence Act, 1872 and the Code of Criminal Procedure for the said purpose. In absence of Section 52A and in particular Section 52A (4) of the NDPS Act, 1985 mandating the legal fiction of the specified evidence noted therein to be primary evidence, it would have required the prosecution to not only preserve the seized contraband till the conclusion of trial but also introduce a number of witnesses to prove the same fact at the trial which Section 52A(4) of the NDPS Act, 1985 otherwise allows the prosecution to establish.

17. Before the Court of law, the prosecution has to establish the charges leveled against the accused beyond all reasonable doubt by leading evidence. Evidence which the parties lead before a court of law is governed as per the provisions of the Indian Evidence Act, 1872. Section 52A(4) of the NDPS Act, 1985 has mandated that a Court trying an offence under the NDPS Act, 1985 shall treat the inventory, photographs of the narcotic drugs and substances and any list of samples drawn under Sub-Section (2) and certified by the Magistrate as primary evidence

in respect of the said offence. Compliance with section 52A of the NDPS Act, 1985 liberates the prosecution from the requirement of Section 45 of the Evidence Acts, 1872 amongst others.

- 18.** The purpose for which [Section 52A](#) has been incorporated in the Act is to ensure disposal of contraband to stop repeat of further incident at the behest of unscrupulous person in the department because the course of action for the Investigating Authority has been mentioned in [Section 52A](#) whereby prosecution should have resorted to obtain an order from the competent Court of the Magistrate as envisaged under [Section 52A](#) of the Act in terms whereof the officer empowered under [Section 53](#) upon preparation of an inventory of narcotic drugs containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as he may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings thereunder makes an application for any or all of the following purposes:

"(a) Certifying correctness of the inventory so prepared; or

(b) Taking, in the presence of such Magistrate, photographs substances and certifying such photographs as true; or

(c) Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn."

19. We should keep in mind that one of the objects sought to be achieved by the Legislature for induction of Section 52A in the principal Act of 1985 is to prevent "substitution" of the article. Article after seizure can only be substituted when it is in the custody of the officer and/or department which seizures and comes into possession of the Article after seizure. If these procedures are not followed, the possibility of substitution of the articles cannot be ruled out.

20. The absence of compliance with the procedure prescribed under Section 52A (4) of the NDPS Act, 1985 will, ipso facto, not vitiate entire proceeding and would not be fatal to the case of prosecution. In absence of compliance with the procedure under Section 52A (4) of the NDPS Act, 1985, the prosecution is not non-suited. The prosecution still have the opportunity to establish its case by leading evidence in accordance with the procedure as prescribed under the Indian Evidence Act, 1872. In the situation above, the seized contraband may have to be preserved till the end of trial.

21. In view of the above, this Court is of the view that non-compliance of provision of Section 52A of the NDPS Act, 1985 would vitiate the trial or not can only be decided during the trial on the basis of the evidence on record and thus on the ground of non-compliance of provision of Section 52A of the NDPS Act, 1985, the petitioner cannot claim liberty of bail.

22. CRM (NDPS) 243 of 2022 is thus **rejected**.

All concerned parties shall act in terms of the copy of the Judgment downloaded from the official website of this Court.

Urgent photostat certified copy of this Judgment, if applied for, be supplied to the parties on compliance of necessary formalities.

I agree.

(Subrata Talukdar, J.)

(Krishna Rao, J.)