

203-A

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

CRM-M-13171-2021

Date of Decision: 04.03.2022

Arun Kumar @ Anu

..... Petitioner

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. Kanwaljit Singh, Senior Advocate, assisted by
Mr. Anirudh Singh Shera, Advocate,
for the petitioner.

Mr. Sandeep Singh Deol, DAG, Punjab.

HARSIMRAN SINGH SETHI J. (ORAL)

The present petition has been filed for grant of regular bail to the petitioner in FIR No.76, dated 25.06.2020, under Sections 21 & 29 of the NDPS Act and Section 25 of the Arms Act, registered at Special Task Force (STF), Phase-4, Mohali, District SAS Nagar.

Learned senior counsel appearing on behalf of the petitioner argues that the petitioner has been involved in the present FIR based on false allegations, despite of the fact that he has done no wrong. Learned senior counsel further submits that in the present case, it has been alleged that the petitioner was travelling in a car bearing No. PB-10-HB-9191, which does not belong to the petitioner, and 3 kgs. and 200 gms. of *heroin* was recovered from the said car, lying under the driver seat in a black polythene and an amount of Rs.60,000/- was also recovered from the car.

Besides this, a loaded pistol, along with live cartridges, is also alleged to

have been recovered from the petitioner. Learned senior counsel for the

petitioner submits that while conducting the said raid and recovering the alleged contraband, provisions of Section 42 of the NDPS Act were violated and hence, the petitioner, who is already behind bars for the last more than one and a half year, may kindly be extended the concession of regular bail, especially in view of the fact that the trial is likely to take some time to conclude due to the restrictive working of the Courts in view of Covid-19 pandemic. Learned senior counsel places reliance upon the judgment of a co-ordinate Bench of this Court in **CRM-M-44957-2021** titled as **“Virender Singh @ Rinku Vs. State of Punjab”** to contend that though the recovery of the contraband alleged to have been effected from the car was commercial in nature but as the possession of the same cannot be attributed to the petitioner, rigors of Section 37 of the NDPS Act will not apply and keeping in view the incarceration already undergone by the petitioner, he is entitled for the grant of regular bail.

Learned State counsel on the other hand submits that in the present case, the petitioner was travelling along with the co-accused persons in the car, which is registered in the name of his first wife and the occupants of the car were his second wife, namely Harpreet Kaur, friend Raj Kumar @ Raju and his wife Anjali. Learned State counsel further submits that the raid was conducted on the basis of a secret information, in which, *heroin* weighing 3 kgs. and 200 gms. in a black polythene, lying under the driver seat of the said car, was recovered and the petitioner was sitting on the front seat along with the driver, therefore, conscious possession of the petitioner in respect of the contraband recovered is proved. Learned State counsel further submits that besides this, a fire arm as well as live cartridges were also recovered from possession of the petitioner, besides drug money from

the glove compartment of the said car. Learned State counsel also submits that in the present case, provisions of the NDPS Act, including Section 42, were complied with as a Gazetted Officer, as required by Section 42 of the Act came present at the spot, at the time of said recovery. Learned State counsel further argues that as the petitioner and co-accused persons were known to each other and the contraband was recovered from the car itself along with the drug money, keeping in view the settled principle of law, it cannot be said that the petitioner was not having conscious possession of the same, hence the rigors of Section 37 of the NDPS Act do come in play. Learned State counsel also submits that the petitioner is a habitual offender as he is also involved in other cases relating to the NDPS Act, and therefore, his prayer for grant of regular bail may kindly be declined.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

As per the facts stated hereinbefore, it is not disputed that the petitioner was travelling in a car along with other co-accused persons at the time of the raid, which was conducted on basis of a secret information and as per the allegations recorded in the present FIR, 3.2 kgs. of *heroin* was recovered from the car along with the drug money. Besides this, a fire arm, along with live cartridges, was also recovered from the person of the petitioner. The argument raised by learned senior counsel appearing on behalf of the petitioner that Section 37 of the NDPS Act is not applicable in the present case as the recovery was done from under the driver seat of the car. *Prima facie*, at this stage the recovery is to be treated as having been done from the conscious possession of the petitioner until proved otherwise during the trial for the reason that there were four occupants of the car, who

were known to each other, and the car belonged to the first wife of the petitioner and it is difficult to accept the plea of the petitioner at this stage that the contraband which was recovered from the said car, lying under the driver seat, was not in his knowledge. Apart from the above, even the alleged drug money amounting to Rs.60,000/- was also recovered from the car. Under these circumstances, keeping in view the settled principle of law laid down by the Hon'ble Supreme Court of India in **SLP (Crl.) No.1771 of 2021** titled as **“Union of India through Narcotics Control Bureau, Lucknow Vs. Md. Nawaz Khan”**, *prima facie*, the argument raised by learned senior counsel for the petitioner, that the petitioner cannot be treated in conscious possession of the recovered contraband, cannot be accepted at this stage.

The further argument being raised by learned senior counsel for the petitioner where he submits that even on the basis of incarceration already undergone by the petitioner, irrespective of the other factors, the petitioner is entitled for grant of regular bail also cannot be accepted, since while considering the plea for grant of bail to the accused, the Court has to consider the provisions of Section 37 of the NDPS Act, coupled with the incarceration already undergone by the accused. Mere incarceration of the accused, especially when the contraband recovered is commercial in nature, cannot be a basis for grant of prayer of the petitioner for regular bail. There has to be a harmonious consideration of all aspects relating to the allegations being alleged against an accused, such as incarceration suffered, whether the accused is *prima facie* guilty of the allegations or not, and whether in case he is granted the concession of bail, the accused might indulge in similar activities or not. In **SLP (Crl.) Nos.2241 & 2250 of 2020**

titled as “*Sheru Vs. Narcotics Control Bureau*”, the Hon'ble Supreme Court of India has observed that mere incarceration for a certain period cannot be a reason for grant of bail and the rigors of Section 37 of the NDPS Act would have to be met. In the present case, since the contraband recovered from the car is commercial in nature, and, the petitioner is already facing trial in another case regarding violation of the NDPS Act and the present allegations against the petitioner have come into being while the petitioner was on bail in the those case, therefore in view of the case in entirety, this Court is of the opinion that the antecedents of the petitioner are such that it cannot be safely opined that if granted the concession of regular bail, the petitioner will not indulge in similar activities once again. Conduct of the petitioner shows that he is a habitual offender. No finding that allegations alleged against the petitioner are false can be recorded at this stage keeping in view the facts of the case recorded hereinbefore.

Further, the judgment of a co-ordinate Bench of this Court passed in ***Virender Singh's case*** (supra), which is being relied upon by the learned senior counsel for the petitioner for grant of regular bail to the petitioner is not applicable in the facts and circumstances of the present case, for the reason that the petitioner therein was nominated on the basis of disclosure statement of the co-accused and no recovery had been effected from him and it was under those circumstances that the petitioner therein was granted regular bail keeping in view the incarceration undergone by him even though in the said case the recovery of contraband was commercial in nature. Facts in the present case are entirely different as herein, the contraband was recovered from the car in which petitioner was present, along with the co-accused persons, who were known to him, and

also he has not been involved in the present FIR on the basis of disclosure statement of any co-accused.

As far as the argument of learned senior counsel for the petitioner with respect to violation of Section 42 of the NDPS Act is concerned, no benefit on basis of the same can be granted to the petitioner at this stage for the reason that as per the factual averments of the present case, a Gazetted Officer came present at the spot during the time of the raid and recovery of the contraband, which fact is conceded between the parties during the arguments. Keeping in view the judgment, being relied upon by learned State counsel, passed in “Sekhar Suman Verma Vs. Superintendent of N.C.B.” (SC), 2016(3) R.C.R. (Criminal) 1002, the argument being raised by learned senior counsel for the petitioner cannot be accepted. The relevant para of the said judgment is as under:-

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13) The submission of the learned counsel appearing for the appellant (accused) was only one and that was in regard to non- compliance of requirements of Section 42 read with Section 50 of the NDPS Act. According to him, the compliance of these Sections being mandatory at the time of search and the same in this case was not done in the manner required by the concerned officials of the Department, the appellant's conviction is rendered legally unsustainable and hence deserves to be set aside.

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16) The point urged by the learned counsel for the

appellant was dealt with by the High Court as under:

“Now, we come to the main area which has detained Shri Jash at length. His argument that there was no compliance of Section 42 of the said Act. This ground has to be discarded at the very outset in view of the latest decision of Supreme Court in State of Haryana Vs. Jarnail Singh and Ors. [2004 SAR (Criminal) 535] wherein Their Lordships had held:

“Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in [M. Prabbulal vs. Assistant Director, Directorate of Revenue Intelligence](#): (2003) 8 SCC 449 that where a search is conducted by a gazetted officer himself acting under [Section 41](#) of the NDPS Act, it was not necessary to comply with the requirement of [Section 42](#). For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to [Section 42](#) of the NDPS Act.”

Such being the position the argument of Shri Jash so far as infraction of [Section 42](#) of the said Act is concerned has no merit at all since PW7 was a Gazetted Officer himself and he conducted the raid and

also effected the search and seizure from the Appellant.

....

17) We are in complete agreement with the aforementioned finding of the High Court as, in our opinion, it is just, legal and proper calling no interference in this appeal.

18) Firstly, the High Court has recorded the finding keeping in view the law laid down by this Court in [State of Haryana vs. Jarnail Singh & Ors.](#), (2004) SAR (Criminal) 535. Secondly, since PW-7 himself was the gazetted officer, it was not necessary for him to ensure compliance of [Section 42](#) as held by this Court in [Prabha Shankar Dubey vs. State of M.P.](#) (2003) 8 Supreme 565 = (2004) 2 SCC 56 and lastly, so far as compliance of the requirement of [Section 50](#) is concerned, it was found and indeed rightly that the offer to search the appellant was given to him in writing and on his giving consent, he was accordingly searched.

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Learned senior counsel appearing on behalf of the petitioner also raises an argument that the present case involves violation of Section 50 of the NDPS Act as well as, no proper offer was given to the petitioner before he was personally searched. Learned senior counsel submits that the said violation itself makes the petitioner eligible for the grant of regular bail.

Learned State counsel has rightly controverted the said averment of the learned senior counsel for the petitioner that in the present case submitting that the raid was conducted on the basis of a secret information and the recovery has been effected from the car, which does not involve Section 50 of the NDPS Act. Once the recovery is effected from the car and not from the personal search, in view of the judgment of the Hon'ble Supreme Court of India, passed in **SLP (Crl.) No.8425 of 2021** titled as **"Kalu Khan Vs. State of Rajasthan"**, the recovery which has been effected other than from the personal search, cannot be ignored and can be treated as a valid recovery. That being so, once in the present case, the recovery has been done from the car and not from personal search of the petitioner, no grievance can be made by the petitioner with regard to violation of Section 50 of the NDPS Act at this stage, while contending for the grant of bail.

Keeping in view the above, no ground is made out to grant petitioner the concession of regular bail, as being prayed for in the present petition.

Dismissed.

It is made clear that this Court is not expressing any opinion on merits of the present case, rather the order is being passed keeping in view the contentions raised by learned senior counsel for the petitioner. The ultimate guilt or innocence of the petitioner will depend upon the complete evidence which will come on record.

04.03.2022

Apurva

(HARSIMRAN SINGH SETHI)

JUDGE

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| 1. Whether speaking/reasoned : | Yes |
| 2. Whether reportable : | No |