

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

CRM-M-16114-2022 (O&M)
Date of Decision:- 5.8.2022

Sant Lal @ Vicky

.....Petitioner

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. Gaurav Datta and Mr. Rajat Narwal, Advocates
for the petitioner.

Mr. Luvinder Sofat, AAG, Punjab
assisted by ASI Jora Singh.

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GURVINDER SINGH GILL, J.

1. The petitioner seeks grant of regular bail in a case registered vide FIR No. 17 dated 18.2.2022 under Sections 22, 61 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') at Police Station Daba, District Ludhiana.
2. The FIR was lodged at the instance of Himanshu Anand, Junior Intelligence Officer, Narcotics Control Bureau wherein he stated that on 18.2.2022, he alongwith Drugs Inspector Gurpreet Singh @ Sodhi and ASI Gulshan Kumar alongwith other associates conducted checking at Shiv Medical Store where Sant Lal @ Vicky was present. A search of the drawers of a counter lying inside the shop led to recovery of a black coloured polythene bag and from which 1720 tablets of 'Trakem-100' were recovered for which Sant Lal could

not produce any permission or bill to justify his possession of the same. Said Sant Lal was asked as to from where he had procured the said tablets and he disclosed that he had bought the said tablets from Hardeep Singh @ Harry. The complainant Himanshu Anand told Sant Lal to make a telephone call to said Hardeep Singh and to ask him to supply more intoxicant tablets. Pursuant to such telephone call made by Sant Lal to Hardeep Singh, said Hardeep Singh came there in about half an hour and took out a black envelope from his bag and handed over to Sant Lal. Upon doing so, said Hardeep Singh @ Harry was also apprehended. Upon opening the envelope, the same was found to contain 4000 tablets of 'Trakem-100' and for which even Hardeep Singh @ Harry could not produce any bill, permit or licence.

3. The learned counsel for the petitioner has submitted that the petitioner has falsely been implicated in the present case and that even the recovery has not been made in accordance with the procedure laid down under the NDPS Act and that neither any offer in terms of Section 50 of the Act was extended and nor the provisions of Section 42 of the Act have been complied with. The learned counsel, in order to hammer forth his aforesaid submissions regarding non-compliance of Sections 42 and 50 of the Act, places reliance upon S.K. Raju @ Abdul Haque vs. State of West Bengal 2018(9) SCC 708.
4. Opposing the petition, the learned State counsel has submitted that it is a case where huge quantity of drugs 'Trakem-100' having Tramadol as an ingredient was recovered from a polythene bag lying in a drawer of counter from the premises of the petitioner and subsequently also led to arrest of co-accused Hardeep Singh @ Harry, who was found to be carrying another 4000 tablets of 'Trakem-100' in a polythene bag. The learned State counsel has

submitted that in view of the facts of the present case, Section 50 of the Act would not have any application as the recovery was not from personal search of petitioner. The learned State counsel has further submitted that even Section 42 of the Act would not have any application in the present case.

5. It has been submitted on behalf of State that the said recovery would fall in the category of 'commercial quantity' and as such keeping in view the restrictions imposed by Section 37 of the Act, no case for grant of bail is made out.
6. I have considered rival submissions addressed before this Court.
7. There are specific allegations in the FIR as regards recovery of 1720 tablets of 'Trakem-100' stated to be having Tramadol as an ingredient. The recovery has been effected from a polythene bag found in a drawer of counter lying in the shop of the petitioner and not from personal search of the petitioner. Hon'ble the Supreme Court, while discussing the scope of application of Section 50 of the NDPS Act, in State of Himachal Pradesh vs. Pawan Kumar 2005(4) SCC 350, held as follows:

“11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a hold all, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

12. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the word "search of person". One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is provided by sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free.”

8. The legal position settled in Pawan Kumar's case (supra) has been reiterated by Hon'ble Supreme Court in 2020(10) RCR 740 Rajesh Dhiman vs. State of Himachal Pradesh. The relevant extract from Rajesh Dhiman's case reads as under:

“22. The appellants' claim that the High Court erred in not considering noncompliance with Section 50 of the NDPS Act at the stage of appeal, is also premised upon a mistaken understanding of the law. As held in State of Himachal Pradesh v. Pawan Kumar (2005) 4 SCC 350., the safeguards for search of a person would not extend to his bag or other article being carried by them. Given how the narcotics have been discovered from a backpack, as per both the prosecution and defence versions, there arises no need to examine compliance with Section 50 of NDPS Act.”

9. In light of ratio of the judgments referred to above, the instant case where recovery has been effected from a bag and not from personal search of the accused, would not attract provisions of Section 50 of the Act.

10. A reference also needs to be made to another judgment of Hon'ble Supreme Court in State of Punjab vs. Baljinder Singh (2019)10 SCC 473, where search of vehicle as well of person of accused had been conducted and recovery had been effected only from search of vehicle and not from person of accused. Hon'ble Supreme Court, while reversing judgment of High Court, acquitting the accused, held that merely because there was non-compliance of Section 50 of Act as far as personal search was concerned, no benefit can be extended so as to invalidate effect of recovery from search of vehicle. The facts in the cited case, as noticed in the judgment, are reproduced hereinunder:

"3. The case of the prosecution in a nutshell is; that on 19.8.2009 ASI Rakesh Kumar along with other police officials in connection with patrolling duty were present at Sirhind bye-pass, Rajpura. Lachhman Singh son of Sarwan Singh came on the spot. When Rakesh Kumar was talking with Lachhman Singh, a Qualis bearing registration no. PB- 13-D-7000 was seen coming from Ambala side. On seeing the police party, the driver of the vehicle tried to reverse the vehicle. On suspicion, the vehicle was stopped. One lady was sitting with the driver. On enquiry, the driver and passenger disclosed their identities. ASI Rakesh Kumar suspected them to be carrying some contraband in the bags lying in the vehicle. He wanted to search them. He apprised the accused of their right to get the search conducted in the presence of Magistrate or Gazetted Police Officer. However, accused reposed confidence in him. Joint consent statement of accused was reduced into writing. On search, 7 bags containing poppy husk were recovered."

11. In the cited case, the personal search of both the accused was undertaken after their arrest, which did not lead to any recovery of contraband. The Trial Court concluded that the aforesaid two accused were guilty of the offence punishable under Section 15 of the Act. In the appeals preferred by the accused, the High Court observed that the personal search of the accused was not conducted before the Magistrate or a Gazetted Officer and as such there

was complete infraction of Section 50 of the Act and thus, while setting aside the order of conviction, acquitted both the accused.

12. Before the Hon'ble Supreme Court, it was urged on behalf of appellant (State of Punjab) that the High Court fell in error in not considering the fact that the search of the vehicle had resulted in recovery of seven bags of poppy husk and that infraction, if any, of the requirement of Section 50 of the Act as regards personal search of the accused, could not affect the factum of recovery of contraband from the vehicle which was an independent factor and ought to have been taken into account. The following question was, thus, formulated for adjudication in *Baljinder Singh's case* (supra):

“ If a person found to be in possession of a vehicle containing contraband is subjected to personal search, which may not be in conformity with the requirements under Section 50 of the Act; but the search of the vehicle results in recovery of contraband material, which stands proved independently; would the accused be entitled to benefit of acquittal on the ground of non-compliance of Section 50 of the Act even in respect of material found in the search of the vehicle.”

13. Hon'ble Supreme Court, while examining the aforesaid proposition, referred to various judgments including judgment of Constitution Bench in *Baldev Singh vs. State of Punjab (1999) 6 SCC 172*, and held as under:

“15. 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.

16. The conclusion (3) as recorded by the Constitution Bench in Para 57 of its judgment in Baldev Singh clearly states that the conviction may not be based "only" on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act but if there be other evidence on record, such material can certainly be looked into.

17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied

upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as "personal search" was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid."

14. The ratio of aforesaid judgment in Baljinder Singh's case (supra) leaves no manner of doubt that the facts of the present where recovery was effected from a bag recovered from a drawer of counter lying in the shop of accused cannot be ignored even if Section 50 of the Act was not complied before conducting personal search. Thus, the submission raised as regards non-compliance of Section 50 of the Act cannot be accepted.
15. As far as the contention of the petitioner regarding non-compliance of provisions of Section 42 of the Act is concerned, the Junior Intelligence Officer, Narcotics Control Bureau, who was on deputation from Income Tax Department, was also accompanied by Drugs Inspector Gurpreet Singh. The question of non-compliance of Section 42 of the Act is a debatable question which can only be decided on the basis of evidence led before the trial Court and the same cannot be adjudicated upon at the stage of considering the matter pertaining to grant of bail. Hon'ble the Supreme Court in a case reported as 2021(10) SCC 100 Union of India through Narcotics Control Bureau, Lucknow versus Md. Nawaz Khan wherein issue of non-compliance of Section 42 of Act was argued for grant of bail, held as under :-

"29. In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial."

(emphasis supplied)

16. Hon'ble Supreme Court in Md. Nawaz Khan's case (supra) has, thus, categorically held that at the time of grant of bail, the question as regards compliance or non-compliance of Section 42 of the Act is not strictly required to be gone into as the same is a matter, which would be best left to be adjudicated at the time of trial.
17. The present case, being a case of recovery of 'commercial quantity', the fetters imposed by Section 37 of the Act will come into play in the matter of grant of bail. Having regard to the quantity of contraband recovered from the petitioner and also the quantity recovered from the co-accused, who was apprehended at the instance of the petitioner, it is evident that they were regularly indulging in drugs and as such it is difficult to hold that the petitioner, if granted bail, will not indulge in similar offences again.
18. In the present case, recovery has been effected in the presence of the complainant as well as in the presence of a Drugs Inspector and other officials accompanying them in broad day light. There is nothing on record to suggest that the petitioner has been falsely implicated. Hon'ble Apex Court in a judgment i.e. 2020(1) RCR(Criminal) 818 State of Kerala vs. Rajesh Kumar has reiterated the legal position as regards the limitations imposed by Section 37 of the Act and has further held that a liberal approach in matters of bail in offences under the NDPS Act is uncalled for.
19. Hon'ble Supreme Court in a very recent judgment Narcotics Control Bureau vs. Mohit Aggarwal, 2022(3) RCR(Criminal) 985, while deciding an appeal filed by Narcotics Control Bureau challenging grant of bail to an accused by the High Court, cancelled the bail while reiterating the view that provisions

of Section 37 of the Act have to be strictly complied with and that mere length of custody cannot be a consideration for grant of bail. Paras 14 and 18 of the said judgment read as follows :-

- “14.

To sum up, the expression “reasonable grounds” used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.
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xxx xxx xxx
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In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. **The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act.”**

(emphasis supplied)

20.

There is nothing on record at this stage from which it could be inferred that the petitioner is not guilty of the offence in question or that in case released on bail, he is not likely to indulge in such offences again. Finding no merit in the petition, the same is hereby dismissed.

5.8.2022

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(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned
Whether Reportable

Yes / No
Yes / No