

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-23269-2021
Reserved on: 24-03-2022
Pronounced on: 25.04.2022

Naval Sood ...Petitioner

Versus

State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Satnam Singh gill, Advocate and
Mr. J.S. Bains, Advocate for the petitioner

Mr. Harsimar Singh Sitta, AAG, Punjab.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
108	28.04.2020	Gate Hakima, District Amritsar	22/29 NDPS Act and later on added sections 25, 27-A, 31 of NDPS Act and Section 465, 468, 471, 420, 120-B IPC

1. The petitioner, incarcerated upon his arrest for trading, possessing, and dealing in huge consignments of medicines, containing Tramadol, in violation of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act), which certainly falls in a commercial quantity, has come up before this Court under Section 439 of CrPC, seeking bail.

2. The petitioner claims that prior to this FIR, on two occasions, he was tried to be implicated in cases under NDPS Act, but in one case cancellation report was filed and in another he was acquitted. This is the third attempt to implicate him and is entitled to bail on this ground alone.

3. Ld. Counsel for the petitioner contends that the actual bills were not considered by the investigator, which would show his innocence, the petitioner is not the owner of the shop and license, and there is nothing to connect him with the alleged recoveries. Ld. counsel further cites medical grounds for bail and submits that the pre-trial incarceration would cause an irreversible injustice to the petitioner and family.

4. While opposing the bail, the contention on behalf of the State is that the quantity of contraband involved in the case falls in the commercial category. Ld. counsel contended that the petitioner had obtained license in the name of a physically

challenged persons, and there is sufficient evidence which implicates the petitioner, who is not only the main accused but the kingpin.

REASONING:

5. I have gone through the police report filed under section 173 CrPC, including the supplementary report. I have also gone through the petition, and the replies. The petitioner has been prima facie dealing in illicit drug trade after projecting a physically challenged person as the proprietor. The evidence collected so far prima facie points towards the petitioner as the kingpin who is a part of drug mafia.

6. The other arguments of Ld. counsel for the petitioner that the investigator conducted search and seizure violating sections 42 and 50 of the NDPS and of Drugs and Cosmetics Act are also insignificant while considering bail in huge commercial quantity, given the riders of section 37 of NDPS Act.

7. Whether the Investigator complied with the mandatory provisions of sections 42 and 50 of the NDPS Act is a question of fact to be adjudicated in the trial. However, before this court treats the compliances as illegal, the prosecution needs an opportunity to prove that they had complied with the mandatory provisions per law. Such stage would come only during the trial and certainly not at the bail stage, where it would be hit by the maxim *Audi alteram partem*. The exception to this would be applicable only when the non-compliance of the mandatory provisions of sections 42 and 50 of the NDPS Act is apparent on the face of the special report under section 57 of the NDPS Act and other documents of search and seizure, and in the opinion of the court, the lapse is non-rectifiable, after recording a finding that it is an incurable defect, the court might consider granting bail on such violations.

8. In State of H.P. v. Prithi Chand, (1996) 2 SCC 37, Hon'ble Supreme Court holds,

[3]. The question is whether the learned Sessions Judge was justified, at the stage of taking cognizance of the offence, in discharging the accused, even before the trial was conducted on merits, on the ground that the provisions of Section 50 of the Act had not been complied with. This Court in State of Punjab v. Balbir Singh [(1994) 3 SCC 299] : (AIR 1994 SCW 1802) has considered the provisions of the Act. Section 50 has been held to be mandatory. In paragraph 16, this Court has held that it is obligatory on the part of the empowered or the authorised officer to inform the suspect that, if so required, he would be produced before a Gazetted Officer or a Magistrate and search would be conducted in his presence. It was imperative on the part of the Officer to inform the person of the above right and if he failed to do the same, it amounted to violation of the requirement of Section 50 of the Act. It was held that when the person was searched he must have been aware of his right and that it could be done only if the authorised or empowered Officer informed him of the same. Accordingly, this Court by implication read the obligation on the part of authorised Officer to inform the person to be searched of his right

to information that he could be searched in the presence of the Gazetted Officer or the Magistrate. In Saiyad Mohd. Saiyaad Umar Saiyed v. State of Gujarat [1995(3) JT SC 489] a three-Judge Bench of this Court had reiterated the above view and held that having regard to the grave consequences that might entail the possession of illicit articles under the Act, viz., the shifting of the onus to the accused and the severe punishment to which he became liable, the Legislature had enacted safeguards contained in Section 50. Compliance of the safeguards in Section 50 is mandatory obliging the Officer concerned to inform the person to be searched of his right to demand that search could be conducted in the presence of a Gazetted Officer or a Magistrate. The possession of illicit article has to be satisfactorily established before the Court. The Officer who conducts search must state in his evidence that he had informed the accused of his right to demand, while he is searched, in the presence of a Gazetted Officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that effect is given, the Court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit articles was not established. The presumption under Article 114, illustration (e) of the Evidence Act, that the official duty was properly performed, therefore, does not apply. It is the duty of the Court to carefully scrutinise the evidence and satisfy that the accused had been informed by the concerned Officer that he had a right to be searched before a Gazetted Officer or a Magistrate and that the person had not chosen to so demand.

[4]. It is to be seen whether the accused has been afforded such a right and whether the authorised Officer has violated the mandatory requirement, as a question of fact, has to be proved at the trial. In Pooran Mal v. Director of Inspection [(1974) 1 SCC 345] : (AIR 1974 SC 348) a Constitution Bench of this Court had held that power of search and seizure, is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction to the right of possession and enjoyment of the property seized. However, the seizure will be only temporary and limited for the purpose of the investigation. The power of search and seizure is an accepted norm in our criminal law envisaged in Sections 96 to 103 and 165 of the Criminal Procedure Code, 1973 [for short, "the Code"]. The Evidence Act permits relevancy as the only test of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to invoke the spirit of Constitution to exclude such evidence. The decisions of the American Supreme Court spelling out certain Constitutional protections in regard to search and seizure are not applicable to exclude the evidence obtained on an illegal search. Courts in India refuse to exclude relevant evidence merely on the ground that it is obtained by illegal search and seizure. When the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search and seizure, is not liable to be shut out. Search and seizure are not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. If the safeguards are generally on the lines adopted by the Code, they would be regarded as adequate and render the restrictions imposed as reasonable measures.

[7]. It would thus be settled law that every deviation from the details of the procedure prescribed for search, does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search, irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The Court is required to scan the evidence with care and to act upon it when it is proved and the Court would hold that the evidence would be relied upon.

9. Given the nature of illness, the petitioner is even not entitled to regular bail on medical grounds in the facts and circumstances peculiar to this case.

10. The grounds taken in the bail petition do not shift the burden placed by the legislature on the accused under S. 37 of the NDPS Act. The petitioner has not stated anything to discharge the burden put by the stringent conditions placed in the statute by the legislature under section 37 of the NDPS Act. Thus, the petitioner has failed to make a case for bail at this stage.

11. In the facts and circumstances peculiar to this case, and for the reasons mentioned above, the petitioner fails to make a case for bail.

12. Any observation made hereinabove is neither an expression of opinion on the merits of the case nor shall the trial Court advert to these comments.

Petition dismissed in aforesaid terms. All pending applications, if any, stand disposed.

(ANOOP CHITKARA)
JUDGE

April 25, 2022
Sonia arora

Whether speaking/reasoned: Yes
Whether reportable: No.