

IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
[CIRCUIT BENCH AT JALPAIGURI]

Present:

HON'BLE JUSTICE ARIJIT BANERJEE

AND

HON'BLE JUSTICE PARTHA SARATHI SEN

CRM(NDPS) No. 496 OF 2023

Joga Ram

Versus.

The State of West Bengal.

For the Petitioner : Mr. Arnab Sengupta, Adv.,
 Mr. Deborshi Dhar, Adv.,
 Mr. Janardan Periwal, Adv.,
 Mr. Somraj Paul, Adv.

For the State : Mr. Aditi Shankar Chakraborty, Ld. Add. PP.
 Mr. Aniruddha Biswas, Adv..

Last heard on : 12.07.2023
Judgment on. : 27.07.2023

Partha Sarathi Sen, J:-

1. The instant case as arises out of an application under Section 439 of the Code of Criminal Procedure, 1973, is taken up for passing judgement.
2. In course of hearing learned advocate for the accused-petitioner at the very outset draws our attention to page no.21 and page no.24 of the instant bail application being photocopy of the seizure list dated

03.02.2022 showing recovery of commercial quantity of contraband articles from the possession of the present accused-petitioner and a photocopy of the memo of arrest dated 03.02.2022 in the name of the present accused petitioner. Attention of this Court is also drawn to Section 36 C and Section 37 of the NDPS Act, 1985.

3. It is contended on behalf of the petitioner that on perusal of the aforesaid two sections it would appear that the provisions of Cr.P.C including the provisions of bail and bonds shall apply to the proceedings under the NDPS Act, 1985 and the offences under the aforesaid Act are cognizable in nature. Drawing attention to a photocopy of the seizure list and a photocopy of the memo of arrest as has been annexed with the instant bail application it is contended that in the instant case there occurred a violation of the mandate of Section 41B of Cr.P.C in view of the fact that column no. 10 of the memo of arrest has been kept blank especially when there is clear mandate of the legislature while enacting Section 41B of Cr.P.C that every officer while making arrest shall prepare a memorandum of arrest which shall be attested by atleast one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made. It is argued further that from the seizure list as well as from the memo of arrest it would appear that the alleged seizure and/or arrest was done on 03.02.2022 during day time at the P.O which is a moderately populated area but on the part of the prosecution no justification has been given as to why they failed to comply with the

provisions of Section 41B of Cr.P.C while arresting the present accused-petitioner in connection with the instant case.

4. In course of hearing learned advocate for the accused-petitioner also took us to Section 52A of the said Act of 1985 and to the Narcotics Drugs and Psychotropic Substances (Seizure, Storage Sampling and Disposal Rules), 2022 (hereinafter referred to as the 'said Rules of 2022' in short).
5. It is contended by him that both Section 52A of the said Act and Rule 3 of the said Rules of 2022 categorically indicate that after seizure of any narcotic drugs, psychotropic substances and control substances, an inventory of the said seized articles containing the details of the description, quality, mode of packaging, marks, numbers, etc. is mandatorily to be made. It is contended on behalf of the petitioner that in the case in hand the prosecution has also miserably failed to make such inventory as mandated under Section 52A of the said Act of 1985 read with Rule 3 of the said Rules of 2022 and thus a gross infraction of rules occurred on the part of the prosecution making the alleged seizure very doubtful. In respect of his contention learned advocate for the petitioner places his reliance upon the following reported decisions namely:-

- 1. *Noor Aga vs. State of Punjab and Anr.* reported in (2008) 16 SCC 417;**
- 2. *Union of India Vs. Mohanlal and Anr.* reported in (2016) 3 SCC 379;**
- 3. *Satender Kumar Antil vs. Central Bureau of Investigation and Anr.* reported in (2022) 10 SCC 51;**

4. *Tofan Singh vs. State of Tamil Nadu* reported in (2021) 4 SCC 1;

5. *State of Punjab vs. Baldev Singh* reported in (1999) 6 SCC 172; and

6. *Laxmi Sardar & Anr vs. The State of West Bengal* reported in 2015 SCC Online Cal 2281: (2015) 3 Cal LT 623.

6. Learned advocate for the petitioner further submits that on a comparative study of the seizure list and the memo of arrest it would also appear that those are in different handwritings which also raises a serious doubt with regard to the genuineness of the allegation as made against the accused-petitioner.
7. Learned advocate for the petitioner thus submits that it is a fit case for enlarging the petitioner on bail.
8. While opposing the prayer for bail, learned advocate for the State at the very outset took us to paragraph 4 of the instant application for bail. It is contended by him that in paragraph 4 of the instant bail petition the petitioner on affidavit categorically stated that he was arrested on 03.02.2022 in connection with the instant case and thus in view of such admission of fact the accused-petitioner cannot take the plea that he was not arrested in connection with the instant case on the said day and hour at the place of occurrence. Drawing attention to Section 54 of the said Act of 1985, it is argued by learned advocate for the State that since in the case in hand commercial quantity of contraband articles was seized from the petitioner, the onus lies on the present accused-petitioner to show that

nothing has been seized from his possession on the relevant day and hour at the place of occurrence and in the case in hand the present accused-petitioner has miserably failed to discharge such onus at least prima facie. Drawing attention to different parts of the case diary it is also argued that from the material available in the case diary it would appear that there was due compliance with Section 57 with regard to the reporting of arrest and seizure by the Investigating Officer to his immediate superior and thus there cannot be any justification to raise doubt with regard to the arrest of the present accused-petitioner and seizure of commercial quantity of contraband articles from the possession of the present accused petitioner at the P.O on the relevant day and hour. It is further argued on behalf of the State that since the said seizure list bears the signature of independent witnesses, the legality, veracity and correctness of the same can only be determined at the stage of trial.

9. In course of his submission Ld. Advocate for the State also places his reliance upon the following three reported decisions namely;

- 1. *Union of India vs. Ajay Kumar Singh @ Pappu* reported in (2023) SCC Online SC 346;**
- 2. *Union of India vs. Ram Samujh* reported in (1999) 9 SCC 429: (1999)SCC (Cri) 1522 and;**
- 3. *An order dated 12.04.2023 as passed in CRM (NDPS) 260 of 2023.***
- 4. *Pratibha Manchanda and Anr. vs. State of Haryana* reported in (2023) SCC Online SC 785.**

10. Placing reliance on the aforesaid decisions it is argued by Learned Advocate for the State that from the aforesaid decisions it would reveal that time and again the Hon'ble Supreme Court as well as this High Court considered the true implications of Section 37 of the said Act of 1985 and thus came to a coherent finding that a Court while disposing of an application for bail under the said Act of 1985 ought to have considered the restrictions on granting of bail as incorporated in Section 37(i) (b) of the said Act of 1985 in addition to the other limitations as enunciated in the Code of Criminal Procedure or in any other law for the time being in force on granting bail. It is thus argued by learned advocate for the State that considering the true spirit and object of the restrictions on granting bail under Section 37 of the said Act of 1985, the instant application for bail may be rejected.
11. In our considered view for effective adjudication of the instant bail application, a look to the provisions of Sections 37 and 52 A of the said Act is necessary and the same is reproduced hereinbelow:-

“37. Offences to be cognizable and non-bailable.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is

not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

“52A. Disposal of seized narcotic drugs and psychotropic substances.—

(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].”

12. Rule 3 of the NDPS (Seizure, Storage, Sampling and Disposal Rules), 2022 reads as under:-

“3. Classification of seized material.-

- 1. The narcotic drugs, psychotropic substances and controlled substances seized under the Act shall be classified based on physical properties and results of the drug detection kit, if any and shall be weighed separately.*
- 2. If the narcotic drugs, psychotropic substances and controlled substances are found in packages or containers, such packages and containers shall be weighed separately and serially numbered for the purpose of identification.*
- 3. All narcotic drugs, psychotropic substances and controlled substances found in loose form shall be packed in tamper proof bag or in container, which shall be serially numbered and weighed and the particular of drugs and the date of seizure shall also be mentioned on such bag or container:*

Provided that bulk quantities of ganja, poppy straw may be packed in gunny bags and sealed in such way that it cannot be tampered with:

Provided further that seized concealing material such as trolley bags, backpack and other seized articles shall be sealed separately.

- 4. The classification, weighing, packing and numbering referred to in this sub-rule shall be done in the presence of search witnesses (Panchas) and the person from whose possession to the drugs and substances was recovered and a mention to this effect shall invariably be made in the panchnama drawn on the spot of seizure.*
- 5. The detailed inventory of the packages, containers, conveyances and other seized articles shall be prepared and attached to the panchnama.”*

13. We have minutely perused the entire material as placed before us including the statutory provisions of the said Act and the said Rules of 2022. We have gone through the reported/unreported decisions as cited from the Bar. We have given our anxious consideration to the submissions of the Learned Advocates for the contending parties.

14. On perusal of the reported decision of **Toofan Singh(supra)** it appears to us that Hon’ble Supreme Court while considering different provisions of the NDPS Act of 1985 in the backdrop of Articles 20 and 21 of the Constitution of India expressed the following view:-

“27. The NDPS Act is to be construed in the backdrop of Article 20(3) and Article 21, Parliament being aware of the fundamental rights of the citizen and the judgments of this Court interpreting them, as a result of which a delicate balance is maintained between the

power of the State to maintain law and order, and the fundamental rights chapter which protects the liberty of the individual. Several safeguards are thus contained in the NDPS Act, which is of an extremely drastic and draconian nature, as has been contended by the counsel for the Appellants before us. Also, the fundamental rights contained in Articles 20(3) and 21 are given pride of place in the Constitution. After the 42 nd Amendment to the Constitution was done away with by the 44 th Amendment, it is now provided that even in an Emergency, these rights cannot be suspended – see Article 359(1). The interpretation of a statute like the NDPS Act must needs be in conformity and in tune with the spirit of the broad fundamental right not to incriminate oneself, and the right to privacy, as has been found in the recent judgments of this Court.

55. Given the stringent provisions of the NDPS Act, together with the safeguards mentioned in the provisions discussed above, it is important to note that statutes like the NDPS Act have to be construed bearing in mind the fact that the severer the punishment, the greater the care taken to see that the safeguards provided in the statute are scrupulously followed. This was laid down in paragraph 28 of Baldev Singh (*supra*). That the NDPS Act is predominantly a penal statute is no longer *res integra*. In *Directorate of Revenue and Anr. v. Mohammed Nisar Holia* (2008) 2 SCC 370, this Court held:

“9. The NDPS Act is a penal statute. It invades the rights of an accused to a large extent. It raises a presumption of a culpable mental state. Ordinarily, even an accused may not be released on bail having regard to Section 37 of the Act. The court has the power to publish names, address and business, etc. of the offenders. Any document produced in evidence becomes admissible. A vast power of calling for

information upon the authorities has been conferred by reason of Section 67 of the Act.

10. Interpretation and/or validity in regard to the power of search and seizure provided for under the said Act came up for consideration in Balbir Singh case [(1994) 3 SCC 299] wherein it was held:

“10. It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC, namely, Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.

11. But there are certain other embargoes envisaged under Sections 41 and 42 of the NDPS Act. Only a Magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been committed so on and so forth as mentioned therein. Under sub-section (2) only a gazetted officer or other officers mentioned and empowered therein can give an authorisation to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirements. One is that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV

has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the legislature intended that only certain Magistrates and certain officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or officers mentioned thereunder.”

11. Power to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the term “reason to believe” has been used. Such belief may be founded upon secret information that may be orally conveyed by the informant. Draconian provision which may lead to a harsh sentence having regard to the doctrine of “due process” as adumbrated under Article 21 of the Constitution of India requires striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other.

12. This Court in Balbir Singh [(1994) 3 SCC 299] referring to Miranda v. State of Arizona [384 US 436 (1966)] while interpreting the provisions of the Act held that not only the provisions of Section 165 of the Code of Criminal Procedure would be attracted in the matter of search and seizure but the same must comply with right of the accused to be informed about the requirement to comply with the statutory provisions.

16. It is not in dispute that the said Act prescribes stringent punishment. A balance, thus, must be struck in regard to the mode

and manner in which the statutory requirements are to be complied with vis-à-vis the place of search and seizure.”

15. In the reported decision of **Baldev Singh (supra)** the Hon’ble Supreme Court while considering different provisions of NDPS Act, 1985 of Cr.P.C held the following:-

“13. Vide Section 51, the provisions of the Code of Criminal Procedure, 1973 shall apply, insofar as they are not inconsistent with the provisions of the NDPS Act, to all warrants issued and arrest, searches and seizures made under the NDPS Act. Thus, the NDPS Act, 1985 after incorporating the broad principles regarding search, seizure and arrest etc in Sections 41, 42, 43, 49 and 50 has laid down in Section 51 that the provisions of the Code of Criminal Procedure shall apply insofar as they are not inconsistent with the provisions of the NDPS Act. The expression “insofar as they are not inconsistent with the provisions of this Act” occurring in Section 51 of the NDPA Act is of significance. This expression implies that the provision of the Code of Criminal Procedure relating to search, seizure or arrest apply to search, seizure and arrest under the NDPS Act also except to the extent they are “inconsistent with the provisions of the Act”. Thus, while conducting search and seizure, in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the NDPS Act are also required to be followed.....”

16. At this juncture we also like to place our reliance upon the decision of the Hon’ble Supreme Court in the case of **D.K Basu vs. State of West Bengal** reported in **(1997) 1 SCC 416** wherein the Apex Court issued various directions which are mandatorily to be followed in all cases of arrest or detention till legal provisions are made in that behalf, as

preventive measures and out of the said direction the following direction of the Hon'ble Supreme Court is very much pertinent for us while disposing of the instant bail application and the same is reproduced hereinbelow:-

“.....
(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest. Such arrest memo shall be attested by atleast one witness who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.”

17. At this juncture if we look to the order dated 10.08.2018 passed in CRM 5708 of 2018 by a Co-ordinate Bench of this Court. The said court dealing with the self same matter expressed the following view:-

“.....
Absence of signature in the arrest memo of a respectable member of the locality particularly when it is alleged that apprehension and recovery from the petitioner was at a public place in presence of independent witnesses gives rise to reasonable grounds that the arrest of the petitioner may not have occurred in the manner as alleged by the prosecution leading credence to the petitioner's plea of prior arrest and wrongful detention.”

18. Looking at the issue from another angle, one may recall the established position in law that when a statute prescribes a particular mode for doing something, that thing must be done following that mode or not at all. Any other method of doing that thing is necessarily forbidden.

This principle was first enunciated in the celebrated case of **Taylor v. Taylor (1875) Ch D 426**, followed by the Privy Council in the well known case of **Nazir Ahmad v. Emperor, reported at AIR 1936 PC 253** and subsequently followed in numerous cases by the Hon'ble Supreme Court and various High Courts. This principle, in our view, should apply with greater force when one is dealing with a statute which empowers the police to arrest a citizen thereby impinging on the citizen's fundamental rights to liberty and free movement.

19. Coming to the factual aspects involved in this case it appears to us that in course of his argument learned advocate for the State inspite of his best effort could not satisfy as to why column no.10 of the memo of arrest in the name of the present accused-petitioner has been kept blank resulting in clear violation of the mandate of Section 41B of the Code of Criminal Procedure which according to the reported decision of **D.K Basu (supra)** is mandatorily to be followed by the arresting officer while arresting the arrestee. On perusal of the seizure list vis-à-vis other materials as available in the case diary we also find non-compliance of Section 52A (2) of the said Act of 1985 vis-à-vis Rule 3 of the said Rules of 2022 keeping in mind that since NDPS Act, 1985 provides severe punishment for the offender, greater care shall have to be taken by the law enforcement agencies in order to ensure that safeguards provided in the said statute are scrupulously followed.

20. In our considered view in the case in hand the prosecution has miserably failed to explain the lacuna as indicated hereinabove and thus a reasonable doubt arises with regard to the genuineness of the alleged arrest of the present accused-petitioner and the alleged seizure of the contraband articles from the possession of the present accused-petitioner on the relevant day and hour at the P.O.
21. In view of the aforesaid discussion the accused-petitioner before us is thus successful in diluting the statutory restrictions of Section 37 of the NDPS Act of 1985 and on an overall consideration of the facts and circumstances of this case, we are inclined to exercise our discretion under Section 439 Cr.P.C in favour of the petitioner.
22. It is thus ordered that the present accused petitioner may find bail of Rs. 20,000/-with two registered sureties of like amount subject to the satisfaction of learned Judge, Special Court (NDPS), 2nd Court Jalpaiguri in connection with (NDPS) case no.15 of 2022 arising out of Kumargram P.S Case no. 60 of 2022 dated 03.02.2022 on condition that the present accused-petitioner shall appear before the learned trial court on each date of substantive hearing and shall not threaten or intimidate the witnesses and/or tamper with evidence in any manner whatsoever, or commit similar offence in future with a further direction to appear before O/C Kumargram P.S once a week and shall not leave the territorial jurisdiction of trial court till conclusion of the NDPS 15 of 2022 unless such condition has been relaxed by the learned trial court.

23. With the aforementioned directions the instant bail application being **CRM (NDPS) No. 496 OF 2023** is thus disposed of.

24. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

I Agree.

(Arijit Banerjee, J)

(Partha Sarathi Sen, J)