

D/L. 23.
September 18, 2023.
MNS

**Calcutta High Court
In The Circuit Bench at Jalpaiguri
Appellate Side**

CRM (NDPS) 718 of 2023

In Re: - An application for bail under Section 439 of the Code of Criminal Procedure filed on 08.09.2023 in connection with C.R (N.D.P.S.) Case No. 17 of 2021 arising out of the NCB Crime No.06/NCB/KOL/2021 dated 12.02.2021 under Section 8(c) r/w 18(b), 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

And

In the matter of: Nesha Bharti @ Nisha Bhrt

.... Petitioner

Ms. Rima Sarkar,
Ms. Sidhi Sethia,

... for the petitioner

Mr. Sudipto Kr. Majumdar,
Mr. Saptak Sarkar

... for the NCB.

1. Learned counsel for the petitioner argues that the petitioner is entitled to bail on several scores. First, several co-accused persons on similar footing have already been enlarged on bail. That apart, since the petitioner is a lady, but the search and seizure was conducted by male personnel, Section 50(4) of the NDPS Act is violated. That apart, Section 41B of the Code of Criminal

Procedure (CrPC) is also violated, in the absence of independent witnesses.

2. Insofar as the trial is concerned, out of seven witnesses only one has been examined, thereby making it uncertain as to when trial would be concluded.
3. It is argued on behalf of the NCB that the presumption of Section 37 of the NDPS Act overrides categorically the provisions of the CrPC as such, the reliance on Section 41B of the Code of Criminal Procedure by the petitioner is misplaced.
4. It is argued by learned counsel for the NCB, by placing reliance on a coordinate Bench judgment in *Jafar Ali's case* [CRM (NDPS) 260 of 2023], that the co-ordinate Bench, categorically relying on *Union of India Vs. Ram Samujh and another reported at (1999) 9 SCC 429*, observed that persons dealing in narcotic drugs are instruments in causing death or in inflicting death blow to a number of innocent young victims who are vulnerable. It causes deleterious effects and deadly impact on the society, since such accused are a hazard to the society. Even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely.
5. Learned counsel submits by placing reliance on the relevant provisions of the NDPS Act as well as the CrPC that in the interaction between the two statutes, the NDPS Act provisions,

particularly those pertaining to bail, override those of the Code of Criminal Procedure.

6. Learned counsel places reliance on Section 4(2) of the Code of Criminal Procedure and argues that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the said provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences.
7. Section 5 of the Code of Criminal Procedure provides that nothing contained in the Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.
8. It is argued, by placing reliance on the language of Section 37 of the NDPS Act, that the same is preceded by a *non obstante* clause which rules out the applicability of the provisions of the Code of Criminal procedure insofar as the restrictions under Section 37 of the NDPS Act are concerned.
9. Learned counsel appearing for the petitioner, in reply, places reliance on another co-ordinate bench judgment in *Jog Ram's case* in CRM(NDPS) No. 496 of 2023, where the said Division Bench placed reliance on *D. K. Basu's case* for holding that in the event of

clear violation of the mandate of Section 41B of the Code of Criminal Procedure, the process of arrest itself is vitiated even in an NDPS proceeding.

10. The interesting question which has been raised in the present case pertains to the interplay between the NDPS Act and the CrPC insofar as grant of bail is concerned. Certain Sections of both statutes acquire relevance in such context.
11. Learned counsel for the petitioner has placed reliance on Section 60A of the Code of Criminal Procedure which provides that no arrest shall be made except in accordance with the provisions of the said Code or any other law for the time being in force providing for arrest.
12. On the other hand, Section 51 of the NDPS Act clearly provides that the provisions of the Code of Criminal Procedure shall apply, insofar as they are not inconsistent with the provisions of the NDPS Act, to all warrants issued, and arrests, searches and seizures made under the NDPS Act.
13. A bare perusal of the provisions of Section 41B of the CrPC, read in conjunction with the NDPS Act, shows that there is no patent conflict between the provisions of Section 41B of the CrPC and the provisions regarding arrest and duties of officers making arrest insofar as the NDPS Act is concerned.
14. Taking into consideration the language of Section 51 of the NDPS Act, the provisions of the Code of Criminal Procedure shall

ordinarily apply, including within its fold Section 41B of the CrPC as well insofar as they are not inconsistent with the provisions of the NDPS act. In the present context, we do not find any patent inconsistency on the face of the two statutes between 41B of the CrPC and the provisions of the NDPS Act regarding search and arrest.

15. Taking into consideration the fact that Section 37 of the NDPS Act operates primarily in respect of grant of bail, we are to look into the provisions of bail as provided in the Code of Criminal Procedure. Upon a bare perusal of Sections 439 of the Code of Criminal Procedure, read in conjunction with Section 37 of the NDPS Act, we find that Section 439 has not been obliterated from the statute book by Section 37 of the NDPS Act. Section 37 provides certain additional conditions, which are to be looked into over and above and in addition to the stipulations provided in Section 439 of the CrPC.

16. Section 37(1)(b), in no uncertain language, provides that notwithstanding anything contained in the Code of Criminal Procedure, no person accused of an offence punishable under Sections 19, 24 or 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,

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.

17. The first sub-clause has been satisfied in the present case insofar as the Public Prosecutor under the NDPS Act has been given an opportunity to oppose the application for the release. Insofar as the second criterion is concerned, we observe here that the provisions of Section 37 operate with regard to grant of bail and not specifically with regard to the procedure of search and arrest. Hence, the *non-obstinate* clause preceding Section 37 does not pertain directly to search and seizure but operates in respect of the provisions of Section 439 of the CrPC to which the provisions of Section 37 of the NDPS Act are additional supplements.

18. Taken in such perspective and read with Section 51 of the NDPS Act, in the absence of any conflict between the provisions of the two statutes, the procedure for search, seizure and arrest as provided in the CrPC is to be looked into for the present adjudication.

19. It is, of course, to be kept in mind that this Court is not sitting in trial but is considering whether the *modus operandi* of search, seizure and arrest vititates the presumption raised against the accused persons under Section 37 of the NDPS Act. Taken in such limited context, even Section 51 of the NDPS Act gives free operation to

the provisions of Section 41B and the other provisions in the CrPC relating to search and arrest, for the limited context of ascertaining whether the rigours of Section 37 are applicable to the present case.

20. Taken in such context, the riders of *D.K. Basu's* judgment are to be taken as sacrosanct, more so since they are on a footing of personal liberty and justice, which are enshrined in the Constitution of India, that is the *grund norm* of all Indian law, as every statute in our country emanates from the Constitution and the fundamental rights which are a part of its basic structure.

21. Taken in such context, we are of the opinion that in the present case, Section 41B has been contravened, at least *prima facie*, in the absence of independent witnesses, which puts a question-mark to the process of arrest, at least for the purpose of ascertaining whether the presumption under Section 37 is at all to be attached in the first place.

22. That apart, Section 50(4) is a part of the NDPS act itself and not of the CrPC. Section 50(4) categorically provides that no female shall be searched by anyone except a female. Being a part of the integral concept of the NDPS Act itself, Section 50(4) also is required to be taken into consideration to attach the presumption under Section 37. In the present case, it appears from the records that no female having searched the present petitioner, who himself is a female, Section 50(4) of the NDPS Act itself is violated. Thus,

the *non-obstante* clause shutting out the Code of Criminal Procedure is, in any event, not applicable on such score as well.

23. Taking into consideration all the above mitigating factors, we are satisfied, within the contemplation of Section 37(1)(b)(ii), that there are reasonable grounds for believing that the petitioner is not guilty of the offence, in view of the seizure and the arrest themselves being vitiated under the above provisions as discussed above and that the petitioner is not likely to commit any offence while on bail, which presumption is substantiated by the fact that the other co-accused persons on a similar footing as the petitioner are already on bail and there is no specific allegation that the said co-accused persons have misused the liberty given to them by virtue of bail and/or jumped bail in any manner whatsoever.
24. Taking into consideration all the above aspects, we are of the opinion that the benefit of bail should be granted to the petitioner.
25. In such perspective, CRM (NDPS) 718 of 2023 is allowed, thereby granting bail to the petitioner on condition that the petitioner furnishes bond of Rs.10,000/-, with two sureties of like amount each, one of whom must be local, to the satisfaction of the learned Judge, Special Court under NDPS Act, Siliguri.
26. The petitioner shall not leave the territorial jurisdiction of the trial court during the entire period of trial and shall attend the trial on each and every date.

27. The petitioner shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts and circumstances of the case so as to dissuade such person from disclosing such facts to any police officer or the court and/or tamper with the evidence in any manner whatsoever.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)