



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of Decision: August 22, 2023***

+ **BAIL APPLN. 1212/2023**

SURENDER KUMAR **Applicant**

Through: Mr. Aditya Aggarwal and Mr. Naveen
Panwar, Advocates

Versus

CENTRAL BUREAU OF NARCOTICS (CBN) **Respondent**

Through: Mr. Satish Aggarwala, Sr. Standing
Counsel and Mr. Gagan Vaswani,
Advocates

CORAM:

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

1. The applicant vide the present application under Section 439 of the Code of Criminal Procedure, 1973 seeks regular bail in File No. P&I/Del/Seizure/02/2019 registered under Section (s) 8/21/22/28/29/30 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [**NDPS Act**] at Central Bureau of Narcotics [**CBN**].

2. As per the complaint, a secret information was received by Sh. D.S. Singh, Superintendent (Prev.) Preventive and Intelligence Cell, CBN on 15.10.2019 at 09:30 AM, that a person namely Surender Kumar, proprietor of RND Distributors (the applicant herein) is engaged in the business of purchasing and selling of illegal/NDPS medicines without bill in his shop bearing Shop no.1 LSC, Block-A, Mangolpuri, Delhi. The secret



information was thus forwarded to the concerned superior in compliance of Section 42 of the NDPS Act.

3. Resultantly, a preventive team was constituted which left for conducting raid at the applicant's shop. On reaching there at 13:45 PM, the preventive team along with the independent witnesses went to the applicant's shop and informed him about the secret information and that his shop had to be searched.

4. Before search, the accused was made aware about his rights in compliance with Section 50 of NDPS Act and the preventive team offered their search before the search of applicant and his shop. After search of the preventive team, the search of the applicant's shop was conducted. During the search of the shop of the applicant, 9 types of medicines, alleged to be NDPS medicines, were recovered.

5. The complaint further alleges that during search of the said shop, the preventive team found a broken wall which was the passage to another shop, which was locked. Upon breaking the said lock, in addition to the above, 17 types of NDPS medicines were also found, alleged to be stored by the applicant.

6. Later, the applicant voluntarily disclosed that few medicines containing narcotics substance, were kept in a room on the roof. The search whereof further unearthed 9 types of NDPS medicines.

7. During the raid, many people gathered near the shop which created commotion and further search could not be made possible in that situation. Resultantly, the raiding team loaded the medicines on a truck which proceeded for CBN Office at 09:30 PM. Upon reaching the CBN Office, the medicines were unloaded and segregated batch wise and sampling was done.



From the 45 batches of medicines, one sample along with their duplicate was taken out from every batch, marked, packed and sealed with the seal of CBN.

8. Thereupon, the applicant was arrested on 16.10.2019 and after completion of investigation, complaint was filed before the competent Court.

9. Learned counsel appearing for the applicant submits that the applicant has been falsely implicated in the present case. He submits that as no samples were drawn on the spot and the unsealed seized medicines were taken to the CBN Office, the same was in contravention of the Standing Order No.1 of 1988 dated 15.03.1988, which is reproduced hereinunder:

“1.5 Place and time of drawal of sample. - Samples from the Narcotic Drugs and Psychotropic Substances seized, must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug is recovered, and mention to this effect should invariably be made in the panchnama drawn on the spot.”

10. In support of the aforesaid argument, learned counsel places reliance on ***Amani Fidel Chris vs. Narcotics Control Bureau*** 2020 SCC OnLine Del 2080 and ***Laxman Thakur vs. State (NCT of Delhi)*** 2022 SCC OnLine Del 4427 to submit that the sanctity of the Standing Order No.1 of 1988 has been upheld and its mandate cannot be blatantly flouted and substantial compliance therewith must be insisted upon, so that sanctity of physical evidence in such cases remains intact.

11. Learned counsel further submits that the drawing of samples at the CBN Office in absence of the Magistrate is violative of the mandate as set under Section 52A(2)(c) of the NDPS Act. In support thereof, he places reliance upon ***Union of India vs. Mohanlal & Anr*** (2016) 3 SCC 379



wherein it was held by the Hon'ble Supreme Court that sub-section (c) of sub-section (2) of Section 52A mandates the drawing of 'representative samples' of the seized contraband, before disposal of seized narcotic drugs and psychotropic substances, in the presence of a Magistrate.

12. The learned counsel for the applicant then submits that non-preparation of the seizure memo on the spot was deliberate and intentional and thus is violative of ***Khet Singh vs. Union of India*** (2002) 4 SCC 380, wherein it has been held as under:

“10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody”.

13. The learned counsel also submits that the applicant was arrested on 16.10.2019 and has been languishing in the judicial custody for almost 2



years and 4 months. In support of the argument, the learned counsel places reliance upon two recent judgements delivered by coordinate Benches of this Court in judgement dated 29.08.2023 in BAIL APPLN. 2881/2022 titled **Suraj vs. State Govt. of NCT of Delhi**, the applicant therein had served for a period of 3 years and 8 months in judicial custody and order dated 16.08.2023 in BAIL APPLN. 3649/2022 titled **Priyaranjan Sharma vs. State of NCT Delhi**, the applicant therein had served a period of 3 years and 7 months in judicial custody, in which the applicants were released on bail.

14. Lastly, the learned counsel for the applicant also places reliance upon **Simranjit Singh vs. State of Punjab** (Criminal Appeal No.1443 of 2023), judgement dated 18.05.2023 in BAIL APPLN. 253/2023 title **Kashif vs. Narcotics Control Bureau**, judgement dated 02.06.2023 in BAIL APPLN. 3805/2022 titled **Amina vs. State NCT of Delhi**, order dated 30.05.2023 in CRL.M.(BAIL) 1324/2022 titled **Ms. Betty Rame vs. Narcotics Control Bureau** and order dated 13.07.2023 in Special Leave to Appeal (Crl.) No(s).4169/2023 titled **Rabi Prakash vs. The State of Odisha**.

15. Notice was issued and the Status Report was called for. Nominal Roll was also requisitioned from the concerned jail authorities.

16. Learned Senior Standing Counsel appearing for the State, opposed the present application placing reliance on the judgment of the Hon'ble Supreme Court in **Supdt., Narcotics Control Bureau, Chennai vs. R. Paulsamy** (2000) 9 SCC 549 as well as on the judgments of coordinate benches of this Court in judgment dated 31.05.2023 in BAIL APPLN. 2894/2022 titled **Masibur Khan vs. State (Govt of NCT of Delhi)** and order dated 23.11.2021 in BAIL APPLN. 3248/2021 titled **Naveed Ummer Sheikh vs. Narcotic Control Bureau**. The learned Senior Standing Counsel



relying on the aforesaid judgments submits that the compliance of the mandate of Standing Order No.1 of 1988 is to be examined at the stage of trial and not at the present stage i.e., while considering application for grant of bail to the accused-applicant. The learned Senior Standing Counsel has placed reliance on para 6 of **R. Paulsamy** (supra) which reads as under:

“6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the stage of consideration for bail. The minimum which learned Single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in those two sections.”

17. The learned Senior Standing Counsel has placed reliance on para 39 of **Masibur Khan** (supra), which reads as under:

“39. In view of the aforesaid, this Court is of the opinion that the procedure adopted with respect to contraband in the present case is not defective in nature, at this stage. The applicant will get ample opportunity to prove that the said recovery was defective and samples drawn were not the true representatives of the contraband recovered, during the course of trial before learned Special Judge. It is pertinent to note that, the said standing orders cannot be exhaustive enough to cover all factual scenarios at the time of seizure of the contraband. Various factors like nature of contraband seized, the volume/quantity of the seizure, place of seizure, time of seizure, etc. will be relevant to determine any non-compliance thereof and effect of such non-compliance.

40. Hon'ble Supreme Court in Balbir Singh (supra) observed that the Investigating Officer is bound by the procedural instructions and has to follow the same, and in case of non-compliance thereof, and if no proper explanation is forthcoming, then the same would have adverse impact on the prosecution's case. It was further noted in the said judgment that the Courts would appreciate the evidence and merits of the case keeping these aspects in view. In the opinion of this Court, whether the sample drawn would be a true representative sample of the contraband recovered, can



be answered by the chemical analyst, who analyses the sample and gives his/her opinion. Learned Special Judge during the course of the trial will have the advantage of the testimony of the chemical analyst as well as the production of contraband seized in the Court. It is pertinent to note that the case property is still there for any further analysis if so required. Therefore, it is premature at this stage to say that the sample drawn are not true representative samples of the contraband seized. In the present case, at the time of examination of case property, the learned Special Judge can satisfy himself with regard to the correctness of the procedure followed.”

18. The learned Senior Standing Counsel further relies on ***Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) vs. Union of India*** (1994) 6 SCC 731 to submit that in cases of offences punishable with a minimum of 10 years under the NDPS Act, the undertrial prisoner may be considered for release on bail on account of delayed trial, only after lapse of 5 years as an under trial prisoner. He placed reliance on para 15 of ***Supreme Court Legal Aid Committee*** (supra), relevant part whereof is as under:

“15.(iii)Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.....”

19. As per the Nominal Roll, the applicant has clean antecedents and satisfactory jail conduct.

20. A coordinate Bench of this Court in ***Naveed*** (supra) held that any procedural defects or violation of any Circular would be a matter of trial, thereby rendering reliance by the learned counsel for the applicant on ***Amani Fidel*** (supra), passed at the appellate stage, as misplaced.

21. This Court finds support in ***M. Prabhulal vs. Assistant Director*** (2003) 8 SCC 449, wherein the Hon’ble Supreme Court declined to exclude relevant evidence merely on the ground that it is obtained by illegal search



or seizure. Also, a coordinate Bench of this Court in order dated 06.07.2021 in BAIL APPLN. 1416/2021 titled **Arvind Yadav vs. Govt of NCT Delhi**, held as under:

“11. It is in the light of these facts referring to Section 52A of the NDPS Act which deals with the disposal of the seized narcotic drugs and psychotropic substances that the Supreme Court noted that after the seizure of the narcotic drug or psychotropic substance is made the officer in- charge will as soon as possible prepare an inventory of such narcotic drugs or psychotropic substance containing the details relating to their description, quantity, quality, mode of packaging, marks, identifying particulars etc. and thereafter file an application to the Magistrate for drawing of the samples. In para-17 of the report Supreme Court further noted that considering the provisions of Section 52A (4) of the NDPS Act which provides that samples to be drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52A would constitute primary evidence for the purpose of the trial. Hence the question of drawing of samples at the time of seizure which often takes place in the absence of a Magistrate does not fall into the scheme of the Act.

12. Section 52A was inserted by the Amendment Act of 1989 w.e.f. 29th May, 1989. The provision relates to the disposal of the seized narcotic drugs and psychotropic substance and Section 52A (1) provides that the Central Government may having regard to hazardous nature of any narcotic drugs or psychotropic substance, their vulnerability to their substitution, constraints of proper storage space or any other relevant consideration by notification published in the Official Gazette, specify the narcotic drugs or psychotropic substance which may as soon as after their seizure be disposed of by such officer. Thus the provision relates to disposal of the drug after the same is seized so as to rule out substitution, misuse and being hazardous. It is not unknown that applications under Section 52A NDPS Act are also filed at the stage of appeal seeking permission of the Court to dispose of the narcotic drugs and psychotropic substance. The procedure prescribed under Section 52A NDPS Act and as ordained by Supreme Court in Mohan Lal (supra) is required to be mandatorily followed however, the issue in the present case is whether non-compliance of this procedure which is applicable for disposal of the narcotic drugs and psychotropic substances would vitiate the trial in case immediately on seizure samples are drawn in the absence of a Magistrate even before they are deposited in the malkhana for being sent to FSL to seek a report as to the nature of the contraband for the purposes of filing the charge-sheet. The decision in Mohan Lal (supra) does not canvas that the procedure followed by the investigating agencies like the Directorate of Revenue Intelligence which takes samples on the spot resulted in an



illegality so as to vitiate the trial. Conscious of the complicity of the matter, Supreme Court in para 18 of the report in Mohan Lal (supra) noted that there is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Supreme Court thus directed the Central Government to re-examine the matter and take suitable steps in the above direction. Needless to note that till date no further amendments to the statutory provision or by rescinding the Standing Order has been brought out.

13. By this petition, petitioner seeks bail on the ground of non-compliance of Section 52A of the NDPS Act, however, in view of the fact that the trial does not stand vitiated by drawing the samples at the spot in the absence of a Magistrate for being sent to FSL analysis for filing a appropriate charge-sheet before the Special Court for ascertaining the nature of contraband and whether the sanctity of drawing the samples was vitiated for the non-presence of the Magistrate would be an issue to be seen during the course of trial, hence this Court finds no ground to grant bail to the petitioner on this ground.”

22. This Court also finds able support from order dated 15.03.2023 in BAIL APPLN. 3054/2022 titled **Sunny vs. State (Govt. of NCT of Delhi)**, **Masibur Khan** (supra), order dated 03.08.2022 in BAIL APPLN. 3508/2021 titled **Shailender vs. State NCT of Delhi** and order dated 25.04.2022 in BAIL APPLN. 3291/2021 titled **Bipin Bihari Lenka vs. Narcotic Control Bureau**. Therefore, the argument of the applicant that the trial is vitiated for non-compliance of Section 52A of the NDPS Act, is misplaced.

23. It is also noteworthy that, *firstly*, Section 52 of the NDPS Act is directory in nature, *secondly*, non-compliance of the said provision, in itself, cannot render the actions of the Investigating Officers null and void and *lastly*, whether non-compliance of rules, in cases involving commercial quantity, could be a ground for grant of bail, will have to be examined considering the nature of violation of such standing procedure and consequences thereof. As has already been held by a coordinate Bench of



this court in judgement dated 31.05.2023 in BAIL APPLN. 71/2023 titled ***Quentin Decon vs. Customs***, wherein it is held as under:

“27. As noted above, the Hon’ble Supreme Court, in Balbir Singh (supra) observed that the provision of Section 52 of the NDPS Act is directory in nature. It was further held that non-compliance of the said provision, in itself, cannot render the actions of the investigating officers as null and void. It would have to be demonstrated that in the facts and circumstances of a particular case, whether such non-compliance caused prejudice to the accused and resulted in failure of justice. It was further held that if there is no proper explanation for non-compliance, then the same will have an effect on the case of the prosecution and the Courts will have to appreciate the evidence and material placed on record in the case in order to determine the issue. Whether non-compliance of rules could be a ground for grant of bail, especially in cases involving a commercial quantity, where the twin conditions of Section 37 of the NDPS Act would required to be satisfied, will have to be examined considering the nature of violation of such standing procedure and consequences thereof.”

24. Be that as it may, in the opinion of this Court, the applicant also cannot claim parity with the accused persons in ***Suraj*** (supra) and ***Priyaranjan*** (supra) as the situation(s) involved therein were far from what are involved herein. In any event, reliance placed by the learned counsel for the applicant on the aforesaid cases is misplaced, as the period undergone in the present case is far less than what was involved therein and bail granted to the accused therein was under the facts of those cases. Even otherwise, it is trite that parity is not the sole ground for granting bail to an accused like the applicant herein, more so, whence there is a huge difference between the quantum of contraband recovered/ involved in the present case.

25. Lastly, the Court must not forget that the burden always remains on the prosecution to prove the guilt of the accused beyond reasonable doubt and it cannot be ignored that the applicant has yet not come up with any plausible explanation, during trial, as to the reason for his possession of such large quantities of contraband.



26. Admittedly, the charges are yet to be framed and no witnesses have been examined so far before the learned Trial Court. Releasing the applicant on bail at this stage may amount to the applicant influencing the witnesses or tampering with evidence.

27. Seeing the gravity of the offence involved and the factual matrix of the case that colossally large quantities of alleged NDPS medicines were recovered from the possession of the applicant and further most relevantly as the applicant is yet to come up with any explanation, why he was in possession of such large quantities of contraband, in the opinion of this Court, grant of bail to the applicant at this stage will not be appropriate and is not called for.

28. Admittedly and even otherwise also, in the opinion of this Court, the reliance placed by the learned counsel for the applicant on ***Khet Singh*** (supra) is misplaced as this Court is considering the grant of bail when the question of preparation of seizure memo is premature. Further, the reliance placed by the learned counsel on ***Simranjit Singh*** (supra), ***Kashif*** (supra), ***Amina*** (supra), ***Ms. Betty Rame*** (supra) and ***Rabi Prakash*** (supra) is also misplaced as the facts of the cases referred are distinguishable from the present case and the heinousness of the offence involved in the present case cannot be kept in hindsight. This is a case where recovery was made from three different places, two of which were identified by the applicant himself.

29. In view of the aforesaid, the present application seeking grant of regular bail in File No. P&I/Del/Seizure/02/2019 registered under Section (s) 8/21/22/28/29/30 of the NDPS Act at Central Bureau of Narcotics, Delhi, is dismissed.



30. Needless to say, observations made on the merits of the matter, if any, are purely for the purposes of adjudicating the present application and shall not be construed as expressions on the merits of the matter.

31. Accordingly, the present application is disposed of.

SAURABH BANERJEE, J

AUGUST 22, 2023

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