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

% **Reserved on: September 06, 2023**  
**Decided on: October 11, 2023**

+ **BAIL APPLN. 2475/2023**

**SADDAD ALAM**

**..... Petitioner**

**Through: Mr. Aditya Aggarwal, Ms.  
Kajol Garg, Mr. Naveen  
Panwar, Advocates.**

**V**

**STATE (GOVT. OF NCT OF DELHI) ..... Respondent**

**Through: Mr. Utkarsh, APP for State  
with SI Sumit, P.S. Kalindi  
Kunj.**

**CORAM**

**HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN**

### **J U D G M E N T**

1. The present bail application is filed on behalf of the petitioner Saddam Alam under section 439 Cr.P.C. for grant of regular bail in FIR bearing no. 0390/2022 registered at P.S. Kalindi Kunj, Delhi under sections 20/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “NDPS Act”).

2. The perusal of FIR bearing no.0390/2022 dated 15.08.2022 registered under sections 20/61/85 of NDPS Act reflects that on



15.08.2022, the police officials namely Inspector Ganshyam Kishore, ASI Bhupender, HC Lakma Ram, HC Yashpal Singh and Ct. Man Singh were on arrangement duty at Kalandi Kunj Red Light Border Picket and were checking the traffic coming from Noida to Delhi. ASI Bhupender, at around 8:45 am, stopped a white Hyundai Accent bearing registration no. UP 14 FT 8884 which was coming from Noida and HC Yashpal Singh instructed the driver to roll down the windows for checking the car. A person was found sitting in the back seat of the said car along with a black coloured bag. HC Yashpal Singh asked him to open the bag for checking. When HC Yashpal Singh was going to the other side of the car, the man sitting in the back seat tried to run away. The police officials chased him and apprehended him near Kalindi Kunj Metro Station and brought him back to the car. He was questioned by the police officials. The apprehended man disclosed his name as Saddam Alam. On being questioned, Saddam Alam admitted that the substance in the bag is *ganja*. The black bag was opened and 10 packets wrapped with brown coloured tape were found. One of the 10 packets was opened and it was found to be containing *ganja*. This information was given



to senior police officials. On further questioning, Saddam Alam stated that he had to deliver the *ganja* to Manish Kumar near Sarita Vihar Metro Station. The 10 packets containing *ganja* were found to be weighing 2.080 kg each and the total weight of the 10 packets was found to be 20.800 kg. The black bag was found to be weighing 620 g. The 10 packets were kept in said black bag and the total weight was found to be 21.420 kg. Thereafter, the black bag was put inside a white sack (*katta*) and the mouth of the sack (*katta*) was sealed and a pullanda was prepared. The stamp of 'SK' was put on the pullanda. The pullanda was marked as 'A-1' and was taken into police custody. The public persons refused to join the investigation despite request after citing their difficulties. Notice under section 50 of NDPS Act was also given to the petitioner. The petitioner was found in possession of 20.800 kg of *ganja*. The petitioner was arrested by the police on 15.08.2022 at around 4:30 pm.

3. The disclosure statement of the petitioner was recorded wherein he disclosed that more contraband substance is lying in his room situated at Sector 63A, Noida. At the instance of the petitioner, 1 black bag containing 14 packets of *ganja* was discovered. The total



weight of the 14 packets along with the black bag was found to be 15.580 kg. The said black bag was put inside a white sack (*katta*) and the mouth of the sack (*katta*) was sealed and a pullanda was prepared. The stamp of 'VP' was put on the pullanda and the pullanda was marked as 'A-2'. In another smaller black bag, 2 packets of *ganja* were discovered. The total weight of the 2 packets along with the black bag was found to be 6.820 kg. The said black bag was put inside a white sack (*katta*) and the mouth of the sack (*katta*) was sealed and a pullanda was prepared. The stamp of 'VP' was put on the pullanda and the same was marked as 'A-3'. Besides this, in a grey bag, 3 polythene bags were found. The total weight of the 3 polythene bags along with the grey bag was found to be 15.870 kg. The said grey bag was put inside a white sack (*katta*) and the mouth of the sack (*katta*) was sealed and a pullanda was prepared. The stamp of 'VP' was put on the pullanda and the pullanda was marked as 'A-4'. The petitioner further disclosed that the contraband was delivered to his room by one Manish Kumar and then the petitioner used to deliver the contraband to Manish Kumar again to be supplied at different places.



4. The petitioner filed a bail application before the Sessions Court bearing Bail Matter no. 1677/2023 which was dismissed vide order dated 27.05.2023 passed by the court of Sh. Arul Verma, ASJ-04/ Special Judge (NDPS), South-East, Saket Courts, New Delhi, primarily on the ground that the petitioner was earlier arrested for a similar offence in Vishakhapatnam and has violated the bail condition imposed upon him by the concerned court.

5. The counsel for the petitioner advanced oral arguments and also submitted written submissions. The counsel for the petitioner stated that the petitioner is in judicial custody since 15.08.2022; the procedure adopted for sampling of the alleged contraband was in violation of the provision of law as per section 52A of the NDPS Act. The counsel for the petitioner prayed for grant of bail to the petitioner primarily on the ground of violation of section 52A of NDPS Act. The counsel for the petitioner cited **U.O.I. V Bal Mukund & Others**, CrI. Appeal no. 1397/2007, decided by the Supreme Court on 31.03.2009. The counsel for the petitioner also cited decisions of this Court which are **Ahmed Hassan Muhammed v. The Customs**, Bail Appln. 3076/2020, decided on 11.02.2021; **Laxman Thakur V**



**State (Govt. of NCT of Delhi)**, Bail Appln. 3233/2022, decided on 14.12.2022; **Basant Rai V State**, Crl. Appeal no. 909/2005, decided on 02.07.2012; **Gopal Das V NCB**, Bail Appln. 3491/2020, decided on 04.02.2021; **Amani Fidel Chris V Narcotics Control Bureau**, Crl. Appeal no. 1027/2015, decided on 13.03.2020; **Jasbir @ Jassu V The State (NCT of Delhi)**, Bail Appln. 471/2023, decided on 24.08.2023; **Ginkala Meddilety V The State**, Bail Appln. 1133/2022, decided on 05.09.2023. The counsel for the petitioner also cited various other decisions in support of his arguments.

6. The Additional Public Prosecutor appearing on behalf of the respondent/State stated that 42.250 kg of *ganja* was recovered from the petitioner which is much more than the commercial quantity i.e. 20 kg, therefore, in view of section 37 of the NDPS Act, the petitioner is not entitled to be released on bail. He also argued that the main ground raised by the petitioner for grant of bail is violation of section 52A of the NDPS Act. He further argued that the violation of any provision of law should not be examined at this stage as it is a matter of trial and in the present case, the trial is yet to begin. The Additional Public Prosecutor for the respondent/State further stated



that the petitioner was arrested in Vishakhapatnam for a similar offence with 10 kg of dry *ganja* on 04.09.2018 in FIR bearing no.85/2018 registered under section 8(c) read with section 20(b)(ii)(c) of the NDPS Act at P.S. Vishakhapatnam-III, Andhra Pradesh. The petitioner was granted bail in the abovementioned case on the condition that he will not commit any other offence. The petitioner has already violated the said bail condition imposed upon him. The Additional Public Prosecutor distinguished the facts of the present case from the facts of the cases as relied upon by the counsel for the petitioner by arguing that some of these judgments were passed by Co-ordinate Benches of this Court while dealing with appeals against conviction and in some other judgments, bail was granted to the accused keeping in view the fact that the accused was in custody since a long period of time. The Additional Public Prosecutor, in support of his arguments, cited the decision of the Supreme Court in **State of Punjab V Balbir Singh and Others**, (1994) 3 SCC 299. The Additional Public Prosecutor also cited the decisions of this Court in **Bipin Behari Lenka V Narcotic Control Bureau**, 2022 SCC OnLine Del 1160; **Shailender V State NCT of**



**Delhi**, Bail Appln. 3508/2021, decided on 03.08.2022; **Arvind Yadav in JC through his Pairokar V Govt of NCT Delhi through Standing Counsel**, 2021 SCC OnLine Del 3619; **Sunny V State (Govt. of NCT of Delhi)**, Bail Appln. 3054/2022, decided on 15.03.2023; **Masibur Khan V State (Govt of NCT of Delhi)**, Bail Appln. 2894/2022, decided on 31.05.2023.

7. Section 52A of NDPS Act deals with disposal of seized Narcotic Drugs and Psychotropic Substances. Sub-section (1) provides that narcotic drugs and psychotropic substances should after their seizure, be disposed of by such officer and in the manner which the Government may prescribe from time to time by following the prescribed procedure. Sub-section (2) provides that after narcotic drugs and psychotropic substances have been seized and forwarded to the officer in charge of the nearest police station or any other authorised officer, an inventory of such narcotic drugs and psychotropic substances etc. is required to be prepared with details. The officer is also required to make an application to the Magistrate for the purpose of certifying the correctness of inventory prepared, taking photographs and allowing to draw representative samples of



such drugs and substances in the presence of such Magistrate who would certify the correctness of the list of samples so drawn. The concerned Magistrate is obliged to allow the application as soon as possible.

8. Ms. Marilyn Joanna Khakha, MM Reliever, South-East District, Saket Courts, New Delhi vide proceedings dated 27.08.2022, conducted the proceedings under section 52A of NDPS Act on the application filed by the Investigating Officer for certifying the inventory and seeking permission to take photographs and to allow the drawing of the representative samples in the presence of Metropolitan Magistrate and thereafter certifying correctness of the samples so drawn. It is reflected from the proceedings dated 27.08.2022 that HC Tika Ram had brought four pullandas stated to be the case property, which were sealed with the seal of 'SK','P.K' marked as 'A', seal of 'VP','P.K' marked as 'A-2', seal of 'VP','P.K' marked as 'A-3' and seal of 'VP','P.K' marked as 'A-4' respectively. The FIR no.0390/2022 dated 15.08.2022 was also mentioned on the four pullandas.

8.1 It is also reflected from the proceedings dated 27.08.2022 that



pullanda marked as 'A' was opened, out of which one black bag with white stripes was taken out which was containing 10 packets, which were packed in a brown scotch tape and were put on the weighing machine and it was found that weight of each packet was 2.080 kg. Thereafter, the packets were opened and mixed in the black bag which became full of green coloured substance and a pinch was taken out of it. After mixing of the material, the total weight was found 21.048 kg. The Investigating Officer sought permission to take two samples of 100 g each from the seized substance. The Investigating Officer had taken two samples both weighing 100 g in two separate empty plastic containers, each weighing 214 g. The samples were marked as 'S-1' and 'S-2'. After taking the samples, the samples ('S-1' and 'S-2') and the remaining substance (marked as 'X') were sealed with the seal of the court i.e. 'RS' and other formalities were also completed.

**8.2** The pullanda marked as 'A-2' was opened, out of which one black bag with white stripes was taken out which was containing 14 packets, which were packed in a brown scotch tape and were put on the weighing machine and it was found that weight of all the 14



packets together was 14.950 kg. Thereafter, the packets were opened and mixed in the black bag which became full of green coloured substance and a pinch was taken out of it. After mixing of the material, the total weight was found 15.332 kg. The Investigating Officer sought permission to take two samples of 100 g each from the seized substance. The Investigating Officer had taken two samples both weighing 100 g in two separate empty plastic containers, each weighing 214 g. The samples were marked as 'S-3' and 'S-4'. After taking the samples, the samples ('S-3' and 'S-4') and the remaining substance (marked as 'X1') were sealed with the seal of the court i.e. 'RS' and other formalities were also completed.

**8.3** The pullanda marked as 'A-3' was opened, out of which one black bag with white stripes was taken out which was containing 2 packets, which were packed in a brown scotch tape and were put on the weighing machine and it was found that weight of the 2 packets was 3.156 kg and 3.120 kg. Thereafter, the packets were opened and mixed in the black bag which became full of green coloured substance and a pinch was taken out of it. After mixing of the material, the total weight was found 6.692 kg. The Investigating



Officer sought permission to take two samples of 100 g each from the seized substance. The Investigating Officer had taken two samples both weighing 100 g in two separate empty plastic containers, each weighing 144 g. The samples were marked as 'S-5' and 'S-6'. After taking the samples, the samples ('S-5' and 'S-6') and the remaining substance (marked as 'X2') were sealed with the seal of the court i.e. 'RS' and other formalities were also completed.

**8.4** The pullanda marked as 'A-4' was opened, out of which one grey bag was taken out which was containing 3 packets which were packed in white polythene and were put on the weighing machine and it was found that weight of the 3 packets was 2.904 kg, 5.082 kg and 5.084 kg. Thereafter, the packets were opened and mixed in the grey bag which became full of golden-brown coloured substance and a pinch was taken out of it. After mixing of the material, the total weight was found 14.794 kg. The Investigating Officer sought permission to take two samples of 100 g each from the seized substance. The Investigating Officer had taken two samples both weighing 100 g in two separate empty plastic containers, each weighing 144 g. The samples were marked as 'S-7' and 'S-8'. After



taking the samples, the samples ('S-7' and 'S-8') and the remaining substance (marked as 'X3') were sealed with the seal of the court i.e. 'RS' and other formalities were also completed.

9. It is reflecting from the proceedings dated 27.08.2022 conducted under section 52A of NDPS Act that the case property which was seized from the possession of the accused was mixed at the time of conducting the proceedings for sampling and after mixing, two samples of 100 g each were taken from each of the pullanda marked as 'A', 'A-1', 'A-2' and 'A-3'.

10. The procedure of drawing a sample of the narcotic drugs and psychotropic substances has been laid down in Standing Order 1/88 dated 15.03.1988 issued by the Narcotics Control Bureau. The relevant paragraphs of the said Standing Order are reproduced as under:-

**1.6 Quantity of different drugs required in the sample - The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.**



**1.7 Number of samples to be drawn in each seizure case-**

**(a) In the case of seizure of single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container.**

**(b) However, when the package/container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/the packages/container may be carefully bunched in lots of 10 packages/containers may be bunched in lots of 40 such packages such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.**

**(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.**

**(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers.**

**(e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.**

**10.1** In *pari materia* with the Standing Order No. 1/88 is the Standing Order No.1/89 dated 13.06.1989 issued under subsection (1) of Section 52A of NDPS Act by the Department of Revenue, Ministry of Finance, Government of India. Section (II) of the said



Standing Order of 1989 provides for the general procedure for sampling, storage. The relevant portion of the said Standing Order reads as under:-

**2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.**

**2.4. In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.**

**2.5. However, when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.**

**2.6. Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain and, in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.**

**2.7. If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja**



and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

**2.8. While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative samples in equal quantity are taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.**

11. The issue which needs consideration is that whether the alleged violation of section 52A of NDPS Act in drawing the samples by the concerned Metropolitan Magistrate entitles the accused for grant of bail notwithstanding the provisions of section 37 of NDPS Act, which reads as under:-

**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 3 [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.**



12. The Supreme Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In **Union of India V Ram Samujh and Others**, 1999 (9) SCC 429, it has been observed as under:-

7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they 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. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secy., Union Territory of Goa* [(1990) 1 SCC 95] as under:

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace,



causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

- (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and
- (ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socioeconomic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.

13. The Supreme Court in **State of Punjab V Balbir Singh and Others**, (1994) 3 SCC 299, while dealing with sections 52 and 57 of the NDPS Act, has observed as under:-

Sections 52 and 57 come into operation after the arrest and seizure under the Act. Somewhat similar provisions are also there in the CrPC. If there is any violation of these provisions, then the Court has to examine the effect of the same. In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for



strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.

The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

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(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

14. A Co-ordinate Bench of this Court in **Bipin Bihari Lenka V Narcotics Control Bureau**, 2022 SCC OnLine Del 1160, while dealing with the alleged violation of section 52A of NDPS Act,



dismissed the bail application and observed that the alleged prejudice caused to the applicant on account of non-compliance of sampling procedure would have to be established during the course of trial. It was observed as under:

**13. ...I am of the view that at this stage, it may be premature to hold that the procedure adopted for sampling vitiates the entire proceedings since the sampling was done after each of the packets tested positive for Ganja. The prejudice, if any, on account of alleged improper sampling as contended by counsel for the petitioner, can only be appropriately considered after the examination of the witnesses during the course of trial.**

**14. In the facts and circumstances and considering the connecting evidence on record, wherein the contraband has been recovered from private vehicle driven by the petitioner, I am of the considered opinion that no grounds for grant of bail are made out in the light of twin conditions laid down in Section 37 of NDPS Act.**

**The application is accordingly dismissed.**

**14.1** Similarly, a Co-ordinate Bench of this Court, vide order dated 03.08.2022 passed in BAIL APPLN. 3508/2021 titled as **Shailender V State NCT of Delhi**, denied bail to the applicant therein by holding that the procedural lapse has to be determined during the course of the trial and not in a proceeding for grant of bail. After discussing various judgments passed by Co-ordinate Benches of this Court on the issue of sampling procedure, it was held as under:



8. It may be observed that the proposition of sending entire quantity seized for chemical analysis may not be practicable in several cases. The drug peddlers and suppliers appear to be adopting the unique and novel methodology to escape law, by carrying large number of smaller packets which later on, is challenged on the ground of improper sampling during investigation. In *Gaunter Edwin Kircher vs. State of Goa*, it was prima facie established by the accused that the recovered substance consisted two separate forms but only a part of the same which was a flat substance and not in the form of cigars was forwarded. As such, benefit was extended at the stage of appeal since no finding could be given that other part of the alleged recovered substance, which was not forwarded for examination could be presumed to be a narcotic substance. However, the factual position in the present case is distinct.

Though the burden always remains on the prosecution to prove that the quantity possessed by accused was heroin, beyond reasonable doubt but it cannot be ignored that the petitioner is yet to come up with any explanation during trial as to what was allegedly contained in the similarly packed smaller packets which on preliminary testing by the Investigating Agency tested positive for heroin. Prima facie the substance recovered in different packets was of similar texture, colour and tested positive on field testing. The circumstances under which the sampling procedure could not be followed as per the mandate, needs to be duly considered after the evidence has been led on record and the FSL expert is examined. Considering the limitations for grant of bail referred in Section 37(1)(b)(ii) for offences punishable under Sections 19, 24 or 27A and also for offences involving a commercial quantity, there must exist 'reasonable grounds to believe' at this stage that the person is not guilty of such an offence. In my considered opinion, there does not exist reasonable grounds at this stage to give a finding that the entire proceedings stand vitiated because of the alleged sampling procedure adopted by the



**Investigating Agency. The procedural deficiency in sampling, as contended by learned counsel for the petitioner, can be considered only after the evidence is led on record. The observations of learned Trial Court in order dated 07.09.2021 are also relevant in this regard.**

**“.....Even if for the sake of arguments, it is presumed that accused/applicant is liable for possession of one packet only, even then accused/applicant is not entitled to bail as a matter of right. 200 grams of heroin is more than small quantity but less than commercial quantity. The facts and circumstances of the present case are very different from the facts and circumstances of the cases upon which reliance has been placed by Ld. Counsel for accused/applicant. The other contentions raised by Ld. Counsel for accused/applicant are a matter of trial.....” For the foregoing reasons, no grounds for bail are made out, at this stage. The application is accordingly dismissed.”**

**14.2** Another Co-ordinate Bench of this Court, in **Arvind Yadav in JC through his Pairokar V Govt of NCT Delhi through Standing Counsel**, 2021 SCC OnLine Del 3619, while dismissing an application for bail after considering violation of section 52A of NDPS Act, held as under:

**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.

**14.3** Further, a Co-ordinate Bench of this Court, while relying upon **Arvind Yadav** (supra), vide order dated 15.03.2023 passed in BAIL APPLN. 3054/2022 titled **Sunny V State (Govt. of NCT of Delhi)**, denied bail to the applicant therein and held as under:

**8. Thus, admittedly there was confusion in the procedure of drawing samples and per Arvind Yadav (supra) even if samples were drawn at the spot would not vitiate the trial, hence any violation thereof could never be the sole basis for grant of bail. Such discrepancy in rules was even noted by the Hon'ble Supreme Court in Mohan Lal (supra) and accordingly fresh Rules were notified vide gazette notification dated 23.12.2022, thus the compliance of Standing Order 01/1989 prior to the notification (supra) perse would not be a ground to grant bail. Hence purely on this ground, I am not inclined to grant bail to the petitioner.**

**14.4** Another Co-ordinate Bench of this Court, vide judgment dated 31.05.2023 passed in Bail Appln. 2894/2022 titled as **Masibur Khan V State (Govt of NCT of Delhi)** denied bail to the applicant therein and observed as under:-

**30. 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.

31. It has been pointed out on behalf of the prosecution that the aforesaid standings order are more in the nature of guidelines with respect to drawl of samples and non-compliance thereof, without showing prejudice, cannot be a ground for bail, especially in cases involving commercial quantity. It has also been submitted that prejudice caused, if any, would have to be established at trial during recording of evidence and examining necessary witnesses.

32. In the present case the alleged recovery is of 09 bags containing 04 small packets each (36 packets of 5 kg each). The alleged total recovery is 180 kg of ganja. It is the case of the prosecution that out of those 04 packets in each bag, a sample was taken which was then homogenously mixed together and after mixing the same, two samples of 250 gm each were taken. The contention of learned counsel appearing on behalf of the applicant is that the aforesaid sampling is defective and for the same he has placed reliance on Standing Order 1/88 & 1/89, dated 15.03.1988 and respectively 13.07.1989, is misplaced.

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34. In the present case, the Seizing Officer had taken sample from each of the 04 bags contained in each of the 09 bags and after homogenously mixing those 04 samples, 02 samples of 250 gm each has been drawn with respect to each of 04 bags containing in one bag. It is also pertinent to note that recovery was with regard to ganja which



otherwise is identifiable by its texture and smell, so non usage of field testing kit is not fatal to the procedure. In any case final confirmation has to be from the chemical analyst.

35. 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.

36. 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.

37. In view of the aforesaid position and circumstances, the present application is dismissed and disposed of accordingly.

15. The decision in **Amani Fidel Chris V Narcotics Control Bureau** (supra) cited by the counsel for the petitioner is distinguishable from the facts of the present case as the findings were given at the stage of appeal after the trial had been concluded. The decision in **Amani Fidel Chris V Narcotics Control Bureau** (supra) as such is not applicable under given facts and circumstances of the present case. In **Basant Rai V State** (supra), the findings were given at the stage of appeal after the trial had been concluded and as such they are not applicable under given facts and circumstances of the present case.

16. It is reflecting that the petitioner was found in possession of commercial quantity of *ganja*. There may be a procedural lapse in the drawing of samples vide the proceedings dated 27.08.2022, but the validity of the proceedings under section 52A of NDPS Act cannot be examined at the stage of consideration of bail and it has to be decided during the trial. The petitioner is not entitled for the grant of bail for



the alleged violation of section 52A of NDPS Act, which is a matter of consideration during the trial or after conclusion of the trial. The petitioner was earlier arrested in a similar case in Vishakhapatnam and was released on bail on the condition that he will not commit any other offence while on bail. The petitioner has violated the said condition imposed upon him by the concerned court. The petitioner is not entitled for grant of bail.

17. In view of the above, no ground for bail is made out. Hence, the present bail application is dismissed.

18. The present application is accordingly disposed of.

**DR. SUDHIR KUMAR JAIN**  
**(JUDGE)**

**OCTOBER 11, 2023**

*N/AM*