



2023:DHC:8550



* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : 10th November, 2023*

Judgment Delivered on: 1st December, 2023

+ BAIL APPLN. 2754/2022

SOMDUTT SINGH @ SHIVAM

..... Petitioner

Through: Mr. Prithish Sabharwal with
Mr. Sharad Pandey, Advocates.

versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through: Mr. Subhash Bansal, Senior Standing
Counsel with Mr. Raghav Bansal,
Advocate.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

1. The present application has been filed seeking grant of regular bail in Crime No. VIII/25/DZU/2019 under Sections 8/22(c)/23/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The applicant has been in judicial custody since 8th April, 2021.

2. The brief facts of the case, as set up by the prosecution are as follows:

2.1 On 6th July, 2019, on receipt of information, the Narcotics Control Bureau (hereinafter "NCB") Team reached DTDC Express Limited Courier Company, New Delhi, where one parcel was found in the name of one Mr. Sudhir Shrivastava, Lucknow to one Mr. Amar Shrivastava, Lynchburg, USA, which was opened and was found containing, *inter alia*, 500 strips of

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10 tablets each of Alprazolam. Therefore, a total of 5000 tablets of Alprazolam were found.

2.2 Out of the recovered tablets, one strip of 10 tablets was opened and upon weighing the tablets, the weight of 10 tablets was found to be 2 grams. Therefore, total weight of the 5000 tablets of Alprazolam was ascertained to be 1 kg, which constitutes commercial quantity (commercial quantity of Alprazolam being 100 grams).

2.3 Upon investigation from the manufacturer of the medicines, it was found that the medicines were sold to M/s SS Medicos in District Ballia, Uttar Pradesh. It was revealed that one Mr. Bhanu Pratap Singh was in charge of the affairs of M/s SS Medicos. Accordingly, Bhanu Pratap Singh was served with notice under Section 67 of the NDPS Act, who tendered his voluntary statement and disclosed that he had sold 20,000 tablets of Alprazolam to one Manish Gupta. Consequently, Bhanu Pratap Singh was arrested on 5th December, 2020.

2.4 Subsequently, upon notices under Section 67 of the NDPS Act being issued to the aforesaid Manish Gupta, he tendered his voluntary statement wherein he stated that out of the 20,000 tablets that he had purchased from Bhanu Pratap Singh, he had booked 5,000 tablets which were seized from DTDC, New Delhi and the remaining 15,000 tablets were sold to one Somdutt Singh. Manish Gupta also endorsed print outs of his conversations with Somdutt Singh and disclosed his involvement in the illegal trade in psychotropic substances. Consequently, Manish Gupta was arrested on 5th April, 2021.

2.5 Upon further investigation, Somdutt Singh was served with a notice under Section 67 of the NDPS Act, in pursuance of which he tendered his

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voluntary statement on 7th April, 2021, wherein he disclosed that a huge quantity of psychotropic substances was lying at his rented apartment situated at F4-19, 4th Floor, Pocket-2, Sector-2, Narela, Delhi (hereinafter 'Narela Flat'). On 7th April, 2021, the NCB team, accompanied by the applicant Somdutt Singh reached the aforesaid apartment and upon search of the same recovered 12,250 Tramadol tablets, 1500 Zolpidem Tablets, 400 Diazepam Tablets, 1.286 kg loose Alprazolam tablets and 2000 Clonazepam tablets, which constitute commercial quantity.

2.6 On 8th April, 2021, Somdutt Singh disclosed that he used to send parcels containing psychotropic substances abroad through different post offices by using fake IDs provided by one Arun @ Varun and Manish Gupta. He also disclosed that 16-17 parcels to USA were already booked with Rohini Sector-7 Post Office and messages regarding the details of the same were forwarded to Arun @ Varun. Consequently, 17 parcels were seized by the NCB at Foreign Post Office, ITO containing huge quantities of various psychotropic substances. Subsequent to these recoveries, Somdutt Singh was arrested on 8th April, 2021.

2.7 Further, at the instance of Somdutt Singh, tracking IDs and photographs of various parcels booked were recovered from his mobile phone. Consequently, on 21st September, 2021, 9 parcels were seized from the Foreign Post Office, ITO and commercial quantities of psychotropic substances were recovered.

3. The applicant Somdutt Singh had moved an application before the learned Additional Sessions Judge, NDPS, Patiala House Courts, New Delhi which was dismissed on 29th August, 2022.

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4. Counsel appearing on behalf of the applicant has made the following submissions:

- I. The applicant's name surfaces for the first time in the statement of Manish Gupta under Section 67 of the NDPS Act. However, no recovery has been made in pursuance of such statement and therefore, the same is inadmissible. Reliance is placed on the judgment of the Supreme Court in *Tofan Singh v. State of Tamil Nadu*, (2021) 4 SCC 1.
- II. The Narela Flat has allegedly been shown as the rented accommodation of the applicant. However, no rent agreement or any other appropriate document has been placed on record to show that the apartment was in fact in possession of the applicant.
- III. The Narela Flat was searched without authorization and in violation of Section 42 of the NDPS Act as no reasons to believe were recorded in writing and forwarded to a superior officer. Further, at the time of seizure, no preliminary testing was undertaken by the agency, which ought to have been done.
- IV. There is an inordinate delay in compliance of the procedure prescribed under Section 52-A of the NDPS Act and no explanation has been given on behalf of the NCB for the same. In this regard, reliance is placed on the judgment of the Supreme Court in *Union of India v. Mohanlal*, (2016) 3 SCC 379 and the judgments of the Co-ordinate Benches in *Kashif v. Narcotics Control Bureau*, (2023) SCC OnLine Del 2881; *Sarvothaman Guhan @ Saarvo v. Narcotics Control Bureau*, 2023 SCC OnLine Del 5643 and *Tamir Ali v. Narcotics Control Bureau*, 2023 SCC OnLine Del 3015.

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- V. The rigours of Section 37 of the NDPS Act are not applicable as there has been no recovery made from the applicant in the present case.
- VI. No CDR records between the petitioner and the other co-accused have been produced and the alleged WhatsApp chats/conversations are not sufficient material to link the petitioner with the trafficking of the contraband. Reliance is placed on the judgment of the Supreme Court in **Bharat Chaudhary v. Union of India**, 2021 SCC OnLine SC 1235.
- VII. Arun Kumar @ Varun, who is a co-accused in the present case has been granted regular bail by this Court *vide* order dated 25th April, 2023 in BAIL APPLN. 1700/2022.
5. *Per contra*, learned Senior Standing Counsel appearing on behalf of the NCB has opposed the present bail application by making the following submissions:
- I. The applicant was directly involved in procuring and sending commercial quantity of psychotropic substances along with other co-accused persons. Recoveries were made from the apartment of the applicant as well as from the Foreign Post Office, ITO, pursuant to the disclosure made by the applicant.
- II. There has been full compliance of the requirements under Section 52-A of the NDPS Act. The samples were drawn before the learned Magistrate in the presence of the accused persons and the said samples were sent to CRCL and the positive Report for psychotropic substances has been received. In any event, non-compliance with any procedural requirement would be subject matter of trial. In this



regard, reliance has been placed on the judgments of the Co-ordinate Benches in ***Gauri Shankar Jaiswal v. Narcotics Control Bureau***, 2023 SCC OnLine 3327 and ***Surender Kumar v. Central Bureau of Narcotics***, 2023 SCC OnLine Del 6839.

- III. Compliance of procedure laid down under Section 42 of the NDPS Act is a question of fact and can only be raised during the course of trial. Reliance in this regard is placed on the judgment of the Co-ordinate Bench in ***Praveen Khatri v. State***, 2023 SCC OnLine Del 6038.
 - IV. Charges are yet to be framed in the present case and the trial is yet to commence. In view of the rigours contained in Section 37 of the NDPS Act, the applicant cannot be granted bail at this stage.
 - V. The requisite certificate under Section 65B of the Indian Evidence Act, 1872, in respect of the WhatsApp chats between the applicant and the other co-accused persons has duly been filed before the Trial Court in a pen drive.
 - VI. Applicant is also involved in another case being Crime No. VIII/13,13A/DZU/2020 under Sections 8/22(c)/23/25/29 of the NDPS Act.
 - VII. Applicant cannot claim parity with Arun Kumar @ Varun as no recoveries were made from him.
6. I have heard the counsels for the parties and perused the material on record.
7. In the present case, it cannot be disputed that on the basis of the disclosure made by the applicant, at least three recoveries of commercial quantities of psychotropic substances have been made. The first recovery of

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commercial quantity of psychotropic substances was made from the Narela Flat. In fact, the applicant was the one who guided the raiding team to the aforesaid flat and the *panchnama* thereof was made in the presence of two independent witnesses. Further, a total of 26 parcels containing commercial quantity of psychotropic substances were also recovered from the Foreign Post Office ITO, Delhi, pursuant to the disclosures made by the applicant in his statement under Section 67 of the NDPS Act. In view of Section 27 of the Indian Evidence Act, 1872, any recovery made pursuant to the disclosure made by an accused person is admissible in law.

8. There are also WhatsApp chats recovered from the mobile phone of the applicant that show transactions between the applicant and the other co-accused persons. It is stated that the requisite certificate under Section 65B of the Indian Evidence Act, 1872, has been filed before the Trial Court. The judgment of the Supreme Court in ***Bharat Choudhary*** (supra) would not come in aid of the applicant as no recovery was made from the petitioner therein and he was arrested on the disclosure made by the other co-accused persons.

9. Insofar as non-compliance of Section 42 of the NDPS Act is concerned, the same would have to be tested at the time of trial, as held by the judgment of the Co-ordinate Bench in ***Pravin Khatri*** (supra).

10. The applicant cannot claim parity with the co-accused Arun Kumar @ Varun as in the case of Arun Kumar @ Varun, there was no recovery made from him or pursuant to his disclosure. The case against Arun Kumar @ Varun was completely based on the disclosure made under Section 67 of the NDPS Act and therefore, benefit of the judgment in ***Tofan Singh*** (supra) was



given to him. The judgment granting him bail itself notes that the role of Arun Kumar was quite different from the other accused.

11. Now, I shall deal with the objection taken by the counsel for the applicant with regard to non-compliance of Section 52-A of the NDPS Act.

12. In regard to Section 52-A of the NDPS Act, the Supreme Court in **Mohanlal** (supra) has made the following observations:

“16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

...

19. Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of



the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.”

13. A reading of the aforesaid *dicta* of the Supreme Court makes it clear that Section 52-A of the NDPS Act prescribes that upon seizure of psychotropic substances, the officer shall approach the Magistrate, under whose presence and supervision the process of sampling will be conducted and certified to be correct. Though the application under Section 52-A of the NDPS Act has to be made without undue delay, no time limit for the same has been prescribed.

14. A Co-ordinate Bench of this Court in **Gauri Shankar Jaiswal** (supra), while denying grant of bail to the accused in an offence involving commercial quantity of *charas*, observed that the defects in sampling and the effects thereof are to be proved during the course of trial. The relevant observations are reproduced hereunder:

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“33. It has been pointed out on behalf of the prosecution that the aforesaid standings orders are more in the nature of guidelines with respect to drawing 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.

34. 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 show that the said recovery was defective and sample drawn were not the true representatives of the sample 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.**

35. The issue with regard to defect in sampling was for the first time dealt with by the Hon'ble Supreme Court in Balbir Singh (supra). In the said judgment, it was 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 samples 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**

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is still there for any further analysis if so required. Therefore, it is premature at this stage to say that the samples 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.”

15. Similarly, a Co-ordinate Bench of this Court in **Arvind Yadav v. Govt. (NCT of Delhi)**, 2021 SCC OnLine Del 3619, refused the grant of bail in a case involving commercial quantity of cocaine despite the sampling not being carried out in the presence of a Magistrate. The relevant observations in this regard are set out below:

“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 an 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.”

16. Furthermore, recently a Co-ordinate Bench of this Court in **Surender Kumar** (supra) has observed that Section 52-A of the NDPS Act is directory in nature and non-compliance of the same, in itself, cannot render the investigation invalid. Accordingly, the bail application of an accused charged of illegally selling narcotic medicines was dismissed by taking into account that the case involved commercial quantity of such medicines.

17. It is clear from a reading of the aforesaid judgments that there is no mandatory time duration prescribed for compliance of Section 52-A of the



NDPS Act. Though it is desirable that the procedure contemplated in Section 52-A of the NDPS Act be complied with at the earliest, mere delayed compliance of the same cannot be a ground for grant of bail. The applicant will have to show the prejudice caused on account of delayed compliance of Section 52-A of the NDPS Act.

18. In the present case, the sampling of the seized psychotropic substances was carried out in the presence of the Magistrate and the accused persons and the samples were directed to be sent for testing. The applicant has failed to show the prejudice caused to him on account of the delayed compliance of Section 52-A of the NDPS Act.

19. At this stage, it is apposite to refer to the judgments relied on by the counsel for the applicant. In *Kashif* (supra) and *Tamir Ali* (supra) no recovery was effected from the possession or at the instance of the applicants therein. Further, in *Sarvothaman Guhan* (supra), the recovery from the applicant was not of a commercial quantity. Therefore, reliance placed on the aforesaid judgments is misplaced as the rigours of Section 37 of the NDPS Act were not applicable therein.

20. Considering the aforesaid facts and circumstances including the fact that commercial quantities of psychotropic substances have been recovered at the instance of the applicant, it is not possible to form a *prima facie* view at this stage, that the applicant is not guilty of the offences or that he would not commit similar offences if released on bail. Therefore, the twin conditions of Section 37 of the NDPS Act are not satisfied and bail cannot be granted to the applicant at this stage.

21. Accordingly, the present application is dismissed.



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22. Needless to state that any observations made herein are purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on the merits of the case.

23. All pending applications stand disposed of.

AMIT BANSAL, J.

DECEMBER 01, 2023

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