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

+ **BAIL APPLN. 886/2024**

YASHMIN

.....Petitioner

Through: Mr. Kundan Kumar, Mr. Randhir Kumar and Mr. Saurabh Srivastava, Advocates.

versus

STATE (NCT OF DELHI)

.....Respondent

Through: Mr. Manoj Pant, APP for the State with Ms. Anugyaa Sharma, Mr. Chirag Aneja, Mr. Dhruv Kumar Verma, Mr. A. Dubey and Ms. Sushma, Advocates.
SI Mahendra Patel, P.S.: Narela.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

27.08.2024

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By way of the present petition filed under section 439 of the Code of Criminal Procedure 1973, the petitioner seeks regular bail in case FIR No. 636/2022 dated 17.12.2022 registered under sections 21/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') at P.S.: Narela, Delhi.

2. Notice on this petition was issued on 12.03.2024; whereupon Status Report dated 10.07.2024 has been filed by the State. Nominal Roll dated 29.04.2024 has also been received from the Jail Superintendent.
3. Mr. Kundan Kumar, learned counsel appearing for the petitioner has pressed only one point in support of the bail petition, viz. that the record of the matter would show that no inventory of the contraband



allegedly recovered from the premises belonging to the petitioner was prepared in accordance with the mandate of section 52-A(2) read with section 53 of the NDPS Act; and therefore, in view of the recent decision of the Supreme Court in *Yusuf @ Asif vs. State*,¹ the seizure is vitiated and there is no primary evidence available on the basis of which the petitioner should even stand trial.

4. Mr. Kumar has drawn attention of this court to section 52-A(2) of the NDPS Act to submit, that the inventory of the seized contraband is required to be prepared by an officer referred to in section 52-A(1) of the NDPS Act; and in the present case, admittedly *there has been no inventorisation at all*, much less an inventory being prepared by an officer empowered under section 52-A(1) of the NDPS Act. Counsel submits, that the only document in evidence of the alleged recovery of the contraband is the seizure memo, which was prepared by the Investigating Officer himself.
5. Mr. Kumar further submits, that evidently, the seized contraband was also not forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53(1) of the NDPS Act as required under section 52-A(2).
6. On the other hand, opposing grant of bail, Mr. Manoj Pant, learned APP appearing for the State submits that 285 grams of heroin have been recovered from the premises of the petitioner. Mr. Pant further draws attention of this court to order dated 03.01.2023 made by the learned Metropolitan Magistrate, Rohini Courts, Delhi on an

¹ 2023 SCC OnLine SC 1328



application moved by the Investigating Officer under section 52-A of the NDPS Act, to submit that the said order shows that there was substantial compliance with the provisions of section 52-A(2) of the NDPS Act.

7. A copy of the order has been shown to the court from the case file.
8. A perusal of order dated 03.01.2023 shows, that the application under section 52-A of the NDPS Act was made by the Investigating Officer *for drawing samples* from the allegedly recovered contraband, on which application the learned Magistrate has recorded the following order :

*“IO is present in person along with the case property stated to be Smack in a Transparent box (marked as Mark A1) recovered from accused **Yashmin, W/o Md. Yunus Khan, R/o H. No-403, Pocket-4, Sec-A6, Punarwas Colony, Narela, Delhi, aged 48 years,** sealed with the seal of ‘VK’ and ‘US’ and having the details of FIR.*

“I have carefully gone through the seizure memo shown by the IO. Section 52-A NDPS Act provides that in case such application is moved, the Magistrate has to certify correctness of the inventory prepared during the course of investigation, allow photographs of NDPS to be taken and allow representative samples to be drawn.”

(underscoring supplied)

9. The order thereupon proceeds to direct the Investigating Officer to open the box in which the allegedly seized contraband was contained, to weigh it and to thereafter draw samples therefrom.
10. Though the learned APP has stressed on the point that what section 52-A of the NDPS Act seeks to do is to preserve the integrity of the seized contraband; and that the proceedings in the present case would show that there was substantial compliance with that provision, the



attention of this court is drawn to the observation of the Supreme Court in *Yusuf @ Asif* (supra), which was a case where 04 persons were found in possession of 20 kgs of heroin, kept in 02 jute bags and the Supreme Court recorded the submission of the State and opined as follows:

“13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of sub-section (2) of Section 52A of the NDPS Act.

* * * * *

“16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

“17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.”

(emphasis supplied)



11. Upon an overall consideration of the circumstances obtaining in the matter and the submissions made, what weighs with the court at this stage is the following :
 - 11.1. There is *evidently a doubt* as to whether the allegedly seized contraband was inventorised in the manner as mandated by section 52-A(2) NDPS Act.
 - 11.2. Nominal Roll dated 29.04.2024 shows that the petitioner, a lady of about 42 years of age, has been in judicial custody since 17.12.2022 and has thereby spent about 01 year and 08 months in custody; that her jail conduct has been 'satisfactory'; and that she has no other criminal involvements.
 - 11.3. Chargesheet in the matter has been filed on 18.03.2023; and out of 22 prosecution witnesses only 03 witnesses are stated to have been examined as of now.
12. In the above view of the matter, this court is persuaded to grant to the petitioner – **Yashmin w/o Yunish Khan** – *regular bail* pending trial, subject to the following conditions :
 - 12.1. The petitioner shall furnish a personal bond in the sum of Rs. 25,000/- (Rs. Twenty-five Thousand Only) with 02 local sureties in the like amount from family members, to the satisfaction of the learned trial court;
 - 12.2. The petitioner shall furnish to the Investigating Officer a cellphone number on which the petitioner may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;



- 12.3. If the petitioner has a passport, she shall surrender the same to the learned trial court and shall not travel out of the country without prior permission of the learned trial court;
- 12.4. The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.
- 12.5. In case of any change in her residential address/contact details, the petitioner shall promptly inform the I.O. in writing.
- 12.6. Since the petitioner is facing trial and is therefore appearing before the learned trial court from time-to-time, it is not considered necessary to impose a reporting requirement as a condition of bail.
13. Nothing in this order shall be construed as an expression of opinion on the merits of the pending matter.
14. A copy of this order be sent to the concerned Jail Superintendent *forthwith*.
15. The petition stands disposed-of in the above terms.
16. Other pending applications, if any, are also disposed-of.

ANUP JAIRAM BHAMBHANI, J

AUGUST 27, 2024

V.Rawat