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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Date of decision: 14.05.2024*+ **CRL.M.C. 3866/2024**

NARCOTIC CONTROL BUREAU (DZU) Petitioner

Through: Mr.Utsav Singh Bains, SPP
(through VC)

versus

AQYAR KHAN SHINWARI

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE NAVIN CHAWLA****NAVIN CHAWLA, J. (ORAL)****CRL.M.A. 14787/2024 (Exemption)**

1. Allowed, subject to all just exceptions.

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2. This petition has been filed under Section 439(2) read with Section 482 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.'), challenging the Order dated 29.01.2024 (hereinafter referred to as 'Impugned Order') passed by the learned Additional Sessions Judge (Special Judge – NDPS), New Delhi District, Patiala House Courts, New Delhi (hereinafter referred to as the 'Special Judge') in SC No.20/2020 titled *NCB v. Aqyar Khan* (Complaint Case no.VIII/30/DZU/2019) directing release of the respondent on Bail in the abovementioned case.



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3. The abovementioned Complaint Case has been registered on the complaint of the petitioner alleging Offence under Sections 8(c), 21(c), 23(c), and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'NDPS Act'), *inter alia*, against the respondent.

4. The learned Special Judge by the Impugned Order has directed the respondent herein to be released on Bail, observing that the respondent has been able to make out a case for release on Bail even after considering the rigours of Section 37 of the NDPS Act, inasmuch as, the petitioner had failed to comply with the mandatory provisions of Section 52A of the NDPS Act. The learned Special Judge has also taken note of the fact that the respondent has been in custody since 25.07.2019, that is, for nearly 4 years and 6 months.

5. The learned counsel for the petitioner submits that, in the present case, contraband of a commercial quantity was seized from the respondent. The same is proved through the seizure memo. Samples had been drawn at the site. He submits that it has been proved through the FSL report that the seized samples were Narcotics/Psychotropic Substances. He submits that neither the non-compliance of Section 52A of the NDPS Act nor the long period of incarceration can be a ground for releasing the respondent on bail, especially in view of the stringent provisions contained in Section 37 of the NDPS Act. He submits that the contraband is still available and can be produced before the learned Trial Court as and when asked for. He submits that Section 52A of the NDPS Act merely deals with the disposal of the contraband and does not have any effect on the sampling procedure or



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on the case of the prosecution.

6. I have considered the submissions made by the learned counsel for the petitioner and perused the contents of the complaint as also of the Impugned Order.

7. This Court in **Gurpreet Singh v. State (NCT of Delhi)**, 2024 SCC OnLine Del 696, placing reliance on the judgments of the Supreme Court in **Mohd. Muslim alias Hussain v. State (NCT of Delhi)**, 2023 SCC Online SC 352; **Rabi Prakash v. State of Odisha**, 2023 SCC OnLine SC 1109; **Badsha SK. v. The State of West Bengal** (Order dated 13.09.2023 passed in Special Leave Petition (Crl.) 9715/2023); **Dheeraj Kumar Shukla v. State of U.P.**, 2023 SCC OnLine SC 918; **Man Mandal & Anr. v. The State of West Bengal** 2023 SCC OnLine SC 1868; **Biswajit Mondal @ Biswajit Mandal v. The State of West Bengal** (Order dated 14.02.2023 in SLP (Crl.) bearing no.11731/2022; and **Dheeraj Kumar Shukla v. State of U.P.**, 2023 SCC OnLine SC 918; and of this Court in **Suraj v. State (NCT of Delhi)**, 2023 SCC OnLine Del 5323, held that delay in conclusion of the trial, not attributable to the accused, would be an important circumstance for releasing the accused on Bail on ground of protection of the liberty of the accused guaranteed under Article 21 of the Constitution of India.

8. As far as non-compliance with Section 52A of the NDPS Act is concerned, in **Yusuf @ Asif v. State**, (2023) SCC OnLine SC 1328, the Supreme Court emphasised on the mandatory compliance with Section 52A of the NDPS Act, by observing as under:

“12. A simple reading of the aforesaid



provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

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 subsections (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.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to



the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

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."

(Emphasis supplied)

9. In ***Bothilal v. Narcotics Control Bureau***, 2023 SCC OnLine SC 498, the Supreme Court reiterated the same as under:-

"16. In paragraphs 15 to 17 of the Mohanlal case, it was held thus:

"15. It is manifest from Section 52-A(2) include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the



Magistrate and certifying the correctness of the list of samples so drawn.

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.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

(emphasis added)

17. Thus, the act of PW-2 of drawing samples from all the packets at the time of seizure is not in conformity with what is held



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by this Court in the case of Mohanlal. This creates a serious doubt about the prosecution's case that the substance recovered was contraband."

10. In ***Simranjit Singh v. State of Punjab***, (2023) SCC OnLine SC 906, again, placing reliance on the earlier judgment of the Supreme Court in ***Union of India v. Mohanlal***, (2016) 3 SCC 379, the Supreme Court reiterated that where the samples were not drawn in conformity with Section 52A of the NDPS Act, it creates a serious doubt on the prosecution's case about the substance recovered to be a contraband.

11. As regards the submission of the learned counsel for the petitioner that the seized substance is still available with the petitioner and, therefore, non-compliance with Section 52A of the NDPS Act would not be relevant, I again do not find any merit in the same. Whether the seized substance has been kept in an intact/untampered position and if it is, in fact, a contraband, and the effect thereof, will need to be proved in trial. However, for purposes of releasing the respondent on Bail, non-compliance with the provisions under Section 52A of the NDPS Act shall be sufficient to hold that the respondent has satisfied the test of Section 37 of the NDPS Act.

12. In my view, therefore, no fault can be found in the Impugned Order directing release of the respondent on Bail. The petition is, accordingly, dismissed. There shall be no order as to costs.

NAVIN CHAWLA, J

MAY 14, 2024/ns/AS

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