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

+ **CRL.M.C. 4225/2024**

NARCOTICS CONTROL BUREAU

..... Petitioner

Through: Mr. Utsav Singh, SPP with Mr. Rana
Debnath, Advocate

versus

ALEX EDITNELSON

..... Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

ORDER

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22.05.2024

CRL.M.A. 16024/2024 (exemption)

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

CRL.M.C. 4225/2024

3. This is a petition filed on behalf of Narcotics Control Bureau ('NCB') under Section 439(2) read with Section 482 Cr.P.C. for cancellation of the bail of the Respondent granted by learned Special Judge, NDPS, Patiala House Courts, New Delhi vide order dated 23.12.2023 in Crime/File No.VIII/32/DZU/2019, SC No.57/2020 titled '*NCB v. Alex Editnelson*'.

4. Perusal of the impugned order dated 23.12.2023 shows that bail was granted to the Respondent by the Trial Court on ground of violation of provisions of Section 52A of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'), basis the law laid down by the Supreme Court in *Simarnjit Singh v. State of Punjab, SLP (Crl.) No.1958/2023* decided on



09.05.2023 and *Yusuf @ Asif v. State, Criminal Appeal No.3191/2023*, decided on 13.10.2023.

5. Contentions raised on behalf of the Respondent/accused were that: he is falsely implicated; is in custody since 20.12.2019; there is violation of Section 52A of NDPS Act since the samples of the contraband, drawn at the time of recovery, were sent to CRCL and Section 52A proceedings were conducted twice with respect to different seizures, i.e. first on 25.02.2023, after a period of 3 years and 6 months on an application filed on 13.02.2023 and second time on 18.01.2023 on an application filed on 07.02.2022, after a delay of 2 years and 6 months. On the aspect of prolonged incarceration, Respondent relied on the judgment of the Supreme Court in *Rabi Prakash v. State of Odisha, SLP (Crl.) No.4169/2023*, decided on 13.07.2023.

6. Stand of NCB before the Trial Court was that there was recovery of 4.107 Kg heroine and 220 grams cocaine, which was a commercial quantity and rigours of Section 37 of the NDPS Act would apply. Accused failed to discharge the onus that he crossed the bar of Section 37. It was contended that in consonance with Section 52A, application with respect to *panchnama* dated 19.12.2019 was filed on 07.02.2022 and with respect to *panchnama* dated 22.08.2019, application was filed on 13.02.2023 and samples drawn on the spot at the time of recovery were sent to CRCL for expert opinion. These submissions are reiterated by learned SPP for NCB before this Court.

7. I have heard learned SPP for NCB and examined his contentions.

8. Non-compliance of the procedure let down in Section 52A of NDPS Act is the heart of dispute in the present case. Plain reading of the provision shows that it describes a procedure for disposal of seized narcotic drugs and psychotropic substances. As per procedure prescribed, where any narcotic



drug or psychotropic substance is seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer shall prepare an inventory and make an application to the Magistrate for the purpose of certifying the correctness of the inventory so prepared. It is no longer *res integra* that provisions of section 52A are mandatory and in this context, it would suffice to refer to the observations of the Supreme Court in *Yusuf (supra)*, as follows:

“11. For the sake of convenience, relevant sub-sections of Section 52A of the NDPS Act are reproduced hereinbelow:

“52A. Disposal of seized narcotic drugs and psychotropic substances.-

(1) -----

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or”

(b) taking, in the presence of such Magistrate, photographs of [such drugs or substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under subsection (2), the Magistrate shall, as soon as may be, allow the application.



(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

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 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.

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 *Union of India vs Mohanlal and Anr* (2016) 3 SCC 379, 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.

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.”

9. It would be apposite to refer to the judgment of the Supreme Court in ***Simarnjit Singh (supra)***, wherein the Supreme Court held as follows:

“5. The learned counsel appearing for the appellant relied upon a decision of this Court in the case of *Union of India v. Mohanlal & Anr.* (2016) 3 SCC 379. He submitted that the prosecution is vitiated as the work of drawing sample was done by PW-7 without taking recourse to sub-section 2 of Section 52A of the NDPS Act. He also pointed out that the examination-in-Chief of PW-7 SI Hardeep Singh which shows that the samples were drawn immediately after the seizure.

6. The learned counsel appearing for the respondent-State supported the impugned judgments.

7. We have perused the evidence of PW-7 Hardeep Singh in which he has stated that from the eight bags of poppy husk, two samples of 250 gms each were drawn and converted into 16 parcels. This has been done immediately after the seizure.

8. In paragraphs 15 to 17 of the decision of this Court in *Mohanlal's* case (2016) 3 SCC 379, 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 subsections (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."

9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal1. This creates a serious doubt about the prosecution's case that substance recovered was a contraband."

10. Significantly, the Supreme Court held that in the absence of any material on record to establish that 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, the seized contraband and the samples drawn would not be a valid piece of primary evidence in trial. Once there is no primary evidence available, trial as a whole would stand vitiated. This Court in ***Amina v. State NCT of Delhi, Bail Appln. 3805/2022***, decided on 02.06.2023, further held that it would not be enough for the prosecution to contend that issues of non-compliance of Section 52A



were to be considered at the time of trial. If non-compliance provides reasonable ground for acquittal of an accused, a *fortiori*, at the stage of granting bail, it would be more important to consider this possibility as at the stage of bail, accused is still not proved guilty and is under trial and deserves the benefit of doubt. Relevant observations are as follows:

“30. The lack of compliance of these provisions necessarily imports an element of "doubt", moreover a "reasonable doubt". This, therefore will segway into the issue of proving guilt, considering that the guilt of any accused has to be proved beyond reasonable doubt. It would therefore not be enough to contend, as is done by the prosecution that issues of non-compliance were to be considered at the time of trial and what prejudice is caused to the accused, had to be shown by the accused. Even if that may be so, if such non-compliance provides reasonable ground for acquittal of an accused [depending on the nature of the evidence led, as it was in the case of Amani Fidel (supra)], a fortiori at the stage of granting bail, it would be even more important to consider this possibility, even if it is just a possibility. At the stage of granting bail, the accused is still not proved as guilty and is under trial and therefore deserves the benefit of doubt.”

11. In the present case, learned Trial Court rendered a finding of fact that there is non-compliance of provisions of Section 52A inasmuch as the samples drawn by the seizing Investigating Officer, at the time of seizure were sent to CRCL and were not drawn in the presence of the Magistrate. Application under Section 52A with respect to *Panchnama* dated 19.12.2019 was filed on 07.02.2022 i.e. after a delay of 2 years and 2 months while application with respect to *Panchnamas* dated 20.8.2019 and 22.08.2019 was filed on 13.02.2023, after a delay of 3 years and 6 months. Therefore, in the absence of the samples being drawn in the presence of the Magistrate and his certification, the samples would not form primary evidence as per the judgment of the Supreme Court in *Yusuf (supra)*. These facts are uncontroverted even today before this Court.



12. Impugned order reflects that the learned Trial Court has enlarged the Respondent on bail on a finding of fact based on records that there was violation of mandatory provisions of Section 52A of NDPS Act and held that rigours of Section 37 NDPS Act would thus stand relaxed. Apart from highlighting that commercial quantity was recovered from the accused and drug trafficking is a serious offence, there is no serious contest to the stand of the accused that Section 52A was followed more in violation than in compliance. Respondent was placed in custody on 20.12.2019 and continued in custody till the passing of the impugned order. In light of the settled law on mandate of Section 52A of NDPS Act and consequence of its non-compliance, I find no infirmity in the impugned order, warranting interference by this Court.

13. Petition is accordingly dismissed.

JYOTI SINGH, J

MAY 22, 2024/kks