



\$~68

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

+ **BAIL APPLN. 1853/2024**

MOHIT BHATI

.....Petitioner

Through: Mr. Soeb Khan with Mr. Shikhar
Goel, Mr. Aman Chaudhary, Mr.
Manmeet Verma, Advocates.

versus

STATE (NCT OF DELHI)

.....Respondent

Through: Ms. Shubhi Gupta, APP for the State
with SI Arun Kumar, Anti Narcotics
Squad.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

01.08.2024

%

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.359/2023 dated 18.07.2023 registered under sections 21/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') at P.S.: Jaitpur, Delhi.

2. Notice on this petition was issued on 24.05.2024. Status Report dated 30.07.2024 has been handed-up in court. The status report is taken on record.
3. Nominal Roll dated 23.07.2024 has been received from the Jail Superintendent. The nominal roll shows that the petitioner was arrested on 18.07.2023; and has been in custody ever-since, and as of 23.07.2024, he has spent more than 11 months in custody as an under-trial.



4. Charge-sheet dated 15.09.2023 and supplementary chargesheet dated 19.02.2024 have been filed in the matter.
5. The proceedings before the learned trial court are stated to be at the stage of arguments on framing of charge, for which purpose the matter is listed before the learned trial court next on 23.08.2024. The prosecution have cited 16 witnesses at the trial.
6. The subject matter of the accusation against the petitioner is that he was found in possession of 20 grams of smack/heroin which was seized from him on 17.07.2023.
7. Mr. Soeb Khan, learned counsel appearing for the petitioner has made the following submissions in support of the bail plea :
 - 7.1. Mr. Khan submits that notice dated 17.07.2023 under section 50 of the NDPS Act served upon the petitioner was defective, for the reason that it stated that the police were about to conduct the personal search of the petitioner and only thereafter did it narrate that the petitioner had the right to be searched in the presence of the nearest Gazetted Officer or Magistrate. Counsel argues that the notice was therefore not in accordance with the requirements of section 50, since the search was proposed to be conducted *by a police officer*.
 - 7.2. Counsel further argues, that admittedly, no inventory of the allegedly seized contraband was either prepared or certified by a Magistrate, in breach of the requirements of section 52-A(2)(a) of the NDPS Act and therefore the recovery is vitiated and cannot form the basis of the trial.



- 7.3. Mr. Khan further argues that Notification dated 23.12.2022 bearing G.S.R. No. 899(E) issued by the Ministry of Finance, Government of India (in exercise of powers conferred under section 76 read with section 52-A of the NDPS Act) requires the preparation of an inventory of seized contraband in accordance with Rule 8 in Form-4 of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules 2022, but there was no compliance with the said requirement. To support this submission, counsel relies upon the judgment of the Supreme Court in *Yusuf @ Asif vs. State*¹, and upon a decision of a Co-ordinate Bench of this court in *Amina vs. State of NCT of Delhi*². He argues therefore, that the alleged recovery of contraband is vitiated.
- 7.4. Counsel further argues that the representative sampling of the contraband allegedly recovered on 17.07.2023 was sent for testing some 10 days later, though Standing Order No.1/1988 dated 15.03.1988 requires that the representative sample must be sent for testing within 72 hours. To support this submission, counsel places reliance on on a judgment of the Punjab & Haryana High Court in *Arjun Singh @ Marra and Anr. vs. State of Punjab*³.
- 7.5. Mr. Khan further argues that though the prosecution says that contraband was recovered from the personal search of the

¹ 2023 INSC 912, para 16

² 2023 SCC OnLine Del 3491, para 27

³ 2023 SCC OnLine P&H 1044, paras 15 & 16



petitioner in a public place, yet no independent public witnesses have been joined, which again dents the credibility of the recovery. In support of this submission, he cites ***Krishan Chand vs. State of Himachal Pradesh***⁴. Lastly, Mr. Khan argues that since charges are yet to be framed in the matter and the prosecution has cited 16 witnesses, the trial will take a considerably long time and there is no justification to keep the petitioner in custody as an under-trial any longer.

8. On the other hand, opposing the grant of bail, Ms. Shubhi Gupta, learned APP appearing for the State submits :

8.1. That the mere narration in the notice issued to the petitioner under section 50 of the NDPS Act, that the police were proposing to conduct a personal search of the petitioner, while clearly informing him that he was entitled to have himself searched in the presence of the nearest Gazetted Officer or Magistrate, was in perfect consonance and accord with the requirement of section 50 of the NDPS Act; and therefore, the notice issued under that provision was valid.

8.2. Learned APP further argues that insofar as the alleged delay in sending the representative sample for testing is concerned, that argument is wholly misconceived inasmuch as *vide* notification dated 23.12.2022 cited by the petitioner himself, Standing Order No.1/1988 dated 15.03.1988 referred to in the judgment of

⁴ (2018) 1 SCC 222, para 23



Punjab & Haryana High Court, stands repealed *vide* rule 29 of the latter notification.

- 8.3. Ms. Gupta submits however, that the representative samples were sent for testing within a reasonable period, since the application for that purpose was moved within about 05 days.
- 8.4. Learned APP also submits that though it is correct that no inventory of the seized contraband was prepared, the absence of the inventory would at worst only impact the factum of recovery and the identity of the contraband, which are matters that cannot be prejudged in the present proceedings for bail but must await a full-dressed trial.
- 8.5. Ms. Gupta also argues that even though the contraband was recovered from the personal search of the petitioner in a public place, after due service of notice under section 50 of the NDPS Act upon him, when the petitioner waived the requirement of his personal search in the presence of the nearest Gazetted Officer or Magistrate, nullifies the objection as regards non-joining of public witnesses.
- 8.6. Most importantly, Ms. Gupta argues, that as narrated in the status report, the petitioner was found in possession of the contraband on 17.07.2023 when he was on regular bail in another case *vide* case FIR No. 179/2022 registered under sections 20/61/85 of the NDPS Act registered at P.S.: Sarai Khawza, Faridabad, Haryana, shows that the petitioner is a habitual offender and does not deserve to be granted bail.



9. Upon a careful consideration of the rival submissions made on behalf of the parties, and without making any observations on matters which may be disputed or which may require a more detailed consideration in the course of trial, what weighs with the court, at this stage, is the observation of the Supreme Court in *Yusuf @ Asif* (supra), wherein the Supreme Court has held as follows :

“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)

10. Admittedly, in the present case, contrary to the requirement of section 52-A(2) of the NDPS Act, no inventory was at all prepared of the allegedly seized contraband and therefore the question of having any such inventory certified for correctness by a Magistrate does not arise.
11. In view of the above, in accordance with the mandate of the Supreme Court in *Yusuf @ Asif* (supra), since the inventory of the allegedly seized contraband was never prepared and there was no inventory certified by the Magistrate, the allegedly seized contraband and the samples allegedly drawn therefrom would *not be a valid piece of primary evidence* at the trial; and *once there is no primary evidence available, the trial as a whole would stand vitiated.*
12. While Ms. Gupta has stressed on the fact that the petitioner is a repeat offender under the NDPS Act, since he committed the offence in the present case while he was on bail in another similar case, in the opinion



of this court since the inventorisation and sampling of the contraband alleged to have been seized from the petitioner is itself not supported by any admissible evidence, and is completely vitiated as per the law laid-down in *Yusuf @ Asif* (supra), the allegation that the petitioner had committed the same offence while on bail in another similar case, holds no water.

13. In the circumstances, the court is persuaded to allow the present petition, thereby admitting the petitioner **Mohit Bhati s/o Sube Singh Bhati** to *regular bail*, during the pendency of the trial, subject to the following conditions :

- 13.1. The petitioner shall furnish a personal bond in the sum of Rs. 50,000/- (Rs. Fifty Thousand Only) with 02 local sureties in the like amount from family members, to the satisfaction of the learned trial court;
- 13.2. 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;
- 13.3. If the petitioner has a passport, he 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;
- 13.4. 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.

13.5. In case of any change in his residential address/contact details, the petitioner shall promptly inform the Investigating Officer.

14. Nothing in this order shall be construed as an expression of opinion on the merits of the pending matter.

15. A copy of this order be sent to the concerned Jail Superintendent *forthwith*.

16. The petition stands disposed-of.

17. Other pending applications, if any, are also disposed-of.

ANUP JAIRAM BHAMBHANI, J

AUGUST 1, 2024

ds