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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 3203/2023**
RABIYA @ DULALI Petitioner
Through: **Mr.Kamal J.S. Mann, Adv.**
versus

STATE (NCT OF DELHI) Respondent
Through: **Mr.Aman Usman, APP with SI**
Murari Krishan & ASI Bedi
Ram, PS NFC, New Delhi.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

% **ORDER**
15.01.2024

1. This application has been filed under Section 439 of the CrPC, praying for release on bail in FIR No. 0164/2023, registered with Police Station: New Friends Colony, under Sections 21/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act').
2. It is the case of the prosecution that on 14.06.2023, the applicant was arrested and smack weighing 45.47 grams was recovered from her.
3. The learned counsel for the applicant submits that the quantity allegedly recovered from the applicant is only an 'intermediate quantity' and, therefore, the rigours of Section 37 of the Act would not be applicable. He further submits that in the present case, the search was not conducted by an Officer who is empowered in terms of Section 42 of the Act, but rather, was conducted but by a constable. He submits that even the notice issued under Section 50 of the Act is



defective, inasmuch as, it did not inform the applicant that she has a right to be taken to be searched before the ‘nearest’ Gazetted Officer of any of the departments mentioned in Section 42 of the Act or the ‘nearest’ Magistrate. He submits that this defect in itself is sufficient to entitle the applicant to be released on bail. In support, he places reliance on the judgment dated of this Court in ***Mohd. Jabir v. State of NCT of Delhi***, 2023 SCC OnLine Del 1827. He submits that this Court has held that notice under Section 50 of the Act must clearly inform the accused that he/she has a right to insist on being searched before the ‘nearest’ Gazetted Officer or the ‘nearest’ Magistrate and such requirement cannot be waived only because the accused is said to have expressed his/her unwillingness to be searched in front of such an Officer or the Magistrate.

4. On the other hand, the learned APP, placing reliance on the judgment of the Supreme Court in ***Ranjan Kumar Chadha v. State of Himachal Pradesh***, 2023 SCC OnLine SC 1262, submits that in the present case, the recovery is made from a polythene bag, which was being carried by the applicant at the time of her arrest. He submits that as the recovery is not made from the body of the applicant, therefore, Section 50 of the Act will not be applicable.

5. Without prejudice to the above submission, he submits that in the present case, the search was conducted by an Officer of the Rank of ASI and not by a constable, as alleged by the applicant. He submits that the said Officer is empowered to conduct the search in terms of Section 42 of the Act.

6. Placing reliance on the judgments of the Supreme Court in ***State***



of Punjab v. Baldev Singh, 1999 (6) SCC 172; of this Court in *Nabi Alam Alia Abbas v. State (Govt. of NCT of Delhi)* 2021 SCC OnLine 3635; and of the High Court of Allahabad in *Gyasuddin v. State of Uttar Pradesh*, 1997 SCC OnLine All 182, he submits that the only requirement of Section 50 of the Act is to inform the accused that the accused has the right to be searched before a Gazetted Officer or the Magistrate. It is only if the accused exercises such an option and requires to be searched before the Gazetted Officer or before the Magistrate, that the person would be taken to the ‘nearest’ Gazetted Officer or the ‘nearest’ Magistrate. He submits that in the present case, as the applicant had refused to be searched before the Gazetted Officer or the Magistrate, the question of taking her to the ‘nearest’ Gazetted Officer or ‘nearest’ Magistrate does not arise. He submits that this Court had followed the judgment of *Mohd. Jabir* (Supra) in *Aabid Khan v. State of Govt. Of NCT of Delhi*, 2023 SCC OnLine Del 7668, which has been challenged by the respondent before the Supreme Court by way of a Special Leave Petition and is likely to be listed in the near future.

7. He further submits that the applicant is also alleged to be involved in a previous case of similar nature, that is, in FIR No. 91/2020, Police Station: Crime Branch, under Sections 21/29 of the NDPS Act.

8. The learned counsel for the applicant, however, submits that in the said case, the applicant has been charged only under Section 29 of the NDPS Act and has already been released on bail.

9. He further submits that the co-accused has also been released on



bail by a separate order passed today in Bail Appln. 2723/2023.

10. I have considered the submissions made by the learned counsels for the parties.

11. The applicant has been languishing in jail since 14.06.2023. As is evident from the above, there are serious questions to be tried with respect to the legality of the recovery proceedings. The Search Memo *prima facie* lends credence to the submission made by the learned counsel for the applicant. Added to this are the judgments of this Court in ***Mohd. Jabir*** (Supra) and ***Aabid Khan*** (supra), on which I am not making further comments as the respondent has filed an SLP challenging the same.

12. In any event, the trial is also likely to take long.

13. Though the applicant is stated to be involved in a previous case, in the said cases, he is already released on bail.

14. The recovery made from the applicant is even otherwise of 'intermediate quantity' and, therefore, rigours of Section 37 of the Act would not be applicable.

15. Keeping in view the above, the applicant is directed to be released on bail on furnishing a personal bond in the sum of Rs.25,000/- with one surety of the like amount subject to the satisfaction of the learned Trial Court, and further subject to the following conditions:

- i. Applicant will not leave the country without the prior permission of the learned Trial Court.
- ii. Applicant shall provide her permanent address to the learned Trial Court. The applicant shall intimate the Court by way of an affidavit and to the IO regarding any



change in the residential address.

- iii. Applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing.
- iv. Applicant shall provide her mobile numbers to the IO concerned, which shall be kept in a working condition at all times and shall not be switched off or changed without prior intimation to the IO concerned. The mobile location shall also be kept on at all times.
- v. Applicant shall report before the concerned IO every 15 days.
- vi. Applicant shall not communicate with or come in contact with any of the prosecution witnesses, the victim or any member of the victim's family or tamper with the evidence of the case while being released on bail.
- vii. Applicant shall not indulge in any criminal activity.

16. Needless to state, any observation touching the merits of the case is 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 matter.

17. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

18. The Bail Application is disposed of in the above terms.

19. *Dasti* under the signatures of the Court Master.

NAVIN CHAWLA, J

JANUARY 15, 2024/rv/am

[Click here to check corrigendum, if any](#)