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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 2315/2024**

SUNITA

.....Petitioner

Through: Mr. Shikhar Goel, Mr. Soeb Khan,
Mr. Ishpreet Singh and Mr. Manmeet
Verma, Advocates

versus

STATE OF NCT OF DELHI

.....Respondent

Through: Mr. Aashneet Singh, APP for State
with SI Sapana Sharma and HC
Lokender Kumar, Anti Narcotics
Cell, Dwarka.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

ORDER

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22.08.2024

1. By way of present bail application, the petitioner/applicant seeks regular bail in FIR No. 43/2023 registered under Sections 21A/25/29/21/8 of the NDPS ACT, at P.S. Jafarpur Kalan, Delhi.
2. Learned counsel for the petitioner submits that the chargesheet has been filed and the applicant is in custody since 09.03.2023. It is submitted that no warrant or authorization was obtained before conducting the search and seizure at the premises of the petitioner/accused in terms of Section 41 NDPS Act. In addition, the conditions laid down under Section 42 NDPS were also not complied with as the information relating to the involvement of the accused was also not reduced into writing nor was a superior officer intimated with any notice. Also, the search was conducted at 1:15 am i.e., between sunset and sunrise, deeming it unauthorised as per the provisions of Section 42 NDPS. It is also argued that there is substantial unexplained



delay of 9 days in the drawing of samples from the alleged contraband and the same is contrary to law. It is lastly stated that the trial is likely to take a long time and that the further custody of the applicant is not required.

3. Learned APP for the state, on the other hand, has vehemently opposed the bail application. It is submitted that the present is a case of chance recovery wherein, based on the disclosure of one Abdul Hamid and Jatin who stated that they had bought drugs from the applicant, the applicant was apprehended at her house from where a white polythene bag containing 277 gms of heroin was recovered. It is submitted that the provisions under Section 41 and 42 NDPS could not be obtained as there was paucity of time and failure to act at that moment could have resulted in the recovered drugs being sold or destroyed. With regards to the unexplained delay of 9 days in drawing the sample, it is stated that an application for sampling was moved before the Ld. MM the very next date of the arrest of the applicant i.e. 10.03.2023. In response to the contention that the search was conducted at 1;15 am, it is clarified that the same is misplaced since the search was in fact conducted at 1:15 pm (noon time) making it within the provisions of Section 42 NDPS. He further contends that since applicant is involved in the case of commercial quantity, therefore, embargo under Section 37 of the NDPS Act shall be applicable.

Additionally, it is stated that non-compliance to Section 52A cannot be the sole ground to grant bail as the said provision is just directory in nature. In this regard, reliance is placed on decision of Coordinate Bench in the case of Quentin Decon v. Customs reported as **(2023) SCC OnLine Del 3329** and the SLP preferred against the said decision has also been



dismissed. Lastly, it is stated that the chargesheet has been filed and 2 witnesses have already been examined.

4. I have heard the learned counsels of the parties and perused the material placed on record.

5. In the present case, it is observed that the recovery of 277 gms of heroin from the applicant was a chance recovery which was based on the disclosure statements of two persons who were apprehended prior to the arrest of the applicant. As per case of prosecution, on a routine patrolling, initially one Abdul Hamid was apprehended from whom small quantity of narcotic substance was seized and immediately thereafter, co-accused Jatin was apprehended from whom also small quantity of narcotic was seized. Both disclosed about purchasing the same from the present applicant. The recovery is from a polythene and not from the person. Further, it's a case of chance recovery. Prima facie, Section 50 of the Act is not applicable. It is contended by state that the pre-conditions as laid down u/s 42 NDPS Act could not be complied with as there was a risk of the alleged drugs being sold or discarded before the raiding party would arrive at the house of the applicant. At this stage it is deemed apposite to refer to the case of Karnail Singh . State of Haryana repored as **(2009) 8 SCC 539:-**

“35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

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(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the



information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency....”

6. In cases involving commercial quantity, rigors of section 37 have to be met. The Section 37 states as under:—

“37. Offences to be cognizable and non-bailable.-(1)
Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974) -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless –

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of subsection (1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

7. The Supreme Court in State of Kerala v. Rajesh reported as **(2020) 12 SCC 122**, has elucidated the limitations prevailing on the exercise of power to grant bail in cases registered under the NDPS Act and further, that the



twin conditions under Section 37 of the Act need to be satisfied before granting bail to a person accused of offence thereunder-

“19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.”

8. Considering the aforesaid factual and legal position, especially the fact that the quantity of *heroin* stated to have been recovered from the present applicant is significantly above the commercial quantity, the rigors of Section 37 NDPS Act are applicable, and the present applicant has not



been able to overcome the bar of Section 37. In the trial, two witnesses already stand examined. In view of this, present bail application is dismissed.

9. The bail application is disposed of in the above terms.
10. Copy of the order be uploaded on the website forthwith.
11. Needless to state that nothing observed hereinabove shall amount to an expression on the merits of the case and shall not have a bearing on the trial of the case.

MANOJ KUMAR OHRI, J

AUGUST 9, 2024/js