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

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Reserved on: 23.08.2022

Pronounced on: 18.11.2022

+ BAIL APPLN. 3582/2021

HARDEEP SINGH..... Petitioner

Through: Ms Sushma Sharma, Mr Girish
Kumar Sharma, Mr Karan Verma and
Ms Aayushi Gaur, Advs.

versus

THE STATE

..... Respondent

Through: Mr. Pradeep Gahalot, APP for State
ASI Charan Singh, PS Tilak Nagar

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1. This is an application seeking grant of bail to the applicant/accused in FIR No. 06/2020 dated 04.01.2020, under Sections 15/25/29/61/85 NDPS Act, registered at Police Station-Tilak Nagar.

2. It is stated that the applicant-accused was found in possession of illicit drug „Doda-Post“ which was recovered by SI Vikas Sahu, HC Sandeep and Constable Manoj while they were patrolling the area. The applicant along with his brother i.e. co-accused Harjeet was found unloading katta from car

bearing No. DL-4CND-8817 make i10. The total recovery of the substance was 58.5 kgs allegedly found in three kattas weighing 17.5 kgs, 22 kgs and 19 kgs respectively. It has been stated by Ms Sushma Sharma, learned counsel for Applicant, that in the present case there is non-compliance of mandatory provisions of Section 41 of the NDPS Act. She states that as per the respondent's case, the applicant and his brother were found at the time of patrolling around 07:15 a.m. The police personnel stopped the boys and on interrogation stated that the katta contained „Doda-Post“ i.e. poppy straw. The katta was checked and the SI informed the Inspector telephonically who gave orders for taking appropriate action. It was the SI who served the applicant and his brother with a notice under Section 50 of the NDPS Act.

3. It is argued that in the present case, the Inspector is not a Gazetted Officer nor the authority competent to grant authorization as per Section 41 of the NDPS Act. The ACP i.e., the Gazetted Officer nor the Magistrate under Section 41 of the NDPS Act ever authorized any officer for the purpose of search, seizure or arrest or investigate in the present case. It is further stated that the SI should have informed the Inspector and the ACP prior to opening of the Katta and only after due authorization, the process of search and seizure had to be followed.

4. It is also argued that there is an irregularity/illegality while issuing notice under Section 50 of the NDPS Act. The notice served to the applicant and his brother is illegal as the officer serving it was not authorized as per Sections 41, 42 or 43 of the NDPS Act. The applicant himself wanted to get searched before a Gazetted Officer or a Magistrate as per the notice under Section 50 of the NDPS Act where it is written „*main police staff ki talashi nahi lena chahta. Apni talaashi kisi rajpatrit Adhikari ke samne karwaana*

chahta hoon’.

5. It is further argued that the object of Section 50 is to check misuse of power and, failure to comply with the provisions of Section 50 would render the recovery of contraband otiose and vitiate the trial. Learned counsel for the applicant has relied upon the following judgments:

- **Arif Khan @ Agha Khan vs The State Of Uttarakhand on 27 April, 2018 Supreme Court of India’**
- **The Hon’ble Delhi High Court judgement, titled as ‘Dharambir v/s State, 13 November, 2018’**
- **Vijaysinh Chandubha Jadeja vs State Of Gujarat on 29 October, 2010**

6. These are primarily the grounds on which the applicant has argued the bail application.

7. Per contra, Mr Gahalot, learned APP has stated that the present case is a case of chance recovery. He states that the recovery in the present case came to be made after the applicant and his brother were acting in a suspicious and wary manner on seeing the patrolling team. He states that the patrolling team did not have any prior knowledge or information as contemplated under Section 41 or 42 of the Act. He further states that in the present case there is no applicability of Section 41 of the NDPS Act as in the facts of the present case “*reason to believe or prior information*” as envisaged under Section 41 of the NDPS Act were missing. There was no prior information or reason to believe in the present case and hence the rigours of Section 41 of the NDPS Act would not apply.

8. As regards Section 50 is concerned, it is stated that the provisions of Section 50 of the Act were duly complied with as personal search of the

applicant was conducted in the presence of the ACP. Lastly, he submits that Section 42 does not use the words “*officers of Gazetted rank*”. It covers all officers above the rank of peon, sepoy or a constable and the argument that only a Gazetted Officer could effectuate seizure is contrary to the provisions of the scheme.

9. I have heard Ms Sushma Sharma, learned counsel for the applicant and Mr. Pradeep Gahalot, learned APP for the State.

10. The prosecution had placed on record the following judgements:

i. *State of Himachal Pradesh vs Sunil Kumar* (2014) 4 Supreme Court Cases 780.

ii. *Sanjay Kumar vs State of H.P., High Court of Himachal Pradesh, Shimla Cr. MP(M) No. 1392 of 2020*

11. In the present case, the questions which arises for my consideration are that,

- a) Whether the present case is the case of Chance Recovery and if not whether there has been non-compliance of section 41(2) of NDPS Act?
- b) Whether there was non-compliance of section 50?
- c) Whether the said non-compliance will entitle the applicant for grant of bail?

12. In the present case, the prosecution has relied on the fact that the said recovery was a chance recovery. The Hon^{ble} Supreme Court in *State of Himachal Pradesh Versus Sunil Kumar* (2014) 4 SCC 780 held that “*The expression "chance recovery" has not been defined anywhere and its plain and simple meaning seems to be a recovery made by chance or by accident or unexpectedly.*”

13. Hence, to examine whether in the present case there was a chance recovery or not, I will have to examine whether the same was by accident or did the officials had *“reason to believe from personal knowledge or prior information given by any person.”*

14. In the present case, the FIR states as under:

“That on questioning about the stuff inside the three kattas, it was stated that the three kattas contained doda post (chura post). Similarly, the chargesheet mentions “That on questioning about the stuff inside the three kattas, it was stated that the three kattas contained doda post (chura post).”

15. From the above, it is quite clear that the SI while he was on the patrolling duty saw the accused persons, including the applicant while unloading the kattas from the i10 car. The officials acted because, the accused persons acted in suspicious and wary manner on sighting the patrolling team. The officials approached the accused person and came across Katta. It is the case of the prosecution itself as it is mentioned in the FIR as well as in the chargesheet that *on enquiry* from the accused persons the patrolling team came to know that the katta were having *doda post*.

16. After this information, the katta was opened and checked, it allegedly contained *doda post*. Further, the other kattas kept in the car were checked which allegedly had the *doda post*. The applicant along with co-accused were interrogated and they allegedly disclosed that they order poppy straw from Chittorgarh, Rajasthan. (rukka). Further, the SI asked from the accused persons about any license or any other document for the same, which they did not have. Following that, the SI informed the Inspector telephonically who gave orders to take appropriate action. The SI served the accused with a

notice u/s 50 NDPS act, thereafter.

17. I am the opinion, the moment such *enquiry* was conducted, the case pivots from no prior knowledge or prior information to *reason to believe from personal knowledge or information given by any person.*” In the latter case, the gazetted officer is required to issue authorisation. Hence the gazetted officer was required to issue authorisation. The moment the SI was informed about the substance, the question of chance, or by accident or unexpectedly, disappears.

18. The judgments relied by the prosecution are of no help to the Prosecution. In *State of Himachal Pradesh vs Sunil Kumar(supra)* that was the case of chance recovery because in that case the police officers were looking for passengers who were travelling ticketless on the bus. They accidentally or unexpectedly came across drugs carried by a passenger and in the above said judgement it was held as a recovery by chance since, they were not looking for drugs nor expecting to find drugs carried by anybody. In the present case, the police officials came to know on enquiry from the accused persons that there is a doda post in the katta hence, it is not the case of chance recovery as before search and seizure, they came to know about the presence of contraband in katta. Hence, facts of the present case are different from the Sunil Kumar (*supra*)and hence distinguishable.

19. In *Sanjay Kumar vs State of H.P.*, also has no relevance in the present case as these judgement deals with the section 42(2) of the NDPS Act whereas the case of the present petitioner falls under the purview of 41(2) of NDPS Act because the police officials had the prior information/knowledge about the presence of the doda post in the katta.

20. This brings me to the second question-Whether there is compliance of

section 41?

21. For consideration, Section 41 is reproduced as under:

41. Power to issue warrant and authorisation.-- (1) *A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under this Act, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed:*

(2) *Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the paramilitary forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government if he has reason to believe from personal knowledge or information*

given by any person and taken in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under section 42.]

22. As per the above section, it is only the ACP being the empowered officer who has the power to authorize any officer subordinate to him but superior in rank of peon/sepoy or a constable to search and seize of the drugs and arrest the accused persons. However, in the present case the police officials even after coming to know about the contraband i.e., doda post, proceeded to open the katta, weighed and sealed the same and the SHO counter sealed the above said kattas.

23. The Inspector is not a Gazetted Officer i.e., not the authority to grant authorization as per the provisions of Section 41 NDPS act. Neither the ACP i.e., the Gazetted Officer nor any Magistrate as per the scope of Section 41 ever authorized any officer for the purpose of search, seizure and arrest in the present case in accordance with the secret information as allegedly given.

24. Hence it appears that prima facie, there is non-compliance of section 41.

25. But the other question before me is whether the prima facie non compliance of Section 41 of NDPS Act entitle the applicant for bail?

26. I am of the opinion that the applicant cannot be granted bail for violation of section 41 of NDPS act alone.

A. Section 41 is discretionary

27. The Supreme Court in *State of Punjab vs Balbir Singh, 1994 (3) SCC 299* has stated that:

“24. ...In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not

invalidate the trial or the conviction if otherwise there is sufficient material. Therefore it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.

25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in

accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction...”

28. From the above it is clear that there should have been compliance of the mandatory provisions. The authorities cannot ignore statutory rigours of the sections especially when it causes serious prejudice to the present

applicant-accused.

29. However in ***Karnail Singh v. State of Haryana, (2009) 8 SCC 539***, the Supreme Court had while examining whether the statutory provision under Sections 41(2) and 42(2) of the Act of writing down the information,isto be interpreted as a mandatory provision stated that:

*“34. ...As a result, if the statutory provision under Sections 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. **Consequently, these provisions should be taken as a discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug peddlers.**”*

Emphasis supplied

30. *Karnail Singh (supra)*, clearly states that the provision of section 41 is discretionary measure. Moreover, the question of whether the non-compliance of section 41 vitiates the trial is to be seen the stage of trial and cannot have any bearing on granting bail.

B. Mandatory provision of section 50 complied with

31. As regards non-compliance of section 50 is considered, the provisions of Section 50 do not extend to the recovery made from the car. The Hon“ble Supreme Court in *State of H. P. Versus Pawan Kumar(2005) 4 SCC 350*

considered the question, on difference of opinion between two Hon“ble judges, whether and after discussing the dictum of the Constitution Bench Judgement in State of Punjab Versus Baldev Singh, held as under:

“14. The above quoted dictum of the Constitution Bench shows that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which he may be carrying.”

32. The Hon“ble Supreme Court in **Kallu Khan v. State of Rajasthan** in Criminal Appeal No. 1605/2021 also held as under:

“15. Simultaneously, the arguments advanced by the appellant regarding non-compliance of Section 50 of NDPS Act is bereft of any merit because no recovery of contraband from the person of the accused has been made to which compliance of the provision of Section 50 NDPS Act has to follow mandatorily. In the present case, in the search of motor cycle at public place, the seizure of contraband was made, as revealed. Therefore, compliance of Section 50 does not attract in the present case. It is settled in the case of Vijaysinh (supra) that in the case of personal search only, the provisions of Section 50 of the Act is required to be complied with but not in the case of vehicle as in the present case, following the judgments of Surinder Kumar (supra) and Baljinder Singh (supra). Considering the facts of this Court, the argument of non-compliance of Section 50 of NDPS Act advanced by the counsel is hereby repelled.”

33. In the present case along with the car, the accused/applicant persons were also searched. Hence, the question which arises is that whether the

provisions of Section 50 were complied with when the person of the applicant was searched. I am of the opinion that Section 50 was duly complied with. In the charge-sheet it is clearly stated that the personal search was conducted in the presence of ACP.

“Thereafter in the presence and surveillance of ACP Sir, SIVikas Sahu took the cursory search of both the accused persons Harjit Singh S/O Satpal Singh (age 19 years) and Hardeep Singh S/O Gurcharan Singh (age 23 years) R/O WZ-48A, gali no.6, Guru Nanak Nagar, Tilak Nagar, Delhi but nothing incriminating was found. Rest are police proceedings.”

34. Since while searching the person of the applicant, the ACP was present, the provisions of Section 50 stand complied with.

35. I am of the view that since the mandatory condition of section 50 has been complied with, the bar imposed by section 37 needs to be met by applicant.

C. Bar imposed by Section 37

36. The total recovery of the alleged substance was 58.500 Kgs (weighed on weighing machine kept in the IO kit) found in three kattas weighing 17.500 kg, 22 kg & 19 kg respectively. The quantity recovered from the accused persons was of commercial quantity.

37. Even if it is assumed that non-compliance of section 41 will vitiate trial, this case involves commercial quantity of the narcotics drugs. Though in the present case, even though I am prima facie of the opinion that there is non-compliance of Section 41, the rigours of section 37 of NDPS Act have to be still met.

38. Bail in this case can only be granted when it is shown that there are

reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.

39. In *State of Kerala v. Rajesh*, (2020) 12 SCC 122, the Supreme Court observed:

“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.”

40. The submission made by learned counsel for the applicant to the effect that there has been procedural aberration in compliance of the section 41 (2) NDPS Act, is of no consequence. The non-compliance of Section 41 will not absolve the accused from the rigours of [Section 37](#) of the NDPS Act.

41. There is a bar imposed by section 37 which cannot be ignored or superceded by a prima facie non-compliance of the discretionary provision i.e., section 41. For the limited purpose of consideration of this application, I am not satisfied that there are reasonable grounds for believing that the applicants are not guilty of such offence and that they are not likely to commit any offence while on bail. Having considered all the relevant aspects, I am of the view that the applicants cannot be enlarged on bail.

42. Before concluding, it is made clear that these prima facie observations are made for the limited purpose of deciding this bail application and any opinion expressed above shall not be regarded as an opinion on merits during trial.

43. The bail application is dismissed of in the above terms.

JASMEET SINGH, J

NOVEMBER 18, 2022

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