

IN THE COURT OF SANJEEV KUMAR-II,
SPECIAL JUDGE (NDPS)-02, CENTRAL DISTRICT,
TIS HAZARI COURTS, NEW DELHI

(Sh. Sanjeev Kumar-II)
Special Judge, (NDPS)-02,
Central District, Court Room No. 22
Tis Hazari Courts, Delhi

Bail Application No.230/2023
Session Case No. 324/2023
State v. Mohd. Tahir @ Beeru

21.07.2023

Present: Sh. K. P. Singh, Substitute Additional Public
Prosecutor for State.

Ms. Kritika, proxy counsel for accused-applicant.

This is an application under section 439 of the Code of Criminal Procedure, 1973 ('CrPC' in short) moved on behalf of **accused-applicant Mohd. Tahir @ Beeru** for grant of bail in case **FIR No. 376/2022** registered at **Police Station, Timarpur** under **Sections 18 & 29** of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' in short). This application is fixed today for order.

2. Mr. Aditya Aggarwal, learned counsel appearing for the accused has contended that accused has been falsely implicated in the present case. The accused is in custody since 11.12.2022. Accused was arrested on the disclosure statement of the co-accused persons. Opium weighing 270 grams was alleged to have been recovered from the possession of the accused-applicant which falls under intermediate quantity. There is delay in sending the samples to the FSL, as seizure was done on 11.12.2022, and application for drawing the samples before the Learned Magistrate under Section 52A NDPS Act was filed on



21.12.2022 i.e. after delay of 10 days and thereafter samples were drawn under section 52A of NDPS Act on 07.01.2023 before Learned Magistrate and sent to FSL on 17.01.2023 i.e. after delay of 10 days.

3. Mr. Aggarwal has further contended that recovery is alleged to have been effected from the person of the accused-applicant is 270 grams of Opium, which is an intermediate quantity and quantity of contraband recovered from other accused cannot be added to bring the case within commercial quantity. Therefore, rigors of section 37 of NDPS Act are not attracted in the present case. Accused is alleged to have been involved in another cases but in the case accused is on bail.

4. Learned counsel has relied upon decision in **Noor Aga v. State of Punjab**; **Kashif v. NCB**, Bail Appln 253/2023 decided by 18.05.2023; **Union of India v. Mohan Lal**, (2016) 3 Supreme Court Cases 379; **Laxman Thakur v. State (Govt. Of NCT of Delhi)**, Bail Appln 3233/2022 decided by Hon'ble High Court of Delhi on 14.12.2022; **Kurva Ramesh v. The State of Telengana**, CrI. Petition no. 563 of 2023 decided by Telengana High Court on 03.02.2023; **Union of India v. Lalthangliantthangtei**, 2003 GLR 3 176; **Valsala v. State of Kerala**, 1994 AIR SC 117; **Rishi Dev @ Onkar Singh v. State (Delhi Admn.)** decided by Hon'ble High Court on 01.05.2008; **Ramji Singh v. State of Haryana**, 2007 RCR Criminal 3 452; **Anita v. State (NCT of Delhi)**, Bail Appln. 1538/2022 decided by Hon'ble High Court on 20.07.2022; **Ragini Dwivedi @ Gini @ Rags v. The State of Karnataka**, CrI. Appeal no. 02/2021 decided by Hon'ble Supreme Court on 21.01.2021; **Narsimman v. State (Govt. Of NCT of Delhi)**, Bail Appln. 3863/2022



decided by Hon'ble High Court of Delhi on 09.02.2023; **Gajender Bahadur v. State (Govt. Of NCT of Delhi)**, Bail Appln. 3655/2022 decided by Hon'ble High Court of Delhi on 31.01.2023; **State of West Bengal v. Rakesh Singh @ Rakesh Kumar Singh**, Criminal Appeal No. 923/2022, decided by Hon'ble Supreme Court of India on 11.07.2022; **Paramjit Singh Gulati v. Directorate of Revenue Intelligence**, Bail Appln. 672/2022 decided by Hon'ble High Court on 13.01.2023; **Mumtaz v. State (NCT of Delhi)**, Bail Appln. 3165/2022 decided by Hon'ble High Court of Delhi on 28.12.2022 and **Sunil v. The State of NCT of Delhi**, Bail Appln 495/2022 decided by Hon'ble Delhi High Court on 28.07.2022 and **Rehmatullah @ Arman v. State of Delhi**, Bail Appln. 2866/2022 decided by Hon'ble High Court on 24.11.2022.

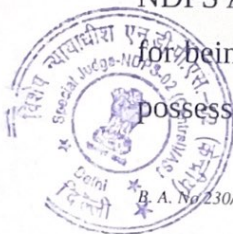
5. On the other hand, learned Additional Public Prosecutor for the State opposed the application contending that case pertains to the recovery of total 3.6 kgs of Opium, out of which 3.1 kgs was recovered from co-accused Sabana Khatoon; 500 grams of Opium was recovered from co-accused Bilal and during their PC remand, accused-applicant was arrested at the instance of co-accused Shabana Khatoon and from his possession 270 grams of heroin was recovered. Accused does not have clean antecedents and involvement in three other cases. Accused persons have shared pictures of contraband from their mobile phones through whatsapp and their mobile phones have been sent to FSL for analysis.

6. The case of the prosecution is that on 06.12.2022 acting upon a secret information, co-accused Shabana and Bilal were apprehended and from their possession opium 3.1 kg and 500



gram were recovered respectively. During investigation, at their instance, accused-applicant Mohd. Tahir @ Beeru was apprehended, notice under Section 50 of the NDPS Act was served upon him and from his possession 270 grams of opium was recovered from the polythene held in his hand. Personal search of the accused-applicant was also conducted but no contraband was recovered in the said search.

7. In **Amar singh Rajibhai Barot v. State of Gujarat**, Appeal (Crl.) 1218 of 2005, decided by Hon'ble Supreme Court of India on 19.09.2005, facts of the case were that after receiving secret information raiding party was constituted and reached at the spot and maintained a watch and after sometime a jeep came and halted near the spot and two persons alighted from the said jeep and while they were going towards a hotel, they were intercepted by the police and appellant Amar Singh Rajibhai Barot was found to be carrying a plastic bag which was found to contain 920 kgs of opium and other co-accused was found to contain 4.250 kgs of opium. The Trial Court held that both the accused were guilty of individually and jointly possessing 920 grams of opium and 4.250 kgs of opium without any pass or permit and were convicted for the offences punishable under Sections 17 and 18 read with Section 29 of NDPS Act. In appeal, Hon'ble High Court was of the view that the conviction of appellant under Sections 17 and 18 read with Section 29 of NDPS Act was not correct but appellant was held to be liable under Section 21 (c) and also 21 (c) read with Section 29 of the NDPS Act, for individually being in possession of 920 grams and for being jointly, in conspiracy with deceased (other accused), in possession 4.250 kgs of the prohibited substance recovered.



Hon'ble Supreme Court held that the High Court proceeded on the footing that there was a criminal conspiracy between the appellant and the deceased but there was no warrant for this conclusion at all as there is no evidence to suggest that there was any abetment and / or criminal conspiracy within the meaning of Section 29 of NDPS Act. It was further held that the appellant and deceased were found together but individually carrying the recovered substances and therefore, it was not possible for the High Court to take the view that section 29 was attracted but conviction of the appellant was upheld under Section 21(c) of NDPS Act.

8. In **Anita v. State (NCT of Delhi)**, Bail App. No.1538/2022 decided by Hon'ble High Court of Delhi on 20.07.2022 has observed as under:-

1. On 19.05.2022, this Court had enquired "Whether the recovery made from the co-accused can be added to the recovery made from the applicant?"

2. Mr. Kumar, learned counsel appearing for the applicant has drawn my attention to judgment dated 30.09.2021 passed in BAIL APPLN. 3351/2021 titled as Smt. Sachala Nayak vs. State of NCT of Delhi, where a Coordinate Bench of this Court has relied upon a judgment of Muthu Kumar & Ors. v. Station House Officer, Kottakkal Police Station [(2008) SCC OnLine Ker 100], specifically para 6 which reads as under:-

"6. As far as this application is concerned, we are of the opinion that the question is mere academic. The applicants herein were charge-sheeted for offences punishable under section 20(b)(ii)(C). The allegations in the charge sheet prima facie show that out of the total quantity of 31.150 k. grams of ganja, the 1st accused was found carrying 15 kg. and 50 grams folded in his waste, the 2nd accused was found in carrying 6 kgms. in a bag and 5 kgm in a suit case and 50 grams in his waste and 3rd accused was carrying 5 kg. and 50 grams in his waste. If that be so, even though total quantity as above is a commercial quantity, each of the accused was in possession of only a lesser than the commercial quantity.



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If the accused were not in possession of the commercial quantity, Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act will not apply. It is reported that the accused were in prison from 26-10-2007 and they had undergone 167 days imprisonment and the charge sheet was already filed. Considering the facts and circumstances of the case, we are of the opinion that this is a fit case for granting bail on stringent conditions."

3. He further draws my attention to another judgment of the Coordinate Bench passed in BAIL APPLN. 44/2020 titled as Raju Diwakar @ Pappu v. The State and more particularly, para 10 which reads as under:-

"10. Similar issue came before High Court of Punjab & Haryana at Chandigarh in Vicky Kaur vs. State of Punjab, wherein while citing case of LawSuit (P&H) Amar Singh Ramji Bhai Barot vs. State of Gujarat (2005) 7 SCC 550 held that quantity of contraband carried by both accused could not be added to bring it within the meaning of commercial quantity and Section 29 will not be attracted."

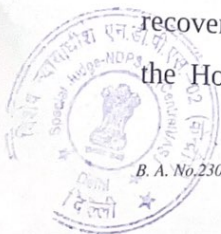
4. In this view of the matter, I am of the view that the recovery made from the co-accused cannot be added to the quantity recovered from the applicant.

5. In the present case, the recovery made from the applicant is 50 grams of Heroine from the cupboard of her house. The applicant has been in custody since 25.06.2021.

6. The applicant was involved in another case under Section 21 of the NDPS Act, where she has already undergone the sentence imposed on her.

7. Since only 50 grams of Heroine was recovered from the petitioner, the same comes within the 'intermediate' quantity and the rigours of Section 37 of the NDPS Act is not applicable to the facts of the present case.

9. In **Mohd. Akil v. State of NCT of Delhi**, Bail Appln. 3463/2021 decided by Hon'ble High Court of Delhi on 13.04.2022, two accused were apprehended on 27.07.2017 and from Nabi Alam accused 250 grams of heroin was recovered from the pant worn by him, while 50 grams of heroin was recovered from the pant of accused Mohd. Akil. It was held by the Hon'ble Delhi High Court that the bail application of co-



accused was dismissed on the ground that there was a recovery of commercial quantity and there was the bar of Section 37 NDPS Act but as far as the present petitioner (Mohd. Akil) is concerned there is a recovery of 50 grams of heroin which is an intermediate quantity.

10. In view of **Amar Singh Rajibhai Barot** (supra), **Anita** (supra) and **Mohd. Akil** (supra), it can be said that recovery of the opium recovered from co-accused Shabana Khatoon and Bilal cannot be added or clubbed with the recovery of opium from the accused-applicant, for the purpose of making the same as commercial quantity and therefore, recovery of opium from the possession of applicant-accused Mohd. Tahir @ Beeru punishable under Section 18 of NDPS Act is intermediate quantity. In this regard **Sunil** (supra) can also be referred.

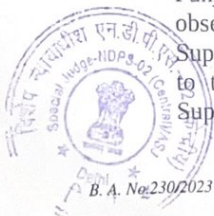
11. In so far as conspiracy and / or abetment punishable under Section 29 of NDPS Act against the accused-applicant in respect of recovery of opium from the co-accused persons are concerned, there are no material available on record at this stage, to shows the said conspiracy and/or abetment and in this regard I have taken into consideration **Amar singh Rajibhai Barot** (supra). Learned Additional Public Prosecutor has submitted that photographs of contraband were shared by the accused persons through whatsapp and mobile phones have been sent to FSL and report is awaited. No photographs have been placed on record alongwith the chargesheet which has already been filed and further FSL report is awaited and therefore, there is no material at present to show the said conspiracy under section 29 of NDPS

Act.



12. In the present case, recovery of the 270 gram of Opium was effected from the possession accused-applicant and not in his personal search which was also conducted. Hon'ble Delhi High Court in case of **Akhilesh Bharti v. State**, Bail Appln. 973/2019 decided by Delhi High Court on 20.01.2020, relying upon several judgments on the point of Section 50 NDPS Act including **State of H.P. v Pawan Kumar**, (2005) 4 SCC 350; **State of Rajasthan v. Parmanand & anr.**, Crl. Appeal No. 78/2055 decided by Hon'ble Supreme Court on 28.02.2014; **S. K. Raju @ Abdul Haque @ Jagga v. State of West Bengal**, (2018) 9 SCC 708 and **State of Punjab v. Baljinder Singh & Anr.**, 2019 SCC Online SC 1408 held that Section 50 of NDPS Act would be applicable where contraband has been recovered from the bag etc. and not from personal search which was also conducted. Hon'ble Delhi High Court held / observed as under :-

"25. It is essential to observe that vide the verdict of the Hon'ble three Judge Bench of the Hon'ble Supreme Court dated 05.09.2018 in "SK. Raju alias Abdul Haque alias Jagga Vs. State of West Bengal" (2018) 9 SCC 708, it has specifically been observed to the effect that where merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act, 1985 will have no application but if the personal search of the accused is also conducted, the provisions of Section 50 of the NDPS Act, 1985 would wholly apply. The verdict of the Hon'ble Supreme Court dated 15.10.2019 in "State of Punjab Vs. Baljinder Singh and Another" 2019 SCC OnLine SC 1408 is also a verdict of the Hon'ble three Judge Bench of the Hon'ble Supreme Court in which the personal search of the accused did not result into recovery of any contraband but there was a recovery of contraband effected from the vehicle in which the accused persons were seated with one of them being the driver. Though, the Hon'ble Supreme Court in "State of Punjab Vs. Baljinder Singh and Another" (supra) has observed to the effect that the judgment of the Hon'ble Supreme Court in Dilip's case is not correct and is opposed to the decision to the law laid down by the Hon'ble Supreme Court in Baldev Singh's and other judgments, the



observations in the verdict of the Hon'ble Supreme Court in "SK. Raju alia Abdul Haque alias Jagga Vs. State of West Bengal" (supra) dated 05.09.2018 (which are not adverted to in "State of Punjab Vs. Baljinder Singh and Another" (supra) dated 15.10.2019) lay down a fine distinction and in these circumstances thus, where the contraband is recovered from an object which is held by an accused in his hand and the search of the person of such an accused is also conducted which lead to no recovery of any contraband, though, there are recoveries of other personal assets of a person from his personal search, in view of the judgments of the Hon'ble Supreme Court in "SK. Raju alia Abdul Haque alias Jagga Vs. State of West Bengal" (supra), the non compliance of Section 50 of the NDPS Act, 1985 would prima facie vitiate the recovery."

13. In case titled as **Mohd. Jabir's** (supra), in para no.42, 43, 44, 45, 47, 50, 51, 53, 56 & 62 Hon'ble High Court observed as under:-

"42. In the present case, section 50 notice which was served upon the applicant reads as under:

"You have the legal right to get yourself searched in the presence of any Gazetted Officer or Magistrate."

43. In my opinion, there is illegality in notice served U/s 50 NDPS Act dated 27.10.2020. The section 50 categorically mandates that where the accused requires a search, the search has to be done by nearest gazetted officer/ nearest magistrate

44. However, the section 50 notice served upon the applicant and the co-accused informs incorrectly that they can be searched by any gazetted information/magistrate. This, in my opinion is where the violation of section 50 lies.

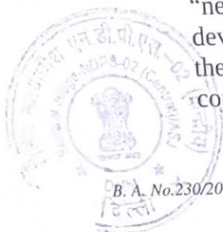
45. It is correct that both the accused persons were informed that of their rights regarding personal search but the same was not informed as per the strict provisions of section 50.

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47. As is clear from the above, the emphasis on the word "nearest" is important since it ensures independence. In deviating from the provisions as laid down in section 50, the IO practiced a third option of having the search conducted by someone who was part of the operation of



this particular alleged drug seizure. The IO practiced a third option which is unknown to law.

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50. In my opinion the use of the word "nearest" by the legislature is intentional and has been used to ensure neutrality and independence at the time of search.

51. Therefore, it was improper for the IO to suggest in the notice under section 50 that "any" Gazetted Officer can be called.

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53. In the present case, not giving the word "nearest" its due meaning and importance, would make the word "nearest", a surplusage, which cannot be the intention of legislature in drafting section 50.

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56. In the light of the above judgments and facts, I am of the view that the applicant's alleged refusal that he is unwilling to be searched is irrelevant. The notice u/s 50 NDPS act itself is faulty in law. Therefore, it cannot be said that accused's unwillingness to be searched in front of an officer who is a member of the raiding team is a voluntary expression of their desire for giving up their right to be searched. The notice of section 50 served to the applicant clearly violates the law and is a misdirection. As a result, I am of the opinion that the applicant was misled into believing that his search was to be before any gazetted officer and not the nearest. Further the fact was conducted before ACP Rich pal is far from an independent search as ACP Rich pal was part of the raiding team.

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62. Hence the notice u/s 50 is will amount to no notice in the eyes of law."

14. Hence, as per the judgment of **Mohd Jabir v. State of NCT of Delhi**, B. A. no.1725/2022 decided by Hon'ble High Court of Delhi on 28.03.2023, if at the time of giving notice under Section 50 of NDPS Act accused is informed his legal right to get himself searched in the presence of **any** Gazetted Officer



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or Magistrate and not in the presence of **nearest** Gazetted Officer or Magistrate, then this is in violation of mandatory provisions of Section 50 of the NDPS Act and said notice amount to no notice in the eyes of law. On the said violation, Delhi High Court had granted bail in commercial quantity observing that rigors of section 37 of NDPS Act would not be an obstacle in the release of the accused.

15. In the present case, perusal of the copy of notice under section 50 of NDPS Act shows that in said notice words '**any** Gazetted Officer or Magistrate' has been used and words '**nearest** Gazetted Officer or Magistrate' have not been used. Hence, as per decision in **Mohd. Jabir** (supra), this is in violation of mandatory provisions of Section 50 of the NDPS Act and said notice amount to no notice in the eyes of law.

16. As per the IO, there are three cases under NDPS Act pending in the State of UP against the accused-applicant. In **Paramjit Singh Gulati** (supra), Hon'ble Delhi High Court in para 15 observed as under:-

“15. In so far as the argument that the petitioner is involved in two more cases of the NDPS Act, it is pointed out that the petitioner has been discharged in those cases on an application filed by the prosecution. Moreover, the allegation is not that the petitioner was allegedly involved in those cases while in custody, any involvement, if at all, would be during the period prior to the petitioner being arrested in the present case and cannot be made the sole basis for the denial of the bail. The Hon'ble Apex Court in **Prabhakar Tewari v. State of U.P.; (2020) 11 SCC 648** had held that the involvement of the accused in other cases cannot be the sole ground for dismissal of the bail application.”

17. In view of above discussion, **I am inclined to grant bail to the accused-applicant Mohd. Tahir @ Beeru on furnishing**



personal bond in the sum of Rs.25,000/- with one surety in the like amount and subject to the following conditions that:-

i) That accused-applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

ii) That accused-applicant shall not leave India without the previous permission of the Court; and

iii) That accused-applicant shall not commit an offence similar to the offence of which he is accused.

Application stands disposed of.

18. Copy of order be given dasti to learned counsel for accused-applicant and be communicated to accused-applicant in Jail also through Jail Superintendent.



(Sanjeev Kumar-II)
Special Judge (NDPS)-02
Central District, Tis Hazari Courts,
Delhi / 21.07.2023

विशेष न्यायाधीश एन.डी.पी.एस.-02 (केन्द्रीय)
Special Judge-NDPS-02 (Central)
तीस हजारी न्यायालय, दिल्ली
Tis Hazari Courts, Delhi