

**IN THE COURT OF ASJ/SPECIAL JUDGE/NDPS
PATIALA HOUSE COURTS, NEW DELHI**

Presided by: Sudhir Kumar Sirohi, DHJS

**SC No. 160/2020
NCB Vs. Achuta Pradhan
NCB Vs Arjun Pahadi
NCB Vs Mayadhar Behara**

**SUDHIR KUMAR SIROHI
Special Judge NDPS Act
Room No. 35, P. Building
Patiala House Courts,
New Delhi**

08.01.2024

Present: Sh P C Aggarwal, Ld. SPP along with Ms Malika Aggarwal, Ld counsel for NCB.
Ms Sushma Sharma, Sh Girish Sharma, Sh R Sahil, Ms Aayushi Gaur and Sh Dhruv Sharma, Ld counsels for accused/applicant Achuta Pradhan.
Sh Aditya Aggarwal, Sh Mohd Yasir and Sh Naveen Panwar, Ld counsels for applicants/accused persons namely Arjun Pahadi and Mayadhar Behara.

Further reply regarding 52A NDPS Act proceedings filed by NCB. Be taken on record.

Arguments on the bail applications of all accused heard.

Vide common order, the bail applications of both the accused persons namely Achuta Pradhan, Arjun Pahadi and Mayadhar Behara are decided as facts are same.

Ld. Counsel for accused persons submitted that accused have been falsely implicated in this matter and are in custody since 25.02.2020 and nearly 03 years and 11 months have lapsed for which the accused persons are in custody. It is further argued by Ld. counsel for accused persons that Section 52A NDPS Act has not been complied in the present matter as



the samples drawn at the time of recovery by NCB officials were sent to CRCL and not the samples drawn under 52A NDPS Act proceedings, 52A NDPS Act application was filed on 24.05.2021 (after delay of 01 year and 03 months) and disposed of on 28.02.2022, therefore, the prosecution has violated the mandatory provision of 52A NDPS Act and bail may be granted to accused persons.

Ld. Counsel for accused persons relied upon following judgments:

1. *Rabi Prakash Vs. The State of Odisha in SLP (Crl.) No (s). 4169/2023 rendered on 13.07.2023 and*
2. *Yusuf @ Asif Criminal Appeal no. 3191 of 2003 decided by Hon'ble Supreme Court of India on 13.10.2023.*

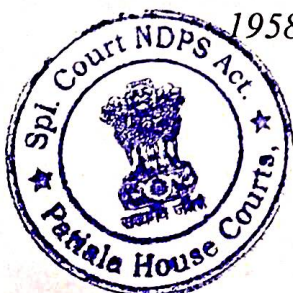
Ld. SPP for NCB and IO, on the another hand argued that on the basis of secret information, there is recovery of 386kg of ganja in this matter. It is further argued that Section 52A NDPS Act application was filed on 24.05.2021 and disposed of on 28.02.2022 but the samples drawn u/s 52A NDPS Act proceedings were not sent to CRCL rather the samples drawn on spot at the time of recovery by the NCB officials were sent to CRCL for expert opinion. It is further argued by Ld. SPP for NCB that there is recovery of commercial quantity of contraband, therefore, there is bar of Section 37 NDPS Act.

Submissions of all the parties heard, judgment perused.

In *Simarjit Singh Vs State of Punjab, SLP No.*

1958/2023 dated 09.05.2023 Hon'ble Apex courts held as:

5. *The learned counsel appearing for the appellant relied upon a decision of this Court in the case of Union of India v. Mohanlal & Anr. He*



submitted that the prosecution is vitiated as the work of drawing sample was done by PW-7 without taking recourse to sub-section 2 of Section 52A of the NDPS Act. He also pointed out that the examination-in-Chief of PW-7 SI Hardeep Singh which shows that the samples were drawn immediately after the seizure.

6. The learned counsel appearing for the respondent-State supported the impugned judgments.

7. We have perused the evidence of PW-7 Hardeep Singh in which he has stated that from the eight bags of poppy husk, two samples of 250 gms each were drawn and converted into 16 parcels. This has been done immediately after the seizure.

8. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case, it was held thus:

"15. It is manifest from Section 52-A(2) include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn



certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."

9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal. This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

10. Hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence.

In the judgment of Yusuf @ Asif Vs. State, Criminal Appeal No. 3191/2023 Hon'ble Supreme Court of India has held:

"11. For the sake of convenience, relevant sub-sections of Section 52A of the NDPS Act are reproduced hereinbelow:

"52A. Disposal of seized narcotic drugs and psychotropic substances.-

(1) _____

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or



conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in subsection (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in subsection (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of (a) certifying the correctness of the inventory so prepared; or

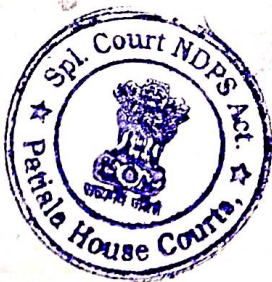
(b) taking, in the presence of such Magistrate, photographs of [such drugs or substances or conveyances] and certifying such photographs as true; or (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. (3) Where an application is made under subsection (2), the Magistrate shall, as soon as maybe, allow the application. (4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence."



12.A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

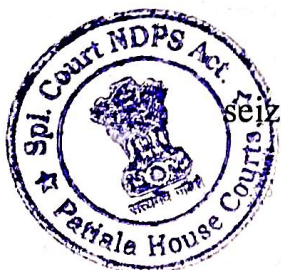


15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone Union of India vs Mohanlal and Anr. (2016) 3 SCC 379 would constitute primary evidence for the purposes of the trial.

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.**

17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside."

In the present matter, the sample drawn by the seizing IO at the time of seizure were sent to CRCL, the



application u/s 52A NDPS Act was filed on 24.05.2021 (after delay of 01 year and 03 months) and disposed of 28.02.2022 but the sample drawn under 52A NDPS Act proceedings were not sent to CRCL, therefore, the samples drawn before Ld. Magistrate were not sent to CRCL which would have form primary evidence as per *Yusuf (supra)* judgment and in *Priyaranjan Sharma Vs. NCT of Delhi Bail Appl. No. 3649/2022* dated 16.08.2023, Hon'ble Delhi High Court has also held "that apart, even sending of the samples drawn by the complainant, instead of those drawn by Magistrate, for chemical analysis to the FSL, prima facie appears to be in violation of provisions of Section 52A NDPS act."

Hon'ble High Court of Delhi in *Kashif Vs. NCB Bail Appl. No. 253/2023* dated 18.05.2023 has taken view that Section 52A NDPS Act is mandatory and cannot be delayed or ignored.

In *Amina Vs State of NCT of Delhi, BA No. 3805/2022* decided on 02.06.2023 Hon'ble High Court of Delhi held as:

30. The lack of compliance of these provisions necessarily imports an element of "doubt", moreover a "reasonable doubt". This, therefore will segway into the issue of proving guilt, considering that the guilt of any accused has to be proved beyond reasonable doubt. It would therefore not be enough to contend, as is done by the prosecution that issues of non-compliance were to be considered at the time of trial and what prejudice is caused to the accused, had to be shown by the accused. Even if that may be so, if such non-compliance provides reasonable ground for acquittal of an accused [depending on the nature of the evidence led, as it was in the case of *Amani Fidel (supra)*], a fortiori at the stage of granting bail, it would be even more



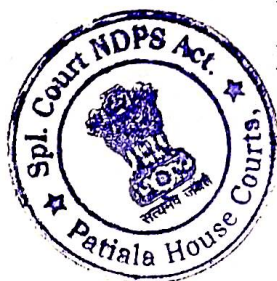
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important to consider this possibility, even if it is just a possibility. At the stage of granting bail, the accused is still not proved as guilty and is under trial and therefore deserves the benefit of doubt.

Therefore, at this stage, it seems to be non compliance of mandatory provision as per *Yusuf (supra)* and *Simarjeet (supra)* judgments and the benefit must be given to the accused at the stage of bail also as per *Amina (supra)* order, accused persons are in custody for 03 years and 11 months.

There is violation of mandatory provision of 52A NDPS Act, therefore, accused persons have crossed the bar of section 37 NDPS Act, in the present facts and circumstances, accused persons namely Achuta Pradhan, Arjun Pahadi and Mayadhar Behara are admitted to bail on furnishing personal bond and surety bond in the sum of Rs. 1 lakh each with two sureties in the like amount subject to the following conditions:-

1. they shall provide their mobile numbers to the IO;
2. they shall keep their mobile phone 'ON' at all times;
3. they shall keep their GPS location 'ON' all the time;
4. they will deposit their passports in the court during the period of bail and if they do not have passport then to file the affidavits in this regard in the court or in absence of passport, LOC be opened against accused persons.
5. they shall mark their attendance in the NCB office on first Monday of every month till trial is completed;
6. they shall not leave the India under any circumstances without prior permission of trial court;
7. they shall not commit any offence whatsoever during the period that they are on bail in the instant case;
8. In the event of there being any FIR/DD Entry/complaint lodged against the applicants/accused it would be open to the NCB to seek cancellation of bail of the accused persons.



Accordingly, both the bail applications of accused persons namely Achuta Pradhan, Arjun Pahadi and Mayadhar Behara stand disposed off. Copy of this order be given dasti and be also sent to accused persons in jail for communication to the accused persons.

(Sudhir Kumar Sirohi)
ASJ/Spl. Judge, NDPS/N. Delhi
08.01.2024

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