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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved On: 21st November, 2023

Pronounced On: 5th December, 2023

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BAIL APPLN. 1156/2023

AABID KHAN

..... Petitioner

Through: Mr. Aditya Aggarwal, Advocate.

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Mr. Aman Usman, APP for the State
with SI Hanspreet Singh, ANTF, Crime
Branch.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present application under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') read with Section 36A(3) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') seeks regular bail in FIR No. 220/2021 under Sections 21/29 of the NDPS Act registered at PS Crime Branch.

2. The facts of the present case are as under:

- i. On 11.11.2021, a team of police personnel was constituted to develop information on supply of drugs and persons involved. On the said date, at about 08:45 PM, when the police team was stationed near Bella



Monde Farm House, Rang Puri, located at NH-8, a secret informer met with ASI Om Prakash and informed him that at about 10:00 PM to 10:30 PM, one person namely Aabid Khan (the applicant) who is involved in supply of heroin in Delhi would come near the Rajokri Flyover and if a raid is conducted he can be apprehended with a huge quantity of heroin.

- ii. Acting on the said information, a raid was conducted and at 10:10 PM, a person wearing a blue colour t-shirt and light blue colour jeans was seen coming on foot carrying a yellow colour cloth carry bag. The said person was identified by the secret informer as the applicant.
- iii. After a few minutes, when the applicant is about to leave, the police team apprehended him. He was informed about the secret information regarding his alleged involvement in supply of heroin and that there was a possibility of recovery of contraband from him.
- iv. Thereafter, a notice under Section 50 of the NDPS Act served upon him and he was informed that he has the right to be produced before a Magistrate or a Gazetted Officer prior to his search or such officer can be called to the spot and his search can be conducted in his/her presence. The applicant was further informed that it is also his right to search the police officers and the private car driven by them. The applicant declined to be searched in the presence of a Magistrate or a Gazetted Officer.
- v. Thereafter, a yellow colour carry bag was recovered from the applicant's right hand and was found to contain a muddy colour



powder. On being tested with the field testing kit, the said powder was found to be heroin and weighed 400 gms.

- vi. The content was seized and a seizure memo was drawn and accordingly, the present FIR was registered under Section 21 of the NDPS Act and the applicant was arrested on 12.11.2021.
- vii. Upon completion of investigation, the chargesheet in the present case was filed for offences under Sections 21/29 of the NDPS Act.

3. Learned counsel appearing on behalf of the applicant submitted that the present applicant is entitled to bail on account of the non-compliance of the mandatory requirements of Section 50 of the NDPS Act, which provides as under:

“50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to **nearest Gazetted Officer** of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person



as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

(emphasis supplied)

4. It was submitted that in the present case, the notice under Section 50 served upon the applicant stated that he has the right to be searched in the presence of any Gazetted Officer or Magistrate and did not stipulate that he has a right to be searched in the presence of the ‘nearest’ Gazetted Officer or Magistrate, and therefore, the provision was not complied with in the manner it ought to have been done. In support of the said contention, learned counsel for the applicant placed reliance on a judgment dated 28.03.2023 passed by a coordinate bench of this Court in BAIL APPLN. 1725/2022 titled ‘Mohd. Jabir v. State of NCT of Delhi’, wherein in a similar case where the word ‘nearest’ was not mentioned in the notice under Section 50 of the NDPS Act, bail was granted to the applicant therein for non-compliance of the said provision.

5. Learned counsel for the applicant further placed reliance on the following judgments:

- i. SK Raju @ Abdul Haque @ Jagga, 2018 INSC 780.
- ii. Sh. Akhilesh Bharti v. State, 2020:DHC:340.
- iii. Kamruddin v. State, 2022/DHC/004767.
- iv. Sachin Arora v. State Govt. NCT of Delhi, 2023:DHC:5808.
- v. Vinay v. State of NCT of Delhi, 2023:DHC:5809.



vi. Emeka Emmanuel v. The State, Order dated 18.11.2022 passed in BAIL APPLN. 1231/2022.

vii. S. Kasi v. State, AIR 2020 SC 2921.

6. *Per contra*, learned APP for the State submitted that a notice was duly served upon the applicant, clearly mentioning that he has the right to be searched in the presence of a Gazetted Officer or a Magistrate. It was submitted that the non-mentioning of the word ‘nearest’ alone cannot amount to non-compliance of Section 50 of the NDPS Act. It was further submitted that the argument advanced on behalf of the applicant is not tenable in law as no statute or precedent prescribes the exact form or language which is to be used for a notice under Section 50 of the NDPS Act.

7. Learned APP submitted that what is mandatory as per the said provision is that a person who has been apprehended is informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate and to search the police party in order to rule out any doubt of the authenticity of proceedings conducted on the spot. Once the applicant was informed about both his rights, the mandatory requirements of Section 50 are complied with. Further, it was submitted that the word ‘any’, as per its literal meaning does not preclude ‘nearest’. Therefore, it was submitted that Section 50 of the NDPS Act was complied with substantially and there is no irregularity.

8. It was also the contention of learned APP for the State that compliance of Section 50 of the NDPS Act is a matter of trial and cannot be considered at the stage of bail, especially in cases involving recovery of a commercial quantity, where rigors of Section 37 of the NDPS Act would be attracted. It was further submitted that the preset applicant had waived of his right to be



searched in the presence of a Gazetted Officer or a Magistrate and the requirement of being searched in the presence of ‘nearest’ Gazetted Officer or nearest Magistrate would arise only if the accused had exercised his option in terms of Section 50 of the NDPS Act.

9. In support of his contentions, learned APP for the State placed reliance on the following judgments:

- i. Arif Khan @ Agha Khan v. The State of Uttarakhand, 2018 INSC 426.
- ii. The State of Punjab v. Baldev Singh, 1999 INSC 282.
- iii. Prabha Shankar Dubey v. State of Madhya Pradesh, 2003 INSC 686.
- iv. Nabi Alam alias Abbas v. State (Govt of NCT of Delhi), 2021:DHC:1974.

10. Heard learned counsel for the parties and perused the record.

11. The primary ground on the basis of which bail has been sought in the present case is the alleged non-compliance of Section 50 of the NDPS Act. Learned APP for the State contended that the same is a matter for trial and the cannot be looked into at this stage. The said contention cannot be sustained because this Court, for the purposes of deciding the present application within the contours of Section 37 of the NDPS Act, has to examine the legal issues raised herein. The Hon’ble Supreme Court, in **Union of India v. Shiv Shankar Kesari, (2007) 7 SCC 798**, while explaining the term ‘reasonable ground’ used in Section 37(1)(b)(ii) of the NDPS Act, held as under:

“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances



as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”

(emphasis supplied)

Further, more recently, in **Mohd. Muslim alias Hussain v. State (NCT of Delhi), 2023 SCC OnLine SC 352**, the Hon’ble Supreme Court held as under:

“**21.** The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused’s guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only *prima facie*, based on a *reasonable reading*, which does not call for meticulous examination of the materials collected during investigation (as held in *Union of India v. Rattan Malik*). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. *Satender Kumar Antil* supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”

In view of the above, this Court, for the limited purpose of deciding the present bail application, has to arrive at a *prima-facie* finding with regard to the legal issues raised herein.



12. A Coordinate Bench of this Court, in **Mohd. Jabir** (*supra*), after examining various precedents on the scope of Section 50 of the NDPS Act, observed and held as under:

“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.

52. In *Nathi Devi v. Radha Devi Gupta*, (2005) 2 SCC 271, the Hon’ble Supreme Court observed:

13. The interpretative function of the court is to discover the true legislative intent. It is trite that in interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional.

14. It is equally well settled that in interpreting a statute, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors. (See State of U.P. v. Dr. Vijay Anand



Maharaj [AIR 1963 SC 946 : (1963) 1 SCR 1], Rananjaya Singh v. Baijnath Singh [AIR 1954 SC 749 : (1955) 1 SCR 671], Kanai Lal Sur v. Paramnidhi Sadhukhan [AIR 1957 SC 907 : 1958 SCR 360], Nyadar Singh v. Union of India [(1988) 4 SCC 170 : 1988 SCC (L&S) 934 : (1988) 8 ATC 226 : (1988) 4 SCC 170 : AIR 1988 SC 1979], J.K. Cotton Spg. and Wvg. Mills Co. Ltd. v. State of U.P. [AIR 1961 SC 1170] and Ghanshyamas v. CST [AIR 1964 SC 766 : (1964) 4 SCR 436].)

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.

54. The factum independence is also stressed in Drug Law Enforcement Field Officer’s Handbook, wherein it is stated:

“The team should reach the locality where the target premises is situated well before the strike time and arrange two respectable independent residents in the area willing to witness the search proceedings. To ensure people agree to be a part of these proceedings, the DLEO should use a mixture of tact, gentle persuasion and legal necessity to convince people to cooperate with the law. In dire necessity, the DLEO can issue a legal notice to persons requiring them to act as witnesses. Refusal to do so when asked in writing, without reasonable cause, is an offence under Section 187 IPC read with Section 100 Cr. P.C. Once witnesses are identified, the DLEO should explain to them the purpose of the search without divulging specific details and ask them to accompany him to the target premises”

55. The sanctity of the above-mentioned Field Officer’s Handbook was discussed by the Hon’ble Supreme Court in the case titled as *Shafhi Mohammad v. State of H.P.*, (2018) 2 SCC 801.

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.”

13. In view of the aforesaid, the contention of learned APP for the State that the question of being search in the presence of the ‘nearest’ Gazetted Officer or Magistrate would arise only if the accused had exercised his option in terms of Section 50 of the NDPS Act, is not tenable.

14. The right of the accused, as contained in Section 50 of the NDPS Act is mandatory in nature and the same has been emphasized time and again in the various judicial precedents. The co-ordinate bench of this Court, in **Mohd. Jabir (supra)**, has taken note that the word ‘nearest’ has been used in the statute with a certain intention, as discussed hereinabove in the aforesaid judgment.

15. The relevance of a notice under Section 50 of the NDPS Act and its mandatory compliance was clearly spelt out by the Hon’ble Supreme Court in **State of Punjab v. Balbir Singh, (1994) 3 SCC 299**, wherein it was held as under:

“**16.** One another important question that arises for consideration is whether failure to comply with the conditions laid down in Section 50 of the NDPS Act by the empowered or authorised officer while conducting the search, affects the prosecution case. The said provision (Section 50) lays down that any officer duly authorised under Section 42, who is about to search any person under the provisions of Sections 41, 42 and 43, shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate and if such requisition is made by the person to be searched, the authorised officer concerned can detain him until he can produce him before such Gazetted Officer or the Magistrate. After such production, the Gazetted Officer or the Magistrate, if sees no reasonable ground for search, may discharge the



person. But otherwise he shall direct that the search be made. To avoid humiliation to females, it is also provided that no female shall be searched by anyone except a female. The words “*if the person to be searched so desires*” are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search would be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. **To us, it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused.** To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right.

18. Under the Act wide powers are conferred on the officers and deterrent sentences are also provided for the offences under the Act. **It is obvious that the legislature while keeping in view the menace of illicit drug trafficking deemed it fit to provide for corresponding safeguards to check the misuse of power thus conferred so that any harm to innocent persons is avoided and to minimise the allegations of planting or fabricating by the prosecution, Section 50 is enacted.**

20. In *Miranda v. Arizona* [384 US 436 : 16 L Ed 2d 694 (1966)] the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus:

“At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it — the threshold requirement for an intelligent decision as to its exercise. More important,



such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”

It was further observed thus:

“The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest.”

When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable. Therefore it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory.”

(emphasis supplied)

16. At this juncture, reference is made to **Nazir Ahmad and The King-Emperor, 1936 SCC OnLine PC 41**, wherein the Privy Council was dealing with a case where the appellant was convicted on the strength of a confession said to have been made by him to a Magistrate under the provisions of Section 164 of the CrPC. Oral evidence of the said alleged confession was given by the learned Magistrate but the same was not recorded by him, as required under Section 164 of the CrPC. While dealing with the aforesaid situation, the Privy Council observed and held as under:

“The rule which applies is a different and not less well recognised rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.”



17. In the present case, notice under Section 50 of the NDPS Act given to the applicant reads as under:

TRUE TYPED COPY

DD No. 10 dated 11/11/21 Narcotics Cell Crime Branch, Delhi
Notice U/S 50 NDPS Act

आप, आबिद S/O मुन्ने खान R/o Village Mohanpur P.S Faridpur District Bareilly, UP, Present address Munna Meat Wali Gali C/o Ajay Kapashera, Delhi. आयु 32 वर्ष को इस नोटिस के माध्यम से सुचित किया जाता है की पुलिस के पास इतला है की आप दिल्ली में थोक व परचुन में हेरोइन की सप्लाई करने का काम करते हो व आज भी आप इस समह यहाँ पर किसी को Herion की सप्लाई देने आये हो तथा आपसे इस समह Herion बरामद होने की संभावना है जिसके लिए आपकी तलाशी ली जानी है आपका यह अधिकार है की आपकी तलाशी से पहले आपको किसी राजपत्रित अधिकारी या मजिस्ट्रेट के सामने पेश किया जा सकता है अन्यथा किसी राजपत्रित अधिकारी या मजिस्ट्रेट साहब को भी बुलाया जा सकता है व अपनी तलाशी उनके सामने करवा सकते हो तथा आपका यह भी कानूनी अधिकार है की आप अपनी तलाशी से पहले पुलिस पार्टी के सदस्यों व पुलिस की प्राइवेट कार की तलाशी भी ले सकते हो।

गवाह :-

1. HC Ashok No. 441/ Crime
Narcotics Cell, Crime Branch
2. HC Rupesh No. 908/ Crime
Narcotics Cell, Crime Branch

11/11/2021
 ASI Om Prakash
 No 1033 / Crime
 N. Cell Crime Branch

मैंने आपके द्वारा दिए नोटिस को प्राप्त कर लिया है आपने मुझे राजपत्रित अधिकारी व मजिस्ट्रेट का मतलब भी अच्छी तरह समझा दिया है मैं अनपढ़ हु व आपने नोटिस को पढ़कर मेरे कानूनी अधिकार के बारे में अच्छी तरह से समझा दिया है मैं अपनी तलाशी किसी राजपत्रित अधिकारी या मजिस्ट्रेट साहब के सामने नहीं करवाना चाहता हु व ना ही पुलिस पार्टी के सदस्यों की व प्राइवेट कार की तलाशी लेना चाहता हु आप मेरी तलाशी ले सकते हो।

Witness

(1) HC Ashok No. 441/ Crime
Narcotics Cell, Crime Branch

(2) HC Rupesh No. 908/ Crime
Narcotics Cell, Crime Branch Delhi

11/11/2021
 ASI Om Prakash
 No 1033 / Crime
 N. Cell Crime Branch



With regard to the aforesaid notice, it is the case of the prosecution that the present applicant refused to be searched before a Gazetted Officer or a Magistrate and therefore, the question of him being searched before ‘nearest’ such officer does not arise. A perusal of the aforesaid notice reflects that the word ‘nearest’ does not find any mention as stated hereinabove. The said word is in the language of the section itself. The raiding officer in the present case ought to have given the said option to the applicant. This Court is in agreement that the judgment of co-ordinate bench in **Mohd. Jabir** (*supra*) to the effect that the word ‘nearest’ has been used in the statute with a certain intention and cannot be ignored by the concerned Investigating Officer at the time of giving notice under Section 50 of the NDPS Act.

18. As per nominal roll dated 10.05.2023, the applicant has been in judicial custody for 01 year 05 months and 28 days. The investigation in the present case is complete, the chargesheet stands filed and the trial is underway. No useful purpose will be served by keeping the applicant in judicial custody any further.

19. In totality of the facts and circumstances of the case, the present application is allowed. The applicant is admitted to bail upon his furnishing a personal bond in the sum of Rs. 50,000/- alongwith two sureties of like amount to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions:

- i. The nominal roll shows that the applicant is residing at Village Mohanpur Dharuva, Tehsil Faridpur, District Bareilly, Uttar Pradesh. In case of any change of address, the applicant is directed to inform the same to the learned Trial Court and the Investigating Officer.



- ii. The applicant shall not leave India without the prior permission of the learned Trial Court.
 - iii. The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
 - iv. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witnesses in any manner.
 - v. The applicant shall join the investigation, as and when required by the Investigating Officer.
 - vi. In case it is established that the applicant tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.
- 20.** The application stands disposed of along with all the pending application(s), if any.
- 21.** Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case and any observations made are only for the purpose of the present bail application.
- 22.** Let a copy of this judgment be communicated to the concerned Jail Superintendent for necessary information and compliance.
- 23.** Judgment be uploaded on the website of this Court, *forthwith*.

**AMIT SHARMA
JUDGE**

DECEMBER 05, 2023/bsr