

Delhi High Court

Nabi Alam @ Abbas vs State (Govt Of Nct Of Delhi) on 6 July, 2021

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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 06.07.2021

+ BAIL APPLN. 2641/2018

NABI ALAM alias ABBAS

..... Petitioner

Through:

Mr. Aldanish Rein, Advocate

Versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Mr. Amit Chadha, Additional Public

Prosecutor for State with Inspector

Rakesh Duhan, SI Vinod &

SI Vishan

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (oral)

The hearing has been conducted through video conferencing. CrI.M(B)555/2021

1. The present application for bail has been preferred by the petitioner praying for his release due to Covid 19 pandemic and also since his application for regular bail is pending since the year 2018.

2. Learned counsel for petitioner points out that besides the afore-noted prayer, the ground on which petitioner has sought interim bail is that son of petitioner's elder brother, who is a physically challenged person, was admitted in ICU due to brain haemorrhage and his brother was unable to attend him in hospital, as his wife had given birth to their third child. Learned counsel submitted that parents of petitioner are old and aged and could not help them and in such circumstances, therefore, petitioner had sought interim bail. However, son of brother of petitioner could not survive.

3. Learned counsel insisted that in above critical circumstances, petitioner could not stand by his family and, therefore, his application for interim bail be allowed, keeping in view that his application for bail is pending consideration since 2018.

4. Learned Additional Public Prosecutor for State has opposed the present application by submitting that since last rites of son of petitioner's brother are over and the offences alleged are serious, this application deserves to be dismissed.

5. After hearing learned counsel appearing from both the sides, this Court finds that infact the relief claimed in this application no more survives for consideration, however, keeping in mind that the bail application of petitioner is pending since the year 2018, with the consent of learned counsel for both the sides, the main petition is heard today itself.

6. The application is disposed of.

BAIL APPLN. 2641/2018

7. By virtue of present petition, petitioner is seeking bail in FIR No. 124/2017, registered at Crime Branch for the offences under Sections 21/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

8. The brief facts of the present case are that on 27.07.2017, SI Vinod Kumar, Narcotic Cell received a secret information that two persons, namely Nabi Alam, i.e. petitioner herein and Mohd. Aakil are indulged in the supply of heroin in Delhi, which they get from Badaiyu/Bareli and they would be supplying a big consignment near Red Light of Chanakya Place, Uttam Nagar, Delhi. Accordingly, a raiding team was constituted and accused were apprehended. Notice under Section 50 of NDPS Act was served upon both of them and they were made aware of their legal rights of being searched before a Gazetted Officer or Magistrate.

9. Upon personal search, heroin weighing 250 gms. was recovered from the possession of petitioner-Nabi Alam and 50 gms. of heroin was recovered from Mohd. Aakil. Both of them were taken into custody on the same day i.e. 27.07.2017 and FIR in question was registered against them. Upon completion of investigation, charge sheet was filed on 25.10.2017 before the learned trial court and the trial commenced. The learned trial court dismissed petitioner's bail application vide order dated 13.07.2018, while observing as under:-

"In the considered opinion of this Court, there are prima facie serious allegations against this accused at this stage qua recovery of commercial quantity of contraband from his possession. Since quantity of contraband recovered from possession of this accused is commercial, there is a bar of section 37 of NDPS Act for granting bail to this accused. He may flee from justice and may adversely affect the prosecution case, if granted bail at this stage. For these reasons, I do not find any merits in this application and it is hereby rejected."

10. Petitioner - Nabi Alam approached this Court for bail primarily on the ground that necessary compliance of provisions under Section 50 of NDPS Act was not made before alleged recovery of heroin was made at his instance, and therefore, trial against him is vitiated.

11. At the hearing, learned counsel for petitioner placed reliance upon Hon'ble Supreme Court's decision in Arif Khan @Agha Khan Vs. The State of Uttarakhand (2018) 18 SCC 380 to submit that Coordinate Benches of this Court have granted bail to the accused in similar circumstances while relying upon decision in Arif Khan (Supra). The decision rendered by this Court and relied upon by petitioner are:-

i. Decision dated 31.10.2018 in Bail Application 1854/2017, Deepak Singh Vs. State;

ii. Decision dated 25.04.2019 in Bail Application 218/2019, Sunny Khanna Vs. State (Govt. of NCT of Delhi) ; iii. Decision dated 15.10.2019 in Bail Application 1766/2019, Lal Babu @ Rajesh @ Raju Vs. Government of NCT of Delhi;

and of this Court in iv. Decision dated 20.09.2019 in Bail Application 2014/2019, Vaibhav Gupta Vs. State

12. Reliance was also placed by petitioner's counsel upon various decisions of High Court of Punjab and Haryana to submit that if the recovery is not made before the Gazetted Officer or Magistrate, it would amount to non-compliance of provisions of Section 50 of NDPS Act and therefore, petitioner deserves bail.

13. To the contrary, the stand of prosecution is that necessary compliance under Section 50 of the Act was made and petitioner was made aware of his rights of being searched before a Gazetted Officer or Magistrate, to which he refused and so, this petition deserves to be rejected. In support of his submissions, learned Additional Public Prosecutor for State has relied upon decision of a Coordinate Bench of this Court dated 14.01.2020 in Crl.A.139/2017, Innocent Uzoma Vs. State.

14. Finding contradictory views expressed by various Benches of this Court qua the scope and ambit of stipulations contained in Section 50 of NDPS Act, a reference was made by this Court to the Hon'ble Chief Justice for constitution of a Bench and vide Judgment dated 04.06.2021 the Division Bench has inter alia answered the reference.

15. With regard to reliance placed by petitioner's counsel upon Supreme Court's decision in Arif Khan @ Agha Khan (Supra), the Division Bench has observed as under:-

21. Coming now to the emphasis placed on behalf of the applicant/accused on the judgment rendered by the Supreme Court in Arif Khan @ Agha Khan (supra), the question that needs to be considered is whether that decision is an authority for the proposition that notwithstanding the person proposed to be searched has, after being duly apprised of his right to be searched before a Gazetted Officer or Magistrate, but has expressly waived this right in clear and unequivocal terms; it is still mandatory that his search be conducted only before a Gazetted Officer or Magistrate.

22. In this behalf, it is necessary to consider the observations of the Hon'ble Supreme Court in Arif Khan @ Agha Khan (supra), the relevant paragraphs of which decision are being extracted hereinbelow: -

"18. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remain no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in State of Punjab v. Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and Vijaysinh Chandubha

Jadeja [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609] .

19. Indeed, the latter Constitution Bench decision rendered in Vijaysinh Chandubha Jadeja (supra) has settled the aforementioned questions after taking into considerations all previous case law on the subject.

20. Their Lordships have held in Vijaysinh Chandubha Jadeja that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied Signature Not Verified Digitally signed Signing Date:07.06.2021 15:26:10 with. It is held that it is imperative on the part of the police officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorised officer to make the suspect aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a gazetted officer or a Magistrate."

23. A plain reading of the above extracted paragraphs leads to but one inescapable conclusion that their Lordships of the Hon'ble Supreme Court whilst following the ratio of the decision of the Constitution Bench in Vijaysinh Chandubha Jadeja (supra) held that the same has settled the position of law in this behalf to the effect that, whilst it is imperative on the part of the empowered officer to apprise the person of his right to be searched only before a Gazetted Officer or Magistrate; and this requires a strict compliance; the Hon'ble Court simultaneously proceeded to reiterate that, in Vijaysinh Chandubha Jadeja (supra) "it is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act". In this view of the matter, the reliance placed by counsel for the applicant/accused on the decision of the Supreme Court in Arif Khan @ Agha Khan (supra), in our respectful view does not come to his aid."

16. In the aforesaid view of the matter, on the aspect of compliance of provisions of Section 50 of NDPS Act, the Division Bench has answered the reference while holding as under:-

"26. For the sake of clarity it is held that, axiomatically, there is no requirement to conduct the search of the person, suspected to be in possession of a narcotic drug or a psychotropic substance, only in the presence of a Gazetted Officer or Magistrate, if the person proposed to be searched, after being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate categorically waives such right by electing to be searched by the empowered officer. The words "if such person so requires", as used in Section 50(1) of the NDPS Act would be rendered otiose, if the person proposed to be searched

would still be required to be searched only before a Gazetted Officer or Magistrate, despite having expressly waived "such requisition", as mentioned in the opening sentence of sub-Section (2) of Section 50 of the NDPS Act. In other words, the person to be searched is mandatorily required to be taken by the empowered officer, for the conduct of the proposed search before a Gazetted Officer or Magistrate, only "if he so requires", upon being informed of the existence of his right to be searched before a Gazetted Officer or Magistrate and not if he waives his right to be so searched voluntarily, and chooses not to exercise the right provided to him under Section 50 of the NDPS Act."

17. In view of afore-noted pertinent observations of the Division Bench, petitioner does not get benefit of Supreme Court's decision in Arif Khan @ Agha Khan (Supra) as well as his challenge to compliance of provisions under Section 50 of NDPS Act also meets its fate.

18. During the course of arguments, learned counsel for petitioner submitted that there is no quarrel to the aforesaid observations of the Hon'ble Division Bench with regard to applicability of Supreme Court's decision in Arif Khan @ Agha Khan (Supra) as well as compliance under Section 50 of NDPS Act, however, the case of petitioner seeking bail is on a strong footing, as the recovered contraband/heroin at the instance of petitioner is less than commercial quantity. It is submitted by learned petitioner's counsel that small quantity of 250 gms. of heroin has been allegedly recovered from petitioner and, therefore, he deserves to be released on bail.

19. The aforesaid submission is strongly opposed by learned Additional Public Prosecutor for State while submitting that total recovery of contraband in this case is 300 gms, which is commercial quantity and the FIR in question has been registered for the offences under Sections 21 and 29 of NDPS Act and also that bar of Section 37 of NDPS Act does not permit any leniency towards the petitioner.

20. Pertinently, contraband/heroin weighing 250 gms. was recovered from the possession of petitioner-Nabi Alam and 50 gms. of heroin was recovered from Mohd. Aakil. Hence, in terms of sub-clause vii(a) and xxiii(a) of Section 2 of the NDPS Act, the recovered quantity of 250 gms. of heroin from the person of petitioner is commercial quantity, whereas the total recovery of heroin in this case is 300 gms.

21. The Hon'ble Supreme Court in Hon'ble Supreme Court in State of Kerala & Ors. Vs. Rajesh & Ors. (2020) 12 SCC 122 has categorically interpreted the mandate and rigors of Section 37 NDPS Act. The pertinent observations are as under:-

"18. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in the offences under the NDPS Act. In Union of India v. Ram Samujh [Union of India v. Ram Samujh, (1999) 9 SCC 429 : 1999 SCC (Cri) 1522] , it has been elaborated as under:

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. State (UT of Goa)* [*Durand Didier v. State (UT of Goa)*, (1990) 1 SCC 95 : 1990 SCC (Cri) 65] as under: (SCC p. 104, para

24) '24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years.

Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.'

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio- economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended."

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."

22. Applying the afore-noted ratio laid down by the Hon'ble Supreme Court in State of Kerala & Ors. Vs. Rajesh (Supra) to the case in hand, this Court finds that petitioner fails to accomplish the embargo laid down under Section 37 of the NDPS Act. Accordingly, I am not inclined to grant bail to petitioner.

23. The present petition is accordingly dismissed, while making it clear that any observation made herein shall influence the case of petitioner on merits.

24. Copy of this judgment along with copy of judgment dated 04.06.2021 passed by the Division Bench in this case be sent to the Registrar General of this Court, who shall circulate it to the District Judge (Headquarters) for being circulated to Principal District and Sessions Judges and all the concerned courts.

(SURESH KUMAR KAIT) JUDGE JULY 06, 2021 r