

**HIGH COURT OF RAJASTHAN**  
**Hon'ble Mr. Justice Farjand Ali**  
**Order Date: 21/11/2023**

S.B. Criminal Misc 2nd Suspension Of Sentence Application (Appeal) No. 1461/2023

**ASAD AHMED S/o ATIKAHMED ANSARI ...PETITIONER**

**VERSUS**

**STATE OF RAJASTHAN ...RESPONDENT**

**Legislation and Rules:**

Sections 8/15(c) of the NDPS (Narcotic Drugs and Psychotropic Substances) Act

**Subject:**

Application for suspension of sentence in relation to a conviction under the NDPS Act, focusing on alleged procedural irregularities in the seizure of contraband and authority of the seizing officer.

**Headnotes:**

Conviction Under NDPS Act: Petitioner convicted and sentenced under Sections 8/15(c) of NDPS Act; challenges conviction citing procedural irregularities and incorrect legal interpretation by the trial court - [Para 1].

Contention on Seizing Officer's Authority: Petitioner argues non-compliance with Section 42 of NDPS Act; seizing officer not authorized as S.H.O., thus rendering the search and seizure process invalid - [Para 2].

Prosecution's Stance: Opposes suspension of sentence, citing the recovery of a commercial quantity of contraband, invoking Section 37 of NDPS Act - [Para 3].

Critical Examination of Seizing Officer's Role: Court notes issues with the legitimacy of the seizing officer's role, referencing precedent on the need for specific authorization under Section 42 of NDPS Act - [Paras 4, 7-9].

Admission of Procedural Flaws: Acknowledgment of non-compliance with Section 42(2) of NDPS Act and premature engagement of independent witnesses during seizure - [Para 5].

Suspension of Sentence and Bail Granted: Sentence suspended considering potential merit in appeal, duration of sentence served, and procedural errors; bail granted with specific conditions - [Paras 6-8].

**Referred Cases:**

S.B. Criminal Misc. II Bail Application No. 3678/2023 titled Satyanarayan @ Sattu S/o Jeetmal Jat Vs. State of Rajasthan

**Order****21/11/2023**

1. The instant application for suspension of sentence has been moved on behalf of the applicant in the matter of judgment dated 16.11.2022 passed by the learned Special Judge, NDPS Act No. 2, Chittorgarh in Sessions Case No.172/2019 whereby he was convicted under Sections 8/15(c) of NDPS Act and sentenced to suffer maximum 10 years rigorous imprisonment along with a fine of Rs.1,00,000/- and in default to further undergo two month of rigorous imprisonment.

2. It is contended on behalf of the applicant that the learned trial Judge has not appreciated the correct, legal and factual aspects of the matter and thus, reached at an erroneous conclusion of guilt, therefore, the same is required to be appreciated again by this court being the first appellate Court. He submits that the seizing officer had been informed about the presence of narcotic substance in the car of the petitioner before he left to conduct search and seizure, yet the seizing officer did not relay the above-mentioned information to the senior officers before proceeding further which is mandatory under Section 42 of NDPS Act and thus, the entire process of recovery stands vitiated on this count because of non-compliance of Section 42 of NDPS Act. He further submits that the seizing officer, while undertaking proceedings for search and seizure, was not posted as S.H.O. of the concerned police station. He vehemently contended that subsection (1) of Section 42 of NDPS Act enumerates the power of officers specified therein who are duly empowered by the Central Government or the State Government as the case may be and as per the law, Sub Inspector is not empowered to effect search, seizure and arrest under the NDPS Act as the notification dated October 16, 1986 empowers only those Sub

Inspectors of Police to exercise the powers under Sec.42 of NDPS Act who are posted as State House Officers. Learned counsel for the petitioner vehemently submits that the mandatory provisions of NDPS Act have not been complied with, thus, on this count, the recovery of the contraband is vitiated. There are no factors at play in the case at hand that may work against grant of bail to the accusedpetitioner and he has been made an accused based on conjectures and surmises.

3. Per contra, learned Public Prosecutor opposes the bail application and submits that the alleged recovered contraband is way above the demarcated commercial quantity, thus, the impediment contained under Section 37 of NDPS Act will be attracted in the factual situation of the present case.

4. Heard and perused the material available on record. It is the case of defence that the Seizing Officer was neither posted as SHO nor any charge of the concerned Police Station was given to him. PW.1 Rajaram, the Sub-Inspector who conducted the search and seizure has been examined in the trial and he has categorically stated in cross-examination that he was second in command at the concerned police station. He has further admitted that there is nothing in writing, neither on record nor in the Roznamcha, which can prove the fact that the SHO handed over the charge of the police station to him. This court has passed a detailed order dated 09.11.2023 in this regard in S.B. Criminal Misc. II Bail Application No. 3678/2023 titled **Satyanarayan @ Sattu S/o Jeetmal Jat Vs. State of Rajasthan**, the relevant portion of the order is reproduced here as under:-

“7. While enacting Section 42 of NDPS Act, the legislature put a complete ban on authorities beyond the ones mentioned in the Section to carry out the functions under the Act. The legislature has clearly empowered the persons mentioned therein and it has also been specified through the notification No. F. 1(3) FD/EX/85-I, dated 16-10-86 as to who are authorised to do so.

8. Chapter V of the NDPS Act specifically provides that only the officers mentioned and empowered therein can give an authorisation to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. As per Section 42, only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal

knowledge or information. The specific rank of the officer and 'reason to believe' are two important requirements that are needed to be complied with necessarily. Firstly, the Magistrate or the Officers mentioned therein are empowered and secondly, they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the Act. So far as the first requirement is concerned, it can be seen that the legislature intended that only certain Magistrates and certain Officers of higher rank are empowered and can act to effect the arrest or search.

9. The notification No. F. 1(3) FD/EX/85-I, dated 16-10-86, published in Rajasthan Gazette Part IV-C

(II) dated 16-10-86 on page 269 reads as: S.O. 115.- In exercise of the powers conferred by section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No 61 of 1985) the State Government hereby authorise all

Inspectors of Police, and Sub-Inspectors of Police, posted as Station House Officers, to exercise the powers mentioned in Section 42 of the said Act with immediate effect:

Provided that, when power is exercised by Police Officer other than Police Inspector of the area concerned such officer shall immediately hand over the person arrested and articles seized to the concerned Police Inspectors or S.H.O. of the Police Station concerned."

5. It is an admitted position that no compliance of Section 42(2) of NDPS Act was made in this present case as the Seizing Officer candidly admitted in his cross-examination that no information under section 42(2) was supplied to higher officers before proceeding for the search and seizure of contraband. He further admits in his cross-examination that the independent witnesses were called even before the suspected vehicle reached the spot of Nakabandi. There remains no question to moot about the fact that there was previous information with the seizing officer regarding storage of illegal substance defined as contraband as per the provisions of NDPS Act, thus, the provision envisaged under Section 42 of NDPS Act would squarely apply in this case. The prosecution has utterly failed to establish the fact that the mandatory provisions were complied with since it is admitted fact that the information was not supplied to the superior officer according to Section 42(2) of NDPS Act.

6. Considering the overall facts and circumstances of the case and looking to the fact that as some of the questions raised by the learned counsel for the appellant

deserves to be appreciated again and if the same were decided in his favour, he may get acquittal; out of total 10 years of sentence he has served almost 6 years and looking to voluminous pendency of the cases, there is no likelihood of hearing of the appeal on merits in near future. While refraining from passing any comments on the niceties of the matter and the defects of the prosecution as the same may put an adverse effect on hearing of the appeal, this court is of the opinion that it is a fit case for suspending the sentence awarded to the accused appellant.

7. Accordingly, the 2<sup>nd</sup> application for suspension of sentence filed under Section 389 Cr.P.C. is allowed and it is ordered that the impugned order of sentence dated 16.11.2022 passed by the learned Special Judge, NDPS Act No. 2, Chittorgarh in Sessions Case No.172/2019 against the appellant-applicant **Asad Ahmed S/o Atik Ahmed Ansari** shall remain suspended till final disposal of the aforesaid appeal and he shall be released on bail provided he executes a personal bond in the sum of Rs.50,000/-with two sureties of Rs.25,000/- each to the satisfaction of the learned trial Judge for his appearance in this court on 22.12.2023 and whenever ordered to do so till the disposal of the appeal on the conditions indicated below:-

- (1) That he will appear before the trial Court in the month of January of every year till the appeal is decided.
- (2) That if the applicant changes the place of residence, he will give in writing his changed address to the trial Court as well as to the counsel in the High Court.
- (3) Similarly, if the sureties change their addresses, they will give in writing their changed address to the trial Court.

8. The learned trial Court shall keep the record of attendance of the accused-applicant in a separate file. Such file be registered as Criminal Misc. Case related to original case in which the accused-applicant was tried and convicted. A copy of this order shall also be placed in that file for ready reference. Criminal Misc. file shall not be taken into account for statistical purpose relating to pendency and disposal of cases in the trial court. In case the said accused applicant does not appear before the trial court, the learned trial Judge shall report the matter to the High Court for cancellation of bail.

\*Disclaimer: Always compare with the original copy of judgment from the official website.