

HIGH COURT OF RAJASTHAN**Bench: Justice Kuldeep Mathur****Date of Decision: 15 December 2023****RAJU LAL S/O SHRI MADHU JAT ...PETITIONER****VERSUS****STATE OF RAJASTHAN ...RESPONDENT****Legislation:**

Section 439 of the Criminal Procedure Code (Cr.P.C.)

Sections 8, 15, 50, 52A of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act)

Subject:

Second bail application under Section 439 Cr.P.C. in connection with offences under the NDPS Act involving recovery of poppy straw.

Headnotes:

Bail Application – NDPS Act Offenses – Second bail application under Section 439 Cr.P.C. for offenses under Section 8/15 of the NDPS Act – Petitioner's first bail application dismissed, co-accused Narayan Lal granted bail – Bail granted considering non-distinguishable case from co-accused. [Para 1, 25, 27]

Procedural Non-compliance – NDPS Act – Non-compliance with Section 50 (mandatory offer to be searched in the presence of a gazetted officer or magistrate) and Section 52A (mandatory sampling in the presence of a magistrate) of the NDPS Act – Seizure and sampling procedures not followed as required, impacting the legality of the seizure and prosecution case. [Para 14, 16, 17, 20, 21]

Judicial Discretion in Bail – NDPS Act – Exercise of judicial discretion favoring bail due to procedural irregularities and the prolonged incarceration of the petitioner – Bail granted based on totality of circumstances and the need to avoid further incarceration without commenting on the merits of the case. [Para 25, 27]

Decision – Bail granted to petitioner Raju Lal in connection with F.I.R. No.26/2022, Police Station Gangrar, District Chittorgarh, under NDPS Act – Petitioner to be released on bail subject to furnishing a personal bond and surety bonds as specified. [Para 29]

Referred Cases:

- **Sanjeev & Ors. Vs. State of Himachal Pradesh, 2022 Live Law (SC) 267**
- **Simranjeet Singh Vs. State of Punjab, 2023 (3) Crimes (SCC) 168**
- **Union of India Vs. Mohanlal & Ors., (2016) 3 SCC 397**
- **Rabi Prakash Vs. State of Odisha, Special Leave to Appeal (Crl.) No.4169 of 2023**

Representing Advocates:

HON'BLE MR. JUSTICE KULDEEP MATHUR

Order

15/12/2023

This second application for bail under Section 439 Cr.P.C. has been filed by the petitioner who has been arrested in connection with F.I.R. No.26/2022, registered at Police Station Gangrar, District Chittorgarh, for offence under Section 8/15 of the NDPS Act.

The first bail application of the petitioner was dismissed by this Court vide order dated 17.05.2023. Heard learned counsel for the petitioner and learned Public Prosecutor. Perused the material available on record.

As per the prosecution, on 29.01.2022, upon receiving secret information, the compound attached with the house of Narayan Lal was searched by the police team. During search, a swift car and a tractor were found parked therein and co-accused Narayan Lal was found sitting on the driver seat of the tractor whereas the present petitioner was found on the mudguard of the tractor.

Learned counsel for the petitioner submitted that co-accused namely Narayan Lal has already been enlarged on bail by a coordinate Bench of this

Court vide order dated 04.12.2023 in Criminal Misc. 2nd Bail Application No.9218/2023. The order dated 04.12.2023 passed by a coordinate Bench of this Court is reproduced hereinbelow:-

1. Arrested in furtherance of FIR No. 26/2022, registered at Police Station Gangrar, District Chittorgarh, petitioner has filed this application under section 439 Cr.P.C. for releasing him on bail. The petitioner is charged for offences punishable under Section 8/15 of the NDPS Act.
2. The first application for bail was disposed of without considering the merits of the case since that was not pressed by the petitioner.
3. The facts in a nutshell are that on 29.01.2022 at about 12.30 P.M. in pursuance to a secret information, the compound attached with house of Narayanlal was searched by Ratan Singh, SHO, Gangrar, District Chittorgarh. A swift car and a tractor without registration number were found parked therein and petitioner Narayanlal was found sitting on the driver seat of the tractor and coaccused Rajulal on the mudguard of the tractor. After due formalities, total 348 Kg. of poppy straw were recovered from 23 plastic bags in the trolley of the tractor.
4. To begin at the beginning Shri Bhagirath Ray Bishnoi, learned counsel representing petitioner has fervently argued that there is non compliance of provisions of section 50 of the NDPS Act. Since notice under section 50 of the Act issued to the petitioner does not mention either any of option or about the right of the petitioner. It only mentions about the necessity. Seizure Officer has not complied with the mandatory requirements of section 50 of the NDPS Act as no option for search, containing rights of petitioner, was given to the petitioner. Search has been conducted without complying with the provisions of section 50 of the NDPS Act, which renders the seizure illegal. While inviting the attention of the Court towards notice under section 50 of the Act issued to the petitioner it is contended that no option at all was given to the petitioner as contemplated under section 50 of the Act.
6. It is further argued that the samples for chemical analysis from seized drug were taken in the absence of a Magistrate in derogation of provisions of Section 52 A of the NDPS Act and such irregularities malign the entire proceedings; that entire allegations so levelled by the Police against the petitioner is totally false and baseless; that there is no concrete evidence to show direct nexus between the petitioner and the alleged contraband drug, rather case of the prosecution is based on surmises and conjectures; that co-accused **Parsu Ram S/o Magni Ram Suthar (Bail Application No. 12684/2023, decided on 19.10.2023)** and **Suresh S/o Late Ratan Lal Jat (Bail Application No.10687/2022, decided on 18.01.2023)** has already been enlarged on bail and the petitioner too deserves the same indulgence. Therefore, considering the facts and circumstances the petitioner may be released on bail.
7. Learned counsel for the petitioner has placed reliance on the Judgment passed in **2022 Live Law (SC) 267 Sanjeev & Ors. Vs. State of**

Himachal Pradesh.

8. Per contra, learned Public Prosecutor submits that seizure and sampling was in consonance with the procedure and the shortcomings pointed out by the learned counsel for the petitioner cannot be considered at this stage and are to be decided after trial only. It is further argued that the procedure prescribed under Sections 50 and 52 A of the NDPS Act were substantially adhered to.
9. It is further argued by learned Public Prosecutor that the tractor involved was in the physical possession of the petitioner which was purchased by him through an agreement to sale from registered owner and being the agreement holder, he was found sitting on the tractor accidentally, which connects direct nexus between the contraband seized and the petitioner, proving alleged contraband in the physical possession of the petitioner. In respect of infirmities in notice issued under Section 50 of the Act to the petitioner, learned Public Prosecutor pointed out that provisions of section 50 of the NDPS Act would have no application in the present case because it is not a case involving the recovery of contraband during personal search of the petitioner; that as the recovery was made from a vehicle, provisions of section 43 of the Act would operate and there was no requirement for the seizure officer to comply with the provisions of section 50 of the Act. The issue about non compliance of section 50 can be looked into after completion of the trial. Substantial compliance of various provisions under NDPS Act were adhered to.
10. It was submitted that the investigating officer had collected overwhelming evidence in the case which would prima-facie point towards the guilt of the accused. That keeping in view the gravity of offence alleged to have been committed by petitioner, he does not deserve any leniency, rather they need to be dealt with severely; that the drug recovered from the petitioner fall within the ambit of commercial quantity and the bar as contained in section 37 of the NDPS Act is attracted. He thus, craves rejection of the petitioner's bail application.
11. I have appreciated the submissions advanced by the learned defence counsel and learned Public Prosecutor and have carefully perused the material available on record.
12. The notice under section 50 issued to the petitioner reads as under:-

आपकी व आपके कब्जेशुदा नोहरे , बि ना नम्बरी ट्रेक्टर मय ट्राली व स्वि फट कार की तलाशी लेनी है। य बिद आप व आपके कब्जेशुदा नोहरे , बि ना नम्बरी ट्रेक्टर मय ट्राली व स्वि फट कार में कोई सं बिदग्ध वस्तु या मादक पदा र्थ& नही बिमला तो आपको उनमोबि(त बिकया जायेगा। यह आपका कानूनी अ बि-कार है। इस सम्बं- में आप अपनी बिलस्वि/त में सहम बित देवें।
13. I have carefully considered this argument in the light of section 50 of the act. 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. Therefore, the provisions of Section 50 are mandatory. As per the said provision, offer is to be made that he will be searched in the presence of a Gazetted Officer or a Magistrate. That is offer should contain mention of both officers and right to be discharged.

14. It is not disputed that words in sub-para 1 of section 50 if such persons so require have been interpreted by the Supreme Court as to mean that the police officer has to make an offer to the person to be searched. In view of the stringent provisions of the N.D.P.S. act, the officer is intended to make the person concerned aware of his rights under statute. When the requirement under the statute as interpreted by the Supreme Court is to make the person concerned aware of his rights, it follows that he has to be informed of all his rights and all the options open to him under the law. The interpretation which the learned counsel for the respondent wants to put on this provision does not appear to be correct. The importance of making a person concerned aware of his rights has been highlighted in the said judgment of the Supreme Court and if the right is so important it is also natural that a person should know all the options

available under the law, so that he can exercise any of options which may appear to be best to him in the circumstances. A particular person may like to be searched in the presence of a gazetted officer, while the other may like to be searched in the presence of a Magistrate or vice versa. Therefore, I am of the view that the offer to search in terms of section 50 NDPS act must contain both the options i.e. to be searched in the presence of a gazetted officer or a magistrate. If the main purpose behind the requirement of making the offer to the person to be searched, as interpreted by the Supreme Court in the aforesaid decision is to make the person aware of his rights under the law, there is no scope for the argument advanced on behalf of the State. Therefore, the complete offer as required under section 50 NDPS Act has not been given to the petitioner in the present case.

15. The record further indicates that the investigating agency had taken samples of contraband without taking recourse to Section 52 A of the NDPS Act. In the case of ***Simranjeet Singh Vs. State of Punjab 2023 (3) Crimes (SCC) 168***, the Apex Court has observed that drawing samples from the contraband recovered at the time of seizure is not in conformity with the law laid down in the case of ***Union of India Vs. Mohanlal & Ors. (2016) 3 SCC 397*** and the same creates a serious doubt about the prosecution case that substance recovered was a contraband.
16. Section 52A of the Act contemplates that where any narcotic drugs has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, such officer shall prepare an inventory of such narcotic drugs, containing all details of that narcotic drugs and make an application to any Magistrate for the purpose of allowing to draw representative samples of such drugs in the presence of such Magistrate and certifying the correctness of samples so drawn.
17. While dealing with scope of section 52 A of the Act, Hon'ble the Supreme Court in the case of Mangilal (supra) held that Sub-section (2) of section 52 A of the NDPS Act mandates the competent officer to prepare an inventory of narcotic drugs recovered. This has to be followed through an appropriate application to the Magistrate concerned. Such an application can be filed for anyone of the aforesaid three purposes. One of them is purpose of drawal of samples in presence of Magistrate with due certification. The objective behind this provision is to have an element of supervision by the Magistrate in taking samples. Therefore, when there is non-compliance of section 52 A of the NDSP Act and where a certification of a Magistrate is lacking, any sampling would not constitute primary evidence. The obvious reason behind this provision is to inject fair play in the process of investigation. section 52 A of the Act is a mandatory rule of evidence which requires the physical presence of a magistrate followed by an order facilitating his approval for certification of samples drawn.
18. In Mohanlal's case (supra), it was held 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 duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, such samples will then be enlisted and the correctness of samples so drawn certified by the Magistrate.

19. There is no provision in the Act that mandates taking of samples at the time of seizure itself. The question of drawing of samples at the time of seizure, which often takes place in the absence of the Magistrate, does not in the above scheme of things, arise. 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.
20. In view of above pronouncements of Hon'ble the Apex Court, I have perused the seizure memo in which it is stated that samples were drawn immediately after the seizure, in the absence of Magistrate.
21. Prima facie, drawing of samples from the contraband drug at the time of seizure is not in conformity with the law laid down in above mentioned cases, which brings the case of prosecution under cloud about the prosecution's case that substance recovered was a contraband. 22. In the case ***Rabi Prakash Vs. State of Odisha, Special Leave to Appeal (Crl.) No.4169 of 2023***, Hon'ble Apex Court has observed that prolonged incarceration, generally militates against the most precise fundamental right guaranteed under Article 21 of the Constitution of India and in such a situation the conditional liberty must override the statutory embargo created under Section 37 of the NDPS Act.
23. In view of above, prima facie there appears to be serious gray areas in the case against the petitioner as regards the sampling of contraband drug.
24. As per charge-sheet, it is admitted case of the prosecution that the procedure of extracting the samples before the Magistrate was not followed. Since the samples sent to the FSL were not the samples extracted before the judicial Magistrate and were the samples taken out at the time recovery itself.
25. Having regard to the facts of the case and taking into account totality of circumstances, in my considered opinion, the submissions made by learned counsel for the petitioner cannot be completely overlooked. The petitioner is in custody for last more than 22 months. Be that as it may, while desisting to make any comment on merits, I feel persuaded to exercise discretion in favour of petitioner for enlarging him on bail.
26. In this background, I am of the opinion that the restrictions imposed by Section 37 of the NDPS Act are duly satisfied, forasmuch this court feels that the petitioner has available to him, substantial grounds so as to question the prosecution case.
27. In this background, without commenting any opinion on the merits of the case and having regard to the entirety of the facts and circumstances of the case, no useful purpose will be served by keeping the petitioner in further incarceration therefore, I am inclined to grant indulgence of bail to the petitioner.
29. Consequently, the present second bail application is allowed and it is directed that the petitioner **Narayan Lal S/o Shiv Lal Suwalka**, arrested in connection with the F.I.R. No. 26/2022, registered at Police Station Gangrar, District Chittorgarh, shall be released on bail provided he furnishes a personal bond and two surety bonds of sufficient amount to the satisfaction of the learned Trial Court with the stipulation to appear before that Court on all dates of hearing and as and when called upon to do so. This order is subject to the condition that accused, within 7 days of his release and sureties, on the day of furnishing bail, will also furnish details of their all bank

accounts, with bank and branch name, in shape of an affidavit, and submit legible copy of their Aadhar cards as well as front page of Bank pass book, for smooth recovery of penalty amount, if there arise a need for recovery of penalty under Section 446 Cr.P.C in future.

Learned counsel for the petitioner further submitted that the case of present petitioner is not distinguishable from that of coaccused Narayan Lal, who has already been enlarged on bail. The petitioner is in judicial custody and the trial of the case will take sufficiently long time, therefore, the benefit of bail should be granted to the accused-petitioner.

Learned Public Prosecutor has opposed the bail application. However, he was not in a position to refute the fact that coaccused has already been enlarged on bail by a coordinate Bench of this Court.

Having considered the rival submissions, facts and circumstances of the case, this Court *prima facie* finds that since the case of present petitioner is not at all distinguishable from that of above named co-accused who has already been enlarged on bail, the twin conditions imposed by Section 37 of the NDPS Act are duly satisfied. Thus, without expressing any opinion on merits/ demerits of the case, this Court is inclined to enlarge the petitioner on bail.

Consequently, the second bail application under Section 439 Cr.P.C. is allowed. It is ordered that the accused-petitioner **Raju Lal S/o Shri Madhu Jat** arrested in connection with F.I.R. No.26/2022, registered at Police Station Gangrar, District Chittorgarh, shall be released on bail, if not wanted in any other case, provided he furnishes a personal bond of Rs.1,00,000/- and two sureties of Rs.50,000/- each, to the satisfaction of learned trial court, for his appearance before that court on each & every date of hearing and whenever called upon to do so till completion of the trial.

© All Rights Reserved @ LAWYER E NEWS

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