1058
20/7/21

Most Urgent/Out of turn

OFFICE OF THE PRINCIPAL DISTRICT & SESSIONS JUDGE (HQ): DELHI

No. 21760 – 21779 Genl./HCS/2021

Dated, Delhi the 17 JUL 2021

3863

Sub: **Circulation of copy of Judgment/Order dated 06.07.2021passed by Hon'ble Mr. Justice Suresh Kumar Kait and a copy of Judgment dated 04.06.2021 passed by Hon'ble Division Bench, High Court of Delhi, New Delhi in Bail Appeal No. 2641/2018 & Crl. M. (Bail) 555/2021 titled as "Nabi Alam@Abbas Vs. State (Govt. of NCT of Delhi)" for compliance.**

1. All the Ld. Principal District & Sessions Judges, Delhi, New Delhi (except Central District) with request to circulate the same amongst the Judicial Officers under their control. NWS
2. All the Judicial Officers dealing with NDPS Cases posted in Central District, Tis Hazari Courts, Delhi.
3. The Ld. Registrar General, Hon'ble High Court of Delhi, New Delhi for information.
4. The Chairman, Website Committee, Tis Hazari Courts, Delhi with the request to direct the concerned official to upload the same on the Website of Delhi District Courts.
5. The Director (Academics), Delhi Judicial Academy, Dwarka, New Delhi for information as requested vide letter no.DJA/Dir (Acd)/2019/4306 dated 06.08.2019
6. Dealing Assistant, R&I Branch for uploading the same on LAYERS
7. For uploading the same on Centralized Website through LAYERS.

OR

Any other order(s)/direction(s) which your good self deem fit may kindly be passed.

Digitally signed by RAKESH PANDIT Date: 2021.07.17 14:13:05 +05'30'

(RAKESH PANDIT)
Officer-in Charge, Genl. Branch, (C)
Addl. District & Sessions Judge,
Tis Hazari Courts, Delhi.

Encl.: As above.

OFFICE OF THE PR. DISTRICT & SESSIONS JUDGE, ROHINI COURTS

Genl.I/N-W & N/Rohini/2021/ 130-133(own) Delhi, dated the 22/7/2021

Copy forwarded for information and necessary compliance to :-

1. All the Ld. Judicial Officers **dealing with NDPS Cases** posted at North-West & North District, Rohini Courts, Delhi (through email-id).
2. The Personal Office, Ld. Principal District & Sessions Judge, North-West & North District, Rohini Courts, Delhi (through email-id).
3. The Dealing Official, Computer Branch, Rohini Courts, Delhi for uploading the same on WEBSITE (through email-id).
4. The Dealing Official, R & I Branch, Rohini Courts, Delhi for uploading the same on LAYERS (through email-id).

(G.K. MATHUR)
Incharge,
General Branch,
Pr. District & Sessions Judge's Office,
Rohini Courts Complex, Delhi.

22/7/21

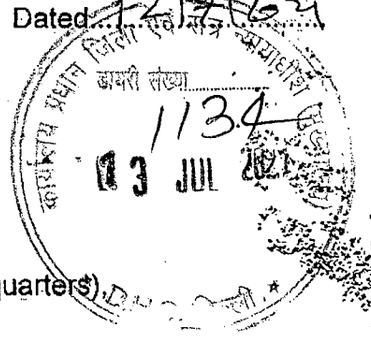
D/O

D-4

HIGH COURT OF DELHI AT NEW DELHI

No...16826...../Crl.-II, Dated...12/7/2021

From:
The Registrar General,
High Court of Delhi,
New Delhi.



To,
The Learned District & Sessions Judge (Headquarters),
Tis Hazari Courts, Delhi.

Bail Appln. 2641/2018 & Crl.M.(B) 555/2021

Nabi Alam alias Abbas **Petitioner**

VERSUS

State (Govt. of NCT of Delhi) **Respondent**

Sub: **Compliance of Order dt. 06.07.2021 passed by Hon'ble Mr. Justice Suresh Kumar Kait in Bail Appln. 2641/2018.**

Ref: Petition under Section 439 Cr. P.C for grant of bail in FIR No. 124/2017, under Section 21/29 NDPS Act, Police Station- Crime Branch, New Delhi.

Sir/Madam,

I am directed to forward herewith for immediate compliance a copy of judgment/order dt. **06/07/2021** passed by **Hon'ble Mr. Justice Suresh Kumar Kait** and a copy of judgment dt. **04.06.2021** passed by **Hon'ble Division Bench** of this Court to circulate to all the Learned Principal District & Sessions Judges and all the concerned courts.

Other necessary directions are contained in the enclosed copy of order.

Yours faithfully

Admin.Officer (Judl.)Crl.-II
for Registrar General

Encl: **Copy of order dt. 06/07/2021 & 04.06.2021**
And memo of parties.

3

IN THE HIGH COURT OF DELHI AT NEW DELHI
CRIMINAL APPELLATE JURISDICTION
Bail Application No. 2641 / 2018

IN THE MATTER OF:
Nabi Alam @ Abbas — Applicant

Vs.

State (Govt of NCT of Delhi) — Respondent

FIR: 124/2017
P.S: Crime Branch
U/s 21/29 NDPS Act.

MEMO OF PARTIES

Nabi Alam ,
Aged 22 years,
S/o Sh. Sadiq Ali,
R/o Vill. Bhandra,
P.S. ushalt, Tehsil – Dataganj,
Dist. Badaiyun , Uttar Pradesh
Presently lodged in Central Jail No-9,
Tihar Jail, New Delhi **...Applicant/ Accused**

ATTESTED
Deputy Superintendent
Central Jail No. 8 Tihar

Versus

17/10/18

State (Govt of NCT of Delhi)
Through its Standing Counsel. **...Respondent**

ATTESTED
Deputy Superintendent
Central Jail No. 8 Tihar

17/10/18

NABI ALAM
Applicant

THROUGH

ALDANISH REIN
Advocate for Applicant
Enrl. No. D - 1384 / 2007
Off.: M - 17, Ground Floor,
Jungpura Extension, New Delhi-110014
#9899211344

#J-1

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved *via* Video Conferencing On : 05.02.2021
Judgment Pronounced *via* Video Conferencing On : 04.06.2021

BAIL APPLN. 2641/2018 & CRL.M.(BAIL) 555/2021

NABI ALAM @ ABBAS ..... Applicant

versus

STATE (GOVT. OF NCT OF DELHI) .....Respondents

Advocates who appeared in this case:
For the Applicant: Mr. Aldanish Rein, Advocate.

For the Respondent: Mr. Amit Chaddha, APP for the State of NCT Delhi.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE TALWANT SINGH

JUDGMENT

SIDDHARTH MRIDUL, J

1. The present matter has been received by way of Reference *vide* Referral Order dated 15.06.2020 passed by learned Single Judge of this Court and marked to this Bench by Hon'ble the Chief Justice by directions dated 18.06.2020, to adjudicate and settle the question of law *vis-à-vis* the Provision of Section 50 Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act'), which governs the procedure *qua* the search of a person

suspected of being in possession of a narcotic drug or a psychotropic substance, *inter alia* before a Gazetted Officer or Magistrate.

2. The genesis of the present proceeding, that calls for determination is that a bail application under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), primarily seeking regular bail pending ensuing trial before the Court of learned Additional Sessions Judge/ Special Judge (NDPS), West, Tis Hazari Courts, Delhi, was instituted on behalf of the applicant/accused, which was dismissed by learned Sessions Court *vide* order dated 13.07.2018.

3. Thereafter, the present bail application under Section 439 Cr.P.C was filed, which has been referred to this Bench by the learned Single Judge of this Court, by reason of the statedly contradictory views expressed by various Benches of this Court *qua* the scope and ambit of the stipulations contained in Section 50 of the NDPS Act, particularly in relation to the question whether, even though the accused at the time of his search has been apprised of his right to be so searched in the presence of a Gazetted Officer or Magistrate, '*if he so requires*' but has expressly waived his right to be so searched before a Gazetted Officer or Magistrate; is it still mandated by the said provision that the the accused be searched only before a Gazetted

Officer or Magistrate.

4. The substratum of the present case is that, upon the reception of a tip-off by Sub-Inspector Vinod, Narcotics Cell, Police Station Crime Branch on 27.07.2017, it was brought to his notice that two people namely Nabi Alam (the present applicant/accused) and Mohd. Aakil were allegedly indulging in the supply of *Heroin* in Delhi, which the applicant/accused and his accomplice obtained from Badaiyu/Bareli and that they would be supplying a big consignment of the contraband *Heroin* between 2.00 p.m. to 2.30 p.m. near traffic light at Chanakya Place, Uttam Nagar. It was also intimated to the police officer by the secret informer that, if a raid were to be conducted at that time, the accused persons could be caught off-guard, while selling or/and purchasing *Heroin*. Accordingly, a raid team was formed and the applicant/accused Nabi Alam along with one Mohd. Aakil were apprehended on the spot. Upon a personal search of the applicant/accused Nabi Alam, a polythene was recovered from the pocket of the trousers worn by him. Inside the said polythene, contraband *Heroin* weighing 250 grams was found; and similarly, from the possession of Mohd. Aakil 50 grams of *Heroin* was recovered. The samples of the seized contraband were sent to Forensic Science Laboratory Division ('FSL') at Rohini, Delhi and the result so

obtained confirmed the presence of *di-acetyl-morphine* in the samples. On the basis of the aforesaid, Nabi Alam and Mohd. Aakil were arrested and booked after registering First Information Report under Sections 21 and 29 of the NDPS Act.

5. At the outset, it is observed that the application seeking bail moved before the learned Session's Court, came to be dismissed *vide* order dated 13.07.2018, on the ground of recovery of *'commercial quantity'* of the contraband from the possession of the applicant/accused Nabi Alam.

6. Mr. Aldanish Rein, learned counsel appearing on behalf of the applicant/accused Nabi Alam submits that he has been falsely implicated in the present case and has been in judicial custody since his arrest on 27.07.2017. It is the contention of the counsel for the applicant/accused that the statutory stipulations as mandated under Section 50 of NDPS Act have not been complied with in the present case and that the prosecution has disregarded the sanctity of the mandatory requirement in force.

7. Learned counsel for the applicant/accused Nabi Alam would submit that the provision of Section 50 of the NDPS Act clearly and unequivocally stipulates that the search of a person accused or suspected of being in possession of any narcotic drug or psychotropic

substance can **only** be conducted in the presence of a Gazetted Officer or Magistrate, which mandatory stipulation, in the instant case, has been observed only in its breach.

8. Learned counsel appearing on behalf of the applicant/accused Nabi Alam also submits that he was asked to inscribe his signature on blank papers at the time of his search conducted under Section 50 of the NDPS Act by the empowered officers of prosecuting agency, negating his statutory right to be searched only before a Gazetted Officer or Magistrate.

9. Learned counsel appearing on behalf of the applicant/accused would further submit that it is statutorily mandated that despite a person accused or suspected of being in possession of any narcotic drug or psychotropic substance waiving his right to be searched before a Gazetted Officer or Magistrate after being apprised of his statutory right in that behalf, it is still incumbent upon the prosecuting agency and its empowered officers to mandatorily conduct his search before a Gazetted Officer or Magistrate only, in order to be compliant with the provisions of Section 50 of the NDPS Act.

10. In order to buttress and bolster his submission, Mr. Aldanish Rein learned counsel appearing on behalf of the applicant/accused Nabi Alam has placed reliance on series of judgements of this Court,

as well as, the Hon'ble Supreme Court of India, which are elaborated hereunder:-

1. ***Arif Khan @ Agha Khan vs. State of Uttarakhand*** reported as AIR 2018 SCC 2123.
2. ***The State of Uttarakhand Vs. Arif Khan @ Agha Khan*** in Review Petition (Criminal) No. 270 of 2019 in Criminal Appeal No. 273/2007.
3. ***State of Punjab vs Baldev Singh*** reported as AIR 1999 SC 2378.
4. ***Karnail Singh vs State of Haryana*** reported as (2009) SCC 539.
5. ***Vijaysinh Chandubha Jadeja vs State of Gujarat*** reported as AIR 2011 SC 77.
6. ***Narcotics Control Bureau Vs. Sukhdev Raj Sodhi*** reported as AIR 2011 SC 1939.
7. ***State of Rajasthan Vs Parmanand & Anr*** reported as AIR 2014 SC 1384.
8. ***Delhi Airtech Services (P) Ltd., v. State of U.P.***, reported as 2011 (9) SCC 354.
9. ***G. K. Dudani v. S. D. Sharma*** reported as AIR 1986 SC 1455.

Judgment of Delhi High Court:

10. ***Innocent Uzoma Vs. State*** in Crl. A. 139/2017, decided on 14/01/2020.
11. ***Lai Babu @ Rajesh @ Raju*** Vs. GNCTD in Bail Appln. No. 1766/2019, decided on 15/10/19.
12. ***Vaibhav Gupta vs. State*** in Bail Appln No. 2014/2019, decided on 20/09/2019.
13. ***State Vs Vicky*** in CRL.L.P.143/2017, decided on 13/09/19
14. ***Sumit Rai @ Subodh Rai vs. State***, in Crl. A. 578/2017 decided on 29/07/19.
15. ***Sikodh Mahto Vs. State*** in Crl. A. 660/2017, decided on 06/06/19.

16. ***Sunny Khanna Vs. State*** in Bail Appln. No. 218/2019 decided on 25/04/19
17. ***Deepak Shamsher Thapa Vs. State***, in Crl. A. 831/2014 decided on 08.01.2019
18. ***Gurtej Singh Bath Vs. State***, in Crl. A. 39/2015 decided on 27.12.2018
19. ***Dharambir vs. State*** in Crl. A. 658/2017 decided on 13.11.2018
20. ***Deepak Singh vs. State***, in Bail Appln. No. 1854/2017, decided on 31/10/18

11. *Per Contra*, Mr. Rahul Mehra learned Standing Counsel (Criminal) appearing on behalf of respondent-State would submit that all statutory prescriptions and requirements have been scrupulously and duly observed in the present case, in accordance with law, and that the requirement of Section 50 of the NDPS Act, for the suspect to be searched only before a Gazetted Officer or Magistrate, even though the suspect waives that requisition, after categorically being apprised of his right to be so searched, is not the stipulation of the provision. It is further submitted that the applicant/accused was served with notice to be searched under Section 50 of the NDPS Act, whilst simultaneously being informed of his statutory right to be searched before a Gazetted Officer or Magistrate, in response to which the applicant/accused decided to waive the right by reposing faith in the empowered officer to conduct his search; in complete accord with the stipulated and statutory

requirements mandated by the provision of Section 50 of the NDPS Act. It is further submitted that, applicant/accused was caught red-handed in possession of *'commercial quantity'* of contraband substance *Heroin* weighing 250 grams, and committed heinous crime of drug-trafficking, and warrants no leniency at this stage of trial.

12. Mr. Rahul Mehra, learned Standing Counsel (Criminal) appearing on behalf of the respondent-State in support of his submissions and contentions placed reliance on the various decisions which are mentioned hereunder: -

1. ***State of Punjab vs Baldev Singh***, reported as **AIR 1999 SC 2378.**
2. ***Vijaysinh Chandubha Jadeja vs State of Gujarat*** reported as **AIR 2011 SC 77.**
3. ***Ashok Kumar Sharma vs State of Rajasthan,*** reported as **(2013) 2 SCC 67.**
4. ***Raghbir Singh vs State of Haryana*** reported as **AIR 1996 SC 2926.**
5. ***Arif Khan @ Agha Khan vs. State of Uttarakhand*** reported as **AIR 2018 SC 2123.**
6. ***Babua@Tazmul Hossain Vs. State of Orissa*** reported as **2010 (1) ACR 713 (SC).**
7. ***Union of India vs Rattan Mallik @ Kabul*** reported as **(2009) 2 SCC 624.**
8. ***Siddharam Satlingappa Mhetre v. State of Maharashtra*** reported as **AIR 2011 SC 312.**
9. ***Sundeep Kumar Bafna v. State of Maharashtra*** reported as **AIR 2014 SC 1745.**
10. ***State of Orissa vs Mohd. Illiyas.*** reported as **AIR 2006 SC 275.**

11. ***National Insurance Company ltd. vs Pranay Sethi*** reported as **AIR 2017 SC 5157.**
12. ***Sandhya Educational Society vs Union of India*** reported as **(2015) (5) ALLMR 467.**

Judgment of Delhi High Court:

1. ***Innocent Uzoma Vs. State*** in **Crl. A. 139/2017** decided on **14/01/2020.**
2. ***Anil SharmaVs. State*** **in Bail App. No. 127/2019** decided on **08/11/2019.**
3. ***Shafi @ Lovely Vs. State*** **in Bail App. No. 1493/2019** decided on **19/08/2019.**

13. Having heard learned counsel appearing on behalf of the parties and after due consideration of the rival submissions in the context of the facts and circumstances on record, as well as, the relevant provisions of law and the decisions relied upon by the parties, we observe that the solitary question of law that arises for consideration in the present case is: -

a) *Whether even after a person accused or suspected of being in possession of narcotic drug or psychotropic substance is apprised by the empowered officer of his statutory right to be required to be searched before a Gazetted Officer or Magistrate, but expressly waives compliance with the said requirement and relinquishes his stipulated right, is it still mandatory for the*

(12)

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prosecution to conduct his search only before a Gazetted Officer or Magistrate?

14. Before we proceed to decide the issue struck, it is pertinent to observe that stringent provisions of the NDPS Act cast a heavier duty upon the prosecution, who enjoy extensive statutory powers, requiring them to follow strictly and comply scrupulously with the safeguards provided in the NDPS Act. There can be no quarrel with the proposition that the intent of the legislature to include Section 50 of the NDPS Act requiring the empowered officer to apprise the person accused or suspected of being in possession of any narcotic drug or psychotropic substance of his statutory right to be searched before a Gazetted Officer or Magistrate was done with a view to impart authenticity, transparency and creditworthiness to the proceedings since the Magistrate axiomatically enjoys more confidence of the common man in contrast to any officer of prosecuting agency.

15. It axiomatically follows, as conclusively opined by the Constitutional Benches of the Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja*** *(supra)* and ***Baldev Singh*** *(supra)*, that the right of the person accused or suspected of being in possession of any narcotic drug or psychotropic substance, to be informed of his

statutory right to be searched before a Gazetted Officer or Magistrate, if such person so requires, is mandatory.

16. In order to effectively adjudicate the issue before this Court, it is considered necessary and profitable to extract the relevant provision of the NDPS Act which reads as follows: -

> Section 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 the 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. 1[(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

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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."

17. On a plain reading and harmonious interpretation of the above extracted provision, it is evident that Section 50 of the NDPS Act stipulates the conditions under and the manner in which the personal search of a person accused or suspected of being in possession of any narcotic drug or psychotropic substance is required to be conducted. Upon delineation of provision of Section 50 of the NDPS Act, it is observed that sub-Section (1) provides that when the empowered officer is about to conduct the search of any suspected person, he shall, "*if the person to be searched so requires*", take him to the nearest Gazetted officer or the Magistrate for the said purpose. Sub-section (2), stipulates that if such request is made by the suspected person, the empowered officer who is to effectuate the search, may detain the person accused or suspected of being in possession of any narcotic drug or psychotropic substance until the latter can be produced before such Gazetted Officer or the Magistrate. It is evident that if the suspect expresses the desire to be taken to the Magistrate, the empowered officer is restrained from effecting the search of the person concerned. Sub-section (3) provides that when a person to be

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searched is brought before such Gazetted Officer or the Magistrate and such Gazetted Officer or the Magistrate finds that there are no reasonable grounds to conduct the search, he shall forthwith discharge the person to be searched; otherwise he shall direct the search to be made. Sub-sections (5) and (6) which were introduced in Section 50 NDPS Act by virtue of the Narcotics, Drugs and Psychotropic Substances (Amendment) Act, 2001 enacted on 27.09.2001 and came into effect from 02.10.2001; provided an option to the empowered officer to search the person accused or suspected of being in possession of any narcotic drug or psychotropic substance notwithstanding the latter exercising his right to be searched only before a Gazetted Officer or Magistrate, if the empowered officer has reason to believe that it was not possible to take such person to be searched before the nearest Gazetted Officer or Magistrate without the possibility of the person parting with the possession of any narcotic drugs, psychotropic substance or any controlled substance or article or document. In terms of Sub-section (6) of Section 50 of the NDPS Act, the empowered officer mandatorily required to record reasons for his belief that it was necessary to search the person accused or suspected of being in possession of any narcotic drug or psychotropic substance without taking him to the nearest Gazetted Officer or Magistrate,

within 72 hours of the search being conducted and a copy of the reasons so recorded was mandatorily required to be sent by the empowered officer to his immediate superior.

18. At this juncture, we must reiterate that the issue before us in terms of the Referral Order is not about the general applicability of Section 50 of the NDPS Act but is specifically to determine *whether even after a person accused or suspected of being in possession of narcotic drug or psychotropic substance is apprised by the empowered officer of his statutory right to be required to be searched before a Gazetted Officer or Magistrate, but expressly waives compliance with the said requirement and relinquishes his stipulated right, it is still mandatory for the prosecution to conduct his search only before a Gazetted Officer or Magistrate.*

19. This issue, in our considered view, is no longer *res-integra* in view of the decision of the Hon'ble Supreme Court in ***Baldev Singh*** *(supra)* and ***Vijaysinh Chandubha Jadeja*** *(supra),* wherein it was held as follows:-

> "23. In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . We are concerned with the following conclusions: (SCC pp. 208-10, para 57)

(17)

"(*1*) That when an empowered officer or a duly authorised officer acting on prior information is about to *search a person*, it is *imperative* for him to *inform* the person concerned of his right under sub-section (*1*) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(*2*) That failure to *inform* the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(*3*) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded *only* on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

***

(*5*) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the *trial*. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(*6*) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not

express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

(emphasis in original)

24. Although the Constitution Bench in *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right

to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

xxxx xxxx xxxx

xxxx xxxx xxxx

27. It can, thus, be seen that apart from the fact that in *Karnail Singh* [(2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] insofar as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

28. We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In *Prabha Shankar Dubey* [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] a two Judge Bench of this Court culled out the ratio of *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] on the issue before us, as follows:

(*Prabha Shankar Dubey case* [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] , SCC p. 64, para 11)

"*11.* ... What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word 'right' at relevant places in the decision of *Baldev Singh case* (1999) 6 SCC 172 seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the 'suspect' at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it."

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and *Joseph Fernandez* [(2000) 1 SCC 707 : 2000 SCC (Cri) 300] the Court chose to follow the views echoed in the latter case, wherein it was held that the searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words: (*Prabha Shankar Dubey case* [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] , SCC p. 64, para 12)

"*12.* The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory

provision, to impute a different meaning to the observations."

It is manifest from the afore-extracted paragraph that *Joseph Fernandez* [(2000) 1 SCC 707 : 2000 SCC (Cri) 300] does not notice the ratio of *Baldev Singh* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and in *Prabha Shankar Dubey* [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] , *Joseph Fernandez* [(2000) 1 SCC 707 : 2000 SCC (Cri) 300] is followed ignoring the dictum laid down in *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080]

29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. **Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.**"

20. On a plain reading of the above decision, it is clear that the obligation of the empowered officer under sub-Section (1) of Section 50 of the NDPS Act makes it imperative on his part to apprise the

person intended to be searched, of his right to be searched before a Gazetted Officer or Magistrate; failure to comply with which prescription, which requires strict compliance, would render the recovery of the of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person accused during such search or suspected of being in possession of any narcotic drug or psychotropic substance during the said search. However, for the purposes of the issue to be determined in the instant case, it is relevant and pertinent to note that the Constitution Bench of the Hon'ble Supreme Court of India in ***Vijaysinh Chandubha Jadeja*** *(supra)* clearly observed that *"Thereafter, the suspect may or may not choose to exercise the right provided to him under the said proviso"*. The sequitur to this observation of the Supreme Court leaves no manner of doubt that once the suspect has been apprised by the empowered officer of his right to be searched before a Gazetted Officer or a Magistrate, but chooses not to exercise that right, the empowered officer can conduct the search of such person without producing him before a Gazetted Officer or a Magistrate, for the said purpose.

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.
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> 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

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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.

24. Having considered the case law on the subject, we are inclined to answer the Reference in the following manner.

25. In view of the discussion in the foregoing paragraphs, we answer the issue that arises for consideration in the present Reference in the negative.

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 Magistate, 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.

27. The Bail Application No.2641/2018 and Criminal M. (Bail) No.555/2021 seeking interim bail be listed before the learned Single Judge for further proceedings, in accordance with law on 06.07.2021.

28. Copies of this Judgment be provided to the learned counsel appearing on behalf of the parties electronically and be also uploaded on the website of this Court *forthwith*.

SIDDHARTH MRIDUL
(JUDGE)

TALWANT SINGH
(JUDGE)

JUNE 04, 2021
dn/danish

Click here to check corrigendum, if any

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% 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

JUDGMENT *(oral)*

The hearing has been conducted through video conferencing.

Crl.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 will 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

(B1.)

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(ii) 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*

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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 bar 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
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Bail Appl. N. 2641/2018

Kindly see Hon'ble Court's order dated 6/7/2021 wherein the Hon'ble Court has inter-alia ordered that :

"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 (Headqurters) for being circulated to Principal District and Sessions Judges and all the concerned courts."

In view of above, the case may be placed before worthy Registrar General for further necessary directions.

DFA is added for approval, may issue, if approved.

(Sachin Sharma)SJA

AO(J)-Crl.-II

DR (Crl.)

DFA is placed below for approval and issue please.

H.K. Arora.
08.7.2021.

Registrar General

(41)

Bail Appl. N. 2641/2018

Kindly see Hon'ble Court's order dated 6/7/2021 wherein the Hon'ble Court has inter-alia ordered that :

> "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 (Headqurters) for being circulated to Principal District and Sessions Judges and all the concerned courts."

In view of above, the case may be placed before worthy Registrar General for further necessary directions.

DFA is added for approval, may issue, if approved.

Sachin 8/7/21

(Sachin Sharma)SJA

8/7/21

AO(J)-Crl.-II

(On Duty)

DR(Crl.)

8/7/2021