



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Criminal Miscellaneous 2nd Bail Application No. 7492/2023

Ashok @ Mulla Ram

----Petitioner

Versus

State Of Rajasthan, Through Pp

----Respondent

For Petitioner(s) : Mr. O.P. Joshi
Mr. Karan Joshi
For Respondent(s) : Mr. Mukhtiyar Khan, PP
Mr. Rajveer CI, Kekri
Mr. Bhanwar Lal, Police Line
Deedwana

HON'BLE MR. JUSTICE FARJAND ALI

ORDER

DATE OF ORDER : 19/08/2023

BY THE COURT :-

1. The instant application for bail has been filed under Section 439 Cr.P.C. on behalf of the petitioner Ashok @ Mulla Ram, who is in custody in relation to F.I.R. No.206/2022, Police Station Merta City, District Nagaur, for the offence under Section 8/21 of the NDPS Act.

2. His first bail application came to be rejected by this Court vide order dated 19.12.2022 (S.B. Criminal Misc. Bail Application No.9224/2022) while giving liberty to the petitioner to renew his prayer after the statement of Investigating Officer is recorded in the trial and now, the statement of P.W. 1 Bhanwar Lal as well as the SHO P.W. 2 Rajveer Singh has been recorded by the learned



trial Court on 19.04.2023 and 18.05.2023. Hence, the present bail application.

3. Learned counsel for the petitioner 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 sub-section (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, a 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. Admittedly, P.W. 1 Bhanwar Lal was not posted as SHO of the Police Station Merta City and rather inspector Rajveer Singh was posted as SHO at the relevant point of time.

4. Per contra, learned Public Prosecutor vehemently opposes the prayer made by learned counsel for the petitioner and submits that the matter pertains to recovery of 100 Bottles of Moncof cough syrup. The impediment contained under Section 37 of NDPS, Act will be attracted in the factual situation of the present case.

5. Heard and perused the material available on record as well as gone through the statutory provisions applicable in the matter.



6. It is the case of the prosecution that on 10.06.2022 the Seizing Officer Bhanwar Lal, Sub-Inspector was having charge of the police station and the reason shown behind it was that the SHO Rajveer Singh was not in the Police Station and the charge was given to him. It is stated that when the Sub-Inspector Bhanwar Lal was on patrol duty, he apprehended the petitioner since his activities appeared to be suspicious. Certain quantity of medicinal drug viz., Monocof Cough Syrup were recovered from a carton which the accused was carrying with him. Admittedly, the entire search and seizure was made by the Sub-Inspector Bhanwar Lal and where-after the investigation was conducted by the then SHO Rajveer Singh who was deployed there as SHO. It is the case of the defence that the Seizing Officer Bhanwar Lal was neither posted as SHO nor any charge of the concerned Police Station was given to him. Now, this court deems it appropriate to discuss the law prevalent in the matter.

7. The NDPS Act is a statute comprising of stringent provisions which need to be followed in letter and in spirit and non-compliance of any stipulations specially the ones relating to the procedure followed during search, seizure and arrest, cannot be overlooked.

8. Section 42 of NDPS Act has been reproduced below for ready reference:-

42. Power of entry, search, seizure and arrest without warrant or authorisation.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs,





revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:





Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector: Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

9. 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.

10. 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.

11. 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 handover the person arrested and articles seized to the concerned Police Inspectors or S.H.O. of the Police Station concerned.

12. In many scenarios, owing to a very small number or inadequate availability of police inspectors, sub-inspectors have been posted as SHO(s) at several police stations. Taking into account the fact that the sub-inspector is posted as SHO at



certain police stations, it is understood that the authorization has been conferred upon the sub-inspector to make search and seizure but obviously with the specific stipulation that he should be posted as SHO. But in the present matter, the same has not been done as the sub-inspector was not posted as the SHO rather the head constable who was actually posted as the SHO by Rajveer Singh had further delegated his charge to the S.I. According to the on-oath statement of PW-3, Rajveer Singh, it is revealed that he had left the police station and given the charge of the police station to head constable Hanuman and the said head constable further gave the charge to sub-inspector Bhanwar Lal. He is also present in person before this court and stands by his statement. It is further deposed therein that Rajveer Singh took back the charge of the station from head constable Hanuman which further reflects that Bhanwar Lal did not have any official charge. Except the sworn statement of Bhanwar Lal stating that he was given the charge, there is no other evidence on record to support or verify his contention. For the purpose of satisfaction, this Court had directed the learned Public Prosecutor to procure daily *Roznamcha* diary of date 10.06.2022 so as to convince this Court with regard to the claim made by the Seizing Officer. Under the direction, the learned Public Prosecutor has submitted requisite *Roznamcha* for perusal of the Court and he admits that there was no entry in the *Roznamcha* showing anything regarding the charge of the SHO Rajveer Singh to the Seizing Officer P.W. 1 Bhanwar Lal. No such documents even for





the name sake have been produced in trial showing direct entry of the aforesaid fact.

13. The latin maxim '*delegata potestas non potest delegari*' which provides that once the power that has been delegated cannot be further delegated or in other words, a delegatee cannot further delegate the power delegated to him might operate in the present facts and circumstances of the case though the same remains a matter to be adjudicated after appreciation of evidence during trial.

14. In ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat*** reported in AIR 2011 SC 77, the Hon'ble Apex court indicated that the failure to comply with the provisions of NDPS Act would render the recovery of illicit articles ineffective and vitiate the conviction. The relevant part of the judgment is as follows:-

"Under Section 42 of the NDPS Act, the empowered officer can enter, search, seize and arrest even without warrant or authorisation, if he has reason to believe from his personal knowledge or information taken down in writing, that an offence under Chapter IV of the said Act has been committed. Under proviso to Sub-section (1), if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief and send the same to his immediate official superior in terms of Sub-section (2) of the Section.

'22. In view of the foregoing discussion, we are of the firm opinion that the object with which 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 in so far 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 a 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.”

15. Hon'ble the Supreme Court passed a landmark judgment in the case of **Roy V.D. Vs. State of Kerala** reported in **AIR 2001 SC 137** wherein, in a similar situation, it was observed as under:-

16. Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) of the Narcotic Drugs & Psychotropic Substances Act or make a complaint under Clause (d) of Sub-section (1) of Section 36A of the Narcotic Drugs & Psychotropic Substances Act. It follows that any collection of material, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorised officer under Section 41(2) of the Narcotic Drugs & Psychotropic Substances Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the Narcotic Drugs & Psychotropic Substances Act and use of such a material by the prosecution vitiates the trial.

18. It is well settled that the power under Section 482 of the Cr.P.C. has to be exercised by the High Court, inter alia, to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the



proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused. In our opinion, exercise of power under Section 482 of the Cr. P.C. to quash proceedings in a case like the one on hand, would indeed secure the ends of justice.

16. A coordinate bench of this court passed a judgment dated 09.04.2004 in S.B. Criminal Appeal No. 659 of 2002 titled ***Bherulal Vs. State of Rajasthan*** wherein it was held as under:-

9. The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly.

17. In light of the judgments cited above, the notification passed by the State government in this regard as well as the provision contained in Section 42 of the NDPS Act, this Court is of the view that the non-compliance of mandatory provisions of the NDPS Act has to be dealt with a strict hand and it is imperative upon the courts to be cautious while adjudicating such matters where seizure is concerned under the NDPS Act as no accused should be able to walk scot-free for want of proper implementation and following of the procedure established by law.

18. The life and liberty of an individual is so sacrosanct that it cannot be allowed to be interfered with except under the authority of law. It is a principle which has been recognised and applied in all civilised countries. In our Constitution, Article 21 guarantees protection of life and personal liberty not only to citizens of India but also to foreigners.



19. This Court is cognizant of the provisions contained in Section 37 of the NDPS Act but considering the submissions made by learned counsel for the accused-petitioner regarding non-compliance of statutory procedure, this court is of the opinion that it is a fit case for grant of bail to the accused petitioner. Needless to say, none of the observations made herein under shall affect the rights of either of the parties during trial and this Court refrains from commenting on the niceties of the matter.

20. Accordingly, the instant bail application under Section 439 Cr.P.C. is allowed and it is ordered that the accused-petitioner shall be enlarged on bail provided he furnishes 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 before the court concerned on all the dates of hearing as and when called upon to do so.

(FARJAND ALI),J

35-Mamta/-