



§~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of decision: August 17, 2023**

+

BAIL APPLN. 1661/2022

SACHIN ARORA

..... Petitioner

Through: Mr. Ajayinder Sangwan, Mr. Rohan Sharma, Mr. Smit Singh Kuru and Mr. Ambuj Johar, Advocates.

versus

STATE GOVT. NCT OF DELHI

..... Respondent

Through: Mr. Aman Usman, APP for State with SI Abdul Barkat, P.S. Crime Branch.

CORAM:**HON'BLE MR. JUSTICE AMIT SHARMA****JUDGMENT****AMIT SHARMA, J.**

1. The present application under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'CrPC') seeks regular bail in case FIR No. 69/2019 under Sections 21/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') registered at PS Crime Branch.

2. Briefly stated, the facts of the case, as stated in the chargesheet, are as under:

- i. On 23.03.2019, SI Ravi Saini, who was present at Narcotic Cell Office at about 06:00 AM, received information from an informant to the effect that a person, namely, Sachin, i.e., the present applicant, who is a resident of Uttam Nagar, Delhi supplies heroin in Delhi and that he



shall be supplying a huge quantity of heroin at about 07:45 AM to 08:15 AM near Mukundpur Flyover on the Outer Ring Road, towards Azadpur.

- ii. It is recorded that after receiving the said information, formalities under Section 42 of the NDPS Act were completed and a raiding party was organized. The said raiding party and the informant, alongwith an IO Bag, Field-Testing Kit and an electronic weighing machine left for the aforesaid spot in a private car.
- iii. After reaching the said place, the raiding party asked 4-5 passersby to join the raid, however, all of them gave reasons and disagreed to join, without disclosing their names and addresses.
- iv. At about 07:55 AM, an auto bearing registration number DL 1 RQ 2577 came towards the side of the Mukundpur Flyover, on the road itself. A person wearing a pink shirt and black pant, carrying a black polythene in his right hand got down from the said auto. The said person was identified by the secret informer as Sachin, i.e., the present applicant.
- v. The applicant then came towards the Mukundpur Flyover and stood on the road. He was looking around while waiting at the spot. In about 05 minutes thereafter, the applicant felt the presence of police personnel and tried to rush towards his auto, however, the raiding party surrounded him at about 08:00 AM. When they tried to apprehend him, the present applicant ran and sat in his auto and tried to start the same. During that period, in his anxiety, the black polythene fell from the applicant's hand, on the road. Before the auto could start, ASI Kirti and



Constable Samrat apprehended the present applicant and another member of the team picked the said black polythene.

- vi. Thereafter, on interrogation, the name and parentage of the applicant was revealed. During this time, it is stated that the raiding team requested 4-5 persons, who had gathered there on account of 'curiosity', to join the police proceedings. However, on hearing about 'drugs', none of the aforesaid persons agreed to join the said proceedings giving their reasons, and without disclosing their names. It is further stated that due to paucity of time, the names of the said persons could not be noted and neither any notice could be given to them. Thereafter, ASI Kirti was directed to bring a private car. Thereafter, the raiding officer introduced himself and his team to the applicant and told him about the secret information. Thereafter, the polythene which was held by the applicant and had fallen from his hand and was subsequently picked up by the raiding officer was checked. Upon checking, it was found to contain heavy transparent polythene tied with an elastic band. On opening the same, a brown colored substance was found.
- vii. After removing the band, the contents of the aforesaid heavy transparent polythene were tested with the help of a field-testing kit and it tested positive for heroin. The substance weighed 300 grams on the electronic weighing machine. Two samples of 5 grams each were drawn and sealed. Similarly, the remaining 290 grams was sealed.
- viii. It is alleged that thereafter, since there was a possibility of more recovery of contraband, SI again informed the applicant about the



secret information and the applicant was served with a notice under Section 50 of the NDPS Act but he declined to be searched in the presence of a Gazetted Officer or a Magistrate. Personal search of the applicant was carried out but no contraband was recovered from his person.

- ix. The present FIR was registered and the disclosure statement of the applicant was recorded, whereby he disclosed that he had procured the recovered contraband from one Bashir. The said person could not be traced and is absconding. The mobile phone of the applicant was also seized, however, no incriminating material was found on it.
- x. After completion of investigation, the chargesheet under Section 21/25 of the NDPS Act was filed on 20.07.2019. The learned Special Judge (NDPS), North, Rohini framed charges under Sections 21/25 of the NDPS Act *qua* the applicant *vide* order dated 04.10.2019 and the trial is underway.

3. Learned counsel appearing on behalf of the applicant submitted that in the present case, the prosecution has not complied with the mandatory provisions of Section 50 of the NDPS Act inasmuch as the black colored polythene that was carried by the applicant, which allegedly contained the contraband, was searched before a notice under Section 50 of the NDPS Act was served upon him. Learned counsel appearing on behalf of the applicant drew the attention of this Court to the status report dated 27.07.2022 authored by Sh. Anil Sharma, ACP, ANTF, Delhi. It was submitted that there is a material discrepancy in the sequence of events as detailed in the said status report and the FIR inasmuch as, as per the status report, the notice under



Section 50 of the NDPS Act was served upon the applicant before the black colored polythene that he was carrying was searched, however, as per the FIR, the said notice was served after the said polythene was searched, but before his personal search was conducted. It was also urged that no independent witnesses were joined when the raid was conducted and that makes the case of the prosecution doubtful. It was submitted that Section 50 of the NDPS Act is a mandatory provision and non-compliance thereof renders the recovery suspicious and effectively vitiates the trial and therefore, the applicant is entitled to be released on bail. In support of the said contention, learned counsel for the applicant placed reliance on the following judgments:

- i. S.K. Raju alias Abdul Haque alias Jagga v. State of West Bengal, (2018) 9 SCC 708.
 - ii. Arif Khan @ Agha Khan v. State of Uttarakhand, (2018) 18 SCC 380.
 - iii. Munni Lal v. The State, 1994 SCC OnLine Del 713.
 - iv. Kamruddin v. State (NCT of Delhi), 2022 SCC OnLine Del 3761.
 - v. Emeka Emmanuel v. The State, Order dated 18.11.2022 in BAIL APPLN. 1231/2022.
4. Learned counsel for the applicant further urged that the latter has been in judicial custody for over four years and the trial is likely to take a long time. In the present case, he has been released on interim bail and did not misuse his liberty in any manner and duly surrendered upon expiry of the interim bail. It was urged that the necessary recoveries in the case have been effected, the investigation is complete and a chargeheet has been filed. The trial is underway and there is no apprehension of the applicant evading trial or



tampering with evidence and influencing the witnesses. In view thereof, it is urged that the applicant be released on bail.

5. *Per contra*, learned APP for the Stated opposed the present application for bail and submitted that it is an admitted case of the prosecution that the black colored polythene that the applicant was carrying was searched before he was served with a notice under Section 50 of the NDPS Act. Learned APP drew the attention of this Court to the chargesheet filed in the present case, and specifically to the portion where it has been recorded that the applicant dropped the black colored polythene that he was carrying, which was then picked up and searched by a police officer. It was submitted that in view of the said sequence of events, it cannot be said that Section 50 of the NDPS Act was not complied with. Learned APP for the State placed reliance on an order dated 25.01.2022 passed by the Hon'ble Supreme Court in **SLP (Crl.) 514/2021 titled Dayalu Kashyap v. The State of Chattisgarh**, wherein a distinction has been drawn between a chance recovery and one which is effected pursuant to specific information. It was submitted that admittedly, in the present case, the recovery was made based on prior information. It was submitted that in **Dayalu Kashyap (supra)**, the recovery was effected based on a specific information that the appellant therein was carrying contraband in a wooden *kanwad*. A similar objection regarding compliance of Section 50 of the NDPS Act was raised as the *kanwad* was searched before a notice under Section 50 was served. In view of the facts of the case, the Hon'ble Supreme Court held as under:

“In the conspectus of the facts of the case, we find the recovery was in a polythene bag which was being carried on a Kanwad. **The recovery was not in person. Learned counsel seeks to expand the**



scope of the observations made by seeking to contend that if the personal search is vitiated by violation of Section 50 of the NDPS Act, the recovery made otherwise also would stand vitiated and thus, cannot be relied upon. We cannot give such an extended view as is sought to be contended by learned counsel for the appellant.”
(emphasis supplied)

It was the contention of learned APP for the State that as far personal search is concerned, compliance with Section 50 of the NDPS Act is mandatory. However, it was submitted that the said provision is not attracted when the search is being conducted of something which a person is carrying, like in the present case, where the search was of a polythene that the applicant was carrying. In support of the said contention, learned APP for the State further placed reliance on a judgment dated 12.04.2019 passed by the Hon’ble High Court of Punjab and Haryana in **CRA-D-1076-DB of 2017 (O&M)**, titled **Harpreet Singh alias Ganju v. State of Punjab**.

6. Without prejudice to the aforesaid argument, learned APP for the State urged that in any case, in the present case, Section 50 of the NDPS Act will have no application to the search of the black colored polythene that the applicant was carrying since the same was searched after it was dropped by him and was picked up by a police officer. The search of the said polythene was not conducted while it was still on the applicant’s person.

7. It was also the contention of learned APP for the State that compliance of Section 50 of the NDPS Act is a matter of trial and cannot be considered at the stage of bail, especially in cases involving recovery of a commercial quantity, where rigors of Section 37 of the NDPS Act would be attracted.



8. It was further submitted that the present applicant does not have clean antecedents inasmuch as he is involved in FIR No. 64/2019 under Sections 21/29/27 of the NDPS Act registered at PS Sadar Solan, District Solan, Himachal Pradesh. However, in the said case, the applicant was released on bail *vide* order dated 03.03.2020 passed by the Hon'ble High Court of Himachal Pradesh in **Cr.MP(M) 318 of 2020** titled **Sachin Arora v. State of Himachal Pradesh**.

9. Heard learned counsel for the parties and perused the record.

10. The primary ground on the basis of which bail has been sought in the present case is the alleged non-compliance of Section 50 of the NDPS Act. Learned APP for the State contended that the same is a matter for trial and the cannot be looked into at this stage. The said contention cannot be sustained because this Court, for the purposes of deciding the present application within the contours of Section 37 of the NDPS Act, has to examine the legal issues raised herein. The Hon'ble Supreme Court, in **Union of India v. Shiv Shankar Kesari, (2007) 7 SCC 798**, while explaining the term 'reasonable ground' used in Section 37(1)(b)(ii) of the NDPS Act, held as under:

“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

XXX

11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is



called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”

(emphasis supplied)

Further, more recently, in **Mohd. Muslim alias Hussain v. State (NCT of Delhi)**, 2023 SCC OnLine SC 352, the Hon’ble Supreme Court held as under:

“**21.** The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused’s guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only *prima facie*, based on a *reasonable reading*, which does not call for meticulous examination of the materials collected during investigation (as held in *Union of India v. Rattan Malik*). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. *Satender Kumar Antil* supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”

In view of the above, this Court, for the limited purpose of deciding the present bail application, has to arrive at a *prima-facie* finding with regard to the legal issues raised herein.

11. The facts in the present case are not disputed to the extent that it is an admitted case of prosecution that no notice under Section 50 of NDPS Act was given to the applicant at the time the black colored polythene alleged to be belonging to him was searched. Consequent upon recovery of the



contraband from the said polythene, notice under Section 50 of the NDPS Act was given to the applicant before his personal search.

12. It is pertinent to note that the case of the prosecution is that this black colored polythene was held by the applicant in his right hand before it is stated to have fallen from his hand. It is also an admitted case of the prosecution that the search of that said polythene was conducted after apprehending the present applicant and in his presence after informing him about the secret information. So, the issue is that whether notice under Section 50 of the NDPS Act should have been given to the applicant before commencing the search of the said polythene.

13. The law with respect to the compliance of Section 50 of the NDPS Act is no more *res-integra* as a constitution bench of the Hon'ble Supreme Court in **Vijaysinh Chandubha Jadeja v. State Of Gujarat, (2011) 1 SCC 609** has clearly held that it is mandatory that the suspect is informed of his right to be searched in the presence of a Gazetted Officer or Magistrate. As far as the applicability of Section 50 of the NDPS Act is concerned, the Hon'ble Supreme Court, in **State of Rajasthan v. Parmanand & Anr., (2014) 5 SCC 345** has held that Section 50 of the NDPS Act would be attracted in a case where the search of the person as well as a bag carried by the said person is conducted. It was held as under:

“**13.** In *Dilip v. State of M.P.* [(2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377] , on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. This Court held that : (SCC p. 456, para 16)

“**16.** ... provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but keeping in



view the fact that the person of [the accused] was also searched, it was obligatory on the part of [the officers] to comply with the said provisions.”

which was not done. This Court confirmed the acquittal of the accused.

14. In *Union of India v. Shah Alam* [(2009) 16 SCC 644 : (2010) 3 SCC (Cri) 377] , heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following *Dilip* [(2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377] , it was held that since the provisions of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

Further, taking note of the aforesaid judgment, a three Judge Bench of the Hon’ble Supreme Court in **S.K. Raju @ Abdul Haque @ Jagga v. State of West Bengal, (2018) 9 SCC 708** has held that Section 50 of the NDPS Act would be attracted in a case where the search of the person as well as bag carried by the said person is searched. It was held as under:

“20. The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW 2 and PW 4.



XXX

22. PW 2 conducted search of the bag of the appellant as well as of the appellant's trousers. Therefore, the search conducted by PW 2 was not only of the bag which the appellant was carrying, but also of the appellant's person. Since the search of the person of the appellant was also involved, Section 50 would be attracted in this case. Accordingly, PW 2 was required to comply with the requirements of Section 50(1). As soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered from the person of the detainee or not. It was, therefore, imperative for PW 2 to inform the appellant of his legal right to be searched in the presence of either a gazetted officer or a Magistrate. From Ext. 3, it can be discerned that the appellant was informed of his legal right to be searched in the presence of a Magistrate or a gazetted officer. The appellant opted for the latter alternative. Ext. 4 is a record of the events after the arrival of PW 4 on the scene. After the arrival of PW 4, the appellant was once again asked by him, whether he wished to be searched in the presence of a gazetted officer or a Magistrate. This was the second option which was presented to him. When he reiterated his desire to be searched before a gazetted officer, PW 4 inquired of the appellant whether he wished to search PW 2 before his own search was conducted by PW 2. The appellant agreed to search PW 2. Only the personal belongings of PW 2 were found by the appellant. It was only after this that a search of the appellant was conducted and charas recovered. Before the appellant's search was conducted, both PW 2 and PW 4 on different occasions apprised the appellant of his legal right to be searched either in the presence of a gazetted officer or a Magistrate. The options given by both PW 2 and PW 4 were unambiguous. Merely because the appellant was given an option of searching PW 2 before the latter conducted his search, would not vitiate the search. In *Parmanand* [*State of Rajasthan v. Parmanand*, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , in addition to the option of being searched by the gazetted officer or the Magistrate, the detainee was given a "third" alternative by the empowered officer which was to be searched by an officer who was a part of the raiding team. This was found to be contrary to the intent of Section 50(1). The option given to the appellant of searching PW 2 in the case at hand, before the latter searched the appellant, did not vitiate the process in which a search of the appellant was conducted. The search of the appellant was as a matter of fact



conducted in the presence of PW 4, a gazetted officer, in consonance with the voluntary communication made by the appellant to both PW 2 and PW 4. There was strict compliance with the requirements of Section 50(1) as stipulated by this Court in *Vijaysinh [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497]*.”

(emphasis supplied)

In another judgment of a three judge bench of the Hon’ble Supreme Court in **State of Punjab v. Baljinder Singh & Anr. (2019) 10 SCC 473**, it has been held as under:

“13. The law is thus well settled that an illicit article seized from the person during personal search conducted in violation of the safeguards provided in Section 50 of the Act cannot by itself be used as admissible evidence of proof of unlawful possession of contraband. But the question is, if there be any other material or article recovered during the investigation, would the infraction with respect to personal search also affect the qualitative value of the other material circumstance?”

14. At this stage we may also consider the following observations from the decision of this Court in *Ajmer Singh v. State of Haryana [Ajmer Singh v. State of Haryana, (2010) 3 SCC 746 : (2010) 2 SCC (Cri) 475] : (SCC pp. 752-53, para 15)*

“15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in *Madan Lal v. State of H.P. [Madan Lal v. State of*



H.P., (2003) 7 SCC 465 : 2003 SCC (Cri) 1664] The Court has observed: (SCC p. 471, para 16)

‘16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see *Kalema Tumba v. State of Maharashtra* [*Kalema Tumba v. State of Maharashtra*, (1999) 8 SCC 257 : 1999 SCC (Cri) 1422] , *State of Punjab v. Baldev Singh* [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and *Gurbax Singh v. State of Haryana* [*Gurbax Singh v. State of Haryana*, (2001) 3 SCC 28 : 2001 SCC (Cri) 426]). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh case* [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.’”

15. As regards applicability of the requirements under Section 50 of the Act is concerned, it is well settled that the mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises.

XXX

17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as “personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

18. The decision of this Court in *Dilip case* [*Dilip v. State of M.P.*, (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377] , however, has not adverted to the distinction as discussed hereinabove and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with. In our view, the decision of this Court in the said judgment in *Dilip case* [*Dilip v. State of M.P.*, (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377] is not correct and is opposed to the law laid



down by this Court in *Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080]* and other judgments.”

It may be noted that in the aforesaid judgment in **Baljinder Singh** (*supra*), the judgment rendered by the earlier three-judge bench in **S.K. Raju** (*supra*) was not referred to and reference was made to judgment rendered by a constitution bench of the Hon’ble Supreme Court, in **State of Punjab v. Baldev Singh, (1999) 6 SCC 172**, regarding applicability of Section 50 of the NDPS Act, wherein it was held as under:

“**12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc.** However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.”

(emphasis supplied)

14. A learned Single Judge of this Court, in **Akhilesh Bharti v. State, 2020 SCC OnLine Del 306**, took note of the aforesaid decisions and held as under:

“**26.** It is essential to observe that vide the verdict of the Hon’ble **three** Judge Bench of the Hon’ble Supreme Court dated 05.09.2018 in “*SK. Raju alias Abdul Haque alias Jagga v. State of West Bengal*” (2018) 9 SCC 708, it has specifically been observed to the effect that where merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act, 1985 will have no application but if the personal search of the accused is also conducted, the provisions of Section 50 of the NDPS Act, 1985 would wholly apply. The verdict of the Hon’ble Supreme Court dated 15.10.2019 in “*State of Punjab v. Baljinder Singh*” 2019 SCC OnLine SC 1408 is also a verdict of the Hon’ble **three** Judge Bench of the



Hon'ble Supreme Court in which the personal search of the accused did not result into recovery of any contraband but there was a recovery of contraband effected from the vehicle in which the accused persons were seated with one of them being the driver. Though, the Hon'ble Supreme Court in "*State of Punjab v. Baljinder Singh*" (supra) has observed to the effect that the judgment of the Hon'ble Supreme Court in *Dilip's case* is not correct and is opposed to the decision to the law laid down by the Hon'ble Supreme Court in *Baldev Singh's* and other judgments, the observations in the verdict of the Hon'ble Supreme Court in "*SK. Raju alia Abdul Haque alias Jagga v. State of West Bengal*" (supra) dated 05.09.2018 (which are **not adverted to** in "*State of Punjab v. Baljinder Singh*" (supra) dated 15.10.2019) lay down a fine distinction and in these circumstances thus, where the contraband is recovered from an object which is held by an accused in his hand and the search of the person of such an accused is also conducted which lead to no recovery of any contraband, though, there are recoveries of other personal assets of a person from his personal search, in view of the judgments of the Hon'ble Supreme Court in "*SK. Raju alia Abdul Haque alias Jagga v. State of West Bengal*" (supra), the non compliance of Section 50 of the NDPS Act, 1985 would *prima facie* vitiate the recovery."

15. Similarly, a coordinate bench of this Court, in **Kamruddin v. State (NCT of Delhi), 2022 SCC OnLine Del 3761**, while taking note of the aforesaid decision in **Akhilesh Bhari (supra)**, held as under:

"**23.** In the decision of *S.K. Raju* (supra), the Hon'ble Supreme Court has clearly held that since the search of the person of the appellant therein was also involved, therefore, Section 50 of the NDPS Act would be attracted in that case and accordingly the requirement of Section 50(1) of the NDPS Act was insisted.

24. So far as the decision relied upon by learned APP for the state in the case of *State of HP v. Pawan Kumar*¹⁴ is concerned, it is to be stated that in paragraph No. 17 of the decision in the case of *S.K. Raju* (supra) the Hon'ble Supreme Court has taken note of the decision in the case of *Pawan Kumar* (supra). The distinction between the two situations has been considered and if a bag, article or container etc. being carried by an accused is subjected to search independently without there being any search of the person of the appellant, the decision in the case



of *Pawan Kumar* (supra) would have application. However, in a case where the person of accused is subjected to search along with the search of bag, article or container which he holds in his hand, there is requirement of compliance of Section 50 of the NDPS Act.”

16. So far as the reliance placed by learned APP for the State on a decision of the Hon’ble Supreme Court in **Dayalu Kashyap** (supra) is concerned, it is pertinent to observe that the said decision has been rendered in the context of a different factual matrix. The contention raised therein was as under:

“Learned counsel submits that the option given to the appellant to take a third choice other than what is prescribed as the two choices under sub-Section (1) of Section 50 of the Act is something which goes contrary to the mandate of the law and in a way affects the protection provided by the said Section to the accused.... The third option stated to be given to the accused to get himself searched from the Officer concerned not being part of the statute, the same could not have been offered to the appellant and thus, the recovery from him is vitiated.”

In the said case, even though a notice under Section 50 of the NDPS Act was given, its non-compliance was contended because the third option in relation to search, was given to accused persons, regarding getting searched by the concerned officer present at the spot, which is not an option under Section 50 of the NDPS Act.

17. In view of the decisions noted hereinabove, and in particular, in view of the decision of the Hon’ble Supreme Court in **S.K. Raju** (supra), a notice under Section 50 of the NDPS Act is attracted in case of a comprehensive search of the person as well as a bag being carried/held by him/her.

18. Admittedly, in the present case, the notice under Section 50 of the NDPS Act was given after the recovery of the contraband from the black colored polythene alleged to have fallen from the applicant’s hand. It is also



an admitted case that the police acted on the basis of prior information in relation to the applicant being allegedly involved in commission of offences under the NDPS Act. It is not the case of the prosecution that the black colored polythene which fell from the applicant's hand, was picked up and searched before he was apprehended and brought to the spot. The recovery was admittedly made in his presence. From an examination of the facts of the case, it has emerged that the search of the black colored polythene and the subsequent personal search of the applicant were comprehensive.

19. The relevance of a notice under Section 50 of the NDPS Act and its mandatory compliance was clearly spelt out by the Hon'ble Supreme Court in **State of Punjab v. Balbir Singh, (1994) 3 SCC 299**, wherein it was held as under:

“**16.** One another important question that arises for consideration is whether failure to comply with the conditions laid down in Section 50 of the NDPS Act by the empowered or authorised officer while conducting the search, affects the prosecution case. The said provision (Section 50) lays down that any officer duly authorised under Section 42, who is about to search any person under the provisions of Sections 41, 42 and 43, shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate and if such requisition is made by the person to be searched, the authorised officer concerned can detain him until he can produce him before such Gazetted Officer or the Magistrate. After such production, the Gazetted Officer or the Magistrate, if sees no reasonable ground for search, may discharge the person. But otherwise he shall direct that the search be made. To avoid humiliation to females, it is also provided that no female shall be searched by anyone except a female. The words “*if the person to be searched so desires*” are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced



before a Gazetted Officer or a Magistrate and thereafter the search would be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. **To us, it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused.** To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right.

xxx

18. Under the Act wide powers are conferred on the officers and deterrent sentences are also provided for the offences under the Act. **It is obvious that the legislature while keeping in view the menace of illicit drug trafficking deemed it fit to provide for corresponding safeguards to check the misuse of power thus conferred so that any harm to innocent persons is avoided and to minimise the allegations of planting or fabricating by the prosecution, Section 50 is enacted.**

xxx

20. In *Miranda v. Arizona* [384 US 436 : 16 L Ed 2d 694 (1966)] the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus:

“At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it — the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”

It was further observed thus:

“The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It



is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest.”

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. Thus the provisions of Section 50 are mandatory.”

(emphasis supplied)

20. In Sanjeev and Another v. State of Himachal Pradesh, (2022) 6 SCC 294, the Hon’ble Supreme Court was dealing with a similar factual situation as in the present case. In the said case, the accused persons tried to abscond but were apprehended. A bag that they were sitting beside was subsequently retrieved and searched. It was held as under:

“3. The prosecution mainly relied upon the testimonies of PW 7 and PW 8, namely, Constable Om Prakash and Head Constable Nand Lal respectively. According to these witnesses, on the day in question at about 9.00 p.m. when the police party had reached the other side of the Ruara Bridge, they found the appellants sitting by the side of bonfire and a bag was lying on the ground near them. As the police put searchlight towards the direction of the appellants, the appellants tried to run away. The police party followed them and after having crossed a distance of about 100 m, they were nabbed. Thereafter, the bag was also retrieved which was found to contain charas weighing about 1.5 kg. According to the witnesses, the electronic weighing scale which was with the police party was utilised to check the weight of the contraband. Thereafter, the procedure for taking personal search of the accused was followed.

XXX



10. We have checked the original record to satisfy ourselves. Exts. PW 8/B, PW 8/C, PW 8/D and PW 8/E, which are arrest memos, do not reflect that any option or **choice was given to the accused before their personal search was undertaken. It is true that the personal search did not result in recovery of any contraband material but the non-compliance of requirement of affording an option, was one of the reasons which weighed with the trial court in disbelieving the case of the prosecution.**”

(emphasis supplied)

21. In the present case, as recorded hereinabove, the applicant was apprehended and the polythene, which had allegedly fallen from his hand, was lifted. The raiding officer requested some passersby to join the police proceedings with regard to search of the polythene. It is stated that upon hearing about ‘drugs’, these persons refused to join the proceedings. Before the polythene was searched, the applicant was informed about the secret information and thereafter, the polythene was opened and found to contain contraband. Thereafter, the team proceeded to conduct the formalities of drawing of samples and sealing the case property. It is the case of the prosecution that after completion of the same, they proceeded to search the applicant and again informed him about the secret information and gave him a notice under Section 50 of the NDPS Act. Therefore, it is abundantly clear that at the time of checking of the polythene, alleged to have been in the applicant’s hand, at a prior point in time, the raiding team had suspicion with respect to possible recovery of contraband.

22. It is important to be borne in mind that Section 50 of the NDPS Act is mandatory in nature and it provides an important safeguard to the accused. It ensures that subsequent allegations of planting of evidence on part of the



investigating agency are avoided and ensures that the stringent provisions of the NDPS Act are not misused by investigating agencies. In the present case, the police party acted on the basis of prior information in relation to the applicant. It is alleged that on spotting the police, the applicant tried to flee and the polythene fell from his hand on the ground. It is not in dispute that the said polythene was searched in the presence of the applicant after he was apprehended. Applying the ratio of **S.K. Raju** (*supra*) to the facts of the present case, this Court is of the opinion that Section 50 of the NDPS Act will be attracted in case of a search of the black colored polythene, as well as the personal search of the applicant. It cannot be said that notice under Section 50 of the NDPS Act was not required for the search of the polythene. It is pertinent to note that conscious possession of the said polythene is being attributed to the present applicant on account of the fact that as per the raiding party, he was holding the same in his hand. Apart from the said fact, there is no marking or identification which can connect the polythene with the applicant. The raiding team, as pointed out hereinabove, was well aware of the situation, in pursuance of the secret information and had also made necessary preparations required in case of recovery of contraband. In this scenario, taking into consideration the scheme and the objective of Section 50 of the NDPS Act, the raiding team was required to follow the procedure as per law. The said team cannot be permitted, in the peculiar facts and circumstances of the case, to split the search into two parts. It is not the case of the prosecution that the polythene was checked and opened before the applicant was apprehended. It is their case that it was done in the presence of the applicant after informing him about the secret information and asking



passersby to join the police proceedings, therefore, splitting the comprehensive search into two parts to justify not giving a notice under Section 50 of the NDPS Act cannot be considered to be just, fair and reasonable procedure and is therefore, impermissible in law.

23. At this stage, it is relevant to record that this Court, *vide* a judgment of the same date, has disposed of BAIL APPLN. 1983/2022 titled ‘Vinay v. State of NCT of Delhi’, pertaining to FIR No. 29/2019 under Sections 21/29 of the NDPS Act registered at PS Crime Branch, wherein the case of the prosecution is identical to the present case. In the said case too, the comprehensive search was split into two parts, in the same manner, as has been done in the present case.

24. As far as the applicant’s involvement in FIR No. 64/2019 dated 20.03.2019 under Sections 21/29/27 of the NDPS Act registered at PS Sadar Solan, District Solan, Himachal Pradesh is concerned, it is noted that in the said case, the applicant has been granted bail by the Hon’ble High Court of Himachal Pradesh *vide* order dated 03.03.2020, wherein it has been recorded that the applicant was arrested in that case, on the basis of a disclosure statement, on 23.03.2019. It is pertinent to note that the date of arrest and seizure in the present case is also the same, i.e., 23.03.2019. The applicant was granted bail in FIR No. 64/2019 registered at PS Sadar Solan, District Solan, Himachal Pradesh after registration of the present FIR.

25. The applicant was released on interim bail on 21.12.2020. The applicant is stated to have duly surrendered and has not misused his liberty. There is no complaint in relation to him attempting to tamper with evidence,



influence the witnesses or getting involved in the commission of any similar offence.

26. The Hon'ble Supreme Court, in **Union of India v. K.A. Najeeb, (2021) 3 SCC 713** observed that if a timely trial is not possible, courts are ordinarily obligated to release the undertrial on bail and statutory restrictions do not exclude the discretion of constitutional courts to grant bail on grounds of violation of fundamental rights enshrined in Part III of the Constitution. It was held as under:

“15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India* [*Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India*, (1994) 6 SCC 731, para 15 : 1995 SCC (Cri) 39] , it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. **However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.**

xxx

17. It is thus clear to us that **the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable**



time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected."

(emphasis supplied)

More recently, *vide* order dated 13.07.2023 passed in **Special Leave to Appeal (Crl.) 4169/2023** titled **Rabi Prakash v. The State of Orissa**, the Hon'ble Supreme Court held that prolonged incarceration of a person overrides the statutory restriction contained in Section 37(1)(b)(ii) of the NDPS Act. It was held as under:

"2. The prosecution case appears to be that the police party while on patrolling duty on 02.10.2019 at about 12.30 p.m. on Nandapur-Semiliguda road MDR-55, spotted one full body twelve wheeler Truck (Eicher) bearing No.EB-13-BD-5753 coming from Nandapur side at a high speed and accordingly they chased and detained the truck at Bodenga Chhak and found three persons boarded in the said truck including the driver. Eventually, 247 kg. Ganja was recovered from the truck. The petitioner was one of the occupants of the truck and was arrested at the spot. He has been in custody for more than three and a half years. There are no criminal antecedents against the petitioner.

3. We are informed that the trial has commenced but only 1 out of the 19 witnesses has been examined. The conclusion of trial will, thus, take some more time.



4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. **The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”**

(emphasis supplied)

It is noted that out of the 18 witnesses cited by the prosecution, only 05 have been examined so far and the trial is likely to take a long time. The present applicant was arrested on 23.03.2019. As per the nominal roll dated 05.04.2023, he has been in custody for 04 years and 05 days.

27. In view of the facts and circumstances of the case, the application is allowed.

28. The applicant is admitted to bail upon his furnishing a personal bond in the sum of Rs. 1,00,000/- alongwith two sureties of like amount to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions:

- i. The memo of parties shows that the applicant is residing at 10-11, Som Bazar Road, Mohan Garden, Uttam Nagar, Delhi. In case of any change of address, the applicant is directed to inform the same to the learned Trial Court and the Investigating Officer.
- ii. The applicant shall not leave India without the prior permission of the learned Trial Court.



- iii. The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
 - iv. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witnesses in any manner.
 - v. The applicant shall join the investigation, as and when required by the Investigating Officer.
 - vi. In case it is established that the applicant tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.
- 29.** The application stands disposed of along with all the pending application(s), if any.
- 30.** Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case.
- 31.** Let a copy of this judgment be communicated to the concerned Jail Superintendent.
- 32.** Judgment be uploaded on the website of this Court, *forthwith*.

AMIT SHARMA
JUDGE

AUGUST 17, 2023/sn