

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

S.B. Criminal Miscellaneous II Bail Application No. 9738/2023

Raju Ram Bishnoi S/o Sh. Naina Ram, Aged About 33 Years,
Macharo Ki Dhani, Keralanada, Bhikamkaur, Osia Police Station,
District Jodhpur. (Lodged In Central Jail, Jodhpur).

-----Petitioner

Versus

Union of India, through NCB, Jodhpur.

-----Respondent

For Petitioner(s)	:	Mr. Vijay Raj Bishnoi
For Respondent(s)	:	Mr. M.R. Pareek, Spl. PP, NCB

HON'BLE MR. JUSTICE RAJENDRA PRAKASH SONI

Order

Reportable

27/05/2024

1. Arrested in furtherance of FIR No.VIII(IO)10/NCB/JZU/2019, registered at Police Station NCB Jodhpur Unit, District Jodhpur, petitioner has filed this application under Section 439 Cr.P.C. for releasing him on bail. The petitioner is charged for offences punishable under sections 8/15, 8/18, 8/25 & 8/29 of the Narcotic Drugs and Psychotropic Substances Act 1985.

2. The first application for bail was disposed of without considering the merits of the case since it was not pressed by the petitioner, while recording of statement of seizure officer and investigation officer were still pending. Now post recording of statements, this second bail application has been moved.

3. I have appreciated the submissions advanced by the learned defence counsel and learned Public Prosecutor and have carefully perused the material available on record.

4. Learned Public Prosecutor for the State has strongly objected the different submissions made by learned counsel for the applicant and submitted that 215.100 Kgs. of contraband poppy straw and 28.920 Kgs. of contraband opium recovered from the applicant falls within the ambit of commercial quantity and the bar as contained in Section 37 of the NDPS Act is attracted; Investigating Officer had collected overwhelming evidence in the case which would prima-facie point towards the guilt of the accused; Keeping in view the gravity of offence alleged to have been committed by applicant, he does not deserve any leniency rather they need to be dealt with severely; accused do not deserve any sympathy as the petitioner is a drug peddler. He thus, craves rejection of the applicants' bail application.

5. I have given my anxious consideration to the rival submissions with reference to material placed before me.

6. On perusal of the record and upon consideration of the submissions, it would be clear that admittedly mandatory provisions of Section 52A of the Act has also not been followed as seizure officer Babu Ram Sirohi (PW-1) did not get the proceedings under section 52A conducted in this case before a Magistrate of Gazetted Officer. Hon'ble the Apex Court in the case of **Mangi Lal vs. The State of Madhya Pradesh (Criminal**

Appeal no. 1651 of 2023 decided on 12.07.2023), it has been propounded that:-

“Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn.”

7. In **Mohammed Khalid Vs. The State of Telangana criminal appeal no. 1610 of 2023 (SC) Decided on 01.03.2024**

Hon’ble the Apex Court has ruled that:-

22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the seizure Officer for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report is nothing but a waste paper and cannot be read in evidence.

8. Further, it is to be noticed that applicant has been in custody for the last almost 5 years (59 months) and during this period statements of only six witnesses have been recorded in the trial, which are of seizure officer Babu Ram Sirohi, constable Mukesh Kumar Saini, constable Gopal Ram Meena, Ranjeet Kumar Barnwal and investigating officer Manoj Souguna. Despite the specific order of this court, the prosecution has not produced remaining witnesses.

9. In a recent order dated 13.07.2023 passed by Hon'ble the Supreme Court in the case of **Rabi Prakash vs. The State of Odisha (Special Leave to Appeal)** Hon'ble the Supreme Court held as under:-

“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.”

10. Hon’ble the Supreme Court in the case of **Union of India Vs. K.A. Najeeb reported in (2021) 3 SCC 713**, while dealing with the cases where fetters are placed on Court’s power to grant bail and the trial has not been completed within a reasonable time, observed breach of constitutional right to speedy trial.

11. Further in decision dated 28.03.2023 rendered by Hon’ble the Supreme Court in **Mohd Muslim @ Hussain Vs. State (NCT of Delhi) in Special Leave Petition (Crl.) No (s) 915 of 2023**, it is observed by the Hon’ble Supreme Court that delay in trial can also be considered for releasing accused person on bail despite the restrictions imposed under Section 37 of the NDPS Act and the petitioner is entitled to be enlarged on bail.

12. Besides above, in the present case admittedly neither the seizure memo was prepared nor the samples were taken at the spot of recovery. Instead, entire seizure and paperwork was done by the seizure officer, after taking the applicant to the Bilara police station. The site plan does not prove that the Bilara Police Station was situated very close to the place of recovery, which suggests that the seizure proceedings were undertaken at the police station. Hence, seizure proceedings were not conducted according to the prescribed procedure, resulting in incurable defects.

Therefore, prima facie the entire seizure process is under suspicion and is vitiated.

13. Hence, with regard to the facts of the case and taking into account totality of circumstances, in my considered opinion, the submissions made by learned counsel for the petitioner cannot be completely overlooked. Having regard to the facts and circumstances of the case and having considered statement of seizure officer in respect of section 52A of the act about the procedure of sampling adopted by the seizure officer during the alleged seizure, as noted from the challan papers and evidence produced, prima facie did not show the compliance of section 52A of the Act in its true spirit. In such a situation, it assumes importance that in absence of proper explanation from the prosecution, it significantly undermines the case of the prosecution and thus, the entire search and seizure proceedings are prima facie vitiated.

14. Having considered the material available on record; the arguments advanced by counsel for the applicant particularly the facts narrated above and the fact that applicant is in custody for almost 5 years; that bail rejection order goes to show that applicant is not involved in any other case under the N.D.P.S. Act; that trial is likely to take its own considerable time and taking note of all these aspects I do not intent to go into the merits of the matter but of the considered view that the rigor of Section 37 of the N.D.P.S. act is duly satisfied, forasmuch this court feels that the applicant has available to him substantial grounds so as to question the prosecution case and no useful purpose would be

served by keeping the applicant in detention for an indefinite period therefore, I am inclined to grant indulgence of bail to the petitioner at this stage.

15. Consequently, the present second bail application is allowed and it is directed that the accused-petitioner **Raju Ram Bishnoi S/o Sh. Naina Ram**, arrested in connection with the F.I.R. No.VIII(IO)10/NCB/JZU/2019, registered at Police Station NCB Jodhpur Unit, District Jodhpur shall be released on bail provided he furnishes a personal bond and two surety bonds of sufficient amount to the satisfaction of the learned trial court with the stipulation to appear before that Court on all dates of hearing and as and when called upon to do so. This order is subject to the condition that accused, within 7 days of his release and sureties, on the day of furnishing bail, will also furnish details of their all bank accounts, with bank and branch name, in shape of an affidavit, and submit legible copy of their Aadhar cards as well as front page of Bank pass book, for smooth recovery of penalty amount, if there arise a need for recovery of penalty under Section 446 Cr.P.C in future.

(RAJENDRA PRAKASH SONI),J